

Cal/OSHA investigates six possible heat-related deaths

Cal/OSHA is investigating six recent fatalities as possible heat illness deaths, including two cases of farmworkers who collapsed while working on farms. Cal/OSHA is reviewing whether a 47-year-old worker in Blythe died because he was operating a tractor to harvest cantaloupes in 102-degree heat on July 7, Cal/OSHA spokeswoman Erika Monterroza said. Cal/OSHA is also investigating the April death of a 56-year-old farmworker who was breaking corn in 84-degree heat in Imperial County.

Other cases that occurred in June involve a drilling crew floor man, a police officer, a temporary laborer and a grading foreman. In all six cases, coroners have not confirmed the cause of death.

When summertime temperatures rose to the 100 degree mark, Cal/OSHA enforcement actions continued to uncover violations of the heat standard throughout California, Monterroza said. Of 869 inspections conducted this year, 148 resulted in heat violation citations.

On June 22, the agency used its broad authority to shut down a farm for failing to protect workers in high heat. Ho Ik Chang, the owner of T Y Farms in Canoga Park, failed to provide shade and other measures for workers in a chile pepper field where temperatures reached 105 degrees before noon, Monterroza said. She said agency investigators found the workers, did not know who they worked for, had no means of communicating with their supervisor in case of an emergency and lacked heat illness prevention training. Cal/OSHA lifted its "stop-work" order on July 11, after the owner demonstrated he was in compliance with the heat illness prevention rules.

California introduced the first heat regulations in the nation in 2005 to protect the state's 450,000 seasonal farm workers. Cal/OSHA tightened the regulation last year, including a high-heat provision that must be implemented by employers in agriculture, construction, landscaping, oil and gas extraction and transportation or delivery of heavy materials.

FELS Can Help!

You can find for important information to help you comply with Cal/OSHA at www.fels.net/find.

ICE Director Revises Agency's Enforcement Priorities

Immigration and Customs Enforcement (ICE) Director John Morton issued a memorandum dated June 17, 2011, entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens."

The memo sets forth guidance that DHS officers, agents, and attorneys are to consider in determining whether or not to cancel deportation/removal proceedings or efforts

The memo notes that "the list is not exhaustive," and that the policy is being codified by the Director to "preserve government resources."

The discretionary guidance the Morton memo offers DHS officials allow them to make judgment calls on illegal aliens using guidelines such as the following:

- Did the alien graduate from high school — what is the alien's education status?

- Was the alien brought here as a child?
- Does the alien have a relative in the U. S. military — National Guard or reserves included?
- Is the alien a security risk?
- Is the alien pregnant or breast-feeding?
- Does the alien care for disabled, infirmed, or mentally challenged relatives?
- Does the alien work?
- Does the alien serve the community?

Combined with ICE's vigorous worksite enforcement in the last two years, it is becoming more clear the ICE will shift its enforcement focus almost exclusively to employers to provide a "magnet" job that "draws" illegal aliens to the U.S. Agricultural employers can expect more of the same.

FELS Can Help!

FELS provides a variety of resources, including guidelines and answers to frequently asked questions provided by the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices, guidance from the IRS for dealing with missing or inaccurate SSNs, and guidance for employers facing ICE audits – you don't have to go it alone! All these resources can be found at www.fels.net/find.

Personal Beverage Containers: Are You Required to Maintain Them?

As California farmers seek to comply with Cal/OSHA's Heat Illness Prevention standard, questions arise about compliance with the requirement for employers to provide water to employees at a location "as close as practicable."

Doing so, according to Cal/OSHA, will encourage employees to drink water frequently and remain adequately hydrated. Given that large water coolers can be cumbersome and bulky, how can this "as close as practicable" standard be consistently met?

Many farm employers have begun to encourage employees to bring personal beverage containers, and that raises the question as to the farm employer's responsibility for the maintenance and cleanliness of these containers.

According to Cal/OSHA Heat Illness Prevention Guidance:

- An employer may choose to augment an existing water supply that is compliant and readily accessible by providing a beverage container (preferably insulated) to be carried and used by the employee while working. The employee must be encouraged to refill the container from the employer's drinking-water supply, and clean and maintain it as needed.

This raises some questions that farm employers will need answers for as they attempt to implement their compliance plans for the Heat Illness Prevention standard:

- Are employers required to ensure the sanitary condition of drinking water containers carried by employees if that container is provided by the employer?

Based on the wording of the guidance, it appears the employer is responsible for the cleanliness and overall condition of the water container carried by employees, even if provided by the employees themselves. According to the guidance, the employee "must be encouraged to refill the container.." and to "clean and maintain it as needed." The

guidance presumably assigns this responsibility to the employer, since no other party is available to "encourage" employees.

While it appears that the answer to the question in title of this article is "yes," other questions come up also:

- If employees are carrying their own water containers, is the employer still required to provide single-use drinking cups?

Section 3457 of Cal/OSHA's regulations describing the Field Sanitation regulation is specific to this point: The watershall be dispensed in single-use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.

- Is the use of a hose acceptable for provision of drinking water from some fixed, plumbed source?

