CALIFORNIA HOSPITAL ASSOCIATION

Providing Leadership in Health Policy and Advocacy

Assembly Bill 2537: FAQs for Hospitals

New law requiring hospitals to maintain certain levels of PPE

December 2020

GENERAL PROVISIONS

Q1: What health care employers are covered by Assembly Bill (AB) 2537?
A: General acute care hospitals licensed under Health and Safety Code 1250(a)

Q2: When does AB 2537 go into effect?
A: AB 2537 goes into effect on January 1, 2021. However, several requirements have delayed implementation dates. The deadlines are:

- *January 1, 2021: General acute care hospitals shall establish and implement effective written procedures for periodically determining the quantity and types of equipment used in its normal consumption.*
- *January 15, 2021: General acute care hospitals shall be prepared to report to the Division of Occupational Safety and Health (Cal/OSHA), under penalty of perjury, its highest seven-day consecutive daily average consumption of personal protective equipment (PPE) during the 2019 calendar year, upon request by the department.*
- *April 1, 2021: General acute care hospitals shall maintain a stockpile of seven specific items of PPE in the amount equal to three months of normal consumption.*

Q3: Who enforces AB 2537?
A: Cal/OSHA is the agency with enforcement authority.

Q4: What are the penalties for non-compliance?
A: AB 2537 specifies penalties for non-compliance with the stockpile requirement (see Q18 below). With respect to the remaining provisions, AB 2537 authorizes Cal/OSHA to enforce alleged violations through the issuance of a citation, pursuant to Labor Code 6317. Arguably, this gives Cal/OSHA authority to issue administrative penalties for violations of the remaining provisions, including the reporting requirement and requirement to maintain written procedures. Under 8 C.C.R. 336, violations for a regulatory or general violation can be up to $13,277. A serious violation can be up to $25,000. There can also be an increase in penalties for subsequent violations.

Q5: With impending deadlines, what guidance has Cal/OSHA provided to hospitals on the various requirements of AB 2537?
A: AB 2537 requires hospitals to undertake activities related to inventory and stockpile of PPE. CHA has been in discussion with Cal/OSHA since the fall in an effort to obtain clarity around many aspects of this law. That advocacy continues. Despite these conversations, much of the law remains unclear.

REQUIREMENT FOR WRITTEN PROCEDURES

Q6: What written procedures are required to be in place by January 1, 2021?
A: Cal/OSHA has not provided guidance on this requirement. However, this requirement would appear to be similar to other Cal/OSHA policy and procedure requirements. Thus, while hospitals may be periodically determining the quantity and types of equipment used, these policies and procedures should be documented.

REPORTING REQUIREMENT

Q7: What information are general acute care hospitals required to be prepared to report as of January 15, 2021?
A: General acute care hospitals shall be prepared to report to the department, under penalty of perjury, their highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year, upon request by the department.

Q8: Do I need to send this information to Cal/OSHA on January 15, 2021?
A: No, hospitals are not required to submit the data to Cal/OSHA on January 15. Rather, the information must be available as of that date and would be produced upon request of the department. While not specified and still subject to change, Cal/OSHA has informed CHA that it does not intend to collect this data on a widespread basis. Rather, Cal/OSHA's current intent is to request the data during the course of an inspection/investigation.

Q9: What personal protective equipment must be included in this report?
A: While not specified and still subject to change, Cal/OSHA has stated the data should be available for the seven items of PPE identified in section (c) of the bill:

- *N95 filtering facepiece respirators*
- *Powered air-purifying respirators with high efficiency particulate air filters*
- *Elastomeric air-purifying respirators and appropriate particulate filters or cartridges*
- *Surgical masks*
- *Isolation gowns*
- *Eye protection*
- *Shoe coverings*

Q10: How should a hospital calculate the daily average consumption for re-usable items such as PAPRs, elastomeric air-purifying respirators, non-disposable isolation gowns, and eye protection?
A: It is unclear how to calculate daily average consumption for these types of re-usable items. Hospitals should consider any reasonable basis, such as the number of items in stock or, where the items have disposable components, the utilization of the disposable components.

