

California Pushes Employers to Make Drinking Water More Easily Available to Workers

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On February 6, 2023, California's Occupational Safety and Health Appeals Board (OSHAB) held that employers must provide their outdoor workers with drinking water at a location "as close as practicable," effectively creating a new precedent for interpreting the state's requirements related to the proximity of drinking water.

On October 12, 2022, an OSHAB administrative law judge (ALJ) issued an opinion regarding an interpretation of California's requirements relating to the provision of drinking water to employees under the Heat Illness Prevention Plan. That decision focused on the definition of the term "as close as practicable" in relation to drinking water under Section 3395(c) of Title 8 of the California Code of Regulations (CCR). The Board took the matter under reconsideration on its own motion, and on February 6, 2023, after briefing by both the employer and the California Division of Occupational Safety and Health (Cal/OSHA), adopted the ALJ's findings.

Background

In the summer of 2018, Cal/OSHA opened an inspection into Rios Farming Co., LLC, following a complaint by an employee that drinking water was not being adequately provided. At the time of the inspection, Rios Farming had a crew of thirteen employees working outdoors in a grape vineyard. The vineyard was comprised of multiple rows of varying lengths, with a middle row running approximately 2,100 feet long. At the start of the middle row Rios Farming had positioned a shade trailer with a water jug, and had employees spread out in five rows to both sides of this trailer. The shade trailer and water jug moved through the middle row as the work progressed down the row. A water jug was placed at the start of each of the ten other rows where work was being performed, and these jugs were not moved as the work progressed. Employees were provided cone rim cups to access the water from the jug.

At the time of his observation, the Cal/OSHA inspector estimated that the crew in the row containing the shade trailer was approximately 1,500 feet into their row, with the workers in the ten other rows located similar distances into their respective rows. This meant that the workers in the ten other rows would have to either travel up to 1,500 feet back to the start of their own row to get water, or cross

through trellises, support wires, and irrigation lines in order to reach the water jug which had traveled with the shade trailer through the middle row. While this trip to the middle row would only cover approximately forty feet for the workers on the outer rows, those employees would have to step over, bend and balance through the rows at least ten times to go back and forth. Each trellis was about five-and-one-half feet high, and each row ran the full length of the vineyard without breaks.

Following the inspection, Cal/OSHA issued Rios Farming a single repeat-serious citation which read in part as follows: "Prior to and during the course of inspection ... the employer failed to ensure that drinking water was located as close as practicable to the areas where employees are working. Specifically, employees working in the vineyard ... were required to climb through grape vine trellises across several vineyard rows to access drinking water."

This citation relied upon 8 CCR Section 3395(c):

(c) Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. *The water shall be located as close as practicable to the areas where employees are working.* Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged. (Emphasis added.)

Appeal and ALJ Ruling

Rios Farming appealed the citation, which ultimately went to hearing before an ALJ. The main issue in dispute on appeal, as framed by the citation, was whether the drinking water provided by Rios Farming was located as close as practicable to the area where the crew was working. Rios Farming argued that the proximity of the workers not located in the center row would have had all employees within approximately forty feet of the water. Cal/OSHA asserted that the bending, balancing, and motion required to go through the trellises would have made it less likely that an employee in those outer rows would make the journey, no matter how physically short the distance.

After weighing the regulatory history of Section 3395, and the various comments and input that resulted in the section which ultimately became law, the ALJ ruled as follows: "Based on the foregoing regulatory history, a reasonable interpretation of the 'as close as practicable' standard is that employers are required to locate water as close to the areas where the employees are working as can be reasonably accomplished in order to encourage frequent water consumption, while taking into consideration the specific jobsite conditions."

Applying this standard to the facts of the Rios Farming appeal, the ALJ found as follows:

(1) water located at the start of each row where the crew began work was not as close as practicable, as that distance at the time of inspection was approximately 1,500 feet; (2) given the length of each row being around 2,100 feet, even if Rios Farming had provided water at the start and end of each row, the location of the water would have similarly been insufficient; and (3) the water located in the center row at the shade trailer was also not as close as practicable, despite being physically only forty feet away from workers on the outer rows. The ALJ agreed with Cal/OSHA's arguments that

forcing employees on the outer rows to move through the trellises, which created tripping hazards as well as the need for repetitive bending and balancing, was not reasonable and created a deterrent.

The ALJ provided further guidance in response to Rios Farming's various arguments: "Even assuming that it would have been impracticable for Employer to maintain 13 water jugs, there was no reason put forth as to why Employer could not have reconfigured the layout of the crew, by having multiple employees working in a row, which would have lessened the number of rows requiring water jugs and the need to move and maintain those water jugs. Along these same lines, Employer put forth no reason it could not have located water jugs within more than one row, for example, in every other row. This would have eliminated the need to cross the trellises as the crew would only need to pass water once in the cone rim cups that were provided as opposed to the multiple passings from one crew member to another it took with water located in only one row."

The ALJ also noted that Rios Farming could have provided the employees with individual water bottles as opposed to the open cone rim cups that were provided. This appears to put the decision in some conflict with 8 CCR Section 3457(c)(1)(C) which states that agricultural employers must make water available "in single-use drinking cups or by fountains." The ALJ also indicated that "[t]he water bottle or container would not be the source of water, rather the vessel used to get and drink the water from the water source," which again appears to conflict with the requirements of Section 3457. The attorney representing the employer appeared not to raise this conflict, and instead argued that plastic water bottles would heat up quickly, which would conflict with the portions of Section 3395 which require "suitably cool."

Because of the potential conflicts created by an employer providing individual lidded containers or individual water bottles to employees, employers may want to focus on the portions of this ruling which suggest that maintaining multiple easily accessible water jugs will meet the "as close as practicable" standard. The main message to take from this case, and which is now Board precedent, is that employers must avoid deterring employees from accessing water as much as possible. Physical proximity of water will not matter if an employee has to make an extra effort to get to the water. Any obstacle that makes it more difficult for workers to get drinking water, or deters them from doing so, could result in the location of the water not being as close as practicable. In light of the opinion, employers may want to consider whether the location of drinking water would potentially deter some employees from taking a water break in the heat, and consider making changes to how water is distributed if they do identify such a deterrent.

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National Law Review, Volume XIII, Number 73

Source URL: <https://natlawreview.com/article/california-pushes-employers-to-make-drinking-water-more-easily-available-to-workers>