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The California Occupational Safety and Health Act of 1973

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I. INTRODUCTION

The California Occupational Safety and Health Act of 1973 (CAL/OSHA) was passed for the purpose of assuring safe and healthful working conditions for employees. This Comment, in examining the Act, will accomplish three things. First, it will put the Act in perspective. In order to do this, it will briefly describe prior state programs on industrial safety, and explain why those programs were criticized. It will also relate the new law to Federal OSHA.

Second, this Comment draws a topical roadmap through the provisions of CAL/OSHA. This section includes parallel references to federal law and former state law. Since the Act is new, the interpretive materials on these provisions may prove helpful to an understanding of the current scheme. Finally, there is an analysis of the inspection provisions in the Act in light of the fourth amendment.

II. CAL/OSHA IN PERSPECTIVE

The California Occupational Safety and Health Act of 1973,[1] popularly known as "CAL/OSHA," revised the state program of regulating employee working conditions. It was enacted in response to two circumstances.[2] First, Congress had passed the Federal Occupational Safety and Health Act of 1970 (OSHA),[3] which required that California develop a similar state plan or be subject to the new federal regulatory

1. Law of Oct. 1, 1973, ch. 993, [1973] Cal. Stat. 1915 (codified at, *as amended*, CAL. LABOR CODE ANN. §§ 53, 55, 57, 57.1, 140-47.1, 155-56, 2626.5, 6300-6708 (West Supp. 1975), CAL. GOV'T CODE ANN. §§ 11200.4, 11553.4, 11554.1, 12804.1 (West Supp. 1976), and CAL. HEALTH & SAFETY CODE ANN. §§ 12081, 13108 (West Supp. 1976), *amended further*, Law of Feb. 18, 1976, ch. 13, [1976] Cal. Stat. —, *amending* CAL. LABOR CODE ANN. § 6309 (West Supp. 1975), and Law of March 5, 1976, ch. 33, [1976] Cal. Stat. —, (adding sections 6401.5 and 6509 to the Labor Code, and section 17922.5 to the Health & Safety Code)).

2. *Hearings of Dec. 12, 1973, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1; *Hearings of May 31, 1974, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1-2.

3. Act of Dec. 29, 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-78 (1970)).

program.[4] Second, the state legislature investigated two industrial accidents: the Sylmar Tunnel disaster and the Arroyo Seco Bridge collapse. In connection with those investigations, it examined the current state occupational safety and health programs. These inquiries revealed an independent need for a new and more effective scheme of worker protection.[5]

A. Prior State Programs for Employee Safety and Health

California has legislated on the subject of worker safety a number of times since 1900. The first instance was the Workmen's Compensation, Insurance and Safety Act of 1913.[6] The safety sections[7] set up a program which is similar to CAL/OSHA.[8] The Industrial Accident Commission was vested with full jurisdiction and supervision over all places of employment "as may be necessary adequately to enforce and administer all laws and all lawful orders requiring such employment and place of employment to be safe . . . ."[9] It was also specifically granted the powers to fix reasonable safety standards, and to prescribe, modify, and enforce reasonable orders for adop-

4. *See* notes 45, 66-72 *infra* and accompanying text.

5. *See* notes 42-75 *infra* and accompanying text.

6. Law of May 26, 1913, ch. 176, [1913] Cal. Stat. 279. Though safety had never been provided for, a voluntary workmen's compensation program had been established in 1911. Law of April 8, 1911, ch. 399, [1911] Cal. Stat. 796. In addition, a workmen's compensation section had been added to the state constitution the same year. CAL. CONST. art. 20, § 21.

The 1913 law was

> [a]n act to promote the general welfare of the people of this state as affected by accidents causing injury or death of employees in the course of their employment . . . and requiring safety in all employments . . . and providing the means and methods of enforcing such safety; and requiring reports of industrial accidents; and providing penalties for offenses by employers . . . and creating an industrial accident commission . . . .

Law of May 26, 1913, ch. 176, [1913] Cal. Stat. 279 (legislative counsel's digest) (emphasis deleted).

7. Law of May 26, 1913, ch. 176, §§ 51-72, [1913] Cal. Stat. 305.

8. *See* notes 118-223 *infra* and accompanying text.

9. Law of May 26, 1913, ch. 176, § 56, [1913] Cal. Stat. 307.

Section 52 set up a general duty for all employers:

> Every employer shall furnish employment which shall be safe for the employees therein . . . and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment . . . safe, and shall do every other thing reasonably necessary to protect the life and safety of such employees.

Id. § 52 at 306. In addition, section 53 required employers not to allow employees to go or be in an unsafe place of employment, and section 54 prohibited employees from constructing unsafe employments. *Id.* §§ 53-54.

tion of safety devices.[10] It could summarily investigate places of employment without notice if it learned or had reason to believe the place was not safe,[11] and could investigate the causes of all employment accidents resulting in disability or death.[12] In addition, it could, after a hearing, enter an order applicable to a particular place of employment.[13]

The employer's duty, in addition to a general responsibility for providing safe working conditions,[14] was to comply with all standards and orders prescribed by the Commission.[15] Failure to comply with those orders,[16] or hampering any investigation[17] was a misdemeanor which could result in prosecution and fines.[18]

Other sections of CAL/OSHA have roots in the 1913 law. This first enactment made possible a system of educating the public about safety.[19] It also prohibited the Commission from divulging confidential information which it received concerning failure of any person to maintain a safe working place.[20] It allowed the Commissioner to grant an employer time to comply with an order,[21] and allowed petitions for rehearing any decision of the Commission.[22]

The Workmen's Compensation, Insurance and Safety Act of 1917[23] repealed most of the 1913 act[24] and created a "complete system of

10. The specific powers of the Industrial Accident Commission were listed in section 57: to prescribe safety devices, to fix safety standards and orders, to fix construction standards, to require acts necessary for the protection of life, and to prescribe forms of accident reports. Law of May 26, 1913, ch. 176, § 57, [1913] Cal. Stat. 307.

11. *Id.* § 61 at 308.

12. *Id.* § 72 at 311.

13. *Id.* § 67 at 309-10.

14. *See* note 9 *supra.*

15. Law of May 26, 1913, ch. 176, § 62, [1913] Cal. Stat. 308.

16. *Id.* § 67 at 309-10.

17. *Id.* § 72 at 311.

18. The Act merely defined the misdemeanor offenses, but did not specifically indicate whether imprisonment was the contemplated criminal penalty. It did, however, in section 69, refer to fines imposed in a prosecution. *Id.* § 69 at 310.

The Act did not set up a system of civil money penalties to be imposed by the Commission. The Commission could hold hearings for the purpose of ordering specific action by an employer under sections 59, 61, and 72, but could not enforce those orders directly. *Id.* §§ 59, 61, 72 at 308, 311. The actions of the Commission were reviewable by the supreme court or the district court of appeal, which could stay such an order pending review. *Id.* §§ 84, 85 at 318.

19. Law of May 26, 1913, ch. 176, § 65, [1913] Cal. Stat. 309. It could establish museums of safety and hygiene, arrange for lectures, and appoint safety advisers. *Id.*

20. Law of May 26, 1913, ch. 176, § 70, [1913] Cal. Stat. 310.

21. *Id.* § 60 at 308.

22. *Id.* § 81 at 315-16.

23. Law of May 23, 1917, ch. 586, [1917] Cal. Stat. 831.

24. *Id.* § 71 at 879.

workmen's compensation."[25] The safety provisions of the 1917 act, however, were taken almost exactly from the earlier law.[26]

The legislature enacted a Labor Code in 1937,[27] and devoted Division V to "Safety in Employment."[28] The program of developing and enforcing safety standards remained basically the same as that provided by the 1913 and 1917 statutes.[29] A significant addition to the powers of the Industrial Accident Commission was section 6508,[30] which authorized application to the superior court for an injunction against the use or operation of machines or equipment that constituted a serious menace to the lives or safety of workers. The new legislation also added specific safety sections on railroads,[31] buildings,[32] mines,[33] and ships and vessels.[34]

In 1945, the legislature reorganized the administration of the safety program.[35] The "Workmen's Safety" provisions of the Labor Code[36]

25. *Id.* § 1 at 832. This complete system was to include

> adequate provision for the comfort, health, safety and general welfare of any and all employees and those dependent on them for support . . . also full provision for securing safety in places of employment, full provision for such medical, surgical, hospital and other remedial treatment . . . full provision for adequate insurance coverage . . . full provision for otherwise securing the payment of compensation, and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any matter arising under this act . . . .

Id. at 832-33.

Article 20, section 21 of the constitution was amended in 1918 to vest the legislature with plenary power to create and enforce a "complete system" of workmen's compensation. It thus expanded the scope of the 1911 version of section 21 so as to bring the 1917 Act within the powers of the legislature. In fact, the provisions which it listed for a "complete system" were basically the same as those set forth in section 1 of the 1917 Act. *Compare* CAL. CONST. art. 20, § 21 *with* Law of May 23, 1917, ch. 586, § 1, [1917] Cal. Stat. 832.

