# OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

## BOARD STAFF'S REVIEW OF THE PETITION

**By: David Kernazitskas**

**Petition File No. 538**
**Service Employees International Union (SEIU) Local 121RN and SEIU Nurse Alliance of California**

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**Date: May 12, 2014**

## Introduction

On February 11, 2014, the Occupational Safety and Health Standards Board (Board) received a petition dated February 10, 2014 from SEIU Local 121RN and SEIU Nurse Alliance of California (Petitioners). The Petitioners requested that the Board amend the General Industry Safety Orders (GISO) and promulgate a comprehensive workplace violence prevention standard for healthcare workers.

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and to render its decision no later than six months following their receipt. In accordance with Board policy, the purpose of this evaluation is to provide the Board with relevant information upon which to base a reasonable decision.

## History

On March 3, 1993, Petition No. 331 (Pat Wentworth and Debby Boucher, Emergency Nurses Association) was received asking the Board to develop a standard to control violence in hospitals, emergency departments and other healthcare settings. Both Board staff and the Division of Occupational Safety and Health (Division) recommended denying the petition for a variety of reasons, including jurisdictional uncertainties of the Board and Division, philosophical challenges of requiring employers to address hazards traditionally handled by law enforcement, duplication of requirements already requiring employers to address workplace hazards through the injury and illness prevention program (IIPP), and the infeasibility of legislating absolute safety. Although the Division did not feel it was necessary to develop a workplace violence standard at the time, it did develop a 1993 guidance document for addressing workplace violence ("Guidelines for Security and Safety of Health Care and Community Service Workers"), which is currently accessible on the Division's website. The Board denied Petition No. 331 on July 22, 1993.

Petition No. 361 (Susan L. Chaussee) was received February 23, 1995 and requested the Board adopt regulations for employee crime protection and prevention. The petitioner stated that no regulations exist in California for protection against workplace violence and that the number of deaths occurring each year in retail and other stores needed to be addressed. She recommended patterning the regulation after the Washington State statute known as "Late Night Retail Workers Crime Protection." Board staff and the Division again recommended that the petition be denied, using arguments similar to those used for Petition No. 331. Board staff recommended that the petitioner participate in the Division's Workplace Security Advisory Committee, which was working on updates to "Cal/OSHA Guidelines for Workplace Security." The workplace security guidelines were last updated in August, 1995. Petition No. 361 was denied in a decision dated June 22, 1995.

## Reason for the Petition

The Petitioners state that "According to OSHA, 'workplace violence has remained among the top four causes of death at work for over fifteen years,' impacting thousands of workers and their families annually." Additionally, they point out that OSHA claims that nearly 2 million American workers report that they have been victims of workplace violence, but that the true number is likely much larger due to unreported incidents. OSHA also states that healthcare and social service workers are among those with the highest risk for violence. As more evidence of the need for regulations to address workplace violence, the Petitioners also cited two specific cases of workplace violence: one involving the death in October, 2010, of a psychiatric technician strangled by a Napa State Hospital patient and the other involving an inmate assault of a registered nurse working at the Contra Costa County jail in Martinez, California.

Furthermore, the Petitioners claim that the IIPP regulations are inadequate to prevent future injury and death because they do not provide employers with specific guidelines to address the complex hazards.

Additional challenges for preventing workplace violence, according to the Petitioners, include a mentality that workplace violence is "part of the job" for healthcare workers, exposure to violent individuals in the absence of strong preventative programs and regulation, and "organizational realities such as staff shortages and increased patient acuity."

Because of the high number of workplace violence incidents, the growing population of healthcare workers, and the lack of specific regulations to address violence in a healthcare setting, the Petitioners request that a comprehensive standard be developed. According to the Petitioners, the new standard should address at a minimum the following: scope and application to expand upon OSHA's definition of healthcare and social assistance workers to include all workers employed in all healthcare settings; definitions; management commitment and employee and union involvement requirements; worksite analysis with input from frontline employees and their union; a written program with frontline employee and union input in its development and in reviewing instances of workplace violence; hazard prevention and control; information and training, including frontline employee and union input, as well as translation for those who would benefit; recordkeeping and program evaluation with employee and union rights to access all workplace violence prevention records and plans; a method for insuring compliance with the program; and spelled out employee and union rights.

## National Consensus and State Standards

There are no national consensus standards regarding workplace violence in healthcare or other settings, but there are numerous sample programs, guidance documents, and other

resources available online to those seeking information on controlling or preventing violence in the workplace.

New York and Washington States have each adopted workplace violence prevention standards. New York's regulation applies to public employees and Washington's regulation applies to businesses operating between 11 pm and 6 am, except restaurants, hotels, taverns, and lodging facilities. Washington State has also passed legislation which will direct employers to develop and implement programs to address workplace violence in health care settings, including State psychiatric hospitals.

