Labor Laws & Regulations Workshop

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Date: September 7, 2022

Today's Agenda

- New and Pending Legislation
- Brief Case Law Update
- State Minimum Wage Increase
- I-9 Update
- Common Mistakes
  - Arbitration
  - Meal & Rest Periods
  - Cal/OSHA

Several Bills Aimed Directly at Agriculture

- No surprise that the agriculture industry continues to be a target of attention in Sacramento.
- New head of California Labor Federation, AFL-CIO is Lorena Gonzalez.
- Her first action on day one was to bring the UFW back into the Federation after nearly two decades.

AB 2183 – Card Check Under ALRA

- Latest in a long effort to provide union organization by "card check" for farm workers under the ALRA.
- Different approach or "spin" but the same essential goal at the end of the day – card check.
- Previous bills have been vetoed by Governors Schwarzenegger, Brown and Newsom.

AB 2183 – Card Check Under ALRA

- **Step # 1 – Labor Peace Compact**
  - Annually must indicate whether agree to a "labor peace compact."
  - A **"labor peace compact"** means you agree to the following:
    - Not speak for or against union representation;
    - Allow labor organizations access to employees on company property;
    - Not hold "captive audience meetings" where unions are discussed;
    - Not disparage a union in communications to employees or the public; and
    - Not express a preference for one union over another.

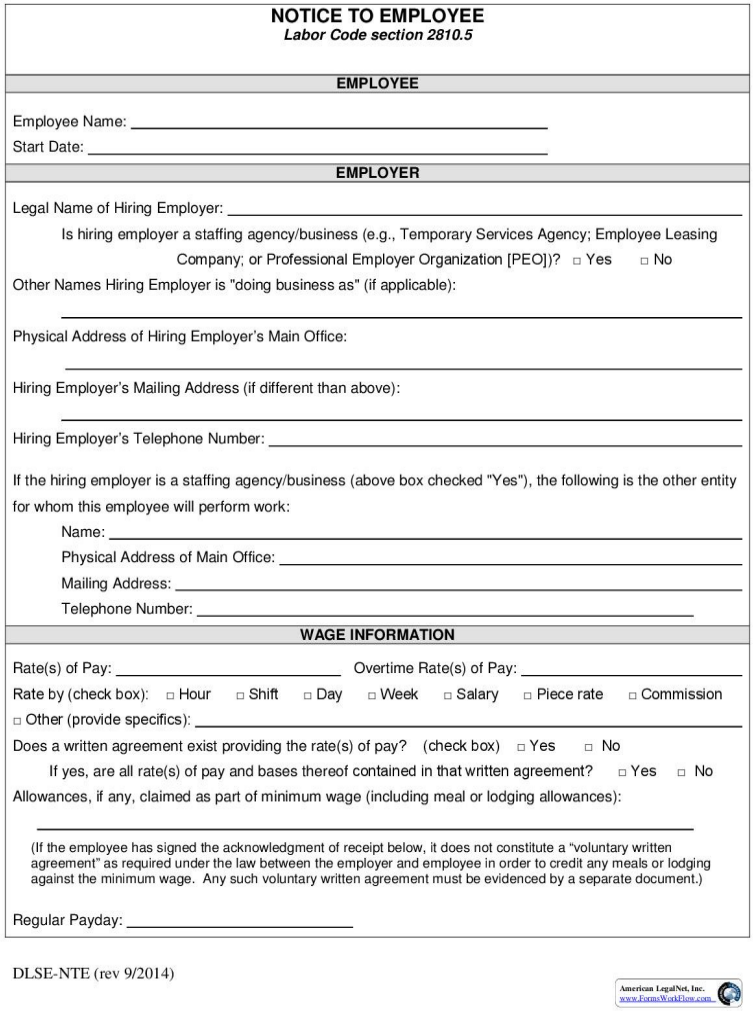
AB 2183 – Card Check Under ALRA

- **Step # 2 – Two Alternatives:**
  1) **If You Agree to a Labor Peace Compact:**
     - Employees can have a "mail-in ballot election."
     - Ballot cards issued to employees by ALRB (30 day time period).
     - If majority of mail-in ballots are for the union, immediately certified.
  2) **If You DO NOT Agree to a Labor Peace Compact:**
     - Employees can select a union by "card check."
     - Merely requires the union to submit authorization cards signed by more than 50 percent of the employees.
     - Union immediately certified.