26. *Compare* Law of May 23, 1917, ch. 586, §§ 33-54, [1917] Cal. Stat. 861-67 *with* Law of May 26, 1913, ch. 176, §§ 51-72, [1913] Cal. Stat. 305-11. *See* notes 6-22 *supra* and accompanying text.

27. Law of April 24, 1937, ch. 90, [1937] Cal. Stat. 185.

28. *Id.* §§ 6300-6603 at 306-13.

29. See notes 6-22 *supra* and accompanying text. The Division of Industrial Accidents and Safety within the Department of Industrial Relations was to administer and enforce Part 1 of Division V of the Labor Code ("Workmen's Safety"). Law of April 24, 1937, ch. 90, § 60, [1937] Cal. Stat. 188. The Division of Industrial Accidents and Safety was under the control of the Industrial Accident Commission. *Id.* §§ 60, 111, at 188, 192.

30. Law of April 24, 1937, ch. 90, § 6508, [1937] Cal. Stat. 312.

31. *Id.* §§ 6800-6952 at 313-17.

32. *Id.* §§ 7100-7319 at 317-23.

33. *Id.* §§ 7400-7501 at 323-25.

34. *Id.* §§ 7600, 7601 at 325-26.

35. Law of July 17, 1945, ch. 1431, [1945] Cal. Stat. 2684. This Act amended both the Labor and Insurance Codes.

36. See note 28 *supra.*

were to be directly administered and enforced by a Division of Industrial Safety.[37] Within the Division, an Industrial Safety Board would adopt safety orders.[38]

There were two significant additions to the program between 1945 and the enactment of CAL/OSHA in 1973. In 1949, section 6604 was added to the Labor Code.[39] It prohibited the discharge of employees who refused to work in a place where a violation of a safety order constituted a real and apparent hazard. It also gave such an employee a right of action for lost wages during that time. In 1963, section 6416 was added to the Labor Code.[40] This section declared that if an employer, through gross negligence in failing to provide a safe working place, caused the death of an employee, he was punishable by one year in county jail or by a fine of up to $5,000.

The procedures and practices of the Division of Industrial Safety as they existed before the passage of CAL/OSHA were examined by an Assembly Committee.[41] These are set forth in that Committee's report.[42]

B. *Federal Awareness: OSHA*

In 1970, Congress passed the Occupational Safety and Health Act.[43]

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37. Under the 1937 code, there had been five divisions within the Department of Industrial Relations, including a Division of Industrial Accidents and Safety. Law of April 24, 1937, ch. 90, § 56, [1937] Cal. Stat. 187. The Division of Industrial Accidents and Safety was under the control of the Industrial Accident Commission. *See* note 29 *supra*. Under the 1945 Act, however, there would be eight divisions within the Department of Industrial Relations, including a Division of Industrial Accidents and a separate Division of Industrial Safety. Law of July 17, 1945, ch. 1431, § 4, [1945] Cal. Stat. 2685, *amending* Law of April 24, 1937, ch. 90, § 56, [1937] Cal. Stat. 187. The Division of Industrial Accidents would continue to be under the control of the Industrial Accident Commission. *Id.* §§ 7, 18 at 2685, 2687, *amending* Law of April 24, 1937, ch. 90, §§ 60, 111, [1937] Cal. Stat. 188, 192. The Division of Industrial Safety was given direct responsibility for the administration and enforcement of the Workmen's Safety provisions of the code. *Id.* §§ 8, 83 at 2685, 2699, *amending* Law of April 24, 1937, ch. 90, § 6312, [1937] Cal. Stat. 307 (and adding Labor Code section 60.5).

38. Law of July 17, 1945, ch. 1431, § 28, [1945] Cal. Stat. 2688.

39. Law of July 21, 1949, ch. 1060, § 1, [1949] Cal. Stat. 1968.

40. Law of July 1, 1963, ch. 1083, § 1, [1963] Cal. Stat. 2545.

41. See note 90 *infra* and accompanying text.

42. See note 101 *infra* and accompanying text.

43. See note 3 *supra*. The administrative regulations and standards are contained in 29 C.F.R. §§ 1901.1-2300.8 (1975).

This subsection of this Comment sets forth the basic elements of OSHA, including its relationship to CAL/OSHA. For references to specific sections of the Federal Act as analogies to the California provisions, *see* notes 114-254 *infra* and accompanying text.

For detailed coverage of Federal OSHA, *see generally* BNA OPERATIONS MANUAL, THE JOB SAFETY AND HEALTH ACT OF 1970 (1971); CCH GUIDEBOOK TO OCCUPATIONAL

It had a broad declaration of policy, focusing particularly on the substantial burden placed upon interstate commerce by illness and injury arising out of employment related incidents.[44]

The Act applies to "employment" in a workplace within a State.[45] An employer has the general duty to "furnish to each of his employees

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SAFETY AND HEALTH (1973); *Symposium: The Developing Law of Occupational Safety and Health*, 9 GONZAGA L. REV. 317-650 (1974).

44. 29 U.S.C. § 651 (1970). The Act enumerates the many policy objectives of the OSHA program, among them:

> (1) encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and healthful working conditions;
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> . . . .
>
> (3) authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;
>
> . . . .
>
> (5) providing for research in the field of occupational safety and health . . .
>
> (6) exploring ways to discover latent diseases, establishing causal connections between diseases and work . . .
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> . . . .
>
> (8) providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;
>
> . . . .
>
> (10) providing an effective enforcement program . . .
>
> (11) *encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith . . . .*

Id. (emphasis added).

For further discussion of legislative intent, *see generally* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (Comm. Print 1971); BNA OPERATIONS MANUAL, THE JOB AND SAFETY HEALTH ACT OF 1970, 13-21 (1971); Meeds, *A Legislative History of OSHA*, 9 GONZAGA L. REV. 327 (1974).

45. 29 U.S.C. § 653(a) (1970). It also applies in the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and in other areas of federal jurisdiction. *Id.*

Although "employment" is not defined in the Act, an "employer" is a person who has employees and who is engaged in business affecting commerce. *Id.* § 652(5). An employer does not include the United States, a state, or a political subdivision of a state. *Id.*

A "person" is defined in section 652(4) as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons."

Although OSHA does not apply to government employers at any level, state plans developed under the Federal Act (*see* notes 66-74 *infra* and accompanying text) must include a program "to the extent permitted by its law" for all public employees of the State and its political subdivisions. 29 U.S.C. § 667(c)(6) (1970).

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."[46] He must also comply with safety and health standards promulgated under the Act.[47]

The Secretary of Labor (Secretary) carries out the enforcement procedures of OSHA. He is authorized to inspect and investigate places of employment during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner.[48] If, upon such entry into the workplace, the Secretary believes that the employer has violated his general duty[49] or any standard, rule, order, or regulation,[50] he must issue a citation to the employer. These citations describe with particularity the nature of the violation and fix a reasonable time for abatement.[51]

Civil and criminal penalties may be assessed for violations of standards, rules, orders or regulations. For example, wilful violations that cause death to any employee may result in a $10,000 fine, six months imprisonment, or both.[52] Civil penalties of up to $1,000 will be assessed for each serious violation,[53] and may be assessed for each nonserious violation.[54] Wilful or repeated violators may be assessed civil penalties of up to $10,000 each.[55]

When the Secretary issues a citation, he must, within a reasonable time after the inspection or investigation, notify the employer by certified mail of a proposed penalty. He must also notify the employer that if he wants to contest the citation or the proposed penalty, he has fifteen working days to notify the Secretary of such intention.[56] An Occu-

46. 29 U.S.C. § 654(a)(1) (1970).

47. *Id.* § 654(a)(2). The Secretary of Labor promulgates these standards under section 655. These include any existing national consensus standards or established federal standards (both defined in section 652) unless any of those would not result in improved health and safety. *Id.* § 655(a).

Employers may apply for variances from these standards, which are granted if the employer shows that the conditions in his workplace are as safe and healthful as those which would prevail if the standard were complied with. *Id.* § 655(d).

Each employee must also comply with all rules, regulations, and orders. *Id.* § 654(b).

48. 29 U.S.C. § 657(a)(2) (1970).

49. See note 46 *supra* and accompanying text.

50. See note 47 *supra* and accompanying text.

51. 29 U.S.C. § 658(a) (1970).

52. *Id.* § 666(e).

53. *Id.* § 666(b).

54. *Id.* § 666(c).

55. *Id.* § 666(a).

