The I2P2 Debate

What California Case Law Tells Us About Effective Training in Injury & Illness Prevention Programs

By Matthew T. Deffebach, Katie Chatterton, Brenna Nava and Erin Shea

IN BRIEF

- **OSHA continues to emphasize its commitment to an injury and illness prevention program standard. The agency has indicated that it plans to issue a notice of proposed rulemaking in September 2014.**
- **Review of case law in California highlights some lessons that employers can learn as they plan and prepare to implement such a program.**

Although its fate is uncertain, the debate continues over the passage of a federal-level injury and illness prevention program (I2P2) regulation. OSHA continues to emphasize its commitment to I2P2. To date, the agency has issued a white paper on I2P2s and has indicated in its most recent regulatory agenda that it is targeting September 2014 for publication of a notice of proposed rulemaking (Office of Information and Regulatory Affairs, 2013). Before OSHA can issue the proposal, the agency must conduct a Small Business Regulatory Enforcement Fairness Act Small Business Advocacy Review Panel of I2P2.

Against this backdrop, California, a model state program for reviewing I2P2 experience, made headlines when a study commissioned by the California Commission for Health, Safety and Workers' Compensation (conducted by the RAND Corp.) indicated that its Injury and Illness Prevention Program (IIPP) regulation, which has been in effect since 1991, was generally ineffective in reducing injuries and illnesses in California.

Haynes and Boone LLP's OSHA Practice Group reviewed the California IIPP experience from a different set of historical data. The team reviewed published case law in California regarding the IIPP general industry regulation, namely, Title 8, California Code of Regulations, Section 3203. In doing so, the review team read decisions from both the administrative law judges (ALJs) and the Appeals Board to summarize trends during the past 15 years that the IIPP regulation has existed in its current Section 3203 form. The findings were reported in a comprehensive paper, "The California Experience: Legal Lessons Learned From the Injury and Illness Prevention Program Regulation." This article focuses specifically on findings regarding the training provisions of California's IIPP regulation.

Case Selection & Review

The analysis is limited to the decisions published through research services available to attorneys. To become a published case, an employer must have contested a Cal/OSHA citation and some adjudication of that citation then occurred, either before an ALJ or before the appellate body of Cal/OSHA, the Appeals Board. It should be noted that the review team examined these cases for their pronouncements by the particular adjudicator—ALJ or Appeals Board—as to whether Cal/OSHA (called

Matthew T. Deffebach, J.D., is a partner in the Labor and Employment Practice Group of the law firm of Haynes and Boone LLP, and manages its OSHA Practice Group. He has represented employers nationally in disputes with OSHA or state-equivalents. He is an associate member of ASSE's Gulf Coast Chapter and a member of ASSE's Risk Management/Insurance Practice Specialty.

Katie Chatterton, Brenna Nava and **Erin Shea** are associates or former associates within Haynes and Boone's Labor and Employment Practice Group. Chatterton is a member of ASSE's Gulf Coast Chapter, and Shea is a member of the Southwest Chapter.

"Division" in most judgments) or the employer was victorious on the specific issue presented, not whether the case has precedential value.

Cal/OSHA has various rules regarding whether certain ALJ decisions are binding in subsequent, unrelated proceedings. This analysis was most interested in lessons learned rather than in a particular case's precedential value. Nonetheless, Cal/OSHA's citations in the referenced cases were contested and the allegations denied by the respective employers.

Given the volume of cases, the team focused solely on general industry IIPP regulations, and did not include IIPP regulations specific to the following industries: petroleum; shipbuilding, repairing and breaking; and tunnels. The group did not specifically include the construction IIPP regulation (Section 1509 of Title 8), but several cases involving that standard were acquired as a result of the search query.