AB 2183 – Card Check Under ALRA

- **Will Governor Newsom sign it?**
- Spokesperson stated he "cannot support an untested mail-in election process."
- Later clarified that negotiations were still underway.
- But the bill was not amended any further after that.
- ***Would appear this sets up another veto…but you never know until it actually happens.***

AB 857 – Worker Notices



NOTICE TO EMPLOYEE
Labor Code section 2810.5

EMPLOYEE

Employee Name: _____
Start Date: _____

EMPLOYER

Legal Name of Hiring Employer: _____
Is hiring employer a staffing agency/business (e.g., Temporary Services Agency; Employee Leasing Company; or Professional Employer Organization [PEO])? □ Yes □ No
Other Names Hiring Employer is "doing business as" (if applicable):
_____
Physical Address of Hiring Employer's Main Office:
_____
Hiring Employer's Mailing Address (if different than above):
_____
Hiring Employer's Telephone Number: _____

If the hiring employer is a staffing agency/business (above box checked "Yes"), the following is the other entity for whom this employee will perform work:
Name: _____
Physical Address of Main Office: _____
Mailing Address: _____
Telephone Number: _____

WAGE INFORMATION

Rate(s) of Pay: _____ Overtime Rate(s) of Pay: _____
Rate by (check box): □ Hour □ Shift □ Day □ Week □ Salary □ Piece rate □ Commission
□ Other (provide specifics): _____
Does a written agreement exist providing the rate(s) of pay? (check box) □ Yes □ No
If yes, are all rate(s) of pay and bases thereof contained in that written agreement? □ Yes □ No
Allowances, if any, claimed as part of minimum wage (including meal or lodging allowances):
_____
(If the employee has signed the acknowledgment of receipt below, it does not constitute a "voluntary written agreement" as required under the law between the employer and employee in order to credit any meals or lodging against the minimum wage. Any such voluntary written agreement must be evidenced by a separate document.)

Regular Payday: _____

DLSE-NTE (rev 9/2014)

American LegalNet, Inc.
www.FormsWorkFlow.com

- Makes changes to the "Wage Theft Prevention Act" notice that apply to all employers.
- Enacts a **new** notice requirement for H-2A workers.

AB 857 – Worker Notices

- Change to "Wage Theft Prevention Act" notice (applicable to ***all*** employers):
  - Must include the existence of a "federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed and that was issued within 30 days prior to the employee's first day of employment, that may affect their health and safety during their employment."

AB 857 – New H-2A Notice

- New notice in Spanish (and English if requested) effective March 15, 2023.
- Must also be in the Wage Theft Prevention Act notice (but Labor Commissioner will prepare a combined template).
- Must be provided on the first day the employee begins work in California or begins work for a new employer.
- Sets forth a **"Summary of Key Legal Rights of H-2A Workers under California Laws"** with various topics that must be covered.
- Industry concern is this is unnecessary and duplicative.

AB 364 – Foreign Labor Contractors

- The “other” FLCs.
- Foreign labor contractors have an entirely separate registration process under DLSE.
- **“Foreign labor contracting activity” means recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker’s employment in California, including when that activity occurs wholly outside the United States.**
- “Foreign labor contracting activity” does not include the services of an employer, or employee of an employer, if those services are provided directly to foreign workers solely to find workers for the employer’s own use.
- If you engage in this activity, you must be registered.

AB 364 – Foreign Labor Contractors

- Previously only applied to “nonagricultural workers” and exempted farm labor contractors or any employer employing agricultural workers.
- This bill eliminates those exemptions so now potentially applies to agriculture if you meet the definition of “foreign labor contracting activity.”

A Few Pending Bills of General Applicability

- Extension of CA SPSL
- Employment Discrimination and Cannabis
- Retaliation for Employees Refusing to Work Under "Emergency Conditions"
- Extension of a Few Other COVID-19 Laws

AB 152 – Extension of CA SPSL

- California's statewide COVID-19 Supplemental Paid Sick Leave law is set to expire September 30, 2022.
- This bill would extend that existing law until the end of the year – until December 31, 2022.
- ***This is not a new "bucket" of leave – it just extends the existing law until the end of the year.***
- Also contains a small business grant program to provide grants of up to $50,000 to businesses with 26-49 employees for cost of providing CA SPSL.

