# DEPARTMENT OF INDUSTRIAL RELATIONS

## CAL-OSHA

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California's Occupational Safety and Health Administration (Cal-OSHA) is part of the cabinet-level Department of Industrial Relations (DIR). The agency administers California's programs ensuring the safety and health of California workers.

Cal-OSHA was created by statute in October 1973 and its authority is outlined in Labor Code sections 140–49. It is approved and monitored by, and receives some funding from, the federal OSHA. Cal-OSHA's regulations are codified in Titles 8, 24, and 26 of the California Code of Regulations (CCR).

The Occupational Safety and Health Standards Board (OSB) is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety orders which affect California employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's safety and health standards must be at least as effective as the federal standards within six months of the adoption of a given federal standard. Current procedures require justification for the adoption of standards more stringent than the federal standards. In addition, OSB may grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternative process would provide equal or superior safety to their employees.

The seven members of the OSB are appointed to four-year terms. Labor Code section 140 mandates the composition of the Board, which is comprised of two members from management, two from labor, one from the field of occupational health, one from occupational safety, and one from the general public. The current members of OSB are Jere Ingram, Chair, John Baird, James Grobaty, John Hay, and William Jackson. At this writing, OSB continues to function with two vacancies—an occupational safety representative and a labor representative.

The duty to investigate and enforce the safety and health orders rests with the Division of Occupational Safety and Health (DOSH). DOSH issues citations and abatement orders (granting a specific time period for remedying the violation), and levies civil and criminal penalties for serious, willful, and repeated violations. In addition to making routine investigations, DOSH is required by law to investigate employee complaints and any accident causing serious injury, and to make follow-up inspections at the end of the abatement period.

The Cal-OSHA Consultation Service provides on-site health and safety recommendations to employers who request assistance. Consultants guide employers in adhering to Cal-OSHA standards without the threat of citations or fines.

The Appeals Board adjudicates disputes arising out of the enforcement of Cal-OSHA's standards.

### MAJOR PROJECTS

**OSB to Revise Emergency Call System Regulation.** On June 5, OSB published notice of its intent to amend section 1512(g), Title 8 of the CCR, which currently requires installation of an emergency call system in building or structures five or more stories or 48 feet above or below ground; the system is to be used to notify emergency medical services personnel of the location of an injured employee. OSB's proposed revisions would require the communication system to be a two-way voice system which allows for communication of the location and condition of the employee who is in need of emergency medical services; include an exception statement to permit the use—subject to the approval of DOSH—of other communication methods capable of communicating the required information, where worksite conditions or circumstances impair or prevent two-way voice communication; and require the employer to ensure a system is available to effectively alert the personnel designated in the employer's emergency services plan of a medical emergency at the jobsite, to direct them to have available transportation to the site, and to be prepared to provide specific treatment to the injured or ill employee(s).

On July 23, OSB conducted a public hearing on these proposed amendments. At the hearing, OSB heard testimony from a representative of the Associated General Contractors of California (AGCC), who questioned the necessity for changing the existing standard, and commented that most construction projects with three or more floors have two-way radios to assist management and foreperson-level employees in communication, whether it involves construction or safety concerns. OSB also heard testimony from a representative of the Iron Workers Union (IWU), who stated that IWU supports the proposed improved communication systems, as it would help direct rescue traffic to injured employees. The proposed changes were scheduled for Board adoption at its October 22 meeting in San Francisco.

**Outdoor Advertising Structures.** On June 5, OSB published notice of its intent to adopt Article 11, consisting of sections 3412, 3413, 3414, 3415, and 3416, Title 8 of the CCR. Because of the unique nature of outdoor advertising, the outdoor advertising industry has experienced difficulty in complying with various safety regulations. For example, certain ladders, scaffolds, and work platforms are necessary to accomplish tasks on billboards and signboards, which are sometimes over 80 feet above the ground; such equipment is not always in exact conformance with OSB's regulations. In response to this situation, OSB proposes to adopt the following provisions:

–Section 3412 would describe the industries that will be subject to the regulations in proposed Article 11, and defines the terms "poster ladder scaffold" and "special purpose poster ladder."

–Section 3413 would contain provisions regarding portable ladders and special purpose poster ladders, and the use of such ladders for gaining access to outdoor advertising structures. The proposed requirements for special purpose poster ladders would require that employers inspect and identify existing ladders and—after a specific date—purchase only approved and labeled special purpose poster ladders.

–Section 3414 would permit employers to use ladder-jack type scaffolds on outdoor advertising structures elevated at heights greater than those permitted by the ladder-jack scaffold regulations in the Construction Safety Orders.

–Section 3415 would provide information on the location of regulations concerning suspended transportable scaffolds.

–Section 3416 would contain provisions concerning the use of fall protection devices and systems specific to

the outdoor advertising industry.

On July 23, OSB conducted a public hearing on this rulemaking package; however, the Board received no public comment regarding the proposals. Article 11 was scheduled for adoption at OSB's October 22 meeting in San Francisco.

**Equipment Secured to Grounded Structural Metal.** On July 10, OSB published notice of its intent to amend sections 2395.58(a), Title 8 of the CCR, and 250–58(a), Title 24 of the CCR, regarding equipment secured to grounded structural metal; this proposed rulemaking is the result of federal OSHA's determination that California's rules concerning the grounding of equipment secured to grounded structural metal and metal car frames are not at least as effective as the counterpart federal regulation, 29 C.F.R. Part 1910.304(f)(6)(ii). Among other things, sections 2395.58(a) and 250–58(a) provide that electric equipment secured to, and in metallic contact with, the grounded structural metal frame of a building is considered to be effectively grounded. OSB's proposed amendments to this language would provide that electric equipment secured to, and in electrical contact with, a metal rack or structure provided for its support and grounded by one of the means indicated in section 2395.42, Title 8 of the CCR, is considered effectively grounded. Further, the revisions would provide that the structural metal frame of a building shall not be used as the air conditioning equipment grounding conductor for installations made after February 1, 1993.