56. *Id.* § 659(a).

pational Safety and Health Review Commission[57] is charged with the duty of affording an aggrieved employer a hearing at which he may contest the citation or the proposed penalty.[58] It issues an order based on findings of fact, affirming, modifying, or vacating the citation or proposed penalty, or directing other relief.[59] Anyone aggrieved by such an order may obtain review in a United States Court of Appeals.[60] If the employer does not make a timely contest, however, the citation and proposed assessment become the final order of the Commission, not subject to review by any court or agency.[61]

The Occupational Safety and Health Act also contains provisions requiring recordkeeping,[62] protecting trade secrets,[63] and requiring research[64] and educational[65] programs in the field of occupational safety and health.

One of the most significant provisions in OSHA is that which allows States to assume responsibility for developing and enforcing occupational safety and health standards.[66] Any state may submit a plan[67] which the Secretary must approve if, in his judgment, it meets certain conditions.[68] Once a state plan is approved, the Secretary may exercise

57. The OSHRC is established by section 661. It has the authority to assess civil penalties. *Id.* § 666(i).

58. *Id.* § 659(c). It must also give a hearing to an employee who files notice with the Secretary within the fifteen-day period on the question of the reasonableness of the time fixed for abatement.

59. *Id.*

60. *Id.* § 660.

61. *Id.* § 659(a).

62. *Id.* § 657(c).

63. *Id.* § 664.

64. *Id.* § 669.

65. *Id.* § 670.

66. *Id.* § 667. *See also* 29 C.F.R. § 1902.1(d) (1975).

If there is no federal standard with respect to an occupational safety and health issue, a state may assert its jurisdiction on that issue. 29 U.S.C. § 677(a) (1970).

67. 29 U.S.C. § 667(b) (1970).

68. *Id.* § 667(c). The conditions are:

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for development and enforcement of safety and health standards . . . which . . . are . . . at least as effective . . . as the standards promulgated under section 655 . . .

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

his authority in enforcing the Federal Act until and while he determines, on the basis of actual operations under the state plan, that all the conditions for approval of the plan are indeed met.[69] Such determination may not be made for at least three years, during which period the federal standards continue to apply (but which he may choose not to enforce).[70] Once the determination is made, federal standards no longer apply,[71] but the Secretary must make a continuing evaluation as to whether the state is carrying out the plan.[72]

The Secretary may make grants to states developing "plans" or similar improvement programs.[73] More significantly, however, he may grant up to fifty percent of the total cost of administering and enforcing a state occupational safety and health program.[74]

California submitted such a plan on September 27, 1972.[75] Interested persons had thirty days to submit written comments on the plan.[76] The plan was approved May 1, 1973.[77] The developmental

(6) contains satisfactory assurances that such State, will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

Id.

69. 29 U.S.C. § 667(e) (1970).

70. *Id.*

71. *Id.*

72. *Id.* § 667(f).

73. *Id.* § 672(a). The grants may not exceed ninety percent of the total cost set forth in the state's application therefor. *Id.* § 672(f).

74. 29 U.S.C. § 672(g) (1970).

75. *See* 38 Fed. Reg. 10717 (1973). The plan as enacted is described in notes 114-254 *infra* and accompanying text.

76. *See* 38 Fed. Reg. 10718 (1973). Comments were submitted by the AFL-CIO; California Labor Federation, AFL-CIO; Federated Fire Fighters of California, AFL-CIO; General Electric; Nuclear Energy Division; United States Steel; and the California Chamber of Commerce. In response to those comments, the state modified the plan in certain respects.

One significant modification was an amendment to the criminal penalty provisions, removing possible sanctions against employees for violations of standards. This amendment was intended to avoid the danger that employees would be inhibited from exercising their rights to complain for fear that counter-complaints or threats would be made against them. *See id.* Other criticisms were found to be unwarranted. These concerned the adequacy of the proposed staff, the availability of effective legal means of entry for investigations, and confidentiality of employee complaints. *See id.* at 10718-19.

77. *Id.* at 10719.

schedule contemplated that legislation authorizing complete implementation would be enacted within one year following plan approval,[78] and that, within the same period, the standards would be as effective and as comprehensive as the federal standards.[79]

Assembly bill 150, the enabling legislation, was passed in September, 1973, and was filed with the California Secretary of State October 2, 1973.[80] The Occupational Safety and Health Standards Board began functioning January, 1974.[81] Initial major training and education of employers, employees, and the general public was completed by 1974.[82] The Occupational Safety and Health Appeals Board began functioning in early 1974, and its rules of procedure were approved by the Assistant Secretary of Labor in November, 1975.[83]

C. Dissatisfaction with the Existing California Program

On August 18, 1971, the Speaker of the Assembly appointed the Subcommittee on the Sylmar Tunnel Disaster.[84] Its purpose was to examine the June 24, 1971, tragic explosion of the Sylmar Tunnel which resulted in the deaths of seventeen men. Specifically, it was charged with determining whether the existing Labor Code and safety regulations were adequate to prevent the explosion and the fatalities.[85] It held hearings in which labor and field men within the Division of Industrial Safety made charges concerning serious problems with Divi-

78. 29 C.F.R. § 1952.173(a) (1975).

79. 38 Fed. Reg. 10719 (1973), *as amended*, 29 C.F.R. § 1952.173(b) (1975) (the developmental schedule for the standards was extended to October 31, 1975). The existing level of federal enforcement was not to be diminished, but after six months, evaluation of the plan as implemented would be made to determine the appropriate level of federal enforcement activities. 38 Fed. Reg. 10719 (1973). Effective September 30, 1975, discretionary federal enforcement activity is no longer initiated with respect to the occupational and health standards and construction regulations. 41 Fed. Reg. 1905 (1976), *amending* 29 C.F.R. § 1952.172 (1975).

80. 29 C.F.R. § 1952.174(a)(1) (1975).

81. 40 Fed. Reg. 40156 (1975) (adding 29 C.F.R. § 1952.174(e) (1975)).

82. 40 Fed. Reg. 40156 (1975) (adding 29 C.F.R. § 1952.174(f) (1975)).

83. 40 Fed. Reg. 54426 (1975) (adding 29 C.F.R. § 1952.174(i) (1975)).

84. 5 J. OF THE ASSEMBLY OF CAL. 8379 (1971) (communication from Speaker of the Assembly, Bob Moretti, to State Controller, Aug. 18, 1971, creating the Subcommittee on Sylmar Tunnel Disaster of the General Research Committee). The members appointed to the committee were Assemblymen Keysor (Chairman), Fenton, and Russell. *Id.*

85. *Hearings of Sept. 2, 1971, Before the Subcomm. on Sylmar Tunnel Disaster of the Assembly General Research Comm.* at 1. The Subcommittee published hearings which took place on September 2-3, 1971, and September 24, 1971.

sion management policies and enforcement of the Labor Code and safety orders.[86]

As a result, the following year, this Subcommittee introduced A.B. 1157, which enacted the Tom Carrell Memorial Tunnel and Mine Safety Act of 1972.[87] The Act added part 9 ("Tunnel and Mine Safety") to Division V of the Labor Code ("Safety in Employment"),[88] specifying safeguards which must be met in mines and tunnels, and the powers and duties of the Division of Industrial Safety with respect to those sections.

At the unanimous request of this Subcommittee, and as an outgrowth of the Sylmar Tunnel hearings,[89] the Assembly Select Committee on Industrial Safety was also appointed by Speaker Moretti.[90] It began its investigation by conducting hearings on January 12 and 13, 1972, at which it took testimony from representatives of the Division of Industrial Safety, of management of California industries, of private safety engineers, and of labor.[91] These hearings revealed "serious and far-reaching problems in the Division."[92] It discovered "a deplorable lack of programs and planning to insure safety for California workers."[93] It noted that, although employee injuries and fatalities had increased be-

86. *See* note 62 *supra*; *Hearings of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1.

87. Law of Dec. 29, 1972, ch. 1430, [1972] Cal. Stat. 3118 (codified at, *as amended*, CAL. LABOR CODE ANN. §§ 7950-8004 (West Supp. 1975)).

88. *Id.* § 1.

89. *Hearings of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1; SELECT COMM. ON INDUSTRIAL SAFETY OF THE ASSEMBLY GENERAL RESEARCH COMM., 1972 SESS., REPORT ON PRELIMINARY FINDINGS 3 (1972).

90. 7 J. OF THE ASSEMBLY OF CAL. 11907 (1971) (communication from Speaker of the Assembly, Bob Moretti, to State Controller, Nov. 3, 1971, appointing the Select Committee on Industrial Safety of the General Research Committee). The members appointed to the committee were Assemblymen Fenton (Chairman), Arnett, Keysor, Russell, and Townsend.

Its investigation into the safety program set forth in the Labor Code and the enforcement policies of the Division of Industrial Safety was to determine whether the basic mandate of the Labor Code was being carried out: that "[e]very employer shall furnish employment and a place of employment which are safe for the employees therein." Law of April 24, 1937, ch. 90, § 6400, [1937] Cal. Stat. 308, *as amended*, CAL. LABOR CODE ANN. § 6400 (West Supp. 1975).