AB 2188 – Employment Discrimination and Cannabis

- Latest in a series of bills – but none have ever made it to the Governor's desk until now.
- This bill does not apply to the building and construction trades, which removed a big political hurdle that had stopped prior bills.
- Thus has a decent chance of being signed.

AB 2188 – Employment Discrimination and Cannabis

Prohibits an employer from taking adverse action based on:

1) An employee's use of cannabis off the job and away from the workplace.
2) A drug-screening test that found the employee to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.
    - An effort to try to move employers away from metabolite testing.
    - Adverse action based on THC-positive test results would still be permitted.

AB 2188 – Employment Discrimination and Cannabis

- Does not allow an employee to possess or use on the job or to be **"impaired by"** cannabis on the job.
  - But how do you measure **"impairment?"**
- Does not apply to employers covered by federal laws or receiving federal funds or federal contractors that have different requirements.
- Does not apply to employees subject to federal background investigations or security clearances.
- Does not apply to employees in the building and construction trades.
- If signed, goes into effect **January 1, 2024.**

SB 1044 – Retaliation and "Emergency Conditions"

- Law applies to all employers, not just agriculture.
- But impetus for the bill was reports of workers (including agricultural workers) being required to work during wildfires and in evacuation zones.

SB 1044 – Retaliation and "Emergency Conditions"

- Prohibits an employer, in the event of an **"emergency condition"** from taking adverse action against an employee for refusing to report to, or leaving, a workplace or worksite because the employee has a "reasonable belief" that the workplace or worksite is unsafe.

- An **"emergency condition"** is defined to mean (1) conditions of disaster or peril caused by natural forces or a criminal act, or (2) an order to evacuate a workplace, worksite, a worker's home, or the school of a worker's child.

SB 1044 – Retaliation and "Emergency Conditions"

- **"Emergency condition"** does not include a health pandemic so SB 1044 will not be applicable to employees that claim the worksite is unsafe due to COVID-19.

- An employee's belief that the workplace is unsafe is **"reasonable"** if a person under similar circumstances would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.

Extension of Two COVID Laws

- **AB 2693** would extend statutory COVID-19 exposure notification requirements (AB 685) to 2024 (set to expire at end of the year).
- Also provides for posting notices in lieu of individual notices.
- **AB 1751** would extend the COVID-19 workers' compensation presumption (SB 1159) until 2024.

Important Case Law Update

Cinagro Farms **(July 28, 2022)**

- ALRB issued civil penalties to agricultural employer for "willful misclassification" of crew members as independent contractors.
- Troubling precedent – assessing penalties for violations outside of the ALRA.
- ALRB did this on its own initiative.
- Keep an eye on this one.

State Minimum Wage Increase

- Statute enacting the state minimum wage says if inflation increases by more then **7%** - minimum wage increases.
- In May, California Department of Finance announced that inflation hit **7.6%** for 2022 fiscal year.
- Therefore, Governor announced minimum wage will increase to **$15.50** per hour January 1, 2023.
- And this will apply to all employers **regardless of size** (no longer distinction for those with less than 25 employees).
- Keep local minimum wages in mind.
- "Domino effect" on minimum salary for exempt employees - **$64,480**.

I-9 Update – Remote Document Review?

- August 18, 2022 - DHS published a Proposed Rule that would allow DHS to explore "alternative options" such as remote review of documents.
- Rules were "relaxed" during COVID-19 and extended multiple times (although still require eventual in-person review).
- Current remote I-9 verification flexibility policy is in place until October 31, 2022.
- Proposed rule allows DHS to create pilot programs and implement remote document review "as a temporary measure."
- ***Stay tuned!***

Some Common Mistakes

- **Arbitration**
- **Meal & Rest Periods**
- **Cal/OSHA**

Arbitration – Unsettled Area of Law

- A lot going on in the courts.
- The lay of the land is still unsettled.
- AB 51 (law banning mandatory arbitration) tied up in the courts and on hold.
- Lots of action this year on arbitration and how it relates to PAGA.

Arbitration Agreements and PAGA

- For many years, PAGA claims could not be compelled to arbitration.
  - Even with an arbitration agreement that waived an employee's right to bring any representative claim
- The recent *Viking River Cruises* decision changed that.

Viking River Cruises Holding

- Individual PAGA claims CAN be compelled to arbitration.
  - Individual PAGA claims = Labor Code violations that employee personally suffered
- Plaintiffs then lose standing to bring representative PAGA cases.

