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TO: Barsamian & Moody Clients

FROM: Barsamian & Moody

RE: Cal/OSHA New Frequently Asked Question Section For Field Worker Toilet Facilities

DATE: March 31, 2017

On March 30, 2017, Cal/OSHA changed its position yet again and released a new "Frequently Asked Questions About Toilet Facilities" section concerning the all-gender bathroom requirements for single-user toilet facilities of Health and Safety Code ("HSC") section 118600, which went into effect on March 1, 2017, and how it relates to the existing Cal/OSHA requirements to provide agricultural employees "separate toilet facilities for each sex." (Cal/OSHA Field Sanitation, Title 8, California Code of Regulations ("CCR") §3457.) The new FAQ states:

"Health and Safety Code section 118600 takes precedence over the requirements of Title 8 sections 1526, 3364, 3457, and 5192 in cases where employers provide single-user toilet facilities with flush toilets for their employees. In those situations, Cal/OSHA still enforces the total numbers of toilet facilities required for males and females combined, as well as the individual numbers required for males and females separately, as provided in Title 8 sections 1526, 3364, 3457, and 5192, but no longer enforces the requirement that a toilet facility with a flush toilet be designated as single-gender if it is single-user. **Toilet facilities that are multiple-user or that contain other than a flush toilet (e.g., chemical toilets, recirculating toilets, combustion toilets, biological toilets, and sanitary privies) are not covered by section 118600 and must still be provided separately for males and females.**"

HSC section 118600 requires employers to post signage on all single-user toilet facilities identifying them as "all-gender," instead of male or female. Cal/OSHA Field Sanitation section 3457 for agricultural operations states, "separate toilet facilities for each sex shall be provided for each twenty (20) employees or fraction thereof" and requires signage designating the toilets as "male" or "female." The new Cal/OSHA FAQ section defines a "single-user toilet facility" under HSC section 118600 as "a toilet facility with no more than one water closet (or flush toilet) and one urinal with a locking mechanism controlled by the user."

Almost all single-user toilet facilities provided to agricultural workers in the fields contain non-flush toilets, which means that agricultural operations that provide this type of toilet facility should continue to designate them as male or female and provide separate toilet facilities in the number specified by Cal/OSHA section 3457. Agricultural operations that provide single-user toilet facilities with flush toilets must designate those facilities as all-gender and provide toilet facilities in the number required by section 3457.

The new FAQ section marks a shift in course from Cal/OSHA's earlier interpretation of HSC section 118600 and section 3457. Earlier this month, law firms and agricultural associations, including Barsamian & Moody, released advisory memorandums and newsletters based on confirmation from Cal/OSHA's legal department and a FAQ section on Cal/OSHA's website explaining that the all-gender bathroom requirements of HSC section 118600 applied to all single-user toilet facilities, including those containing other than flush (chemical) toilets. The new FAQ section now specifically states that HSC section 118600 does not apply to single-user toilet facilities that contain non-flush toilets. Barsamian & Moody's initial position, shared by others in the industry, was that the new law did not apply to agricultural operations utilizing chemical toilets. Unfortunately, it took Cal/OSHA officials until now, a month after the law went into effect and after giving contrary interpretations to employers and employees alike, to finally reach the same conclusion.

For good measure, at the end of the FAQs, Cal/OSHA adds a caveat to their guidance on the issue, "NOTE: Cal/OSHA does not have the authority to enforce and issue citations for violation of Health and Safety Code section 118600." In other words, Cal/OSHA's interpretation of HSC section 118600 is limited solely to enforcement of Cal/OSHA regulations and does not apply to other enforcement agencies.

What This Means For Employers:

Agricultural operations that provide single-user non-flush or multi-user toilet facilities are not covered by the all-gender signage requirements of Health and Safety Code ("HSC") section 118600 and should continue to designate those facilities as male or female and provide them in the number specified by Cal/OSHA section 3457. Single-user flush toilets must comply with the all-gender signage requirements of HSC section 118600.

The goal of this Memorandum is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.