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Cal-OSHA Adopts Airborne Transmissible Disease Safety Standards with an Employer Provided Respirator Requirement – Effective August 5, 2009

California may not be able to balance its budget, but it has approved new safety standards for Aerosol Transmissible Diseases (ATDs) in health care related workplaces and in workplaces handling animals potentially infected with ATDs. The California Occupational Safety Health and Standards Board (COSHSB) unanimously approved the standards on May 21, 2009, and the California's Office of Administrative Law (OAL) has now approved them. The standards become effective August 5, 2009.

California's new standards are the first specific regulatory response, at either the state or federal level, to worker safety in the face of diseases such as SARS, H1N1, tuberculosis and West Nile virus. The regulations were shaped to a degree by the national dialogue surrounding the emergence of H1N1, or "swine flu," in workplaces and schools in the United States, and are the result of significant input and support from the Service Employees International Union (SEIU).

It is widely anticipated that California's new regulation will be the blueprint for forthcoming federal standards with regard to worker safety in the face of ATD exposure. There is precedent for this approach. In 1986, for example, California OSHSB passed a bloodborne pathogens standard that was later used as the model at the federal level. SEIU has already made known its intentions to push for a similar standard at the federal level.

What are ATDs?

ATDs are diseases or pathogens for which bodily fluid droplet or airborne exposure precautions are required. Zoonotic ATD's are disease agents that (a) are transmissible from animals to humans and (b) are capable of causing human disease that may be transmitted by air or by droplet exposure. Among the most notable ATDs are tuberculosis, SARS, H1N1 (swine flu), West Nile virus and other flu and respiratory diseases. A long, but non-exhaustive list is provided as an addendum to the regulations.

It is widely anticipated that California's new regulation (with its mandatory employer provided respirator requirement) will be the blueprint for forthcoming federal standards with regard to worker safety in the face of ATD exposure.

The ATD Standard

The new ATD rules will be codified as Title 8, Chapter 4, Subchapter 7, Article 109, Section 5199. (In the meantime, the full text can be found at <http://www.dir.ca.gov/oshsb/atdproptext.pdf>.) The regulations require compliance by covered health care facilities and providers, including:

- hospitals
- nursing facilities
- clinics and outpatient facilities
- home health care services
- long term care facilities
- paramedic and medical transport services, as well as outreach and public health programs.

Other covered workplaces include: facilities operating pursuant to Hazardous Waste and Emergency Response orders; police services transporting persons anticipated to be cases of ATDs or rendering services in a health care or public health role; correctional facilities; homeless shelters; drug treatment programs; laboratories (including coroner and mortuary facilities); and other specialized and enumerated workplaces. Dentists are excluded from the regulations, unless they render treatment to patients identified as ATD cases or suspected cases.

Compliance will require the following efforts:

- Establishing and implementing a written ATD Exposure Control Plan
- Engineering and work practice controls for cleaning and decontaminating
- Personal protective equipment and respiratory protection (see below)
- Isolation plans for identified or suspected cases
- Initial and annual training
- Recordkeeping
- Provision of medical services to exposed workers

In cases where an employee faces an increased risk of occupational exposure to ATDs, the regulations require that the employer provide special respirator protection at its own cost. A surgical mask is insufficient; the respirator must be at least as effective as the N95 filtering facepiece respirator. Employees covered by these enhanced protections include those who work in contaminated areas or in areas designed for the isolation or quarantine of ATD cases or those whose jobs include the handling of infected cadavers or transport of exposed materials or persons. Where applicable, these employees must be fitted annually for a respirator (the details of which are outlined in the regulations) and must use the respirator rather than a simple surgical mask.

The requirement that employers provide respirators was the most contentious of the provisions included in the standard, and many state and local health departments continue to assert that mask protection alone is a medically adequate response. SEIU claimed that the respirator requirement was essential and that its inclusion in the standard is a victory for worker protection. Not all health care providers or public health agencies are as convinced. Although this issue is resolved, for now, in California, it is expected to continue to be debated at the national level as work on a federal standard continues.

The Zoonotic Standard

The new Zoonotic rules will be codified as Title 8, Chapter 4, Subchapter 7, Article 109, Section 5199.1. (In the meantime, the full text can be found at <http://www.dir.ca.gov/oshsb/zoonoticstext.pdf>.) These regulations require compliance by services that capture, sample, transport or dispose of birds and other wildlife; farms producing animals or animal products (including untreated animal products, byproducts or wastes); slaughterhouses; veterinary animal inspection; importers of live or untreated animals or animal products; zoos; animal parks; pet stores; and laboratory operations.

These covered facilities and services must follow the standard whenever an employee is involved in capturing or sampling of animals to detect the presence of infection with zoonotic ATDs or is involved in the transportation or disposal of animals suspected to be infected with zoonotic ATD' or covered under a quarantine or alert issued by Centers for Disease Control, California Department of Food and Agriculture, California Department of Fish and Game, California Department Public Health, U.S. Department of Agriculture or U.S. Department of the Interior.

Compliance will include the following efforts:

- Establishing procedures that minimize production of aerosols
- Controls for cleaning and decontaminating
- Personal protective equipment and respiratory protection (see below)
- Posting of signs in areas containing identified or suspected cases
- Training
- Recordkeeping
- Provision of medical services to exposed workers

Like Section 5199, Section 5199.1 requires that employers provide respirators at their own cost in the event that an employee must enter an enclosed area in which aerosols from potentially infectious animals or animal wastes are present. Like the ATD standard, respirators must be at least as effective as the N95 filtering facepiece respirator. Section 5199.1 also requires the annual fit testing at employer expense.

This *GT Alert* is relevant to all Greenberg Traurig clients, not just those with California operations, because of the anticipation that similar standards will be issued by other states and federal OSHA based in part on the California standard. Although the "employer provided respirator" issue has been resolved in California, the debate continues elsewhere. Apart from cost, room remains for debate as to whether a full faceplate respirator (as opposed to a more modest mask and face shield or other approach) is necessary to adequately address the threat of infection. Although the respirator approach will certainly be a part of federal OSHA consideration, there may still be time and opportunity to affect whether this requirement is part of a federal standard. Although employers are, of course, concerned about safety, employers in affected industries may find that a mandatory facepiece respirator, is a matter of significant operational concern.

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