On August 27, OSB conducted a public hearing on this rulemaking package. No public comments were received and the Board recommended that the proposal, as written, be prepared for Board approval. At this writing, the proposed changes are scheduled for OSB adoption at its November 19 meeting in San Diego.

**Pressure-Relieving Safety Devices in the Petroleum Industry.** On July 10, OSB published notice of its intent to amend section 6857(e)(3), Title 8 of the CCR. Section 6857 currently contains occupational safety regulations pertaining to pressure vessels and pressure-relieving safety devices in the petroleum refining, transportation, and handling industry; section 6857(e)(3) allows for the installation of stop (shut-off) valves between the pressure vessel and the safety relief device if the operating temperature is less than 200 degrees Fahrenheit and if certain safety requirements are met. OSB's proposed amendments would delete the existing language in section 6857(e)(3) and instead provide that stop valves may be installed between a pressure relief device and the operating vessel for the purposes of inspection, repair, and/or replacement of the pressure relief device. Where stop valves are installed, the employer would be required to develop, implement, and maintain a written plan specifying the following:

–procedures to ensure that stop valves are open and locked or sealed during normal operations and are not to be closed except by a qualified person. In the case of multiple relief device installations having spare capacity or spare relief valves, the stop valves can be closed on the inactive relief valves providing sufficient system relief capacity is maintained;

–procedures to minimize the frequency of closing stop valves while the vessel is in service;

–procedures to ensure that a replacement pressure-relieving device or needed replacement parts are available prior to closing the stop valve and removing the pressure relief device;

–procedures to ensure that before the removal of a pressure relief device from operating equipment, management has reviewed and approved a written operations plan for closing the stop valves; and

–a written overpressure-relief plan for each safety relief device prior to closing the stop valve; that plan shall be made available to DOSH upon request during the course of the work operation to which it applies.

According to OSB staff, pressure relief devices require periodic maintenance; however, a means to either control or eliminate the pressure while performing the maintenance is required. The most efficient method for controlling the pressure while performing this maintenance is by the installation and use of a stop valve. When the stop valve is closed, however, the system can become overpressurized, creating a danger to both the system and employees. OSB contends that its revision would provide the petroleum industry with a practical means for maintaining or replacing pressure-relieving safety devices without incurring unnecessary cost, and while ensuring the safety of workers.

On August 27, OSB conducted a public hearing on this rulemaking proposal. The Board received testimony from representatives of the petroleum industry and labor; many of the comments indicated a concern that the proposed revisions do not provide the necessary flexibility for permitting the closing of stop valves, in the absence of a written overpressure-relief plan, when existing or developing conditions would endanger the safety of employees. OSB staff is currently reviewing the comments; the Board was scheduled to consider the adoption of the amendments at its November 19 meeting in San Diego.

**Safety Standards for Pulp, Paper, or Paperboard Operations.** On August 7, OSB published notice of its intent to amend sections 4402(d), 4415(e)(4), and 4415(f)(1) and (2), Article 64, Title 8 of the CCR, regarding the use of pulping devices, shredders, blowers, cutters, and dusters by employees. The proposal is designed to incorporate the provisions of 29 C.F.R. Part 1910.261(c)(7)(i), (j)(4)(ii), and (f)(2)(iii) into the CCR. The proposed amendments would require that employers secure railcars, trucks, and trailers against movement during unloading operations using tipple type unloading devices; require employers to provide guardrails at least 42 inches in height around pulping device tubs whose tops are less than 42 inches high; and add the terms "cutters" and "dusters" so that operations of those devices will require specific guarding, ventilation, and point of operation protection for employers who operate manually-fed equipment.

On September 24, OSB conducted a public hearing on the proposed amendments; at this writing, the rulemaking file awaits adoption by OSB and review and approval by the Office of Administrative Law (OAL).

**Lead Exposure Regulation Amendment Proposed.** On August 7, OSB published notice of its intent to amend section 5216, Article 110, Title 8 of the CCR, which currently regulates occupational exposure to lead. Among other things, amendments to the section would require, by specified dates, implementation of engineering and work practice controls to the extent necessary and feasible to control airborne exposures to lead at specified levels in the following industries: lead pigment manufacture, nonferrous foundries, leaded steel manufacture, lead chemical manufacture, shipbuilding and ship repair, battery breaking in the collection and processing of scrap, secondary smelting of copper, and lead casting.

On September 24, the Board conducted a public hearing on these proposed amendments, which await adoption by OSB and review and approval by OAL.

**OSB to Amend Formaldehyde Exposure Regulation.** On August 7, OSB published notice of its intent to amend section 5217, Article 110, Title 8 of the CCR, regarding the control of occupational exposures to formaldehyde. The proposed revisions would lower the permissible exposure limit regarding formal-

dehyde from one part per million (ppm) to 0.75 ppm on an eight-hour time-weighted basis; revise the exposure monitoring criteria; lower the minimum requirements for respiratory protection, adding medical removal and multiple physician review requirements; revise the hazard communication requirements; and establish delayed start-up dates to implement these new provisions.

