CLIENT ALERTS & INSIGHTS

From Citation to Criminal Case: AB 2321 Expands Cal/OSHA's Criminal Enforcement and Penalizes Inspection Interference

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Featured Practices: Labor & Employment

Key Takeaways:

- AB 2321 creates new criminal enforcement powers for Cal/OSHA's Bureau of Investigations ("BOI").
- Willfully resisting, preventing, impeding, or interfering with a BOI inspection becomes a misdemeanor, punishable by up to six months in county jail and a $5,000 fine.
- While legal challenges are expected, employers should adopt or update an inspection response plan that details how they will respond in the event of a workplace incident and a subsequent BOI inspection.

Taking effect January 1, 2027, AB 2321 expands the reach of the BOI, the criminal investigation unit within the California Division of Occupational Safety and Health ("Cal/OSHA"). Under current law, criminal prosecution is limited to willful violations that cause an employee's death or permanent or prolonged impairment, but BOI's power expands on January 1st.

What the Law Does:

In two ways, AB 2321 significantly expands BOI's power to investigate Cal/OSHA claims:

1. The law requires the involvement of the criminal investigation unit whenever Cal/OSHA issues a willful violation citation in any case involving serious injury, illness, or exposure; and
2. The law makes it a misdemeanor for any person to willfully interfere with a Cal/OSHA inspection.

Open Questions and Expected Challenges:

AB 2321 raises concerns about employers' ability to lawfully object to Cal/OSHA inspections. The legislature, not Cal/OSHA, drafted this law, providing Cal/OSHA with no opportunity to solicit public comments concerning its interpretation and enforcement. As a result, practitioners have little guidance on how BOI will apply the law in its investigations.

Legal challenges are expected because the law may prevent employers from lawfully asserting their rights under the Fourth and Fifth Amendments.

As one example, the law may not allow an employer to question whether Cal/OSHA has presented sufficient justification for its search. BOI is not always required to provide the basis for the complaint it is investigating. In the past, employers could challenge the reasonableness of Cal/OSHA's inspection process, including by refusing entry when the employer determined Cal/OSHA had not provided sufficient justification during an unannounced inspection. Now, BOI could conduct an unannounced inspection where it does not provide the basis of its inspection and penalize the employer for denying entry, challenging the reasonableness of BOI's inspection, or otherwise asserting its rights.

What This Means for Employers:

A serious accident that would once have led only to a regulatory citation may now also lead to a criminal investigation, necessitating closer scrutiny of safety procedures, training records, and maintenance logs. Additionally, employers' good-faith challenges to BOI investigations and inspections carry new risk.

Given this uncertainty, employers should take proactive steps, including reviewing or adopting an inspection response plan. Additionally, employers should consider an audit of their injury and illness prevention programs.

The Benesch Labor & Employment Practice Group will continue to monitor developments and provide updates as appropriate. If you have any questions, please reach out to the team.

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