Talking Points for July 16, 2020 Meeting of the California Occupational Safety and Health Standards Board

- Thank you for the opportunity to speak today on an important issue at an important time.
- Specifically, I want to call your attention to the recent interpretive guidance issued by Cal/OSHA related to COVID-19 recordkeeping. The guidance directly contradicts fed OSHA's COVID-19 recordkeeping requirements, and is therefore not permitted under the law.
- I represent the **Coalition for Uniformity in COVID-19 Recordkeeping**, which is composed of a broad array of Calif. employers impacted by Cal/OSHA's COVID-19 recordkeeping requirements.
    - Directly or through trade associations, the Coalition represents more than 20,000 employers with more than half a million workplaces and more than 5 million employees in California.
    - Included among our members are individual employers from the retail industry; supermarkets and grocery stores; and the automotive, aerospace defense, chemical manufacturing, petroleum refining, construction, pharmaceutical, agricultural, and airline industries.
    - The Coalition also is supported by the California Chamber of Commerce, the California Retail Association, the Retail Industry Leaders Association, the National Retail Federation, the National Grocers Association, the Food Industry Association (FMI), and the Crane Owners Association.

BACKGROUND:

- On May 27, 2020, Cal/OSHA issued *Recording and Reporting Requirements for COVID-19 Cases, Frequently Asked Questions* setting new requirements for logging COVID-19 cases on California employers' 300 Logs. In several respects, these requirements differ materially from the corollary federal OSHA requirements for logging COVID-19 cases.
- Cal/OSHA's differing and inconsistent requirements will necessarily result in California employers recording COVID-19 cases on 300 Logs that will not be recorded anywhere else in the country, which undermines the purpose and benefit of recordkeeping, rendering the data of little utility for multi-state employers, OSHA, the Bureau of Labor Statistics, labor unions, and researchers that will conduct COVID-19 related comparative analyses, risk assessments, and/or make decisions about resource allocation.
- It is to avoid these very problems specifically that OSHA promulgated a regulatory mandate preventing state recordkeeping regulations from differing from federal OSHA's. Beyond this, Cal/OSHA's different recordkeeping criteria will result in myriad negative consequences and unjustifiable burdens borne uniquely by California employers.

THE LAW:

- As we all know, the federal OSH Act mandates that State OSH Plans establish standards that are "as effective as" federal OSHA standards, but generally provides State Plans with authority to establish

more stringent and/or supplemental requirements. However, the one requirement about which State Plans have no discretion to deviate from federal OSHA is *recordkeeping* requirements – which cases must be logged and how to log them.

- 29 C.F.R. 1904.37(b) provides in plain, clear language that state OSH Plans "***must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded.***"

- In explaining the objective of these restrictions, OSHA stated in the Preamble to the 2001 Final Recordkeeping Rule that:

  > State Plans ***must have recording and reporting regulations that impose identical requirements*** for the recordability of occupational injuries and illnesses and the manner in which they are entered. These requirements must be the same for employers in all the States, whether under Federal or State Plan jurisdiction . . . **to *ensure that the occupational injury and illness data for the entire nation are uniform and consistent so that statistics that allow comparisons between the States and between employers located in different States* are created**.

- Yet Cal/OSHA has deviated from this clear regulatory mandate. As far as we are aware, this is the first time that Cal/OSHA or any other State Plan has ever done so.

- Specifically, Cal/OSHA's May 27th FAQs improperly deviate from federal OSHA's recordkeeping requirements in two important respects: (1) the requirement for a confirmed positive COVID-19 test result; and (2) the standard for work-relatedness.

CONFIRMED CASE:

- To distinguish COVID-19 cases from the cold, the flu, or other ailments, fed OSHA set as a precondition for recordability that the COVID-19 infection must be a "confirmed case," which means an individual with at least one respiratory specimen that tested positive for the active virus. It is not enough to self-diagnose or even to have a medical professional opine an illness likely is coronavirus.

- Cal/OSHA acknowledges and expressly rejected fed OSHA's requirement that there be a confirmed positive test result for California recordkeeping. Eliminating this precondition guarantees discrepancies between California employers' logs and logs of employers everywhere else in the country. This inconsistency alone will likely dramatically increase the number of COVID-19 cases recorded on California logs and result in recording of cases of cold and flu, which are exempt from recordkeeping.