91. *Hearings of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1-2.

92. *See Hearings on Feb. 22, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1.

93. *See Hearings of Dec. 12, 1973, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1.

tween 1966 and 1970, complaints for criminal prosecutions by the Division of Industrial Safety had decreased from twenty-one in 1966 to five in 1970.[94] Fines collected, moreover, went from $3,500 in 1966 to $1,815 in 1970.[95] The Committee also discovered that the Division was understaffed and had an insufficient budget.[96]

The Committee heard that there had been employment-related deaths in which a prosecutorial fine of $25-50 was levied,[97] and that there had been many times when there was no prosecution at all for violations of safety orders that resulted in deaths.[98] In fact, the Division had no policy requiring a report of each fatality to the Chief.[99] Furthermore, when a field man recommended prosecution, that recommendation never reached the Chief unless it went through five or six people, all of whom had approved the action.[100]

As a result of these January, 1972, hearings, the Committee made a Report on Preliminary Findings.[101] After listing the charges which it had heard,[102] it made these findings with respect to the Division of Industrial Safety: lack of enforcement, inefficient and improper administration, serious morale problems, an inadequate educational program, and inadequate manpower.[103]

A new temporary Chief of the Division of Industrial Safety was appointed,[104] and the Committee held hearings at which he presented proposals for reorganization of the Division.[105] In addition, they dis-

94. *Hearings of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 9.

95. *Id.*

96. *See Hearings of Jan. 12-13, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.*

97. *Hearings of Jan. 12, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 31.

98. *Id.* at 46.

99. *Id.* at 96.

100. *Hearings of Jan. 13, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 75.

101. SELECT COMM. ON INDUSTRIAL SAFETY OF THE ASSEMBLY GENERAL RESEARCH COMM., 1972 SESS., REPORT ON PRELIMINARY FINDINGS (1972).

102. *Id.*, Introduction at 3.

103. *Id.*, Findings at 1-6.

104. *See Hearings of Feb. 22, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 106.

105. *See Hearings of Feb. 22, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.; Hearings of April 28, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.*

The acting Chief also reported that he was hiring new employees and would reorganize the administration of the Division to give persons in the field immediate contact with supervisors in case of accidents or other safety problems. *Hearings of April 28, 1972,*

cussed changes recommended by independent fact-finding groups.[106]

The Committee introduced A.B. 1400 on March 15, 1972.[107] Though it was passed by the Assembly, it died in the Senate.[108] The bill would have generally revised the existing industrial safety laws, but, interestingly enough, was not a close parallel to the Committee's subsequent bill, A.B. 150,[109] which was enacted as CAL/OSHA.

Before the end of the 1972 legislative session, there was another tragic industrial accident. On October 16, 1972, a freeway bridge collapsed across the Arroyo Seco in Pasadena, causing six deaths and thirty-one injuries.[110] The Committee met twice to take testimony on the accident.[111] The product of these investigations by the Assembly Select Committee on Industrial Safety was A.B. 150, which it introduced on January 23, 1973. This bill was called the California Occupational Safety and Health Act, and it completely revamped the industrial safety program. It reorganized the Division of Industrial Safety and created a new scheme for carrying out the policy of the state

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Before the Select Comm. on Industrial Safety of the Assembly General Research Comm. at 1.

106. *See Hearings of Feb. 22, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1-2. The other groups were the Department of Finance, the Joint Legislative Audit Committee, and the Select Labor-Management Fact-Finding Committee of the Division of Industrial Safety. *Id.* at 1.

107. One noteworthy feature of A.B. 1400, which, after revision, was incorporated into A.B. 150, was its provision for a system which would require a contractor to get a permit from the Division before beginning work on a job site. *Compare, e.g.*, A.B. 1400 (*as amended* in Assembly April 24, 1972), 1972 Sess. §§ 6704-06, *and* A.B. 1400 (*as amended* in Senate Nov. 21, 1972), Sess. §§ 6700-04 *with* CAL. LABOR CODE ANN. §§ 6500-08, 6706, 6435 (West Supp. 1975) The Committee took testimony on this matter from representatives of the Contractors' State License Board in a hearing on June 22, 1972. *See Hearings of June 22, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.*

108. *See* CAL. ASSEMBLY FINAL HISTORY, 1972 Sess. 539.

109. A.B. 150, 1973-74 Sess.

110. *Hearings of Dec. 13, 1973, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 2.

111. *Hearings of Nov. 1-2, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.; Hearings of April 6, 1973, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* At these hearings, it attempted to determine what caused the accident, whether state agencies properly carried out their functions, and whether legislation would be necessary to prevent recurrences of such accidents. *Hearings of Nov. 1, 1972, Before the Select Comm. on Industrial Safety of the Assembly General Research Comm.* at 1. It also looked into the record and attitudes of the contractor, on that job and previous jobs, in order to determine if its record warranted action by the Contractors' State License Board. *Id.*

of ensuring safe and healthful working conditions for employees. A.B. 150 was filed with the California Secretary of State as an emergency statute to go into immediate effect in October, 1973.[112]

III. A ROADMAP THROUGH CAL/OSHA

> The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.[113]

A. Administration

The state agency designated the responsibility for administering CAL/OSHA is the Agriculture and Services Agency, and within that body, the Department of Industrial Relations.[114] Within the Department, there are three entities which directly administer the program: the Occupational Safety and Health Standards Board;[115] the Occupa-

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112. Law of Oct. 1, 1973, ch. 993, § 107, [1973] Cal. Stat. 1954.

113. CAL. LABOR CODE ANN. § 6300 (West Supp. 1975). Section 107 of the Act indicates that its purpose is to allow the state to assume responsibility for the development and enforcement of occupational safety and health standards under a state plan pursuant to Federal OSHA. Law of Oct. 31, 1973, ch. 993, § 107, [1973] Cal. Stat. 1954-55. The CAL/OSHA Reporter contains administrative interpretive material on the current code sections and regulations, as well as other general information on the state program. As of the final preparation of this Comment, there has been no case law on the Act. Since some of the code sections have roots in the earlier law, and since many of the safety standards are the same as before the passage of CAL/OSHA, interpretive sources on the prior scheme (which was also contained in the Labor Code and Title 8 of the Administrative Code) should be helpful to an understanding or construction of the current program.

114. CAL. GOV'T CODE ANN. § 12804.1 (West Supp. 1975). All enforcement and rulemaking authority is in the Department of Industrial Relations. *Id.*

A condition to state plan approval is such a designation of an agency. 29 U.S.C. § 667(c)(1) (1970) (see note 68 *supra*). The plan must also describe the authority and responsibilities vested in the agency, and contain assurance that any other responsibilities of the designated agency will not significantly detract from the resources and administration of the plan. 29 C.F.R. § 1902.3(b)(2) (1975).

115. This Board consists of seven members appointed by the Governor. CAL. LABOR CODE ANN. § 140(a) (West Supp. 1975). Two members are from the field of labor, two are from the field of management, one is from the field of occupational health, one is from the field of occupational safety, and one is from the general public. *Id.* It is the only agency authorized to adopt, amend, or repeal occupational safety and health

tional Safety and Health Appeals Board;[116] and the Division of Industrial Safety.[117]

B. *Duties of Employers and Employees*

The definition of an "employer" was not changed by CAL/OSHA. Labor Code section 6304, which was amended in 1971,[118] states that "employer" has the same meaning as in section 3300.[119]

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standards and orders. It is charged with adopting standards for all issues for which federal standards have been promulgated, and must insure that such state standards are at least as effective as the federal counterparts. CAL. LABOR CODE ANN. § 142.3(a) (West Supp. 1975). It must adopt parallel state standards within six months after the effective date of the federal standard. *Id.* The qualification on the effectiveness of state standards is a requirement for approval of the state plan. 29 U.S.C. § 667(c)(2) (1970) (*see* note 68 *supra*).

It must refer any proposed health standard to the Department of Health for evaluation, and any proposed safety standard to the Division of Industrial Safety for evaluation. CAL. LABOR CODE ANN. § 147 (West Supp. 1975). Such requirement of referral does not apply if the Department of Health or the Division of Industrial Safety was the respective source of the proposal. *Id.*

The Department of Health must cooperate in the development and promulgation of occupational health standards and variances from standards, *see* notes 146-60 *infra* and accompanying text. CAL. LABOR CODE ANN. § 147.1 (West Supp. 1975). The State Fire Marshall must prepare and adopt reasonable regulations concerning the sale, use, handling, possession, and storage of explosives. CAL. HEALTH & SAFETY CODE ANN. § 12081 (West Supp. 1975).

General safety orders already adopted by the Industrial Accident Commission or the Industrial Safety Board (*see* notes 10, 38 *supra* and accompanying text) continue in effect, but are subject to amendment or repeal by the Standards Board. CAL. LABOR CODE ANN. §§ 142, 6305(a) (West Supp. 1975). Current standards are contained in Title 8 of the California Administrative Code.