On September 24, OSB conducted a public hearing on these proposed amendments, which await adoption by OSB and review and approval by OAL.

**OSB Proposes Elevator Safety Regulatory Amendments.** On August 28, OSB published notice of its intent to amend sections 3033, 3039, 3070, 3079, and 3093.35, Title 8 of the CCR, and 7-3033, 7039, 7-3070, 7-3079, and 7-3093.35, Title 24 of the CCR, regarding machinery and equipment for power cable-driven passenger and freight elevators. Specifically, the proposal would accomplish the following:

–amend section 3033(e), which requires that every elevator car have a platform consisting of a nonperforated floor attached to a platform frame supported by the car frame, to permit the use of laminated elevator platforms as permitted by ANSI A17.1-1984, Rule 203.5;

–amend section 3039(a)(1), which concerns the operation of the normal terminal stopping device switches for power cable-driven elevators, and specifies that the switch contacts be opened mechanically, to permit the use of magnetically operated, optical, or static type switches as well as mechanically operated switches, as permitted in 1983 by ANSI A17.1, Rule 209.1;

–amend section 3070(a), which requires that hydraulic elevators be provided with normal terminal stopping devices which conform to the specified requirements for cable-driven elevators, to permit normal terminal stopping device switches other than mechanical, and to require that the switch contacts be opened mechanically, because hydraulic elevators are not provided with final terminal stopping devices;

–amend section 3079(k), which requires that power dumbwaiters be provided with normal terminal stopping devices which conform to specified requirements for power cable-driven elevators, to permit normal terminal stopping device switches other than mechanical, and to require that the switch contacts be opened mechanically, because power dumbwaiters are not provided with final terminal stopping devices; and

–amend section 3093.35, which specifies that the normal and final terminal stopping device switches for private residence elevators be positively opened mechanically as required for power cable-driven elevators, to, among other things, repeal the specific requirement of mechanical operation.

Also on August 28, OSB published notice of its intent to adopt new sections 3087 and 3087.1–.10, Title 8 of the CCR, as well as sections 7-3087 and 7-3087.1-10, Title 24 of the CCR, regarding reciprocating conveyors. Among other things, the proposed regulations would provide that reciprocating conveyors are to be used for moving inanimate objects and/or material only; require safety devices to be arranged to operate in a fail-safe manner, require overtravel and overload devices, and prohibit riding on the conveyors; require owners to ensure that electrical installations conform to the California Electrical Code, Title 24 of the CCR; specify the location and designation of controls and emergency stop switches; specify that the rated speed of reciprocating conveyors is 50 feet per minute; specify safeguards regarding transfer, loading, and discharge points which require the owner/user to prevent obstructions which could be hazardous to persons working in the area; specify guarding requirements on and around reciprocating conveyors; require that the owner/user equip reciprocating conveyors with backstop devices; require the owner/user to confine the counterweight of a reciprocating conveyor in an enclosure to prevent the presence of persons beneath the counterweight, or provide a means to restrain a falling counterweight in case of failure of the normal counterweight support; and require the owner/user to establish a program for the inspection and maintenance of reciprocating conveyors and the area around them which is to be supervised and accomplished by qualified and trained persons.

OSB was scheduled to hold a public hearing on these proposals on October 22 in San Francisco.

**HIV/HBV Exposure Prevention Regulations.** On May 28, OSB conducted a public hearing on its proposed adoption of section 5193, Title 8 of the CCR, which would provide procedures and controls to reduce the potential for exposure to occupational incidents involving bloodborne infectious disease in general, and both the human immunodeficiency virus (HIV) and hepatitis B virus (HBV) in particular; these proposed changes are intended to bring California into compliance with federal OSHA standards concerning occupational exposure to bloodborne pathogens (29 C.F.R. Part 1910.1030). *[12:2&3 CRLR 187]*

Over 100 people attended the May 28 public hearing; the participants included representatives from various health professions, labor organizations, medical schools, the construction industry, law enforcement, and public utilities, as well as various other industries. Included in the public comments offered were the following:

–the Board should improve the definitions of the terms "occupational exposure," "facilities of inclusion," and "emergency response";

–the construction industry should be exempted from the proposed regulation;

–parks and recreation employees should be included within the scope of the regulation;

–the proposed standards should be bifurcated into one section concerning health care providers and others who are routinely exposed to bodily fluids, and a second section concerning employees whose duties do not normally entail exposure to bodily fluids, but may be exposed in rare circumstances; and

–the definition of the term "bloodborne pathogens" should be expanded to include all human infectious agents.

On August 25, OSB released a revised version of proposed section 5193; most of the changes are technical and minor, except that subsection 5193(f), regarding hepatitis B vaccination and post-exposure evaluation and follow-up, was substantially rewritten. Also, the construction industry was exempted from the purview of the regulation. OSB received comments on the modified version of section 5193 until September 14. At this writing, section 5193 awaits adoption by OSB and review and approval by OAL.

**Rulemaking Update.** The following is a status update on other OSB regulatory proposals reported in detail in previous issues of the *Reporter*:

• ***Hazardous Substances List.*** On June 25, OSB conducted a public hearing on DIR's proposed amendments to section 339, Title 8 of the CCR, regarding its hazardous substances list. Among other things, the proposed amendments would add 389 new entries to the list and delete seven existing substances from the list. *[12:2&3 CRLR 188]* At the hearing, OSB received testimony from representatives of the North American Insulation Manufacturers Association and the Associated Roofing Contractors of the Bay Area Counties, Inc., who commented on, among other things, the proposed revisions to the listing for "glass, fibrous or dust" and a possible contradiction be-

tween existing footnote 38, which provides that fibrous glass is a mechanical irritant and that there is no present scientific evidence as to the existence of any adverse health effect, and proposed footnote 39, which provides that "glass, fibrous or dust," among other substances, "is known to the state to cause cancer and listed on the Governor's list of chemicals known to cause cancer or reproductive toxicity...."