- Cal/OSHA's stated reason for deviating from fed OSHA requirements in this regard is concern about the shortage of COVID-19 testing in California.

  - However, the entire nation, not just California, faced COVID-19 testing challenges in the early stages of the pandemic. Indeed, based on objective data, California has been and remains far ahead of the curve in testing among its peer states.

  - As of the end of June, California had performed more COVID-19 tests than any state in the country (a full 13% of the total tests performed nationwide).

  - Even if we focus just on early days of the pandemic, by the end of April, Calif. had performed the 2nd most test in the country (behind only New York).

- Furthermore, the FAQs in this regard are unworkably vague and will result in over-recording non-COVID cases due to confusion about whether an illness actually is a COVID-19 case. That is especially true now that CDC has expanded the list of potential COVID-19 symptoms to include very common ailments like headache and diarrhea.

WORK RELATEDNESS:

- Federal OSHA also directs employers to record COVID-19 cases only where it is "more likely than not" that the illness was caused by an exposure in the workplace, based on reasonably available evidence, and in the absence of an equally or more likely alternative (non-work) explanation for the illness.
- Illnesses of uncertain origin are not presumed to be work-related, and indeed, where there may be both work-related as well as non-work-related possible explanations for an employee's illness, federal OSHA makes clear the case is not work-related.
- That is, of course, the exact same standard fed OSHA (and Cal/OSHA) have always used for every case of an injury or illness of uncertain origin, like virtually every COVID-19 case will be.
- Cal/OSHA, however, has flipped this longstanding standard for work-relatedness on its head, instead establishing a presumption of work-relatedness, which would require logging a COVID-19 case even where there is an equally likely, non-work cause of an individual's illness.
- Also, it seems the only situation Cal/OSHA even allows consideration of non-work exposures is when there is no identifiable work-related exposure at all. In all other circumstances, especially in the very common and murky area where there are multiple identifiable sources of exposure within and outside the workplace, Cal/OSHA seems to demand a conclusion of work-relatedness.

BURDEN ON CALIFORNIA EMPLOYERS:

- The Coalition's concerns regarding Cal/OSHA's deviation from fed OSHA recordkeeping criteria are not merely esoteric. Compliance with the criteria laid out in Cal/OSHA's FAQs will have real and significant negative consequences for the regulated community, and will hamper the ability of OSHA and State Plan states from accurately evaluating trends associated with COVID-19 infection control in the workplace.
- First, for employers with facilities in both California and other parts of the country, their facility logs will inevitably skew higher at their California facilities. This will make it appear that risk mitigation measures in place in their California facilities are less effective than measures implemented in other states, even if California exposure control plans are equal or even superior.
- Because the fed OSHA and Cal/OSHA recordkeeping standards are different, the data will have lost its meaning. Company safety professionals will have no way of knowing which COVID-19 safety measures are working and which are not. The data distortion will hamper job hazard analyses and evaluation of risk mitigation protocols and controls, and may improperly drive flawed resource decisions.
- Additionally, the same data distortion will occur for OSHA and the State Plans. OSHA relies on 300 Logs to identify injury and illness trends, and to assess existing hazards, but because California data will not reflect an "apples to apples" comparison, any trend analysis will be distorted and inaccurate.
- Higher COVID-19 caseloads on OSHA logs in just one state will also negatively impact California companies' contract bidding opportunities where the safety record of potential contractors is

carefully scrutinized. Likewise, and more generally, the risk of reputational harm associated with increased injury and illness recordables and/or DART rates is real and significant.

- Finally, DART rates are also an element in most workers' compensation insurance rate modifiers, so artificially inflated rates in California will result in California employers facing disproportionately higher workers' compensation insurance rates, not because they are experiencing higher rates of illnesses, but just because Cal/OSHA set a unique standard for recording such cases.

CONCLUSION:

- For all these reasons, Cal/OSHA's unique COVID-19 recordkeeping requirements place California employers between the proverbial rock and a hard place. We can either follow federal guidance and risk harsh enforcement in California for violating Cal/OSHA's unique recordkeeping criteria, or we can follow Cal/OSHA's recordkeeping criteria and be exposed to myriad negative consequences because of artificially elevated COVID-19 recordable cases on our 300 Logs.

- Accordingly, we respectfully request Cal/OSHA rescind the COVID-19 FAQs referenced herein and promptly reissue revised guidance that is fully consistent with federal OSHA's COVID-19 recordkeeping criteria.