116. This body consists of three persons appointed by the Governor. CAL. LABOR CODE ANN. § 142.3(a) (West Supp. 1975). One member is from the field of management, one is from the field of labor, and one is from the general public. The Board hears the appeals from citations and proposed penalties issued to employers for violation of safety orders and standards. *See* notes 224-41 *infra* and accompanying text.

There was no comparable institution in the previous California program, since there were no civil penalties assessed through an administrative mechanism. Criminal fines were levied in a criminal prosecution for violations. *See* note 18 *supra* and accompanying text. *See also* 8 CAL. ADM. CODE §§ 345-390.6.

117. The Division of Industrial Safety [hereafter "the Division"] enforces CAL/OSHA. CAL. LABOR CODE ANN. §§ 142, 2626.5, 6307 (West Supp. 1975). This continues from prior law. See note 18 *supra* and accompanying text. It inspects and investigates places of employment in order to determine whether employers are fulfilling their duties to maintain safe and healthful working environments. *See* notes 179-84 *infra* and accompanying text.

118. Law of Dec. 15, 1971, ch. 1751, [1971] Cal. Stat. 3780 (codified at CAL. LABOR CODE ANN. § 6304 (West Supp. 1975)).

119. *See* note 118 *supra.*

Section 3300 provides that an employer is the State, County, City, District, and their

An "employee" is every person who is required or directed by any employer to engage in any employment, or to go to work or be in any place of employment at any time.[120]

1. General Duties

Sections 6400 through 6407 set forth the general duties of employers and employees.[121] "Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein."[122] He must also use safety devices and safeguards, adopt methods which are reasonably adequate to render the place of employment safe and healthful, and do every other thing reasonably necessary to protect the life, safety, and health of employees.[123] The most significant "general duty" section is that which creates very specific responsibilities: every employer and employee must comply with occupational safety and health standards and all rules, regulations, and orders applicable to his own actions and conduct.[124]

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respective agencies, all public service corporations, every person or public service corporation which has any natural person in service, or the legal representative of any deceased employed. CAL. LABOR CODE ANN. § 3300 (West 1971). Various sections of the Act however, apply to a category which is broader than "employers." For example, certain penalty provisions apply to "every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment," CAL. LABOR CODE ANN. § 6423 (West Supp. 1975), "an employer and every employee having direction, management, control, or custody of any employment," *id.* § 6425, and to "[w]hoever knowingly makes any false statement . . . ." *Id.* § 6426.

120. CAL. LABOR CODE ANN. § 6304.1 (West Supp. 1975). A "place of employment" is any place where employment is carried on, "except a place the safety jurisdiction over which is vested in a state or federal agency other than the division." *Id.* § 6303(a). "Employment" includes:

> the carrying on of any trade, enterprise, project, industry, business, occupation or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire except household domestic service.

Id. § 6303(b).

121. CAL. LABOR CODE ANN. §§ 6400-07 (West Supp. 1975). Sections 6400 through 6406 are substantially the same as the previous sections in the 1937 code. *Compare id.* §§ 6400-06 *with* Law of April 24, 1937, ch. 90, §§ 6400-06, [1937] Cal. Stat. 308-09.

122. CAL. LABOR CODE ANN. § 6400 (West Supp. 1975).

123. *Id.* § 6401.

124. *Id.* § 6407. The Division may issue citations for violations of standards, rules, orders, or regulations. *Id.* § 6317. Therefore, a failure to comply with a "general duty" is not a proper subject of a civil penalty and hearing before the Appeals Board. The Appeals Board has so held. Christian Regenfuss Masonry, CAL-OSHA REP., Cal-OSHA Digest ¶ 10,422 (May 19, 1975).

However, section 6423, which defines a misdemeanor for a knowing or negligent violation which is serious, applies to a violation of not only a "standard, order, or special

2. Providing Information to Employees

An employer has specific responsibilities in addition to his general duties. One such responsibility is to provide certain information to his employees.[125] He must post the CAL/OSHA poster.[126] He must prominently post each citation[127] or a copy of it at or near each place a violation to which it refers occured.[128] Furthermore, he must afford employees or their representatives the opportunity to observe the monitoring or measuring of employee exposure to hazards,[129] allow them access to accurate records of exposures to potentially toxic materials,[130] and notify any employee who has been or is being exposed to toxic materials or harmful agents, informing him of corrective action

order," but also of "any provision of this division." CAL. LABOR CODE ANN. § 6423(a) (West Supp. 1975). Thus, under the Act, a criminal court may adjudicate violations of the general duty clauses, but the Division, acting through the citation and Appeals Board procedure, may not.

As an alternative to a misdemeanor prosecution for violation of the general duty clause, the Division could declare and prescribe a safety device to be necessary for a particular place of employment (*id.* § 6308(a)), or require the performance of any other act necessary to protect the life and safety of employees (*id.* § 6308(c)). This would be a "special order." *Id.* § 6305(b).

125. CAL. LABOR CODE ANN. § 6408 (West Supp. 1975).

126. *Id.* § 6408(a). This provision requires the posting of "information" regarding protections and obligations of employees under the occupational safety and health laws. In connection with this requirement for employers, the Division must prepare a "notice" (poster) containing pertinent information regarding safety rules and regulations, which must be supplied to employers. *Id.* § 6328. The Division must also promulgate regulations relating to the required location and number of posters which must be displayed. *Id.* It has done so. 8 CAL. ADM. CODE § 340.

Section 6408(a) encompasses the posting not only of the CAL/OSHA poster, but also of any job permit acquired under the permit requirements (CAL. LABOR CODE ANN. §§ 6500-09 (West Supp. 1975)). *Id.* § 6504. There is a regulation on posting of permits. 8 CAL. ADM. CODE § 341.4.

127. See notes 210-18 *infra* and accompanying text for a discussion of "citations."

128. CAL. LABOR CODE ANN. § 6408(b) (West Supp. 1975). There is no regulation on this posting requirement.

This requirement is also set forth in the chapter on jurisdiction and duties of the Division (sections 6300-30). *Id.* § 6318. Presumably, that section extends the posting duty "as prescribed in regulations" to the Division itself. Similarly, there are no regulations for the Division on this issue.

An employer's violation of "any of the posting . . . requirements as prescribed by regulations adopted pursuant to [section] 6408" must be assessed a civil penalty of up to one thousand dollars. *Id.* § 6431.

The parallel OSHA provision is 29 U.S.C. § 658(b) (1970).

129. CAL. LABOR CODE ANN. § 6408(c) (West Supp. 1975); 8 CAL. ADM. CODE § 340.1.

130. CAL. LABOR CODE ANN. § 6408(d) (West Supp. 1975); 8 CAL. ADM. CODE § 340.3.

which is being taken.[131]

3. Recordkeeping

Employers have the further responsibility of recordkeeping. Every employer, insurer, and physician must file with the Division of Labor Statistics and Research a complete report of every injury or occupational illness arising out of the employment.[132] If there is a serious illness, injury or death,[133] the employer must, in addition to the report described above, make an immediate report by telegram or telephone to the Division of Industrial Safety.[134] In addition to these recordkeep-

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131. CAL. LABOR CODE ANN. § 6408(e) (West Supp. 1975); 8 CAL. ADM. CODE § 340.2.

Federal regulations set forth criteria which must be satisfied for the approval of state plans. 29 C.F.R. § 1902.3 (1975). In order to meet certain of those criteria, state plans must meet "indices of effectiveness," *id.* § 1902.4. One of the "indices of effectiveness" of a state plan is that the plan provide that employees have access to information regarding their exposure to toxic materials or harmful physical agents and that they receive prompt information when they have been so exposed. The regulations suggest that employees be able to observe monitoring procedures, have access to records of such procedures, receive notification of exposure, and receive information regarding corrective action being taken. *Id.* § 1902.4(c)(vi). Sections 6408(c), (d) and (e), thus fulfill this "index of effectiveness." (Sections 6408(c) and (d) are discussed in notes 129 and 130 *supra* and accompanying text). Federal OSHA has a comparable provision. 29 U.S.C. § 657(c)(3) (1970).

132. CAL. LABOR CODE ANN. § 6409(a) (West Supp. 1975). The requirement does not apply if the disability resulting from such injury does not last through the day or does not require more than ordinary first aid treatment. *Id.* This provision is taken from section 6407 of the previous program. *Compare id. with* Law of July 16, 1963, ch. 1623, § 1, [1963] Cal. Stat. 3215. It has roots in the 1917 act. Law of May 23, 1917, ch. 586, § 53, [1917] Cal. Stat. 866-67.