Search Results

The search returned 284 cases through June 2011. Table 1 (p. 54) provides a breakdown of the categories of cases and provides a detailed analysis of the 12 subcategories of cases for which substantive IIPP arguments and defenses were adjudicated by ALJs and/or Appeals Board. As demonstrated in Table 2 (p. 55), most employers in California must, among other things, implement seven elements to advance an effective IIPP, which can be summarized as follows: 1) designate a person with program responsibility and authority; 2) ensure that employees comply with safe and healthy work practices; 3) implement a system for communicating IIPP requirements; 4) conduct an appropriate hazard assessment; 5) include a procedure to investigate injuries and illnesses; 6) include methods and/or procedures for correcting unsafe and unhealthy conditions; and 7) train employees on the hazards to which they are exposed. Additional recordkeeping obligations exist but they were not part of this case law review.

When employers contested a Cal/OSHA citation based on one or several of these seven IIPP subparts, they generally did not fare well. Of the 284 cases reviewed, 94 addressed one of these factors. The agency prevailed in 71% of these 94 cases. For this article, the focus is on case law regarding item 7, necessary IIPP training. In this one area, the employer had its greatest chance of advancing successful arguments against the citations.

Litigating Training Issues in California IIPP Cases

No matter how much energy is invested in implementing a Section 3203 IIPP, when incidents occur, Cal/OSHA critically reviews whether the injured employee was adequately trained to have avoided the hazardous outcome. No issue was litigated more often than subpart (7) of Section 3203. In the 56 training cases reviewed, Cal/OSHA was victorious in 35. These cases illustrate the following recurring themes: the importance of training regarding new hazards or new job assignments; the challenges in determining the appropriate level of specificity in training; the necessity of training based on reasonably foreseeable hazards; the ongoing obligation to create the required training documents; and miscellaneous matters (not addressed in this article).

Importance of Training Regarding New Hazards or New Job Assignments

Employers experienced difficulty in the cases where Cal/OSHA discovered that a new hazard or job assignment had been introduced but the employer failed to include it in its IIPP training. For example, in an Oct. 26, 2010, decision, an agricultural service company received an adverse ruling from an ALJ. An employee was injured in the process of unloading sulfuric acid from a railroad car to a stationary tank. He was wearing PPE (red coveralls) when the incident occurred. The integrity of the PPE was compromised, and the employee was injured.

In upholding the citation, the judge concluded that the red suits provided by the employer represented a new hazard in that if the suits were damaged unbeknownst to the employee, they would provide inadequate protection against contact with acid. Since the suit in question was more than 5 years old and it had been washed at a commercial laundry, the judge reasoned that failure to provide training about the garment's care and life expectancy caused its failure. Thus, although this employer provided training about PPE use and selection, by introducing the PPE into the workplace, the employer also introduced hazards related to its improper care. Because the employer failed to include PPE care in the IIPP training, the judge upheld the citation.

Cal/OSHA similarly prevailed when an employer's training failed to account for a manufacturer's specifications. A retail juice maker assigned a worker the new task of operating an electric wheatgrass juicer. After approximately 6 months of operation, she suffered an amputation when using her hand to push "a lot of wheatgrass" into the juicer.

In California, only decisions after reconsideration and denials of petition for consideration have precedential effect because in both types of decision the Appeals Board has reviewed and ruled on a decision or order by an ALJ [e.g., Prison Industry Authority, 2011 CA OSHA App. Bd. LEXIS 159 (Oct. 26, 2011)]. The California specific industry IIPP standards are located at Title 8, California Code of Regulations: petroleum (Sections 6507, 6508, 6509, 6760, 6761 and 6762); shipbuilding, repairing and breaking (Section 8350); and tunnels (Section 8406). See Title 8, California Code of Regulations (**www.dir.ca.gov/title8/index/T8index.asp**).