On August 27, staff presented a modified version of the amendments to section 339 to OSB for adoption; among other things, staff recommended that footnote 39 be deleted. The Board adopted the modified amendments to section 339, which still await review and approval by OAL.

• ***DOSH's Inspection Fee Schedule.*** On June 4, OAL approved DOSH's amendments to section 344(a), 344.1, and 344.2, Title 8 of the CCR, relating to its inspection fee schedule for boiler and tank permits. *[12:2&3 CRLR 188]*

• ***Stairways and Ladders Used in the Construction Industry.*** On June 1, OAL approved OSB's amendments to sections 1504, 1620, 1629, 1675, 3276, and 3277, Title 8 of the CCR, concerning stairways and ladders used in the construction industry. *[12:2&3 CRLR 188]*

• ***Warning Garments for Flaggers and Other Employees.*** On June 25, OSB conducted a public hearing on its proposed amendments to sections 1598 and 1599, Title 8 of the CCR, regarding traffic control for public streets and highways and flaggers, respectively. Among other things, the proposed amendments to section 1598 would require that traffic controls be in accordance with the updated version of the *Manual of Traffic Controls for Construction and Maintenance Work Zones-1990.* Amendments to section 1599 would specify that the placement of warning signs, among other things, also be in accordance with the Manual. *[12:2&3 CRLR 189]* The proposed amendments give examples of acceptable flaggers' warning garments, and provides the option for all employees exposed to vehicular traffic—except flaggers—to wear either orange or yellow rainwear during rainy weather. At the hearing, OSB Executive Director Steven Jablonsky stated that the proposed rulemaking is in response to a petition submitted by the County of Los Angeles' Department of Public Works. OSB heard extensive testimony from representatives of labor organizations who commented on training course requirements and various safety concerns, among other things. At this writing, the amendments await adoption by OSB and review and approval by OAL.

• ***DBCP Exposure.*** On May 28, OSB adopted its proposed amendment to section 5212, Article 110, Title 8 of the CCR, which provides that exposures to 1,2-Dibromo-3-Chloropropane (DBCP) are governed by the California Department of Health Services for low-level DBCP concentrations in water and the California Environmental Protection Agency for direct pesticide application of use. *[12:2&3 CRLR 189]* On June 9, OAL approved OSB's amendments to section 5212.

• ***Wheelchair Access Lifts.*** OSB's April 1992 amendments to section 3000, Title 8 of the CCR, and section 7-3000, Title 24 of the CCR, regarding wheelchair access lifts, await approval by the Building Standards Commission. *[12:1 CRLR 131]*

• ***Process Safety Management Standards.*** At its May 28 meeting, OSB adopted its proposed revisions to section 5189, Title 8 of the CCR, which establish process safety management standards for refineries, chemical plants, and other specified manufacturing facilities. *[12:1 CRLR 131]* OAL approved the amendments on July 10.

• ***Certification of Asbestos Consultants and Site Surveillance Technicians.*** On August 6, OAL approved DOSH's adoption of section 341.15, Article 2.6, Title 8 of the CCR, which establishes fees and procedures for certification as an asbestos consultant or site surveillance technician. *[12:2&3 CRLR 188]*

• ***Inspection Fee Schedules.*** On August 25, OAL approved DOSH's amendments to sections 343, 344.10, and 344.30, Title 8 of the CCR, which increase fees for field permit inspections and reinspections of tramways, amusements rides, and elevators. *[12:2&3 CRLR 188]*

• ***Window Cleaning Safety Rules.*** At this writing, OSB staff is still reviewing comments received regarding its proposed amendments to sections 3281–3289 and 3291–3292, Article 5, Title 8 of the CCR, and sections 8501–8505, Title 24 of the CCR, regarding safety standards for window cleaning. *[12:2&3 CRLR 188–89]*

• ***Powered Platforms for Exterior Building Maintenance.*** At this writing, OSB staff is still reviewing comments received regarding its proposed amendments to sections 3292–3298 and the adoption of new section 3299 and Appendices A–D, Article 6, Title 8 of the CCR, and amendments to sections 8510–8515 and adoption of new sections 8520–8522 and Appendices A–B, Title 24 of the CCR, regarding the installation, maintenance, and training in the use of powered platforms for exterior building maintenance. *[12:2&3 CRLR 189]*

• ***Removal of Materials or Tools From Buildings or Structures.*** On June 25, OSB held a public hearing regarding its proposed adoption of section 1513(g), Title 8 of the CCR, which would prohibit employers from having waste, materials, and/or tools thrown from buildings or structures, unless adequate safety precautions have been taken to protect employees working below. *[12:2&3 CRLR 189]* The Board received no public comment regarding the proposal, and subsequently adopted the section at its July 23 meeting; on August 21, OAL approved the new section.

• ***Body Belts/Safety Straps and Protective Equipment.*** At its September 24 meeting, OSB was scheduled to adopt amendments to section 2940.6(c)(1) and Appendix A, Article 36, Title 8 of the CCR, regarding various procedures concerning tools and protective equipment such as body belts, safety straps, and lanyards used when working with high voltage electricity. *[12:2&3 CRLR 189]* However, OSB did not have enough members in attendance at its September meeting to constitute a quorum; therefore, adoption of these amendments was postponed until OSB's October 22 meeting in San Francisco.