Specific requirements for filling out reports to the Division of Labor Statistics and Research are set forth in sections 6410 and 6411. CAL. LABOR CODE ANN. §§ 6410, 6411 (West Supp. 1975). That Division must provide forms for the required records. *Id.* § 6410. The information furnished will not be open for public inspection; reports of employers and insurers are not admissible as evidence before the Workmen's Compensation Appeals Board. *Id.* § 6412. Section 6412 is substantially the same as former section 6413 (Law of July 23, 1965, ch. 1513, § 200, [1965] Cal. Stat. 3605), and this confidentiality requirement can be traced to the 1917 statute (Law of May 23, 1917, ch. 586, § 53(c), [1917] Cal. Stat. 867).

The Division of Industrial Safety enforces the recordkeeping requirements by citation and penalty assessment. CAL. LABOR CODE ANN. § 6410 (West Supp. 1975). An employer violating these requirements may be assessed a civil penalty of up to one thousand dollars. *Id.* § 6413.

133. Serious injury or illness is specifically defined. CAL. LABOR CODE ANN. § 6409 (c) (West Supp. 1975). *See* note 193 *infra.*

134. CAL. LABOR CODE ANN. § 6409(b) (West Supp. 1975); 8 CAL. ADM. CODE § 342.

ing requirements under CAL/OSHA, the employer must comply with similar provisions in Federal OSHA.[135]

4. Obtaining Job Permits

For those jobs which involve a substantial risk of injury, the Division of Industrial Safety requires the issuance of a permit before work may begin.[136] The employer applies to the Division for the permit,[137] which may be issued if it is determined that he has demonstrated evidence that the employment conditions will be safe and healthful.[138] The Division may, on its own motion, conduct any investigation or hearings in order to make that determination.[139] The employer must post the permit.[140]

The Division may revoke the permit at any time for good cause after an employer has received notice and an opportunity to be heard.[141] An employer who is denied a permit or whose permit is revoked may appeal to the Director of Industrial Relations (the Director).[142]

There may be both civil and criminal penalties for violations of these

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135. CAL. LABOR CODE ANN. § 6410 (West Supp. 1975). This section is a requirement for the state plan under OSHA. 29 U.S.C. § 667(c)(7) (1970).

The federal recordkeeping provisions are in both the Act and the regulations. 29 U.S.C. §§ 657(c)(1)-(3) (1970); 29 C.F.R. §§ 1904.1-.22 (1975). The federal exemption of employers of seven or fewer employees (29 C.F.R. § 1904.15(a) (1975)) has been extended to employers of ten or fewer employees pursuant to the funding limitation of the Appropriations Act for Fiscal Year 1976 (July 1, 1975-Sept. 30, 1976). 41 Fed. Reg. 11022 (1976).

136. CAL. LABOR CODE ANN. § 6500 (West Supp. 1975). These jobs are limited to:

a. Construction of trenches or excavations which are five feet or deeper and into which a person is required to descend.

b. The construction of any building, structure, falsework, or scaffolding more than three stories high or the equivalent height.

c. The demolition of any building, structure, falsework, or scaffold more than three stories high or the equivalent height.

Id. There are also permit regulations. 8 CAL. ADM. CODE §§ 341-341.5.

137. CAL. LABOR CODE ANN. § 6501 (West Supp. 1975).

138. *Id.* § 6502.

139. *Id.* It may also require a "safety conference" before the start of the actual work. *Id.* A "safety conference" is described at section 6503. *Id.* § 6503.

140. CAL. LABOR CODE ANN. § 6504 (West Supp. 1975). The Appeals Board has found this section to be overly vague and ambiguous. It held that neither it, nor the section to which it refers (section 6408(a)) shows where the posting must be. W.R. Thomason, Inc., CAL.-OSHA REP., Cal-OSHA Digest ¶ 10,284 (Jan. 20, 1975). The regulation, however, is much more specific. 8 CAL. ADM. CODE § 341.4.

141. CAL. LABOR CODE ANN. § 6505 (West Supp. 1975).

142. *Id.* § 6506.

provisions. Section 6509 makes violations of the "chapter" a misdemeanor,[143] and section 6435 allows civil penalties.[144]

5. Relief from Standards: Permanent and Temporary Variances

The duty to comply with all standards and orders is not absolute. Employers may apply to the Standards Board for "permanent variances"[145] and to the Division for "temporary variances."[146]

A permanent variance may be granted by the Standards Board upon a showing of an alternate program, method, practice, means, or device which will provide equal or superior safety for employees.[147] The Standards Board may issue the variance if the proponent demonstrates by a preponderance of the evidence that the substitute conditions will be as safe and healthful as those which would prevail if he complied with the standard.[148] The Standards Board is not bound by common law or statutory rules of evidence,[149] and may adopt its own rules of procedure and practice.[150] Employees must be properly notified and given an opportunity to appear at hearings conducted by the Standards Board.[151]

The Standards Board may also grant an "interim order of variance" to be effective until a decision is rendered on the application for a permanent variance.[152] The Standards Board must refer proposed vari-

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143. Law of Feb. 18, 1976, ch. 13, § 1, [1976] Cal. Stat. — (adding CAL. LABOR CODE ANN. § 6509 (West Supp. 1975).

144. CAL. LABOR CODE ANN. § 6435 (West Supp. 1975). This section refers to the assessment of civil penalties under the "appropriate provisions" of sections 6427 through 6430. *Id.* §§ 6427-30.

145. *Id.* §§ 143-143.2.

146. *Id.* §§ 6450-57. There are regulations for both permanent and temporary variances. 8 CAL. ADM. CODE §§ 401-08.

147. CAL. LABOR CODE ANN. § 143(a) (West Supp. 1975).

148. *Id.* § 143(b). The variance follows an investigation (where appropriate) and a hearing. It must prescribe the conditions that the employer must maintain. *Id.*

The Standards Board may also grant a variance if it determines it necessary to permit an employer to participate in an experiment approved by the director. *Id.* § 143(c).

149. CAL. LABOR CODE ANN. § 146 (West Supp. 1975).

150. *Id.* § 143.2. The Standards Board's own rules of procedure and practice are also in effect on "variance appeals." *Id.* (variance appeals are described at note 160 *infra* and accompanying text).

151. CAL. LABOR CODE ANN. § 143.1 (West Supp. 1975).

152. 8 CAL. ADM. CODE §§ 411.2-.4.

ances from health and safety standards for evaluation by the Department of Health and the Division of Industrial Safety, respectively.[153] Permanent variances may be modified or revoked at any time on the Standards Board's or Division's own motion, or upon application by the employer or his employees, in the manner prescribed for issuance.[154]

Another type of relief from compliance with standards and orders is the temporary variance. This exempts an employer who is unable to comply by the effective date of the standard or order, but only during the time that he is acting to come into compliance. This section has roots in the 1917 act, which allowed the Industrial Accident Commission to grant "such time as may be reasonably necessary for compliance with any order . . . ."[155] To obtain such a variance, the employer may apply to the Division of Industrial Safety.[156] A temporary order will be granted if the application establishes that: (1) the employer is unable to comply with the standard by its effective date (because of unavailability of necessary personnel or material or equipment, or because facilities cannot be completed by the effective date); (2) he is taking all available steps to safeguard his employees against the hazards covered by the standard; and (3) he has an effective program for coming into compliance as quickly as practicable.[157] Like the permanent variance, a temporary order may only be granted after notice to employees and an opportunity for a hearing.[158] The Division may also issue one "interim order for a temporary variance" upon a

153. CAL. LABOR CODE ANN. § 147 (West Supp. 1975). Such referrals for "any . . . variance" presumably refer to temporary variances which are the subject of "variance appeals" as well as "permanent variances" (temporary variances and variance appeals are described at notes 155-60 *infra* and accompanying text).

154. CAL. LABOR CODE ANN. § 143(d) (West Supp. 1975).

155. Law of May 23, 1917, ch. 586, § 42, [1917] Cal. Stat. 864. There was no such provision in the 1937 code.

156. CAL. LABOR CODE ANN. § 6450(a) (West Supp. 1975).

157. *Id.* The application must also meet the formal requirements set forth in section 6451. *Id.* An order issued under this section, as an order for a permanent variance under section 143(b), must prescribe the practices, means, methods, operations, and processes which the employer must use while the order is in effect. The order must also state in detail the program for coming into compliance with the standard. *Id.* § 6450(b).

As under section 143(c) (permanent variances), a temporary variance may be granted to enable an employer to participate in experiments approved by the Director. *Id.* § 6452.

