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CAL/OSHA LEGAL UNIT
NORTHERN OFFICE - DOSI

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2015 DEC 31 A 8:31

December 30, 2015

Enforcement Division Director
OSHA
200 Constitution Ave., NW,
Washington, DC 20210

OSHA District IX Director
90 7th Street, Suite 18100
San Francisco, California 94103

Hon. Jeff Stone, Vice-Chair
CA Senate Committee on Labor & Industrial Relations
1020 N Street, Room 545
Sacramento, CA 95814

RE : Failure of Cal-OSHA to Apply Arc-Flash Electrical Safety Protocols

Dear Gentilepersons:

Please find enclosed a letter forwarded to Mr. Hom of the Cal-OSHA office in Oakland. The letter was precipitated by the fact that we found out that a well known hotel chain in California was of the position that they have no duty to conduct arc-flash risk assessments per federal law (29 CFR 1910, et seq) and the consensus standards of NFPA70E. After hearing this, we inquired further by requesting a formal opinion letter from the Cal-OSHA Regional Office Consultants. Instead of receiving a written response, we were called back by one Mr. Hom on Monday of this week.

Frankly, we were shocked to hear of Cal-OSHA's position on the issues raised. In essence, Mr. Hom claimed that there is no standard for arc-flash risk assessment under Title 8 of the California Code of Regulations and further claimed that there is no duty to enforce Federal OSHA standards, even where the State of California has failed to promulgate corollary state regulations following OSHA's own enactment of new arc-flash safety standards in the last two years.

Unfortunately, as reported by the Fire Protection Research Foundation (3/15), there are thousands of injuries attributable to electrical hazards each year. Moreover, Federal OSHA has made it clear that electrical violations are in its "Top Ten" for enforcement proceedings. The fact that the State of California would be so nonchalant about something so dangerous to workers is extremely disheartening – notwithstanding the failure to adopt state plan rules that are "at least as effective" as the federal standards.



In sum, we are most respectfully requesting that you take a serious look at this issue and provide us with some guidance as to whether California does care about preventing arc flash injuries by adopting and enforcing the well thought out regulations already in place at the federal level.

Our company, along with many others in California, prides itself on the fact that we offer increased safety to California workers. However, Mr. Hom's position mocks the federal government's attempts to increase safety and decimates our industry's attempts to bring hotels, manufacturing plants, municipal buildings, malls, and others into electrical safety compliance. Sadly, the current Cal-OSHA approach creates serious risk of injury to thousands of workers and citizens who are unknowingly being put in harm's way.

We sincerely hope to receive feedback from you on this important issue.

Respectfully,

A handwritten signature in black ink, appearing to read "Richard D. Ackerman". The signature is written over a horizontal line and has a large, sweeping flourish that loops back to the left.

Richard D. Ackerman, BSL, JD,
Regulatory Analyst,
AMERISK ENGINEERING CORP.

Enclosure : Letter to Mr. Hom (12/29/15)

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2015 DEC 31 A 8:31

December 29, 2015

Christine Baker, Director & Mr. Hom
Cal-OSHA / DIR
1515 Clay Street Ste. 1103
Oakland, CA 94612

Dear Gentilepersons:

This letter serves to confirm our discussion on Monday wherein I inquired of your office with regard to the applicability of arc-flash safety standards in the State of California and related matters. Your positions on these matters are summed up as follows:

1. There is no duty by employers to comply with the labeling and arc-flash risk assessment standards set forth in federal OSHA regulations (29 CFR 1910.132, et seq). You specifically indicated that there are no content requirements for labeling in the State of California. Similarly, you rejected the notion that NFPA70E or NEC standards for labeling apply. You essentially indicated that it is up to the employer to determine how they label any live electrical distribution system components.
2. That California does not have a "General Duty Clause" which can be enforced against an employer.
3. That NFPA70E standards are generally not enforced by Cal-OSHA.
4. That California has its own laws and has no compunction to enforce federal OSHA standards/regulations. In fact, you indicated that California may opt to have looser standards than Federal OSHA (i.e. your example relating to fall protection).

Frankly, I am confounded by these position statements for the following reasons:

1. The original California State Plan, as certified in 1977, "incorporates federal standards by reference. Therefore, the state and federal standards are identical." Thus, California cannot have looser standards than the federal government.
2. "Agreement Under Section 18(e) of the Occupational Safety and Health Act of 1970," signed by your Director on 4/28/2014, makes it abundantly clear that Cal-OSHA has a continuing duty to promulgate rules that are at least as effective as the federal standards. (See Section V of the Agreement). By your own statements, Title 8 of the CCR does not mirror the more stringent federal standards on arc-flash risk assessment.