Takeaway and Win for Employers

- In your employee arbitration agreement:
  - Include representative action waivers
    - Make sure there is a severability clause
- When a PAGA claim arises:
  - File a motion to compel arbitration
    - → Compels employees' individual PAGA claims to arbitration
    - → Dismisses non-individual PAGA claims for violations suffered by others
    - → Limits scope of PAGA actions

Victory…FOR NOW

- While a victory for employers, could be short-lived.
- CA courts or legislature could wipe this out.
- Plaintiffs' attorneys will be pushing for this.

Plaintiff and Court Reactions

- Plaintiffs refusing to stipulate to arbitration more generally
- Courts subjecting arbitration agreements to higher scrutiny
- Courts compelling arbitration of individual PAGA claim but stay PAGA claim on behalf of other employees (instead of dismiss like in *Viking River*)
- CA Supreme Court granted review of Uber case which may provide response to *Viking River*

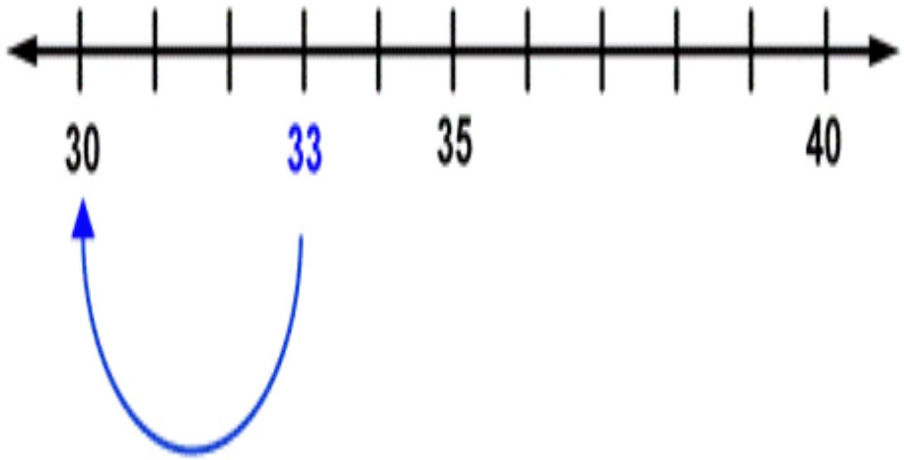
Arbitration – Beware of the Fee Trap!

- SB 672 was passed by the California legislature, and it went into effect in 2022.
- Absent an **express provision in the arbitration agreement** stating the number of days in which the employer must pay arbitration fees and costs, these are due upon receipt.
- If invoices are not paid within 30 days, it is considered a waiver of a right to arbitrate, and the plaintiff can take their claims back to court and avoid arbitration.
- Plaintiff attorneys are alleging this applies even if the invoice says something different, if it's not specifically in the arbitration agreement.
- Plaintiff attorneys are playing games with this and trying to lure you into missing payments and getting kicked back to court.

Meal and Rest Periods – Common Mistakes

- Meal and rest periods continue to be a hot area of litigation.
- Several significant court decisions in the last year or two.
- Don’t take you eyes off this area of the law!

Donohue v. AMN Services, LLC (Cal., 2021)

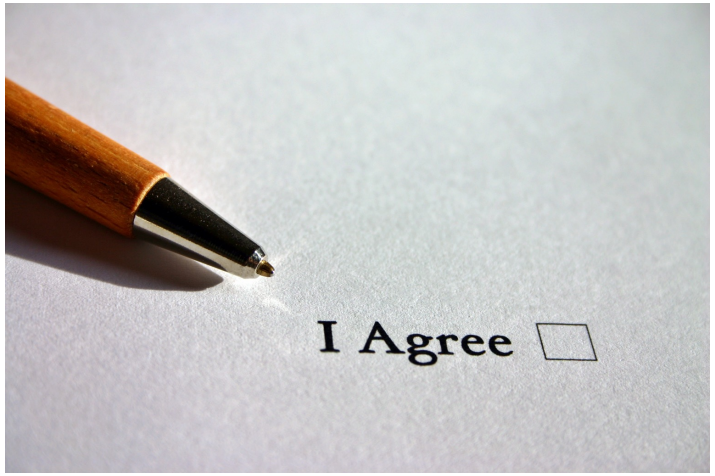


- Employer had timekeeping system that rounded all time records.
  - (i.e. 11:33 AM time punch recorded 11:30 AM)
- Employee acknowledgement each pay period:
  - accuracy of time records
  - whether they were offered meal periods
- Employees sued for failure to pay for noncompliant meal periods.
- Court clarified meal break and rounding rules.