In addition to California, New York, and Washington, other states with online workplace violence prevention assistance include Indiana, Iowa, Michigan, Minnesota, Oregon, Virginia, and Wyoming. Numerous other public and private organizations have workplace violence prevention information, ranging from sample programs to guidance documents for use in addressing workplace violence issues as well. Most such information is general and performance based to be applicable to a variety of industries, including healthcare and social services.

## Federal OSHA Standards

Federal OSHA does not have a regulation specific to workplace violence prevention, but regulates workplace violence using the general duty clause of the Occupational Safety and Health Act. In the OSHA document entitled "Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents," page 3 states in part:

> "Employers may be found in violation of the general duty clause if they fail to reduce or eliminate serious recognized hazards. Under this directive, inspectors should therefore gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees. Furthermore, investigations should focus on the availability to employers of feasible means of preventing or minimizing such hazards[1]."

## Division of Occupational Safety and Health (Division) Report

The Division submitted an evaluation for Petition No. 538 dated April 10, 2014, which recommended granting the Petitioners' request to the extent that a representative advisory committee be convened by the Division to consider regulations for preventing workplace violence hazards. The Division noted that Bureau of Labor Statistics data indicate a high rate of violent events per 10,000 full-time workers for healthcare and social service

[1] Occupational Safety and Health Administration, U.S. Department of Labor, "Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents," Directive Number CPL 02-01-052, effective September 8, 2011, https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf, accessed April 7, 2014.

workers. They also noted that workers compensation claims data for workplace violence among healthcare workers for the years 2010-2012 had the highest frequencies in hospitals, skilled nursing and intermediate care facilities, and government. The Division is of the opinion that based on its field experience in response to acts of workplace violence, employer's actions to date fall short of ensuring workplace violence acts are minimized. Without a specific regulation to address this issue, the employer is without sufficient guidance to develop an effective program and the Division has nothing but generic Title 8 standards and special orders to enforce, thus leaving many workers at risk of becoming victims to workplace violence.

## Board Staff Evaluation

Health and Safety Code Section 1257.7 requires certain hospitals to conduct a security and safety assessment at least annually as part of their licensing conditions. Using the assessment, the hospitals must develop and update annually a security plan with measures to protect personnel, patients, and visitors from aggressive or violent behavior. As part of the plan, affected hospitals are required to examine trends of aggressive or violent behavior, track such incidents, and develop means to deter and manage further incidents.

Health and Safety Code Section 1257.7, which is enforced by the California Department of Public Health and not the Division, applies specifically to general acute care, acute psychiatric, and special hospitals. Special hospitals are defined in the Health and Safety Code as those facilities with "organized medical or dental staff that provide inpatient or outpatient care in dentistry or maternity." Section 1257.8 requires that the provisions of 1257.7 apply to emergency departments as well.

Other types of health facilities not included in the requirement to develop a security plan are skilled nursing, intermediate care, and congregate living health facilities. Additionally, correctional treatment centers, hospice facilities, and State hospitals are not covered by Section 1257.7. State mental hospitals, however, are required to address workplace violence by Section 4141 of the Welfare and Institutions Code.

The Petitioners are requesting that the Standards Board promulgate a standard that would cover all workers in a healthcare or social services setting. Such workers are found in psychiatric facilities, hospital emergency departments, community health clinics, drug abuse treatment clinics, pharmacies, community-care facilities, residential facilities and long-term care facilities. Job titles covered by the proposed standard include physicians, registered nurses, pharmacists, nurse practitioners, physicians' assistants, nurses' aides, therapists, technicians, public health nurses, home healthcare workers, social and welfare workers, security personnel, maintenance personnel and emergency medical care personnel.

In the petition, the Petitioners claim that

> "The provisions of Section 3203 are inadequate to address the specific elements that are needed to prevent future deaths and injuries among healthcare workers in California. While Cal/OSHA often cites employers under Section 3203, the section does not provide employers with the specific guidance to address the complex factors that must be in place to protect healthcare workers from the hazard of workplace violence."

The Petitioners' proposed regulation is similar in concept to the requirements of Section 3203, "Injury and Illness Prevention Program". The Petitioners request a requirement for worksite analysis and training (including translation as necessary) that includes input from frontline workers and union representatives, where applicable. They also suggest that the regulation contain provisions for hazard prevention and control, recordkeeping, program evaluation, and incident and plan review. Many of the elements of the Petitioners' proposed regulation are more specific than what is required by the IIPP, though some of them are suggested within the text of the IIPP regulation as "substantial compliance[2]".

