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California supreme court holds Cal-OSHA regulations may be used to establish standards and duties of care in negligence actions against companies by third parties.

## Increased Liability To Third Parties From Cal-Osha Violations

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For more than thirty years, references to California Occupational Safety and Health Act (Cal-OSHA) statutes and regulations have been barred in employee negligence actions against companies that were not their employers. This preclusion was a longstanding exception to the rule of Evidence Code section 669 which states that statutes may be admitted to establish a standard or duty of care in negligence actions. However, the California Supreme Court recently ruled in *Elsner v. Uveges* that the 1999 amendments to Labor Code section 6304.5 permit the introduction at trial of occupational health and safety standards in the same manner as any other statute, ordinance or regulation. As such, Cal-OSHA provisions now may be admitted in third party negligence actions to establish the standards and duties of care.

### The Historical Application Of Cal-OSHA Provisions

Cal-OSHA provisions are intended to "assur[e] safe and healthful working conditions for all California employees by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for...enforcement in the field of occupational safety and health." Until 1971, these provisions were routinely admitted in workplace negligence actions to show the standard of care, and their violation was treated as negligence per se. However, in 1971 this application was halted. With the enactment of section 6304.5, Cal-OSHA provisions were to be admissible as evidence in actions only between the employee and his/her own employer (such as serious and willful workers' compensation claims or a very few civil actions). Since then, California courts consistently held that section 6304.5 barred the introduction of Cal-OSHA provisions in actions between employees and third party tortfeasors.

### The Facts Of The *Elsner* Case

Plaintiff *Elsner* injured his ankle when a scaffold collapsed beneath him. He was an employee of a roofing contractor. Defendant *Uveges* was the general contractor for the project. His carpenter employee had constructed the scaffold. *Elsner* sued the general contractor and its joint venturer on the project for negligence, premises liabilities, failure to provide a safe place of work and peculiar risk. *Uveges* objected to the admission of any Cal-OSHA provisions for any purpose in an employee's third party action.

### The Court's Holding Regarding Key Amendments To Section 6304.5

In 1999, the California Legislature made significant amendments to provisions relating to workplace safety, including section 6304.5. According to the Supreme Court, the amendments allowed proof of violations of Cal-OSHA statutes and regulations to establish duties and standards of care in all negligence and wrongful death actions, and to create a presumption of negligence against the defendant company. The Court said that this will facilitate suits against workplace tortfeasors.

### The Far-Reaching Effect Of The Decision

These statutory modifications approved by the Court mean that Cal-OSHA statutes and regulations may be admitted to establish a standard or duty of care in third party actions. Cal-OSHA provisions may now be introduced to establish a duty of care, to establish the standard of care, and to shift the burden of proof to the defendant in wrongful death, personal injury and other negligence actions by third parties. This means that recovery by third parties such as independent contractors, employees of subcontractors or vendors, or members of the public is enhanced.

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Consequently, industry custom and practice may no longer be determinative of the standard of care, and such testimony at odds with Cal-OSHA provisions would be excluded.

While the applicability of Cal-OSHA provisions has been extended, there are some limits on the admissibility of Cal-OSHA violations in negligence actions. The issuance of, or failure to issue, a citation by the Division of Occupational Safety and Health is still not admissible into evidence in personal injury or wrongful death actions by third parties.

## The Need To Emphasize Compliance With OSHA Standards

Due to this ruling, employers must be aware of the effect of not complying with Cal-OSHA standards. Companies now face enhanced risk of liability to third parties who may be injured while working at or visiting their worksite or project. Failure to comply with OSHA standards and regulations can mean liability to the employees of a subcontractor or vendor who may be working at a site owned or controlled by the employer.

Admittedly, an employer already may have been obligated to provide some of the duties of care established by Cal-OSHA under the common law duties of care. However, employers must be all the more vigilant to ensure that compliance with workplace safety regulations is among their highest priorities. Inspections must be made of a company's facilities for workplace hazards and to ensure compliance with the myriad of Cal-OSHA regulations.

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