Table 1
Cases by Category

Case category	No. of cases	
No substantive discussion of IIPP (i.e., IIPP was referenced as part of a different cited standard; accordingly, we did not consider these cases)	64	
Technical victory and miscellaneous cases (i.e., the employer lacked an IIPP or Cal/OSHA won on procedural grounds; accordingly, we did not consider these cases)	100	
Substantive cases, which we considered and divided into 12 categories	***Cal/OSHA prevailed***	***Employer prevailed***
1) Designating a person with authority and responsibility	3	0
2) Ensuring employees comply with safe and healthy work practices	14	2
3) Implementing a system for communicating	1	0
4) Conducting an appropriate hazard assessment	3	2
5) Including a procedure to investigate injuries and illnesses	5	0
6) Including methods and/or procedures for correcting unsafe or unhealthy conditions	6	2
7) Training on the hazards identified in IIPP (this subpart is the focus of this article)	35	21
8) Asserting the estoppel defense	0	1
9) Arguing the defense of independent employee action	6	0
10) Lodging the defense of isolated act	2	2
11) Avoiding IIPP claims in the multi-employer worksite	2	3
12) Adjusting the penalty	0	10
Subtotal	***77***	***43***
Substantive cases total	***120***	
All cases total	**284**	

The team reviewed published case law in California regarding the IIPP general industry regulation. The team read decisions from both administrative law judges and the Appeals Board to summarize trends during the past 15 years.

According to Cal/OSHA, the manufacturer's instructions suggested that a plastic pusher should have been used when feeding wheatgrass through the device. The injured employee had not used a plastic pusher. This was problematic to the ALJ, who ruled that the manufacturer's instructions made it reasonably foreseeable that circumstances could arise when it would be difficult to feed product into the juicer's funnel.

As the decision explained, training on a pusher would have reduced the possibility of contact with the auger inside the juicer under these "reasonably foreseeable" circumstances. Thus, the agency prevailed on its failure-to-train IIPP citation. As this case reveals, it takes more than just training on what an employer intends to happen with a piece of machinery if the manufacturer suggests alternative methods to safely operate a machine.

A construction contractor had a similar outcome in a 2001 case. While constructing portions of rail stations for the Los Angeles Metro Red Line Rail, a construction company employee fell from an elevated platform. The contractor's crew allegedly used inferior quality lumber to construct the platform, which was a new assignment for at least two of the contractor's experienced carpenters. The judge concluded that the company failed to provide any training regarding the proper selection of lumber for such an elevated structure. The employer's carpenters testified that although they had experience working with lumber, they lacked the knowledge necessary to select appropriate grades of lumber. The judge found this testimony credible enough to affirm the citation.

These examples reflect some of the similar themes noted in other cases. To avoid the outcome experienced by the employers in these cases, one business argued that an individual was not given a new job assignment that required training. In this 2007 case, a worker was described by the employer as an experienced union ironworker who knew how to use the equipment (air tuggers) and had used them several times before. The Appeals Board disagreed, noting that the employer was responsible for ensuring that its ironworker knew how to safely set up and operate this particular type of winch; it did not matter that the employee had knowledge of how to use similar winches. Significantly, this case suggests that one issue for employers in the hiring process is not to rely on previous training if some material deviation involving the type of equipment being used renders previous general training insufficient.

Against the odds, one entity prevailed in the area of training regarding new hazards or job assignments. Cal/OSHA asserted that an oil well service company's IIPP failed to include provisions for training and instructing personnel when new substances were introduced into the workplace. At trial, an associate Cal/OSHA engineer testified that the company's IIPP was confusing and, in many respects, incomprehensible.

In response, a supervisor testified that he trained employees on new tasks, procedures and previously unrecognized hazards while also conducting weekly safety meetings. The judge observed that the IIPP's inadequacy could not be determined based on the

evidentiary record because the "Division failed to prove what the specific deficiencies were, electing instead to generalize in a brief, equivocal and unconvincing manner." This resulted in an employer victory in the otherwise difficult landscape of new hazard/assignment training cases.

Examining the Appropriate Specificity in Training

Concerning the level of detail required in IIPP training, employers achieved greater success when contending that training need not be compartmentalized as to each unique machine, equipment, vehicle, process or procedure.