158. CAL. LABOR CODE ANN. § 6450(b) (West Supp. 1975). The Division may make its own rules and regulations relating to the grant or denial of temporary variances. *Id.* § 6454. Hearings conducted by the Division must give the affected employer the opportunity to submit facts or arguments, but may be conducted either orally or in writing. *Id.* § 6308.5.

showing that the place of employment will be safe pending the hearing on the application for a temporary variance.[159] An employer or other person adversely affected by the Division's grant or denial of a temporary variance may appeal to the Standards Board.[160]

C. *Penalties*

The basic penalty provisions for CAL/OSHA violations are contained in Labor Code sections 6423 through 6435.[161] These sections are modeled on the federal program,[162] while the provisions mandating the assessment of "civil penalties" are new.[163]

The general criminal penalties are prescribed by sections 6423 through 6426.[164] Every employer and other supervisor having direction, management, control, or custody of any employment or employee is guilty of a misdemeanor if: (1) he knowingly or negligently violates any standard, order, or special order, or any provision "of this division" (CAL/OSHA and the Tunnel and Mine Safety Act), when that viola-

159. CAL. LABOR CODE ANN. § 6450(b) (West Supp. 1975). This is analogous to the "interim order of variance" pending the grant or denial of a permanent variance. See note 152 *supra* and accompanying text.

160. CAL. LABOR CODE ANN. § 6455 (West Supp. 1975). The appellant has fifteen working days from receipt of the notice of the Division's decision. *Id.* The Standards Board must conduct hearings on these "variance appeals." *Id.* § 6457; 8 CAL. ADM. CODE § 412. The decision of the Standards Board is binding on the Director and the Division with respect to the parties involved, but the Director has the right to seek judicial review of the Standards Board decision. CAL. LABOR CODE ANN. § 6456 (West Supp. 1975). The Standards Board decisions are final except for any rehearing or judicial review. *Id.* § 6457.

161. CAL. LABOR CODE ANN. §§ 6423-35 (West Supp. 1975).

162. *See* notes 52-55 *supra* and accompanying text.

Though the scheme of defining civil penalties (to be administered through an administrative body (see notes 224-41 *infra* and accompanying text)) and criminal penalties is not a specific requirement of the Federal Act, the federal regulations prescribing criteria for approval of state plans do more than suggest the adoption of a scheme similar to the federal plan in the states. Thus, the state plan should provide a program for enforcement of state standards which is at least as effective as that provided in the Federal Act. 29 C.F.R. § 1902.3(d)(1) (1975). In order to satisfy that requirement, the state plan must provide effective sanctions against employers who violate state standards and orders, "such as those prescribed in the Act." *Id.* § 1902.4(c)(2)(xi) (1975).

163. Previous California penalty programs provided only for misdemeanors for violations of safety orders and standards (and for hampering investigations). For the 1917 act, see note 26 *supra* and accompanying text; for the scheme of the 1913 program, see notes 16-18 *supra* and accompanying text. The 1937 code provisions on this issue were former sections 6315 and 6414. Law of April 24, 1937, ch. 90, §§ 6315, 6414, [1937] Cal. Stat. 307, 310.

164. CAL. LABOR CODE ANN. §§ 6423-26 (West Supp. 1975).

tion is "serious" under section 6432;[165] (2) he repeatedly violates any standard, order, or special order, or any provision "of this division" which repeated violation creates a real and apparent hazard to employees;[166] (3) he fails or refuses to comply, after notification and expiration of any abatement period, with any such standard, order, or special order, or any provision "of this division," which failure or refusal creates a real apparent hazard to employees;[167] (4) he directly or indirectly, knowingly induces another to do any of the above.[168]

An employer and every employee having direction, management, control, or custody of any employment or other employee may also be convicted for a wilful violation of a standard, order, or special order that causes death or permanent or prolonged impairment of the body of any employee.[169] Finally, "whoever" makes any false statement, representation, or certification in a document filed under "this division" may be convicted and fined ten thousand dollars or imprisoned for six months, or both.[170]

The "civil penalties" are set forth in sections 6427 through 6431.[171] A violation by an employer that is not "serious"[172] may be assessed a civil penalty of up to one thousand dollars for each such violation,[173] but if serious, must be assessed a civil penalty of up to one thousand

165. CAL. LABOR CODE ANN. § 6423(a) (West Supp. 1975). The imposition of a misdemeanor penalty for a violation of "any provision" presumably includes violations of the general duty clauses.

A "serious violation" exists in a place of employment if there is a substantial probability that death or serious physical harm could result . . . ." *Id.* § 6432.

166. CAL. LABOR CODE ANN. § 6423(b) (West Supp. 1975).

167. *Id.* § 6423(c). A description of the procedure of notification of a violation and setting of an abatement period is contained in notes 204-12 *infra* and accompanying text.

168. CAL. LABOR CODE ANN. § 6423(d) (West Supp. 1975). The four subdivisions of section 6423 do not apply where "another penalty is specifically provided." *Id.* § 6423. "Another penalty" does not include a civil penalty assessed under sections 6427 through 6431. *Id.* § 6433.

169. CAL. LABOR CODE ANN. § 6425 (West Supp. 1975). Punishment may be by fine (not to exceed ten thousand dollars) or by imprisonment (not to exceed six months), or both. If the conviction is for a violation committed after a first conviction, the maximum penalties are twenty thousand dollars, one year imprisonment, or both. Prosecution under CAL. PENAL CODE § 192 (West 1970) is an alternative to prosecution under this section. CAL. LABOR CODE ANN. § 6425 (West Supp. 1975).

Former section 6416 allowed for misdemeanor prosecutions of an employer whose gross negligence in failing to provide a safe place of employment caused the death of an employee. Law of July 1, 1963, ch. 1083, § 1, [1963] Cal. Stat. 2545.

170. CAL. LABOR CODE ANN. § 6426 (West Supp. 1975).

171. CAL. LABOR CODE ANN. §§ 6427-31 (West Supp. 1975).

172. *See* note 165 *supra.*

173. CAL. LABOR CODE ANN. § 6427 (West Supp. 1975).

dollars.[174] An employer who wilfully or repeatedly violates any standard, order, or special order may be assessed up to ten thousand dollars for each such violation.[175] Failure to correct a violation within the abatement period may be assessed up to one thousand dollars for each day that the failure or violation continues.[176] Violations of the posting or recordkeeping requirements may be assessed up to one thousand dollars each.[177] There may also be civil penalties for violation of the permit requirements.[178]

D. Enforcement Mechanisms and Procedures

1. Jurisdiction

The Division of Industrial Safety has jurisdiction over every employment which is necessary to enforce and administer all laws which protect life, safety, and health of employees.[179] In order to exercise this power, the Division may prescribe safety devices, safeguards, or other means of protection that are well-adapted to render the place of employment safe as required by law or lawful order.[180] It enforces standards and orders adopted by the Standards Board regarding such safety devices[181] and may request the performance of any other act reasonably necessary for the protection of employees' life and safety.[182]

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174. *Id.* § 6428.

175. *Id.* § 6429.

176. *Id.* § 6430.

177. *Id.* § 6431. This section is taken from prior law. Law of June 2, 1951, ch. 840, § 1, [1951] Cal. Stat. 2329; Law of May 23, 1917, ch. 586, § 53, [1917] Cal. Stat. 866.

178. See notes 131-40 *supra* and accompanying text.

There are other penalty provisions scattered throughout the Act. A discussion of these provisions is included in the respective sections of this Comment which deal with those "issues" in CAL/OSHA.

179. CAL. LABOR CODE ANN. § 6307 (West Supp. 1975). OSHA requires that a state plan contain satisfactory assurances that the agency designated to administer the plan have the legal authority for the enforcement of standards. 29 U.S.C. § 667(c)(4) (1970) (*see* note 68 *supra*); 29 C.F.R. § 1902.3(g) (1975). There are "indices of effectiveness" of a state plan for enforcement. 29 C.F.R. § 1902.4(c) (1975).

180. CAL. LABOR CODE ANN. § 6308(a) (West Supp. 1975).

181. *Id.* § 6308(b).

182. *Id.* § 6308(c). Under this subdivision, the Division may promulgate a "special order." A special order is any order written by the Division to correct an unsafe condition which cannot be made safe under existing standards of the Standards Board. Such an order has the effect of any other standard, but only applies to the place described in the order. *Id.* § 6305(b). An employer may request a hearing before the Division on a special order. *Id.* § 6308(c). These hearings may be conducted informally, and orally or in writing. *Id.* § 6308.5. All orders, rules, regulations,

Other agencies, departments, divisions, bureaus, or political subdivisions may assist in the administration and enforcement of the program pursuant to a written agreement with the Division.[183] In addition, the Department of Health is charged with assisting in the enforcement of standards. It must, upon the request of the Division of Industrial Safety, assist in the conduct of inspections; conduct special investigations of occupational health problems; and provide a continuous program of training for safety engineers.[184]

2. Investigations Pursuant to Complaints

The Division must make routine inspections to assure the healthfulness and safety of places of employment.[185] When it learns or has reason to believe that an employment is unsafe or injurious to health, it may, on its own motion or upon complaint, investigate that place of employment.[186] If it receives a complaint from an employee, however, it must investigate the workplace as soon as possible, but not later than three working days after receipt of the complaint.[187] The identity of anyone who submits a complaint will be confidential unless that person requests otherwise.[188]

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findings, and decisions of the Division entered under CAL/OSHA may be reviewed by the supreme court and courts of appeal. *Id.* § 6308(c).