The Petitioners' proposal aims to specify many of the elements implied by the IIPP. Because the IIPP regulation was written to cover all California businesses and to allow each employer to assess the hazards specific to their workplace, thereby tailoring their workplace violence and security program to meet their individualized and unique needs, it was intentionally written to be a performance standard and not fully detail how to resolve each safety concern.

A recent Occupational Safety and Health Appeals Board (OSHAB) decision (BHC Fremont Hospital, Inc., Docket 13-R1D2-0204) upheld a citation issued by the Division to a behavioral healthcare hospital in Fremont. The employer had workplace violence prevention training, panic buttons in patient rooms, procedures for responding to calls for attacks, personal employee alarms, and other safety precautions in place, but was not effectively controlling workplace violence incidents. The facility had 18 patient-on-staff assaults in 2011 and 39 in the first ten months of 2012.

The OSHAB decision states "The Division established a violation of Section 3203(a)(6) by showing that the employer was required to implement a plan to protect its employees from the known or reported hazards in a timely fashion and it did not do so." A footnote explains that "The use of personal alarms by employees is not specifically mandated by

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[2] For example, Section 3203(a)(3) requires a system for communicating with employees on matters of occupational safety and health and states: "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 (emphasis added)."

the safety order. However, once a hazard is identified, the Employer must develop the methods or procedures for correcting the unsafe condition."

Although the employer had personal alarms available for employee use, it did not require employees to use them. The decision further states that the "Employer's failure to require the use of personal alarms or other devices constitute a failure to correct unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard" and upheld the citation.

Because of the high rate of injury in the healthcare and social work industries, employers are aware, or can be expected to be aware through the exercising of reasonable diligence, of the hazards involved in their industries and are required to take every action necessary to control employee exposure to workplace violence and other hazards in the workplace. Furthermore, because of the numerous resources available online for controlling or eliminating workplace violence—in every setting, not just in healthcare—conscientious employers have ample information to develop a program specific to their workplace.

Although violent incidents are too common in healthcare, they are not limited to healthcare. Taxi cab drivers, bartenders, security guards, gas station attendants and technical/industrial school teachers are also among the occupations with the highest rates of workplace violence, according to a report dated March, 2011, prepared by the Bureau of Justice Statistics in the U.S. Department of Justice[3]. Care should be exercised in dealing with workplace violence in one setting to avoid giving the impression that violence in other settings need not be addressed to the same degree. Furthermore, developing regulations specific to each affected industry, or subclass within an industry (i.e. emergency rooms, hospice care, psychiatric wards, and prison units, etc.), could lead to numerous new vertical workplace violence standards being developed for a long list of occupations.

Countless incidents of workplace violence are senseless and unpredictable and cannot be prevented by regulation; however, increased effort should be made to prevent those incidents which can be prevented. Creating a safety regulation for every imaginable hazard or hazardous situation is infeasible and cannot be relied upon for employee injury and illness prevention when dealing with the randomness of workplace violence. However, the Petitioners' concerns for the safety and health of healthcare and social workers are well-founded, but staff believes the solution may not lie entirely with the development of new standards.

Using California's IIPP and the healthcare licensing requirements of the Health and Safety Code and other licensing agencies to require employers to address workplace violence prevention in the workplace is helpful to prevent, control, or reduce occurrences

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[3] Bureau of Justice Statistics, U.S. Department of Justice, "Workplace Violence, 1993-2009," http://www.bjs.gov/content/pub/pdf/wv09.pdf, accessed April 10, 2014.

at California medical facilities. Guidance documents available to employers, existing statutory law, and the recent Appeals Board decision affirming the Division's citation of Fremont hospital have put the industry on notice and spotlighted the workplace violence issue in the healthcare industry such that they will be held accountable for failing to provide a safe and healthful workplace to their employees.

Board staff's considered opinion is that given the number of workplace violence incidents in California health care workplaces, an advisory committee should be convened to determine the necessity of a workplace violence prevention standard. The Board should also request that the Division update its guidance documents to ensure that they reflect the knowledge and experience gained over the past 2 decades of enforcement, so that employers can refer to them for better guidance in addressing workplace violence.

## Recommendation

Based on the foregoing discussion, staff recommends that the Petition be granted to the extent that the Board should request the Division to convene an advisory committee to discuss the necessity of the rulemaking proposed by the Petitioners. Should necessity be established, the Division is requested to prepare rulemaking documents for consideration by the public and the Board. Additionally, the Board should request that the Division reconvene its advisory committee(s) to discuss any necessary revisions to the Cal/OSHA "Guidelines for Workplace Security", "Guidelines for Security & Safety of Health Care and Community Service Workers" and "Model Injury & Illness Prevention Program for Workplace Security" sample programs, which were last revised in the 1990s, and ensure that they contain up-to-date best practices for assisting employers in developing their 21st century workplace violence prevention programs.