This point is illustrated in a 2010 decision where Cal/OSHA cited an agricultural hauling company for failing to include a provision in its IIPP for training its pneumatic truck drivers. A driver who fell off the top of a transport trailer testified that he was "generally" trained by his employer on how to load and unload trailers. The company's IIPP described comprehensive employee training provisions for drivers on trucks generally with arguably little mention of pneumatic trucks or specific training on them.

Contrary to the agency's position, the ALJ determined that Section 3203(a)(7)—the training component of the Cal/OSHA IIPP regulation—does not require an employer to reduce specific details of training to writing. This analysis is good news for employers and makes sense given that it would be a considerable and onerous burden on employers to have to document training for each model or type of machine where verbal training covers any significant deviations among different machines or models.

Additionally, the judge embraced the employer's "single, isolated act defense," noting that this was not a case revealing the entire absence of training provisions. Rather, instructions appeared in the IIPP for truck drivers, including pneumatic truck drivers, although limited in scope. The judge dismissed the citations.

A case 7 years earlier further supports this point: As long as employer training specifies the general task at hand, it need not reference details provided the employer's actual practices put employees on sufficient notice of the requisite details. For example, Cal/OSHA cited an aggregate firm for failing to implement a standard procedure for the routine practice of cleaning loader windshields during the night. At trial, Cal/OSHA claimed that a new employee fell off a loader and suffered a compound hip fracture. Testimony revealed that a coworker had shown the injured employee how to climb on the loader to clean the windshield. Based on this testimony, the Appeals Board found for the employer, concluding that no evidence existed that the procedure for washing the loader windshield, as demonstrated by the co-

When incidents occur, Cal/OSHA critically reviews whether the injured employee was adequately trained to have avoided the hazardous outcome. No issue was litigated more often than subpart (7) of Section 3203.

Table 2

Nonrecordkeeping Elements Required Under Title 8, Section 3203 for an IIPP

IIPP element	Requirements
1) Identify the person or persons with authority and responsibility for implementing the program.	
2) Include a system for ensuring that employees comply with safe and healthy work practices.	Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal.	Substantial compliance with this provision includes meetings, training programs, postings, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees. As indicated, an employer may achieve substantial compliance with these provisions, including safety and health committees, but this is voluntary. Employers may achieve compliance through other means and without committees.
4) Include procedures for identifying and evaluating workplace hazards including scheduling periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.	These provisions must be included: a) when the program is first established, unless the employer had in place on July 1, 1991, a written IIPP complying with previously existing Section 3203; b) whenever new substances, processes, procedures or equipment are introduced to the workplace that present a new occupational safety and health hazard; and c) whenever the employer is made aware of a new or previously unrecognized hazard.
5) Include a procedure to investigate occupational injury or occupational illness.	
6) Include methods and/or procedures for correction of unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard.	These methods must be included: a) when unsafe or unhealthy items are observed or discovered; and b) when an imminent hazard exists that cannot be immediately abated without endangering employee(s) and/or property. The employer must remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
7) Provide training and instruction.	This training and instruction must be provided: a) when the program is first established, unless the employer had in place on July 1, 1991, a written IIPP complying with the previously existing Accident Prevention Program in Section 3203; b) to all new employees; c) to all employees given new job assignments for which training has not previously been received; d) whenever new substances, processes, procedures or equipment are introduced to the workplace and present a new hazard; e) whenever the employer is made aware of a new or previously unrecognized hazard; and f) to familiarize supervisors with the safety and health hazards to which employees under their immediate direction and control may be exposed.

worker, was not the standard procedure. In other words, while these specifics were not detailed in writing in the IIPP, the hazard was accounted for in on-the-job training.

However, by not providing details in its written IIPP, a company is depending on employees to remember the actual or specific practice. This can be a precarious position, as demonstrated in a 1999 case. In response to Cal/OSHA's contention that a company's IIPP lacked the required training elements, a concrete masonry producer submitted the following evidence to demonstrate that an employee had, in fact, received lockout/tagout training: general safety rules with an employee acknowledgment (but it did not contain lockout procedures); mixer lockout procedure (that addressed only mixers and not hopper cleaning); and the IIPP.