• ***Lift-Slab Construction Operations.*** At its July 23 meeting, OSB staff reported that modifications were made to the Board's amendments to sections 1504 and 1722.1, Title 8 of the CCR, regarding the use of lift-slab construction; the Board's previous amendments to these sections were disapproved by OAL on May 7. *[12:2&3 CRLR 190]* The modified version was released for a fifteen-day public comment period, adopted by OSB at its July 23 meeting, and approved by OAL on August 11.

• ***Cranes and Other Hoisting Equipment.*** At its September 24 meeting, OSB was scheduled to adopt amendments to sections 4884, 4885, 4924, 4929, 4965, and 4966, and the adoption of new section 5029, Title 8 of the CCR, regarding the use of cranes and other hoisting equipment. *[12:2&3 CRLR 190]* However, OSB did not have enough members in attendance at its September meeting to constitute a quorum; therefore, adoption of these amendments was postponed until OSB's October 22 meeting in San Francisco.

## LEGISLATION

**ACR 95 (Gotch)** directs DOSH to set an airborne infectious disease standard that prevents the occupational transmission of tuberculosis, and present a draft to

OSB for adoption on or before December 31, 1993. This resolution was chaptered on July 15 (Chapter 81, Resolutions of 1992).

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 190–92:

**SB 1742 (Petris)**. Existing law entitles any employee who is discharged, threatened with discharge, demoted, suspended, or in any manner discriminated against in the terms and conditions of employment by his/her employer because the employee has made a bona fide oral or written complaint to DOSH, other governmental agencies, or his/her employer or representative of unsafe working conditions or work practices at the employee's workplace, or has participated in an employer-employee occupational health and safety committee, to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. This bill would have additionally entitled an employee to recover all other damages of any kind caused by the acts or omissions of the employer, including costs and reasonable attorneys' fees, the sum of which would be trebled. This bill was vetoed by the Governor on September 26.

**SB 1794 (Hart)**. Existing law requires every physician providing treatment to an injured employee for pesticide poisoning, or a condition suspected to be pesticide poisoning, to file a complete report with DIR's Division of Labor Statistics and Research. Among other things, this bill would have additionally required every physician providing treatment for pesticide poisoning or a condition suspected to be pesticide poisoning to file, within 24 hours of the initial examination, a complete report with the local health officer by facsimile transmission or other means. The bill would have provided that the physician shall not be compensated for the initial diagnosis and treatment unless the report to the Division of Labor Statistics is filed with the employer or, if insured, with the employer's insurer, and the local health officer. This bill was vetoed by the Governor on September 30.

**SB 1931 (B. Greene)** would have required DOSH, notwithstanding any other provision of law, if it determines that an alleged violation is serious and presents such a substantial risk to the safety or health of employees that the initiation of appeal proceedings should not suspend the running of the period for abatement, to so direct in the citation issued to the employer. This bill would have authorized an employer who receives a citation described above to file a motion with the Occupational Safety and Health Appeals Board, concurrent with the timely initiation of an appeal, requesting that the running of the period for abatement be suspended during the pendency of the appeal. The bill would have required the Appeals Board, in a case where the motion is filed, to expedite the consideration and decision of the employer's appeal, and would have authorized the Appeals Board, in its decision on the appeal, to modify the citation's direction that the period for abatement not be suspended. This bill was vetoed by the Governor on September 17.

**SB 1935 (B. Greene)** would have—among other things—required that any decision by OSB not to adopt, modify, or revoke a proposed order or standard be accompanied by a written statement of the Board of its reasons for not doing so, and provided that any statement issued by the Board indicating its reasons for not adopting, modifying, or revoking a proposed order or standard shall be subject to review in the courts in an action brought by any person who may be adversely affected by the Board's decision. The bill would have provided that any determination by OSB with respect to a proposed order or standard shall be set aside if found by the court to be arbitrary, capricious, or an abuse of the Board's discretion, or otherwise not in accordance with existing law. This bill was vetoed by the Governor on September 12.

**AB 2277 (Burton)**. Existing law generally provides for the assessment of civil penalties against employers, with the exception of employers that are governmental entities, for violations of certain occupational safety and health provisions. This bill would have eliminated the exemption of the assessment of these civil penalties for employers that are governmental entities. This bill was vetoed by the Governor on July 21.

**AB 3487 (T. Friedman)**. Existing law requires DOSH to require a permit for employments or places of employment that by their nature involve a substantial risk of injury, limited to (a) the construction of trenches or excavations; (b) the construction or demolition of any building structure, falsework, or scaffolding more than a specified height; and (c) the underground use of diesel engines in work in mines and tunnels. This bill would have added lead-related work to the list of employments or places of employment that require the issuance of a permit on or after January 1, 1994; required DOSH to propose a regulation containing specified requirements relating to lead-related work to OSB for its review and adoption; and required the owner or specified persons to inspect any building, structure, or soil before any contract is bid or entered into or any work begins, for the presence of dangerous amounts of lead.

Existing law requires that an application for a permit for employments or places of employment that by their nature involve a substantial risk of injury include a provision that the applicant has a knowledge of occupational safety and health standards and will comply with those standards. This bill would have required that every application for any of those permits include proof of coverage for workers' compensation, proof of health insurance coverage, a written copy of the employer's written injury and illness prevention program, and proof of the employer's proficiency or access to the necessary equipment to do the work safely. This bill was vetoed by the Governor on September 30.