Takeaways from *Donohue*

- Held employers cannot round meal period time punches.
- Meal periods must be ***at least*** 30 actual minutes
- Time records showing noncompliant meal periods raise rebuttable presumption of violations.
  - Shifts burden to employers.

How Employers Can Show Compliance



- Should adopt system that tracks and pays for the **exact hours worked** (to the actual minute).
- If time records are inaccurate, employers can present evidence that:
  - a meal period was taken
  - OR the employee knowingly and voluntarily decided to not take a provided meal period
- Employee acknowledgements that time records are accurate are given great weight!

Naranjo v. Spectrum Security Services (Cal., 2022)

- Employer's policy required certain employees to remain on duty during all meal breaks.
- Employee fired after allegedly leaving his post to take a meal break.
- Employee brought class action alleging employer violated CA meal break requirements, seeking premium pay.
- Issue: Was the premium a "wage" or a "penalty"?

What the *Naranjo* Court Determined

- Held that employer violated meal break laws.
- Meal and rest premiums are **wages**, not penalties.
- These premiums must be reported on wage statements.
  - **Note: like wages, subject to withholdings**

Cal/OSHA Common Mistakes

1) **Thinking COVID-19 is Over**
   - ETS Still in Effect Until End of the Year
   - Permanent (2-Year) Standard Likely After That
2) **Failure to Maintain IIPP/WCPP**
   - Always Cal/OSHA's # 1 Violation
   - Don't Give Them an Easy One!
3) **Failure to Report**
   - Work Related Death or Serious Injury
   - COVID-19 Cases

Questions?

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Thank You!

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Cal/OSHA – Updates, Inspections and Hot Topics

California Citrus Mutual

September 7, 2022

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Topics

- New Cal/OSHA requirements and safety best practices for:
  - Wildfire smoke
  - Work-related employee injury & illness reporting
  - Employee access to Written Injury & Illness Prevention Program
- Update on Cal/OSHA enforcement activity
- Programs
- On the Horizon
- Resources

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Protection from Wildfire Smoke

Passage of Permanent Standard

- Title 8 Section 5141.1
- Elements Hazard Assessment
  - Communication
  - Training and instruction
  - Control of harmful exposures to wildfire smoke

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Protection from Wildfire Smoke (continued)

Appendix B

- Information to be provided to employees (mandatory)
- Use to train employees
- Other versions acceptable as long as they address critical elements

Air Quality Index (AQI) Values	Levels of Health Concern	Colors
When the AQI is in this range:	*..air quality conditions are:*	*...as symbolized by this color:*
0 to 50	Good	Green
51 to 100	Moderate	Yellow
101 to 150	Unhealthy for Sensitive Groups	Orange
151 to 200	Unhealthy	Red
201 to 300	Very Unhealthy	Purple
301 to 500	Hazardous	Maroon

Note: Values above 500 are considered Beyond the AQI. Follow recommendations for the Hazardous category. Additional information on reducing exposure to extremely high levels of particle pollution is available here.

Source: airnow.gov

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Protection from Wildfire Smoke (continued)

Safety Best Practices for wildfire smoke:

- Assessing critical operations
- Monitoring
- Communicating
- Personal protective equipment and other safety practices
- Employee Training
- Response

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Work-related Employee Injury & Illness Reporting

AB 1805 - *8/30/2019*

- Changed definitions of serious injury and exposure
- Dropped 24-hour time limit for hospitalization and reporting
- Aligned concept of “realistic possibility” to severity

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Work-related Employee Injury & Illness Reporting (continued)

Effective early *2020*

- Title 8 Section 330:
  - "Serious injury or illness" means
    - Any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing
    - Testing confirmed COVID-19 cases
    - Or in which an employee suffers
      - » Amputation
      - » Loss of an eye
      - » Any serious degree of permanent disfigurement

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Written Injury & Illness Prevention Program

Allow employees access to program:

- Written or electronic copy
- Employer notice to employees of right of access
- Must be in written program

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Safety Program Evaluation

Facility: _____ **Administrator:** _____

Once you have evaluated all of the elements that should be a part of your safety program, use this section to summarize the present status of the program elements, and to establish goals for improvement. After filling in the present status of each element evaluated, determine measurable goals for improvement where necessary. Then you are ready to prioritize each goal and establish target dates for completion. You should periodically review your progress towards each goal and provide support to those responsible for implementation.

