OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

BOARD STAFF'S REVIEW OF THE PETITION

By: David Kernazitskas

Petition No. 539
California Nurses Association (CNA)

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Date: May 14, 2014

Introduction

At the February 20, 2014, public meeting held in Sacramento, California, the Occupational Safety and Health Standards Board (Board) received a petition from the California Nurses Association (Petitioner). The Petitioner requested that the Board amend the General Industry Safety Orders (GISO) and promulgate a workplace violence prevention standard for healthcare settings.

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 the petition 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 Petitioner states that "Countless acts of assault, battery, and aggression [routinely] take place in health care settings [and] demonstrate a frightening trend of increasing violence faced by health care workers in California and throughout the country." Also, according to the Bureau of Labor Statistics, "A worker in health care and social assistance is nearly 5 times more likely to be the victim of a nonfatal assault or violent act by another person than the average worker in all other major industries combined."

Additionally, the Petitioner points out that violence in health care occurs most frequently in psychiatric wards, emergency rooms, waiting rooms, and geriatric units. A 2013 Journal of Safety Research article concluded that workplace violence incidents are not well described, and consequently, rigorous surveillance efforts are needed to properly address the hazards.

The Petitioner mentions legislation introduced by the CNA in its effort to combat the issue. Health and Safety Code 1257.7 and 1257.8, which require certain hospitals to address workplace violence as a licensing and/or certification condition, resulted from AB 30 (Hayashi) in the 2010-2011 legislative session.

In 2013, SB 718 (Yee) was introduced in order to add provisions similar to AB 30 (Hayashi) to the Labor Code, so that the Division, in addition to the California Department of Public Health, can enforce them. The Petitioner writes:

> "While the California Department of Public Health (CDPH) may enforce hospital safety and security plans from a perspective of hospital licensure and certification, we believe that Cal/OSHA, with its core mission to protect workers from health and safety hazards on the job, is well-equipped to enforce workplace violence standards from the perspective of worker safety and injury prevention."

The Petitioner points out that there are several model workplace violence prevention programs and guidelines available for constructing a standard, but asserts that at a minimum, the workplace violence prevention (WVP) standard should:

- Cover general acute care hospitals licensed pursuant to subdivision (a), (b), or (f) of Section 1250 of the Health and Safety Code (see the section entitled "Staff Evaluation" below for a description of which health care facilities would be covered by the proposed scope, and which would not.)

- Define workplace violence to at least include any use of physical force that results in or has the likelihood to result in injury or psychological trauma, or stress. It must also include any use of a firearm or other dangerous weapon.

- Require personnel education and training with question and answer interaction; a system for responding to, and investigating violent incidents; a system for assessing and correcting factors that could lead to workplace violence; and requirements that all temporary personnel be oriented to the provisions of the WVP plan.

- Protect an employee's right to seek assistance from law enforcement when a violent incident occurs, without fear of retaliation or discrimination.

- Include requirements that all WVP plans be developed in conjunction with affected employees and their collective bargaining agents, if any.

- Include requirements that hospitals document and retain written records of any violent act against a hospital employee.

- Require hospitals to report violent incidents to the Division within specified timeframes.

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. 539 dated April 23, 2014, which recommended granting the Petitioners' request to the extent that a representative advisory committee be convened by the Division. The Division cited a 2007 NIOSH study entitled "Evaluation of Safety and Security Programs to Reduce Violence in Health Care Settings" that showed that in California emergency departments, 92% of employees surveyed reported verbal abuse, 49% reported threats, and more than one-third reported being assaulted in the previous year. The study also reported that 72% of the employees, who were assaulted either verbally or physically, did not report the incident. Workers compensation claims data reviewed by the Division for workplace violence among healthcare workers for the years 2010-2012 showed the highest frequency of injury 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. Section 3203 provides only limited guidance for employers about how to specifically address the hazards of workplace violence. 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.

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[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.

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 Petitioner requests that the Standards Board promulgate a standard that would allow the Division to enforce protections similar to the requirements of Health and Safety Code Sections 1257.7 and 1257.8. Many of the specific elements requested in the petition are similar to the requirements of Section 3203, "Injury and Illness Prevention Program". For example, the Petitioner requests a requirement for worksite assessment, hazard resolution, training, and recordkeeping as part of a written workplace violence prevention program. The Petitioner also suggests that the regulation contain provisions for employee and union representation in developing the program and a specific protection for the right of an employee to contact law enforcement during a workplace violence incident. Although various elements of the proposed regulation are already contained in the IIPP, the IIPP is not specifically written to address workplace violence.

The Petitioner's proposal would not require that all healthcare workers be covered by a WVP plan. Workers employed at skilled nursing, intermediate care, congregate living, and hospice facilities would not be included in the Petitioner's proposed scope, nor would workers at correctional treatment centers, and State hospitals, though these employees are arguably covered under the provisions of the IIPP.

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

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—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[2]. 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.

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 Petitioner's 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 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

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[2] 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.

provide a safe and healthful workplace to their employees. Amending Title 8 to specifically address workplace violence in healthcare may be necessary to further control workplace violence incidents.

Recommendation

Based on the foregoing discussion, Board staff recommends that the Petition be granted to the extent that the Board 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.