**AB 1544 (T. Friedman)** would have created the Agricultural Enforcement Unit within DIR's Division of Labor Standards Enforcement, and provided that it is unlawful for any employer of an agricultural worker to retaliate against, intimidate, threaten, coerce, or otherwise discriminate against the worker or a member of his/her immediate family in the terms and conditions of employment because that worker has filed a complaint against the employer for violation of these provisions, or exercised any other right to which the worker is entitled by law. This bill was vetoed by the Governor on September 30.

**AB 2968 (Horcher)**. Existing law requires the manufacturer of any hazardous substance listed pursuant to a specified statute to prepare and provide purchasers of the hazardous substance with a material safety data sheet containing specified information with regard to hazards or other risks associated with the use of or exposure to the hazardous substance. Existing law provides that, for purposes of compliance with the above requirements, the provision of a federal material safety data sheet or equivalent shall constitute prima facie proof of compliance. This bill revises this provision with regard to the provision of a federal material safety data sheet as prima facie proof of compliance to delete a reference to an obsolete federal material safety data sheet form. This bill was signed by the Governor on September 30 (Chapter 1214, Statutes of 1992).

**AB 3386 (Alpert)**. Existing law requires DOSH to establish and maintain a safety inspection and permitting program for all tower cranes, and prescribes civil penalties for violations of crane safety

standards, orders, and special orders. For purposes of this provision, existing law defines the term "crane" and excludes certain machines used to lift, lower, and move loads, as specified, from the definition. This bill also excludes from the definition of a "crane," for purposes of the above provisions, straddle type mobile boat hoists, as defined. This bill was signed by the Governor on July 18 (Chapter 254, Statutes of 1992).

The following bills died in committee: **AB 2667 (T. Friedman)**, which would have prohibited any employer from permitting, or any person from engaging in, the smoking of tobacco products in an enclosed space at a place of employment; **AB 3462 (Speier)**, which would have—among other things—required any supplier of any chemical containing a reproductive toxicant to disclose the health hazard(s) of the toxicant in a label containing specified information and affixed to every container of the chemical that it supplies; **SB 520 (Petris)**, which would have prohibited any employer from engaging in, or causing any employee to engage in, the dispersed use of extremely toxic poisons, except as authorized by the DIR Director, where the Director finds that certain conditions of economic hardship are met; **AB 1313 (T. Friedman)**, a spot bill which was expected to be amended in order to prevent an anticipated effort to repeal the Corporate Criminal Liability Act of 1990 (Chapter 1616, Statutes of 1990); **AB 644 (Hayden)**, which would have required that every computer video display terminal (VDT) and peripheral equipment acquired or placed into service in any place of employment, on or after January 1, 1993, be in conformance with all applicable design standards adopted by the American National Standards Institute; and **AB 147 (Floyd)**, which would have amended existing law to provide that nothing in the California Occupational Health and Safety Act shall have any application to, be considered in, or be admissible into evidence in any personal injury or wrongful death action against the state, and would have provided that evidence pertaining to inspections or investigations by DOSH and citations for violations of any provision of the California Occupational Safety and Health Act shall not be admissible in any wrongful death or personal injury action, except as between an employee, as specified, and his/her own employer.

## LITIGATION

In *Cabrera v. Martin*, Nos. 90-1665 and 90-16666 (Aug. 21, 1992), the U.S. Ninth Circuit Court of Appeals reversed a district court ruling awarding attorneys' fees in a lawsuit stemming from then-Governor George Deukmejian's 1987 attempt to dismantle Cal-OSHA. In February 1987, Deukmejian notified the U.S. Department of Labor (DOL) that California would be withdrawing its OSHA plan as of June 30, 1987, and that the 1987–88 state budget provided no funds for the operation of Cal-OSHA in the private sector. Although it exhibited initial reluctance to withdraw California's plan completely, DOL subsequently announced that it would resume exclusive federal jurisdiction over private sector worker safety in California as of October 1, 1987. Following DOL's announcement, plaintiffs—consisting of three labor organizations and seven private sector employees who work in California—filed a lawsuit against federal officials and Deukmejian, seeking an injunction prohibiting DOL from approving Deukmejian's request; plaintiffs contended that the Governor lacked legal authority to unilaterally request DOL to withdraw approval of Cal-OSHA. At a preliminary injunction hearing in October 1987, the court concluded that "the plaintiffs' position is a substantial one" and subsequently granted an injunction restraining DOL from acting in any manner so as to withdraw approval of Cal-OSHA; as a result of this decision, Cal-OSHA remained in existence, continuing to have concurrent jurisdiction with the federal OSHA.

One year later, California voters repudiated Deukmejian's action by passing Proposition 97, an initiative mandating that the Governor continue funding Cal-OSHA. *[9:1 CRLR 80]* Following that, plaintiffs and defendants agreed that plaintiffs would dismiss their lawsuit as moot; plaintiffs then filed a motion for attorneys' fees pursuant to 42 U.S.C. section 1988 and California Code of Civil Procedure section 1021.5. In February 1990, the district court awarded attorneys' fees against the federal defendants and Deukmejian under 42 U.S.C. section 1988; the court did not address plaintiffs' entitlement to fees under section 1021.5.