Basic Program Element	***Present Status (Poor, Fair, Good, Excellent)***	***Goal***	***Target Date***
1. Written Safety Policy Statement			
2. Safety Responsibilities			
3. Safety Program Recognition and Enforcement			
4. Safety Communications			
5. Hazard Recognition and Control			
6. Incident Reporting and Investigation			
7. Employee Training			
8. Recordkeeping			
Additional Considerations			
9. Standard Operating Procedures (SOP's) and/or safety rules			
10. Return to Work for Injured Employees			
11. Employee Selection and Placement			
12. Emergency Procedures			

Date Completed: _____ **Evaluator:** _____

_____ _____

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Safety Program Evaluation

Zenith's Safety Program Evaluation is based on the premise that the same basic principles of good management should be applied for any management endeavor. Production, quality, cost, and safety and health. Long-term, bottom line results are dictated by the degree to which effective management controls (activities) are applied.

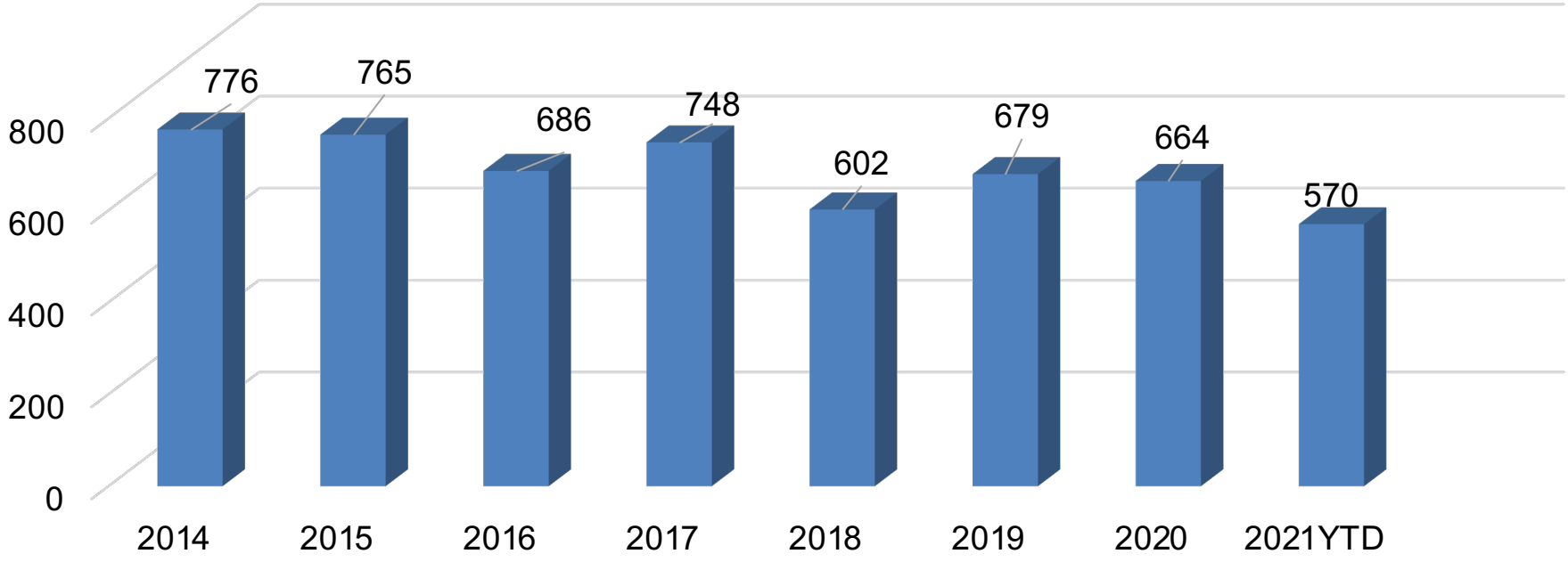
This system will help evaluate your safety management controls (activities), and offer recommendations for improvement. The following twelve activities should be in place to varying degrees regardless of size or type of business. For each activity, circle the rating which most accurately reflects the present status of your safety program.