According to the injured employee, he received some training, but not on the block machine on which he was allegedly injured. Specifically, this employee testified that he frequently used machine number 2, but was injured the first time he used machine number 3, which had a different turn-off switch. The worker also stated that he did not recall reviewing general safety rules or seeing the IIPP.

The company countered by offering testimony from a safety trainer who indicated that the injured worker had received training on machine number 3. Furthermore, on cross-examination, the employee conceded that he only thought machine number 3 was off, not that he was unaware of how to turn it off. For these and other reasons, the employer prevailed. However, to do so, it had to rely on testimony at trial and, therefore, had to incur the expenses associated with proving that the employee received the specific training in question.

These cases support a consistent theme that Cal/OSHA faces considerable hurdles in failure-to-train cases where documents may lack specificity but employers otherwise demonstrate that their employees comprehend the nuances of particular equipment. However, to avoid the cost of litigating and putting on the testimony needed to prevail in the example cases, specific documentation may be necessary.

Even if an employer can avoid specific training documentation citations based on such cases, merely stating a goal in the written plan is not compliant. In a 2005 decision, a compliance inspector cited a shotcrete company because its IIPP did not apparently meet all the elements required by 3203(a)(7). Although the compliance officer conceded at trial that training for a new job or recognized hazard could occur during normal tailgate safety meetings, the Appeals Board explained that general references dispersed throughout a written plan are ineffective even if the tailgate meetings may have put employees on notice of the details.

The company then requested reconsideration and appealed. Agreeing with the original ruling, the Appeals Board concluded that the employer's written plan failed to instruct supervisors or others to provide additional training 1) when new job assignments were made for which the employee had not previously been trained; 2) when new substances, processes, procedures or equipment were introduced into the workplace and represented a new hazard; or 3) whenever the employer was made aware of a new or previously unrecognized hazard.

According to the Appeals Board, although the IIPP provided for weekly safety meetings that could include special training for employees, *special training* was not defined in the IIPP document. Moreover, the IIPP provided supervisors with no guidance to identify a routine from a nonroutine hazard. In sum, the employer's submitted plan did not indicate that required training was actually being delivered beyond the IIPP's written reference to special training. This case highlights the quandary that employers face when they rely on general training references and try to buttress those references with after-the-fact testimony at trial. At a minimum, these cases reveal that an employer must be able to draw on credible witnesses if the training remains general and unspecified.

Finally, even if a machine or process is so unique that the hazard should be obvious, an employer is not relieved from its duty to specify the training, even if verbally delivered in reliance on general doc-

Cases Cited in This Article

- Crop Production Services, 2010 CA OSHA App. Bd. LEXIS 150 (Oct. 26, 2010).
- Jamba Juice Co., 2003 CA OSHA App. Bd. LEXIS 32 (Mar. 26, 2003).
- Tutor Saliba-Perini., 2007 CA OSHA App. Bd. LEXIS 94 (Oct. 31, 2001).
- Tutor Saliba Kock Tidewater, JV, 2007 CA OSHA App. Bd. LEXIS 94 (May 16, 2007).
- Oil Well Servs. Co., 2001 CA OSHA App. Bd. LEXIS 146 (Aug. 6, 2001).
- A.L. Gilbert Co., 2010 CA OSHA App. Bd. LEXIS 100 (July 14, 2010).
- Teichert Aggregates, 2003 CA OSHA App. Bd. LEXIS 10 (Jan. 10, 2003).
- Angelus Block Co., 1999 CA OSHA App. Bd. LEXIS 167 (Sept. 24, 1999).
- Structural Shotcrete Sys., 2005 CA OSHA App. Bd. LEXIS 65 (July 22, 2005).
- C&C Farm Labor Contractors, 2000 CA OSHA App. Bd. LEXIS 13 (Jan. 7, 2000).
- KV Mart Co., 2001 CA OSHA App. Bd. LEXIS 267 (Dec. 10, 2001).
- Nick's Lighthouse, 2007 CA OSHA App. Bd. LEXIS 48 (Mar. 30, 2007).
- Home Depot, 1999 CA OSHA App. Bd. LEXIS 201 (Dec. 3, 1999).