On appeal, the Ninth Circuit reviewed whether the district court was correct in finding that the federal defendants "acted under color of state law" for purposes of plaintiffs' recovery of attorneys' fees under the federal statute; the district court had found that the federal defendants should be considered state actors because of their "significant and substantial cooperation" with Deukmejian in accepting his withdrawal of Cal-OSHA. However, the Ninth Circuit disagreed, finding that to transform a federal official into a state actor, plaintiffs must show that there is a "symbiotic relationship" between the federal defendants and the state such that the challenged action can fairly be attributed to the state. The Ninth Circuit noted that DOL's initial reluctance to accept Deukmejian's notice of withdrawal indicated that the Governor and the federal defendants were involved in an antagonistic relationship, not a symbiotic venture. According to the Ninth Circuit, DOL's planned announcement to withdraw Cal-OSHA "was not the joint product of an exercise of a state and a federal power; it was the unilateral action of a federal actor, acting under color of federal law, who was forced into action by the independent action of a state actor."

Regarding the district court's award of section 1988 attorneys' fees against Deukmejian, the Ninth Circuit noted that plaintiffs were required to show that some person deprived them of a federal right and that the person depriving them of that right acted under color of state law. The Ninth Circuit reversed the award, holding that plaintiffs neither alleged nor proved that Deukmejian deprived them of a federally-secured right; "they merely alleged that the federal defendants had no basis under either state or federal law to accept the Governor's unilateral notice of withdrawal."

Regarding plaintiffs' claim of entitlement to attorneys' fees against the federal defendants and Deukmejian under Code of Civil Procedure section 1021.5, the Ninth Circuit curiously held that plaintiffs cannot be considered the "prevailing party" under either federal or state law, despite the fact that plaintiffs were successful in obtaining the injunction against DOL.

In *Gade v. National Solid Waste Management Association*, No. 90-1676 (June 18, 1992), the U.S. Supreme Court held that Illinois' Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and Hazardous Waste Laborers Licensing Act are preempted by the federal Occupational Safety and Health Act of 1970 (Act) and the standards promulgated thereunder by federal OSHA. The articulated purpose of the state statutes is both "to promote job safety" and "to protect life, limb and property"; the Court held that such "dual impact" state regulations cannot avoid preemption under the Act simply because the regulation serves several objectives rather than one. According to the Court, "a state law requirement that directly, substantially, and specifically regulates oc-

cupational safety and health is an occupational safety and health standard within the meaning of the Act. That such a law may also have a nonoccupational impact does not render it any less of an occupational safety or health issue for purposes of preemption analysis." The Court added that if the state wishes to enact a dual impact law that regulates an occupational safety or health issue for which a federal standard is in effect, section 18 of the Act requires that the state submit a plan to the Secretary of Labor for review and approval.

In ***American Federal of Labor and Congress of Industrial Organizations, et al. v. OSHA***, 965 F.2d 962 (July 7, 1992), the U.S. Eleventh Circuit Court of Appeals rejected federal OSHA's 1989 adoption of air quality standards for 428 substances, claiming that the agency adopted the standards with insufficient supporting evidence. The standards in question lowered the permissible exposure limits (PELs) for 212 substances, set limits for 164 previously-unregulated substances, and kept the PELs constant for 52 other substances. Plaintiffs contended that OSHA used generic findings, lumped together too many substances in one rulemaking, and provided an inadequate length of time for comment by interested parties; according to plaintiffs, those factors combined to create a record incapable of supporting OSHA's new set of PELs.

The Eleventh Circuit agreed, finding that although OSHA had established that most or all of the substances involved do pose a significant risk at some level, the agency failed to establish that the air quality standards established in its rulemaking were low enough to significantly reduce that risk. Noting that OSHA may base its standards on assumptions, the court stated that it may do so "only to the extent that those assumptions have some basis in reputable scientific evidence." Accordingly, the court remanded the matter to OSHA.

## RECENT MEETINGS

At its May 28 meeting, OSB reviewed its 1991 decision to grant Petitions 296 and 297, requesting lower guardrail height requirements on metal scaffolds, to the extent that it directed staff to convene a representative advisory committee to review all sections of the Construction Safety Orders that address guardrail heights to identify whether amendments are warranted to accommodate manufactured system scaffolds. *[12:1 CRLR 135]* Petitioner Daniel Zarletti reported that an advisory committee met on February 25 to discuss the uniform standard relative to handrail and guardrail heights on scaffolds as they service temporary structures in the construction industry; the committee recommended that no revision to scaffold guardrail requirements are necessary at this time. Zarletti contended that the committee lacked the collective competence to analyze the facts and present a fair and meaningful recommendation to OSB; according to Zarletti, committee participants did not constitute a fair representation of persons involved in the construction industry with experience in all types of scaffolding. Accordingly, Zarletti requested that OSB convene another advisory committee consisting of one representative from at least four scaffold manufacturing companies; four representatives from organized labor unions, specifically from those trades regularly using all types of scaffolds; four representatives from open-shop labor groups specifically using all types of scaffolds; four representatives from major consumer groups; and one representative from the Scaffold Industry Association.

OSB staff noted that federal OSHA is expected to publish a new regulation in the near future regarding guardrail height requirements on metal scaffolds. As a result, OSB agreed to keep the petitions open for twelve months and monitor the federal activity regarding this issue; at the end of the twelve-month period, staff will report to the Board if it is necessary to reconvene an advisory committee or if a regulatory amendment is appropriate.