3. Where the State has not adopted a rule promulgated by Federal OSHA, then the federal standard applies. (Section V(b) of the Agreement).
4. 29 U.S.C. § 667(c)(2) requires that any state regulations be at least as effective as any federal corollaries. This runs completely contrary to the assertion that California can somehow adopt looser standards. Moreover, federal preemption probably applies where the State of California has failed to act on important federal regulations. (Executive Order 12612 (52 FR 41685 – 1987).
5. The NEC has been adopted, in part, by California per Title 24, Part 3, of the CCR. This seems contrary to the conclusion that NEC is not something Cal-OSHA considers in enforcement proceedings. NEC 110.16 requires appropriate arc-flash risk labeling.
6. Title 8 of the CCR does reference appropriate safety labeling as was indicated to you yesterday. However, it hardly appears that the "loose" standards under the California regulations are "as effective" as the 2015 Federal OSHA standards for labeling, which essentially incorporate or mirror NEC Section 110.16, NFPA70E, Art. 130, and related Appendices. It is also clear from the language in 8 CCR 3390 that California, at least theoretically, is concerned about electrical safety, including labeling requirements.
7. 29 CFR 1954 provides a mechanism for assuring California's proper administration of its plan, including enforcement and promulgation of standards "at least as effective" as the Federal OSHA counterparts. This would include the necessity of incorporating a General Duty Clause (which allows for consideration of NFPA and other national/state consensus standards in enforcement proceedings). If we are unable to resolve this issue through your office, we do intend on seeking federal intervention through the filing of a Complaint About State Program Administration and through our existing official contacts in OSHA's Washington DC office, who have already affirmed our position on arc-flash safety.
8. Per 29 CFR 1953.5, "Where a Federal program change is a new permanent standard, or a more stringent amendment to an existing permanent standard, the State shall promulgate a State standard adopting such new Federal standard, or more stringent amendment to an existing Federal standard, or an at least as effective equivalent thereof, within six months of the date of promulgation of the new Federal standard or more stringent amendment. The State may demonstrate that a standard change is not necessary because the State standard is already the same as or at least as effective as the Federal standard change. In order to avoid delays in worker protection, the effective date of the State standard and any of its delayed provisions must be the date of State promulgation or the Federal effective date whichever is later." There is absolutely no indication whatsoever that California has followed suit with regard to Federal OSHA's emphasis on proper labeling, PPE, and training with regard to arc-flash hazards.



9. The Electrical Safety Manual published by OSHA (2009), on its website, specifically mentions the necessity of arc-flash compliance as a critical element of electrical safety in the workplace.
10. It would literally be impossible for a company to adopt a safety plan or injury prevention plan (as required by California and Federal OSHA) without conducting an arc-flash analysis.
11. Proper training under 8 CCR 2320 could only occur where the employer was made aware of the actual arc-flash risks associated with equipment at the worksite.
12. Personal protective equipment needs per 8 CCR 2320 are only evaluated as against the data that is acquired from a proper arc-flash study and associated labeling.
13. The markings or labeling requirements set forth at 8 CCR 2320 make no sense without referenced to the types of data that are critical to an employee's ability to evaluate the safety risks associated with work on a particular electrical system component.
14. 8 CCR 2340.2 and 2710 specifically reference arc-flash incidence as a concern.
15. In Federal OSHA Enforcement Matter Nos. 305434243 and 307995217, OSHA enforced provisions of NFPA70E with regard to arc-flash related compliance. How can California claim to have electrical safety regulations, as effective as those of Federal OSHA, if your claim that NFPA70E and arc-flash labeling requirements aren't enforced by your office? This is a very curious position to say the least.
16. It does not appear that California has promulgated any regulations or legislation consistent with the newest provisions of 29 CFR 1910.132 through 1910.335 as required by 29 CFR 1953.5.

I sincerely hope that Cal-OSHA can correct any misunderstandings with regard to its promulgation and enforcement of electrical safety standards "at least as effective" as those of Federal OSHA. Based on our conversation of yesterday, it does seem unlikely that this can be resolved without the filing of a complaint per 29 CFR 1954. However, since Federal OSHA does evaluate whether efforts were made to resolve the issue short of a formal complaint, this letter is being sent to you. This is now our third attempt, or more, to get a formal opinion on this important issue affecting the safety of thousands of California workers.

If we do not get clarification from your office on this matter, we will go ahead and proceed with a formal complaint with Federal OSHA.



Respectfully,

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Richard D Ackerman, BSL, JD,
Regulatory Analyst,
AMERISK ENGINEERING CORP.

CC : Hon. Jeff Stone, Vice-Chair, CA State Senate Committee on Industrial Relations
Mr. Harvey, OSHA