Q11: What should a hospital do now to prepare for the January 15, 2021 deadline?
A: If a hospital has the ability to calculate the highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year, it should do so before January 15, 2021.

Q12: What if a hospital did not capture daily consumption data for calendar year 2019?
A: Most hospitals have reported the inability to report daily consumption for calendar year 2019, as that data was not captured. CHA shared this information with Cal/OSHA. Cal/OSHA has advised that it will,

nonetheless, request the highest seven-day consecutive daily average consumption of PPE during the 2019 calendar year. If a hospital does not have that information, Cal/OSHA will work with the hospital to obtain information that is available.

Q13: What are the compliance options for hospitals that do not have 2019 consumption data?
A: At a minimum, CHA recommends hospitals evaluate their 2019 data in order to attest under penalty of perjury that the hospital cannot reasonably provide 2019 consumption data. CHA also recommends that hospitals identify and locate the purchasing and/or distribution data of PPE utilized during the 2019 calendar year.

During CHA's discussions with Cal/OSHA on this issue, CHA shared language that would provide an appropriate proxy and likely more useful data:

- *Daily average consumption may be calculated using 2019 calendar year purchase order and/or distribution data for each item of PPE to be used for the hospital workforce.*

While the initial response was positive, ultimately Cal/OSHA stated it would not provide written guidance on what calculation may be acceptable if the hospital does not have consumption data. Thus, hospitals that do not have consumption data available appear to have at least two options:

- *Develop a proxy calculation, such as the daily average purchase order or distribution data for hospital utilization, to be available to Cal/OSHA upon request*
- *Wait for a Cal/OSHA inspection asking for the information and work with the investigator on an appropriate proxy calculation*

<u>STOCKPILE REQUIREMENT</u>

Q14: What is required to be included in a hospital's stockpile as of April 1, 2021?
A: The law requires hospitals to maintain a stockpile of the following equipment in the amount equal to three months of normal consumption:

- *N95 filtering facepiece respirators*
- *Powered air-purifying respirators with high efficiency particulate air filters*
- *Elastomeric air-purifying respirators and appropriate particulate filters or cartridges*
- *Surgical masks*
- *Isolation gowns*
- *Eye protection*
- *Shoe coverings*

Single-use equipment in the stockpile shall be unexpired, new, and not previously worn or used.

Q15: How does a hospital determine three months of normal consumption?
A: This phrase is not defined in the law. Currently, Cal/OSHA is considering emergency rulemaking to define phrase. If emergency rulemaking was undertaken, it could be completed within approximately 45 days. CHA believes it was the intent of the legislation to define "normal consumption" to be based on average consumption of PPE during the 2019 calendar year and has been advocating that approach.

Q16: Where can the PPE in the stockpile be stored?
A: CHA and Cal/OSHA agree that the law does not specify where the stockpile must be maintained. There is further acknowledgement that the key is that the hospital has access to the items and ownership of the items. However, "access" has not yet been defined.

CHA believes that all PPE procured and secured by a hospital or health system are included for purposes of establishing and maintaining a stockpile, including but not limited to, PPE stored on-site, on campus, in centralized or regional warehouses, or with their respective intrastate or interstate suppliers. Cal/OSHA has not yet provided any guidance on this issue.

Q17: Who is responsible for providing PPE to contracted employees or for contracted services?
A: The law provides that, if an employer provides health care services in a facility or other setting controlled by a general acute care hospital employer, the general acute care hospital employer that controls the facility or other setting shall maintain the required equipment for the employer providing health care services in that facility or setting.

Q18: What are the penalties if a hospital is unable to obtain a three-month supply of PPE by April 1, 2021?
A: The law provides that an employer that does not maintain the stockpile as required shall be assessed a civil penalty of up to $25,000 for each violation. However, the law also gives Cal/OSHA discretion not to impose a penalty if it determines that the employer could not meet the requirement due to issues beyond their control, such as the employer can demonstrate that equipment needed to meet the requirements of this section has been ordered from their manufacturer or distributor and not fulfilled, or has been damaged or stolen.