



The Evolution of Cal/OSHA's Injury and Illness Prevention Program Statute and Regulation

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In the Beginning...

- ▶ 1977--Accident Prevention Program requirement adopted as 8 CCR sections 3203 (Gen Industry) and 1509 (Construction).
- ▶ 1986--Labor Fed attempted to add a requirement for an “effective” Program. Standards Board says no.
- ▶ SB 198 (1989) (When regs don’t work, consider legislation) rolls out brand new Injury and Illness Prevention Program, Labor Code section 6401.7, “urgency legislation” signed into law that year and taking effect just about immediately—1 October.

Whose Idea Was It???

- ▶ We know the Labor Fed was after “effective.”
- ▶ Where did the rest come from?

Also happening at this time...

- ▶ In 1987, then Gov Deukmejian withdraws C/O from private sector OSH enforcement, then loses to a challenge at Court of Appeal.
- ▶ Gov then appeals to CA Supreme Court...
- ▶ In 1989, Prop 97 brings Cal/OSHA back, Gov declares “make whole” policy, Appeal to Supremes withdrawn as moot.

And...

- ▶ AB 2249, Corporate Criminal Liability Act (PC 387) signed into law in 1990. “Be a manager, go to jail.”
- ▶ In a nutshell, a corp or person who is a manager who has “actual knowledge” of a “serious concealed danger” is guilty of a misD or felony for knowingly failing to inform DOSH and affected employees.
- ▶ Prison up to 3 years and/or fine up to \$25k for an individual and \$1 million for a corp or LLC depending on classification of crime.

And...

- ▶ Pete Wilson elected Governor in 1990, to serve 8-year term from 1991 to 1999.
- ▶ John Howard appointed Cal/OSHA Chief, 1991
- ▶ The ergo wars begin...

Rulemaking to Implement SB 198

- ▶ In accordance with old Appeals Board rule that Cal/OSHA cannot directly enforce statutes...
- ▶ (But see recent AB 865...)

- ▶ Standards Board adopts massive amendments to 8 CCR section 3203, which take effect in 1991. Labor finally gets “effective,” as required now by statute.

Not Just a Safety and Health Program Requirement...

- ▶ Original version of 6401.7 includes a requirement to permit “employee occupational safety and health committees.”
- ▶ Introduction of the concept of “less stringent criteria” for employers with “few employees” and for employers “in industries with insignificant occupational safety and health hazards.”
- ▶ No real recognition of how to write requirements that are meaningful to small employers.
- ▶ 6401.7, 6314.1 and companion statutes set up high-hazard industry targeting paradigm, 1993.

3203 In a Nutshell

- ▶ Employers must have “effective” workplace safety and health practices/procedures that provide for:
 - a person in charge with power to enforce the rules;
 - adequate practices or procedures to enforce the rules;
 - timely, “two-way-street” communication on safety and health issues from employees to management and management to employees;
 - hazard recognition, including periodic inspections;
 - hazard correction;
 - accident/illness investigation;
 - training; and
 - making and maintaining critical safety-related records.

Issue No. 1: Can 3203 Be Used as a General Duty Clause?

- ▶ DOSH had attempted in the 70's to use Labor Code sections 6400, 6401 and 6403 as general duty clauses—Appeals Board said no.

Labor Code General Duty Clauses

- ▶ 6400 Employers must provide a “safe and healthful” work environment.
- ▶ 6401: Employers must do what’s “reasonably adequate” to protect safety and health of employees.
- ▶ **[[6401.7, SB 198]]**
- ▶ 6402: “No employer shall require or permit” unsafe or unhealthfu work for employees.
- ▶ 6403: Employers must do what’s “reasonably adequate” and “reasonably necessary” “to protect life, safety, and health” of employees.

Fed OSHA's General Duty Clause

- ▶ 29 U.S.C. § 654, 5 (a)1:
- ▶ Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Resistance to IIPP being used as GDC

- ▶ Wilson Admin: For hazards not specifically addressed by regulation, use only Special Orders or Orders to Take Special Action, or in extreme cases Order Prohibiting Use.

Resistance to IIPP being used as GDC

- ▶ Enter: large uptick of Tuberculosis incidence in the 90's, need to protect healthcare workers, and no TB standard, but clear guidance from CDC and CA Dept of Public Health on standard measures for healthcare worker protection.
- ▶ 3203—IIPP
- ▶ 5141—Harmful exposures shall be prevented
- ▶ 5144—requirement in (a)(2) to provide respirators “when necessary to protect the health of the employee.”
- ▶ Wouldn't any reasonable healthcare employer follow undisputed CDC and DPH guidance?

The Winds of Change...

- ▶ First decade 2000: Cal/Chamber of Commerce opposes an indoor heat protection standard and urges the use of IIPP citations for protection of employees from hazardous heat indoors.
- ▶ DOSH starts openly issuing general duty IIPP citations.

And Now COVID-19

- ▶ Adoption of COVID Emergency Temporary Standards opposed by management representatives as unnecessary in light of DOSH ability to issue 3203 citations.
- ▶ Labor advocates say it's too difficult for DOSH to succeed on appeal with 3203 citations.

A Model to Sort Out Special Orders/Orders to Take Special Action vs 3203 vs Specification Standards

- ▶ Section 3203 requires safety/health protection measures that reasonable employers would be expected to take, in the absence of a specific standard addressing the hazard in question. Things to consider:
 - ▶ Degree of certainty about the exposure hazard.
 - ▶ Likelihood of protective measure in question to be effective.
 - ▶ Unity of expert opinion on the above.
- ▶ If DOSH determines a protective measure is necessary where these criteria are uncertain, it can issue a Special Order or Order to Take Special Action. See, e.g. 3205(c)(8)(E)3. DOSH can issue OTTSA requiring respirator use, or 332.2, general issuance of SO.

Section 6401.7 is Still Fertile Ground for Growing New Issues...

Latest amendment to section 3203, subsection (a)(8), which grew out of an attempt to amend LC section 6401.7:

Employee or employee rep access to printed copy (or electronic if chosen) of program, no later than 5 days after making request.

Other IIPP Issues

- ▶ 3203 as a “gotcha” when accidents occur. How can the program be “effective” if someone got hurt?
- ▶ 3203 as an add-on where DOSH alleges violation of a standard specifically applicable to the hazard in question.
- ▶ 3203 as a piece of paper sitting on a shelf somewhere collecting dust.
- ▶ Rand study shows no WC claim incidence correlation with presence or absence of IIPP.
- ▶ Speaking of the requirement for the program to be effective, is the law itself effective?

What Kind of Future Shall We Have?

How about:

- ▶ Competent federal oversight.
- ▶ True targeting of high-hazard industries.
- ▶ True targeting of bad actors or underground economy operators.
- ▶ Greater emphasis on safety culture.
- ▶ Recognition of skill at job tasks as a critical safety factor.
- ▶ Dumping the economic warfare paradigm.
- ▶ Long-term profit over short-term profit.
- ▶ Keeping an eye on the influence of consumer attorneys on legislative initiatives.