BASIC PROGRAM ELEMENTS

	Poor	Fair	Good	Excellent
1. Written Safety Policy Statement	No written safety policy statement.	Policy distributed and communicated to all employees, but is outdated and incomplete.	Policy statement includes company safety and health philosophy, and designation of responsibility and authority. Also established accountability	In addition to "good" – the policy is reviewed at least annually and updated as needed. The policy is signed and communicated "down the line" by operating management.
2. Safety Responsibilities	Responsibilities are not written, communicated or applied	Some responsibilities are written and communicated, but not applied consistently	Responsibilities are written, communicated and enforced consistently. Safety rules are also posted. Employees and managers/supervisors are held accountable for complying with all safety rules. Managers/supervisors are held accountable for their safety performance.	In addition to "good" – all employees show positive interest in preventing losses by bring unsafe acts and conditions to the attention of management. Employees are involved in job analyses. Managers/supervisors perform above established safety standards/goals and are rewarded accordingly.
3. Safety Program Recognition and Enforcement	No written procedure or system in place	Informal recognition provided but not on a consistent basis. Discipline process exists but not enforced.	Management is responsible for ensuring that all safety and health policies and procedures are clearly communicated and understood by all employees. Managers and supervisors are expected to enforce the rules fairly and uniformly. Formal recognition for safety activities. Discipline process enforced consistently.	In addition to good, it is evident that safety activities are being completed consistently without the need for constant discipline. Safety culture has improved.
4. Safety Communications	No written procedures. Management does not conduct meetings. No safety committee	Some managers/supervisors conduct meetings, some do not. Meetings are not planned or documented. Some communication methods used such as bulletin boards, posters, brochures in new hire orientation and safety committee's. Safety committee exists, but no formal guidelines and/or procedures.	All manager/supervisors conduct planned safety meetings. Meetings and attendance are documented. Meetings provide two way communications and are in a form readily understandable by employees. There is a form of anonymous communication available for employees. In addition, various other communication methods included as described in fair category. Safety committee is comprised of membership from each department or location. Representation by management and employees. Meets regularly and documents activities.	In addition to "good" – subjects are based on needs pointed out by accident cause analysis, inspections and observations. Problems are identified, effects on group/individual are discussed and specific action implemented to eliminate problem. Management uses the safety committee as the basic means of implementing the loss control efforts. Key operating executive acts as the chairperson. The committee has guidelines and objectives.

Cal/OSHA Enforcement Activity

Cal/OSHA Enforcement Inspections in NAICS Major Group 11 Agricultural Production Crops by Calendar Year



Data from Fed-OSHA

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Cal/OSHA Enforcement Activity
(continued)

Frequent Citations 10-1-2020 to 9-30-2021
Title 8 Section 3395, Heat Illness Prevention
Title 8 Section 3203, Injury and Illness Prevention Program
Title 8 Section 3457, Field Sanitation
Title 8 Section 342, Reporting Serious Injury/Fatality
Title 8 Section 3441, Operation of Ag Equipment
Title 8 Section 3314, Control of Hazardous Energy (LOTO)

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Cal/OSHA Enforcement Activity

Postharvest Crop Activities

Frequent Citations 10-1-2020 to 9-30-2021
Title 8 Section 342, Reporting
Title 8 Section 3203, Injury and Illness Prevention Program
Title 8 Section 3314, Lock out/Tag out
Title 8 Section 4002, Guarding
Title 8 Section 3210, Guardrails at Elevated Locations
Title 8 Section 3999, Conveyors

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Postharvest Crop Activities
Examples of Injuries*

- Employee Suffers Head Trauma In Fall To Floor
- Employee Falls From Ladder And Fractures Arm
- Employee Fractures Hand And Arm While Cleaning Conveyor Roll
- Employee Amputates Fingers When Caught In Power Transmission
- Employee Amputates Finger And Damages Two Others When Caught in machine
- Employee Crushes Foot When Auger Falls On Top Of It
- Employee Is Struck By Forklift And Fractures Foot And Ankle
- Employee Sustains Compound Fractures To Hip And Foot When Struck by forklift
- Employee Amputates Fingers When Caught Between Two Trucks
- Employee Becomes Ill From Possible Heat Exhaustion

*Data from osha.gov

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Cal/OSHA Enforcement Activity
(continued)

Continued use of “Letter in Lieu of Inspection”

- Need timely response
- Significant increase in “on-site” inspections
- Enforcement
  - Standard, classic, enforcement action with possibility of citations with monetary penalties