At its June 25 meeting, the Board considered Petition No. 308, submitted by D.A. Swerrie of Swerrie, Inc., requesting that OSB amend sections 3089(d)(3) and 3090(b)(1), Article 13, Title 8 of the CCR, regarding the clearance between the side of the steps and the adjacent skirt panel on escalators. According to Swerrie, over 5,000 accidents involving escalators occur each year in the United States; of these, approximately 10% occur in California. Swerrie estimated that 25% of California's accidents occur when a rider's extremities get caught between the side of the steps and the skirt panel on the escalator. Accordingly, Swerrie requested that section 3089(d)(3), which requires that the clearance on either side of the steps between the steps and the adjacent skirt guard on escalators shall be not more than one-quarter inch, be amended to provide that this gap may not exceed three-sixteenths of an inch. Further, Swerrie asked that the Board adopt section 3090(b)(1)(M)1.-3, to require that escalators have installed or retrofitted either a "sideplate," which is a panel that is attached to the sides of the steps and fills the space between the side of the steps and the adjacent skirt panel; a "brush," which is attached to the skirt panels above the nose line of the steps with the bristles facing toward the steps, and which discourage individuals from placing themselves at the edge of the step and rubbing along the skirt panel; or any other means or devices acceptable to DOSH. The Board granted the petition to the extent that DOSH was requested to convene an advisory committee to review petitioner's proposal and, if appropriate, develop proposed amendments to existing regulations to be presented to the Board for consideration at a future public hearing; OSB directed staff to extend an invitation to the petitioner to participate in the advisory committee deliberations.

At July 23 meeting, OSB considered Petition No. 310, submitted by Robert M. Kirby, requesting the amendment of section 2320.4, Title 8 of the CCR, Electrical Safety Orders. Among other things, section 2320.4 provides that, before working on de-energized electrical equipment or systems (unless the equipment is physically removed from the wiring system), an authorized person shall lock the disconnecting means in the "open" position with the use of lockable devices, such as padlocks or combination locks, or by disconnecting of the conductor(s), or other positive methods or procedures which will effectively prevent unexpected or inadvertent energizing of a designated circuit, equipment, or appliance. However, section 2320.4 provides an exception which states that locking is not required where suitable tagging procedures are used and where the disconnecting means is accessible only to personnel instructed in these tagging procedures. Kirby's proposal would delete this exception, thus making lockouts using lockable devices mandatory before working on de-energized electrical equipment.

Kirby also proposed the amendment of section 2320.5 of the Electrical Safety Orders, which currently provides that, before energizing equipment or systems which have been de-energized, an authorized person shall be responsible for determining that all persons are clear from hazards which might result from the equipment or systems being energized and removing locking devices and tags. The section also provides that locking devices and tags may be removed only by the employee who placed them, and locking devices and tags shall be removed upon completion of the work and after the installation of the protective guards and/or safety interlock systems. However, section 2320.5 provides an exception which states that

when the employee has left the premises or is otherwise unavailable, other persons may be authorized by the employer to remove the locking devices and tags in accordance with a procedure determined by the employer. Kirby's proposed amendment would allow persons other than the installer who are authorized by the employer to remove the locking devices only if the key is obtained from the employee who placed the locking device, by obtaining a written statement that the employee who installed the locking device has lost the key, or by obtaining a written verification that the circuit is clear.

OSB staff commented that the current regulations provide the safeguards necessary to ensure a safe workplace, and therefore recommended that the Board deny the petition. Following discussion, OSB unanimously denied the petition.

At its August 27 meeting in Sacramento, OSB considered Petition No. 311 from the California Grain and Feed Association and the National Grain and Feed Association, requesting that OSB amend section 5155, Title 8 of the CCR, which addresses the permissible exposure limit (PEL) for grain dust (oat, wheat, and barley). Specifically, petitioners requested that OSB raise the PEL for grain dust from four milligrams per cubic meter to ten milligrams per cubic meter; petitioners contended that the current standard is inappropriate due to inadequate scientific, regulatory, or policy justification. OSB had adopted the current standard in February, based on the American Conference of Governmental Industrial Hygienist-recommended threshold level value established in 1986; prior to OSB's action, no specific PEL for grain dust existed and grain dust was considered a type of "nuisance dust" with a PEL of ten milligrams per cubic meter. Although OSB staff recommended that the petition be denied, OSB directed staff to reconsider the oral and written comments submitted in conjunction with the petition and present an amended or modified proposed petition decision to OSB for review at its November 19 meeting in San Diego.

At its August 27 meeting, OSB also considered Petition No. 312, from Tri-County Window Cleaning, requesting that OSB amend section 3286(a)(4), Article 5, Title 8 of the CCR, regarding controlled descent apparatuses; petitioner contended that many of the existing boatswain's chair regulations are obsolete. OSB granted the petition to the extent that it will convene an advisory committee to consider revisions to the regulations and, if appropriate, develop recommendations for regulatory amendments.

At its September 24 meeting in Los Angeles, OSB was scheduled to consider Petition No. 313, submitted by Mi-Jack Products, Inc., requesting repeal of section 4906(c), Title 8 of the CCR, regarding rubber-tired, container handling yard cranes; Petition No. 314, from David Caldwell, requesting that OSB promulgate a regulation regarding the responsibility of employers at multi-employer worksites; and Petition No. 315, from Western Liquid Gas Association, requesting that OSB amend sections 470–494, Title 8 of the CCR, regarding unfired pressure vessel safety orders. Because OSB did not have enough members present at its September 24 meeting to constitute a quorum, all of the petitions were rescheduled for OSB's October 22 meeting in San Francisco.

## FUTURE MEETINGS

January 14 in Los Angeles.
February 18 in San Francisco.
March 18 in San Diego.
April 22 in Sacramento.
May 27 in Los Angeles.