umentation. In an opinion from 2000, an agricultural contractor argued that a tractor-type vehicle called a Mayote, which loads broccoli during harvest, was so unique and used by so few employees that it was obvious how to safely operate it. The company argued that training forms revealed that an injured employee was trained on "this piece of equipment," but the judge determined that since the employee operated two types of self-propelled tractors, the generic reference to "this piece of equipment" was inadequate to describe the type of training.

Training Based on Reasonably Foreseeable Hazards

Another consistent theme in the case law reviewed concerns how far IIPP training must go to anticipate employee use of equipment beyond the manufacturer's specifications. How foreseeable is it that an employee will do something counter to his/her training that the employer must nonetheless train the employee on what not to do?

In one illustrative case, Cal/OSHA prevailed when an employer that owned and operated local retail stores had trained its employees to use only one specific method for slicing meats. The machine involved allowed for other methods beyond that sanctioned by the training. According to the agency, a worker was injured while using one of these nonsanctioned methods. The ALJ ruled that the employer did not train on this foreseeable hazard in that the employer should have been aware that an employee might use a method other than that allowed by the employer. This ruling is cause for concern as one can see the slippery slope of attempting to predict what is foreseeable even if counter to an employer's specific training and instructions to its employees.

Similarly, in 2007, a restaurant was cited for failure to train employees regarding a hot-oil hazard. The employer argued that the incident "was such an extraordinary occurrence that it [was] unrealistic for [it] to document in its IIPP or train employees to do what is obvious to anyone—keep any liquids away from hot oil." However, the judge upheld the citation, stating that "it is the existence of a hazard or potential hazard which determines whether it deserves the attention of the employer—not the likelihood of an incident, since a major goal of the act is prevention, which requires proactive and diligent attention by an employer."

That said, one case suggests that boundaries exist as to how far an employer must go to predict foreseeable actions counter to an employee's training. A national retailer prevailed when an employee went beyond the reasonable scope of training by engaging in a hazardous act. An assistant store manager was injured in an elevator shaft when he attempted to retrieve a customer's keys that had fallen down the shaft. Evidence presented at trial demonstrated that the retailer trained its store managers to enter the elevator area for only two reasons: 1) to let the elevator contractor in; and 2) to shut off power. Neither of these activities required entrance into the elevator room itself where the shaft was located. Store employees were trained that a contractor was available at any time to address elevator problems, including the retrieval of items in the shaft. This training put all employees on notice regarding the hazards.

In ruling in the employer's favor, the ALJ disagreed with Cal/OSHA's argument that the employer's training was deficient simply because an unfortunate incident occurred. According to the judge, "[t]here is, however, in life and in safety programs an occasional confluence of variables that cannot be anticipated and are, accordingly, not addressed by training programs." As the decision explained, the employee had been trained to call the elevator company and to do only one other thing, which was to shut off power in that room. The employee failed to comply with this training despite an otherwise effective IIPP.

By not providing details in its written IIPP, a company is depending on employees to remember the actual or specific practice. This can be a precarious position.

Creating the Required Training Documents

Even when employers provide the requisite amount of specific training on foreseeable hazards, including those associated with new assignments, they risk citations for failing to keep required documents. Several of the cases reviewed involved failure to properly create a paper trail.

©ISTOCKPHOTO.COM/DRA_SCHWARTZ

Implications for the OSHA I2P2 Debate

It remains to be seen what type of training requirement the draft federal I2P2 rule will contain. What is clear from the case law experience in California is that training issues will be heavily litigated. Based on the California experience with IIPP, three questions emerge from the case law analysis that are worthy of consideration in the ongoing debate over I2P2 in the context of training-related requirements.