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Mandatory Safety Programs

- Injury and Illness Prevention Program
- COVID-19 Prevention Program
- Wildfire Smoke Protection Program
- Heat Illness Prevention Program

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On the Cal/OSHA Horizon

- Indoor Heat
- Workplace Violence Prevention
- Permanent Infectious Disease/COVID Program
- Changes to First Aid Standard

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Resources

- Wildfire Smoke
  - Cal/OSHA: https://www.dir.ca.gov/dosh/Worker-Health-and-Safety-in-Wildfire-Regions.html
  - Appendix B (English): https://www.dir.ca.gov/Title8/5141_1b.html
  - (Spanish): https://www.dir.ca.gov/dosh/doshreg/Protection-from-Wildfire-Smoke/Spanish/Protection-from-Wildfire-Smoke-Emergency-proptxt-spanish.pdf
  - USEPA/CARB/CDPH:
  - https://www.airnow.gov/sites/default/files/2021-09/wildfire-smoke-guide_0.pdf

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Resources (continued)

- Work related employee injury and illness reporting
  - http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1805
- Field Sanitation
  - https://www.dir.ca.gov/OSHSB/Single-User-Toilet-Facilities.html

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Resources (continued)

- Night work
  - https://www.dir.ca.gov/oshsb/documents/Outdoor-Agricultural-Operations-During-Hours-of-Darkness-apprvdtxt.pdf
- Injury and Illness Prevention Program IIPP
  - https://www.dir.ca.gov/OSHSB/Employee-Access-to-Injury-and-Illness-Prevention-Program.html
  - https://www.dir.ca.gov/dosh/puborder.asp#IIPP

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Resources (continued)

- COVID-19
  - Reporting of confirmed cases to Cal/OSHA
    - https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html
  - Frequently asked questions
    - https://www.dir.ca.gov/dosh/coronavirus/ETS.html
  - December 2021 changes to ETS
    - https://www.dir.ca.gov/dosh/dosh_publications/COVIDOnePageFS-12-16-2021.pdf

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Resources (continued)

- Cal/OSHA

  https://www.dir.ca.gov/dosh/coronavirus/
- NIOSH Western Center for Ag Health and Safety
  https://aghealth.ucdavis.edu/covid19
  - Note: also a good resource for wildfire smoke protection information

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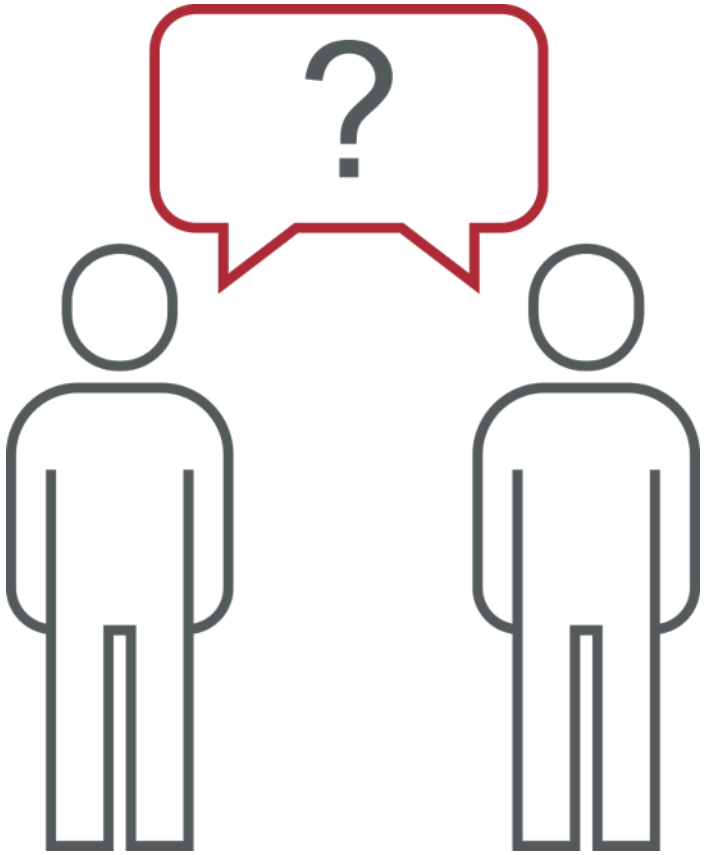

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