While Cal/OSHA has provided no specific written guidance on this point, senior agency officials have indicated in informal conversations that hose that has been designated for use to provide drinking water (such hoses are frequently found in camping and marine supply stores and are typically white with a blue stripe.)

When using a hose to furnish drinking water, it should be kept up off the ground and out of dirt and mud, just as the outlet of a drinking water cooler should be kept clean.

FELS Can Help!

More information about the Cal/OSHA Heat Illness Prevention standard can be found at www.fels.net/find.

Second Meal Periods & Overtime Rules Under IWC Orders Frequently Found in Agriculture

The FELS office receives frequent inquiries about overtime rules and second meal periods for the long work days frequently seen in our industry. Workers on of various types on farms are generally covered by one of four wage orders:

- IWC Wage Order 14 is the most commonly-applicable wage order in agriculture. It covers engaged in the things we commonly think of as agriculture: "preparation, treatment and care of farm land...sowing and planting of any agricultural or horticultural commodity...care of any agriculatural or horticultural commodity...harvesting of any agricultural or horticultural commodity...raising, feeding and management of livestock,...poultry,...and insects..."
- IWC Wage Order 13 covers "industries preparing agricultural products for market, on the farm...in a permanently fixed structure or on a moving packing plant on a farm...on the premises owned or operated by the same employer who produced the products..."
- IWC Wage Order 8 generally covers the same activities as Wage Order 13, except the processing facility is off the farm and processes products of many different farms.
- IWC Wage Order 4 will cover staff working in the farm office and assisting with the administrative functions of running the farm.

Meal Periods For Employees Covered by an IWC Order other than Order 14:

- An employer must provide an employee with a meal period of at least 30 minutes after a work period of not more than five hours;

But: the question of the meaning of provide is in the CA Supreme Court – must an employer (1) prevent an employee from working during a meal period or (2) merely make a meal period available?

But: If a work period of not more than six hours will complete the workday, the employer and employee can agree to waive the meal period

- Must provide a second meal period of at least 30 minutes for a work period of more than 10 hours per day

But: If the total hours 12 hours, the employer and employee can agree to waive the second meal period if they didn't waive the first meal period

But: the question of whether a meal period must be provided after each work period of not more than five hours is in the CA Supreme Court

- Unless the employee is relieved of all duties during the meal period, it is an "on-duty" meal period and is counted as time worked.

But: "On-duty" meal periods are permissible only where the nature of the work prevents the employee from being relieved of all duties and the employer and employee agree in writing to an on-the-job meal period

- The employer must pay an employee one hour of pay at his usual pay rate for each workday that one or more meal periods were not provided

Meal Periods For IWC Order 14 Employees:

- An employer must authorize and permit an employee to take a meal period of at least 30 minutes after a work period of not more than five hours

But: If a work period of not more than six hours will complete the workday, the employer and employee can agree to waive the meal period

- IWC 14 makes no specific provision for a second (etc.) meal period in a workday.

But: It is not clear if a meal period must be authorized and permitted after each work period of not more than five hours

Overtime Rules under Order No. 14:

- Working in an agricultural occupation
- Employee must be paid at least 1 1/2 times the employee's regular rate of pay for work performed after 10 hours in a workday or during the first 8 hours on the seventh day of work in a workweek
- Employee must be paid double the employee's regular rate of pay for hours worked after 8 on the seventh day of work in a workweek

Overtime Rules under Order Nos. 4, 8 and 13:

- An employee covered by Orders 4, 8 or 13 must be paid overtime (time-and-a-half, 1.5x the regular rate of pay) for work performed after 8 hours in a workday, after 40 hours in a workweek, or for the first 8 hours on the seventh day of work in a workweek
- Must be paid "double-time" (2x the regular rate of pay) for hours worked after 12 in a workday or after 8 on the seventh day of work in a workweek

Working Under Two IWC Orders:

Which wage order applies to an employee who usually works in an agricultural occupation but sometimes performs non-agricultural work, such as packing shed activities?

To answer this question, the state Labor Commissioner has indicated that it will apply the logic of a 1977 Superior Court decision in *California Asparagus Growers Association v. IWC*. This decision allows an employer to have an employee work under both IWC Order No. 14 (Agricultural Occupations) and IWC Order No. 13 (Industries Handling Products on the Farm) in the same workday or workweek and still pay overtime after working 10 hours per workday or 6 days per workweek if the employee's work is properly scheduled and proper records of that work are kept.

In *California Asparagus Growers v. IWC*, the court ruled that, "Daily overtime is controlled by the 'Order under which the employee is working when the daily overtime period is reached. . . .'"

The provision of Order 13-76 for overtime for all hours worked over forty hours in the workweek shall be determined by counting only the hours worked under Order 13-76. Hours worked under Order 14-76 shall not be counted in such determination.

Federal Complication:

Under the federal Fair Labor Standards Act, an employee who spends any amount of time during a workweek doing non-agricultural work must be paid overtime for all work-including agricultural work-done after working 40 hours in that workweek.

Winery Employment:

Employment in a winery-even one where grapes grown in only the winery's own vineyards are crushed-is not considered agriculture under the federal Fair Labor Standards Act (FLSA).

Always make sure time records clearly reflect what work was performed at what time of the workday, and clearly distinguish between work performed as agricultural from non-agricultural during the workday.