1) How much specificity should be provided in the draft regulation or associated guidance to employers as to when to train in relation to identified hazards? It makes sense and seems straightforward enough to provide training to new employees when hired and given a job assignment, and when employees take on specific new assignments later in their employment.

What is not so clear is how to interpret in California the requirement to provide training "whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard." As some cases reveal, it makes sense to strike a balance where employers are encouraged to train on new hazards within a zone of actual and anticipated danger to an employee instead of remote and isolated potential hazards, such as ensuring that PPE is not taken to a commercial laundry (as in the crop production services case).

2) As demonstrated by the employer outcomes in California, what guidance is necessary regarding the level of specificity of the training to have a compliant program? The California regulation is silent on this issue, which has resulted in several attempts to prosecute employers for failing to be precise enough in their IIPPs.

For example, as noted, Cal/OSHA sought training on each type of truck concerning loading/offloading hazards. The ALJs were sympathetic to employers' arguments that as long as general training addresses the hazards present, such specificity should not be required in the IIPP document. Nonetheless, this appears to be an area for conflict if compliance inspectors could question a training program for failing to include a specific piece of equipment, process or other device if the federal proposal is likewise silent on this issue.

3) What standard will be used to identify when an employer should have known to implement required training but failed to do so? The Cal/OSHA cases demonstrate the difficulty with what is the common approach, namely, asking whether a hazard was reasonably foreseeable to have, in turn, provided training on it. For example, in the local retailer case, the grocery store chain expected its employees to use one specific setting on the machine to slice meats. What should make it foreseeable that an employee will disregard these instructions? Is it the very existence of the other nonsanctioned setting, or does it take knowledge that the employee may disregard instructions plus the existence of this other setting?

As with the opinion involving the restaurant, what consideration should be given to the likelihood of an injury if an employee deviates from training to make those deviations then reasonably foreseeable to warrant additional training? Without guidance, employers presumably could be in a perpetual loop of assessing and reassessing hazards based on employees' behavioral changes, which could make new hazards reasonably foreseeable every time an employee signals a propensity to do something potentially unwise.

Conclusion

It is difficult to extrapolate conclusive findings from a review of cases with distinct factual backgrounds that span several years and involve different judges, Appeals Board members and interpretations of the law. Realizing this, the findings of this case law analysis are helpful in the ongoing dialogue regarding IIPPs and some of the training-related issues that have been litigated for several years in California.

Beyond this training excerpt, in looking at the substantive cases in which the elements of the IIPP or the defenses were adjudicated, employers frequently lost in litigating IIPP cases. When one adds the cases where employers attempted defenses or penalty adjustments, the authors reviewed a total of 120 substantive cases (Table 1). If one excludes the penalty adjustment cases, Cal/OSHA was victorious in 70% of these cases; if one includes the penalty adjustment cases, Cal/OSHA was victorious in 64%.

Thus, when it comes to litigation involving IIPP citations in California, employers have faced a substantial hurdle. This appears to be something that should at least be taken into account as OSHA considers its introduction of a proposed I2P2 rule. **PS**

References

Daily Labor Reporter. (2012, March 30). Injury prevention rule still in the works; SBREFA panel delayed for a "few months." Washington, DC: Bloomberg BNA.

Mendeloff, J., Gray, W.B., Haviland, A.M., et al. (2012). An evaluation of the California Injury and Illness Program. Retrieved from **www.dir.ca.gov/chswc/reports/2012/IIPPEvaluation.pdf**

Office of Information & Regulatory Affairs, Office of Management & Budget. (2013). Injury and illness prevention program (RIN 1218-AC48). Retrieved from **www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1218-AC48**

OSHA. (2012, Jan.). Injury and illness prevention programs white paper. Retrieved from **www.osha.gov/dsg/InjuryIllnessPreventionProgramsWhitePaper.html**