FEBRUARY 3, 2022 | LEGISLATIVE & STANDARDS BOARD UPDATES

# California Appellate Court Rejects Challenge to COVID-19 Emergency Rule

In Western Growers Association, et al, v. Occupational Safety and Health Standards Board, et al, the California appellate court recently affirmed the lower court's decision denying a challenge to Cal/OSHA's COVID-19 Emergency Temporary Standard (ETS). This decision has far-reaching implications, affording considerable deference to the California Occupational Safety and Health Standards Board's (Board) rulemaking process and authority to bypass regular rulemaking with emergency temporary standards supported by its own "declaration of emergency." The Board – which is tasked with promulgating workplace safety rules – has had an oversized role during the COVID-19 pandemic.

As background, the Board's COVID-19 ETS was approved, effective November 30, 2020, over the recommendation of Board staff finding that "Cal/OSHA's limited resources should continue to be focused on enforcement and consultation outreach specifically targeted at employers and sectors of the economy with deficient COVID-19 protections," as this is likely to be more effective than new rulemaking. Since then Cal/OSHA's ETS has undergone numerous revisions, being "re-adopted" effective June 17, 2021 and then again on January 14, 2022. The regulation has been a moving target for employers, with the Board each time adopting modified text followed by updated FAQs.

In response to the initial adoption of the COVID-19 ETS, the Western Growers Association and other agricultural interests filed suit in state trial court seeking to enjoin the ETS on the basis that it exceeded the authority of the Standards Board and undermined existing laws, regulations and enforcement guidance intended to prevent or slow the spread of COVID-19 in the workplace. As we reported in a blog post last year, the trial court denied the application for a preliminary injunction concluding that the trade groups had not shown a likelihood of prevailing on the merits of the claims. That ruling was then appealed.

In its decision, the appellate court addresses the various arguments raised by the trade groups in the lower court. First, the court tackled the argument that the findings of emergency (FOE) lacked necessary findings to support the ETS, in part based on evidence that Cal/OSHA was successfully conducting investigations and issuing citations related to COVID-19 under then-existing safety regulations. But the court deferred to the Board's findings, concluding that the FOE demonstrates "the emergency and need for immediate action" and that, accordingly, substantial evidence supports the Board's determination that existing regulations were "insufficient to fully protect workers from COVID-19."

Next, the appellate court dismissed the trade groups' argument that the ETS should be invalidated based on the Board's delay in enacting the rule, many months after the Governor's executive orders related to COVID-19. The court concluded that the scope and impact of the COVID-19 pandemic did not exist and was not known by the Board in sufficient time to have been addressed through nonemergency regulations.

The appellate court also rejected the trade organizations' argument that the Board violated a statutory mandate by creating prescriptive standards without considering whether the goals could be achieved by performance standards. A performance standard means a regulation that describes an objective with the criteria stated for achieving the criteria, whereas a prescriptive standard means a regulation that specifies the sole means of compliance by specific actions, measurements or other quantifiable means. The court found that the administrative record demonstrates the Board did not abuse its discretion in adopting prescriptive standards in the ETS.

And, lastly, the appellate court rejected the trade groups' challenge to the ETS requirement that employees experiencing a close contact be excluded from the workplace with pay and benefits. The trade groups asserted that this requirement created an unlawful "irrebuttable presumption" that the exposed worker is infectious. Yet, the court found that even if the ETS created such irrebuttable presumption, the Board did not exceed its authority in mandating that employees with close contacts in the workplace be excluded with pay. The court concluded that a "more limited review" of the Board's adoption of the exclusion requirements is "reasonable in light of the unique nature of the pandemic."

This decision sends a strong message that the California courts are unlikely to conduct any meaningful review of the Standards Board's rulemaking authority related to COVID-19.