183. CAL. LABOR CODE ANN. § 144(a) (West Supp. 1975).

184. *Id.* § 144.5(a).

185. There is no specific provision on this issue; however, a pilot program of the Inspection Scheduling System (ISS) began August 1, 1974. These inspections are made by Compliance Safety Engineers. STATE OF CALIFORNIA, AGRICULTURE AND SERVICES AGENCY, DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL SAFETY, OPERATIONS 6. General inspection procedures are outlined in this official pamphlet and are available at Division offices. *Id.*

186. CAL. LABOR CODE ANN. § 6309 (West Supp. 1975). It may make the investigation with or without notice or hearings.

187. *Id.* Such an investigation may be with or without notice or hearing. If the Division determines from the facts stated in the complaint that the complaint is intended to wilfully harass an employer or is without reasonable basis, it need not respond to it. *Id.*

The Division must keep records of all complaints, whether oral or written. It must inform the complainant of action taken in regard to the complaint, and the reasons therefor. It must also conduct an informal review of a refusal by its representative to issue a citation (see notes 210-18 *infra* and accompanying text) with respect to such an alleged violation, and furnish an employee requesting such review a written statement of the reasons for the final disposition of the case. CAL. LABOR CODE ANN. § 6309 (West Supp. 1975).

188. CAL. LABOR CODE ANN. § 6309 (West Supp. 1975). This section (as described here and in notes 185-87 *supra* and accompanying text) expands on former Labor Code section 6505 (Law of Aug. 19, 1972, ch. 720, § 1, [1972] Cal. Stat. 1310) and complies

The act prohibits discrimination against employees who assert their rights under it.[189] No person may discharge or discriminate in any way against an employee because that employee filed a complaint, instituted a proceeding, or exercised any rights afforded him under the Act.[190] An employer who wilfully refuses to comply after an employee has been determined eligible for rehiring or promotion by a grievance procedure is guilty of a misdemeanor.[191]

An employee may also refuse to work if in that performance there would be a violation of a standard or order which creates a real and apparent hazard to the employee. Under certain conditions, he has a right of action against his employer for wages lost if he is laid off, discharged, or otherwise not paid because of such refusal.[192]

3. Accident Investigations

The Division must investigate the causes of employment accidents which are fatal to one or more employees or which result in serious injury to five or more employees.[193] It may investigate the cause of

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with the "indices of effectiveness" for a state plan set forth in the federal regulations, 29 C.F.R. §§ 1904.4(c)(2)(i), (ii), (iii) (1975). The content of this provision is similar to the parallel OSHA section. *Compare* CAL. LABOR CODE ANN. § 6309 (West Supp. 1975) *with* 29 U.S.C. § 657(f) (1970).

189. The federal "indices of effectiveness" require that state plans provide against discharge or discrimination against an employee because he exercised his rights under the act. 29 C.F.R. § 1902.4(c)(2)(v) (1975).

190. CAL. LABOR CODE ANN. § 6310(a) (West Supp. 1975). If an employee is discharged or so threatened, demoted, suspended, or in any other manner discriminated against because he made a bona fide complaint, he is entitled to reinstatement and reimbursement of lost wages and lost work benefits. CAL. LABOR CODE ANN. § 6310(b) (West Supp. 1975).

191. CAL. LABOR CODE ANN. § 6310(b) (West Supp. 1975).

192. *Id.* § 6311. The conditions for the right of action for lost wages are (1) that he notify his employer of his intention to make the claim within ten days after being laid off or discharged; and (2) that he file a claim with the Labor Commissioner within thirty days after being discharged, laid off, or otherwise not paid in violation of the section. *Id.*

If an employee believes that he has been discriminated against in violation of sections 6310 or 6311, he may, within thirty days of the violation, file a complaint with the Labor Commissioner. The Division of Labor Law Enforcement may investigate the complaint and bring an action in any appropriate court against the violator. Courts have jurisdiction in such actions for injunctive relief. CAL. LABOR CODE ANN. § 6312 (West Supp. 1975). There is a parallel federal section. 29 U.S.C. § 660(c)(2) (1970).

193. CAL. LABOR CODE ANN. § 6313(a) (West Supp. 1975). Serious injury is defined as:

> any injury or illness occurring in a place of employment . . . which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers loss of any member of the body or any

any other occupational accident or illness which has caused serious injury, or has a substantial probability of causing serious injury.[194] The Division must transmit copies of any reports made in mandatory investigations to the Registrar of Contractors.[195]

Within the Division of Industrial Safety is the Bureau of Investigations. It directs accident investigations involving violations of standards and orders in which there is a death, serious injury to five or more employees, or request for prosecution by a Division representative.[196] It also prepares cases for prosecution, including evidence and findings.[197] The results of these investigations must be referred to the appropriate City Attorney or District Attorney.[198] In any prosecution for violation of any provision of CAL/OSHA, all standards, orders, rules, regulations, findings, and decisions of the Division are not only admissible as evidence, but also are presumed to fix a reasonable and lawful standard of safety.[199]

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serious degree of permanent disfigurement. Serious injury or illness or death shall not include any injury, illness or death caused by the commission of a Penal Code violation, except the violation of Penal Code Section 385, or an accident on a public street or highway.

Id. § 6409(c).

The predecessor Labor Code provision was section 6313. Law of July 17, 1945, ch. 1431, § 84, [1945] Cal. Stat. 2699. There is no parallel section in Federal OSHA which distinguishes routine inspections or investigations in response to complaints from accident investigations.

194. CAL. LABOR CODE ANN. § 6313(b) (West Supp. 1975). If it does so investigate, it must issue any orders necessary to eliminate the causes of the injuries. Such orders are not admissible as evidence in an action for damages or compensation arising out of the injury or death investigated under this subdivision. *Id.*

195. CAL. LABOR CODE ANN. § 6313.5 (West Supp. 1975). It may also transmit copies in discretionary investigations pursuant to subdivision (b). *Id.* This section was derived from former Labor Code section 6321. *Compare id. with* Law of Aug. 10, 1972, ch. 705, § 2, [1972] Cal. Stat. 1286.

196. CAL. LABOR CODE ANN. § 6315 (West Supp. 1975). Its responsibility coincides with the investigations which are mandatory under section 6313(a) (accident investigations). The additional requirement of investigation upon request of a Division representative is probably a response to the findings of the Select Committee on Industrial Safety regarding lack of prosecutions under the former law. See note 100 *supra* and accompanying text.

197. CAL. LABOR CODE ANN. § 6315 (West Supp. 1975). The Bureau has the right of access to places of employment, the right to collect evidence and samples, and all the powers of the Division generally under section 6314 (*see* notes 200-06 *infra* and accompanying text). CAL. LABOR CODE ANN. § 6315(c) (West Supp. 1975).

198. CAL. LABOR CODE ANN. § 6315(e) (West Supp. 1975).

199. *Id.* § 6315.5. The presumption does not obtain if, prior to the institution of the prosecution, proceedings for a hearing or a special order are instituted, or a petition is filed under Government Code section 11426 (CAL. GOV'T CODE ANN. § 11426 (West 1966)). CAL. LABOR CODE ANN. § 6315.5 (West Supp. 1975). This section is derived

4. Investigatory Powers and Responsibilities

Division employees, in making an inspection or investigation, have "free access" to any place of employment upon presenting appropriate credentials.[200] A right of access may also be granted any other agency which assists in the enforcement of CAL/OSHA pursuant to a written agreement under section 144.[201] Any person who obstructs or hampers such an investigation is guilty of a misdemeanor.[202] Furthermore, any employer or authorized representative who refuses to admit a Division representative is guilty of a misdemeanor.[203]

The Division has the implied power to demand statistics, information, or any physical materials directly related to the purpose of the inspection or investigation.[204] An employer or his representative who, upon demand, refuses to furnish those things is guilty of a misdemeanor.[205]

The Division may issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, and physical materials. It may also administer oaths, examine witnesses under oath,

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from former section 6507 (Law of July 17, 1945, ch. 1431, § 103, [1945] Cal. Stat. 2703), and has roots in the 1917 act (Law of May 23, 1917, ch. 586, § 48, [1917] Cal. Stat. 865).

200. CAL. LABOR CODE ANN. § 6314(a) (West Supp. 1975). Former section 6314 provided that Division designees "may enter" places of employment. Law of July 17, 1945, ch. 1431, § 85, [1945] Cal. Stat. 2700. Similar language ("may enter") was used in the 1917 act. Law of May 23, 1917, ch. 586, § 54(b), [1917] Cal. Stat. 867.

The OSHA provision allows the Secretary to enter "without delay and at reasonable times," and "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . . ." 29 U.S.C. § 657(a) (1970).

A state plan must provide "a right of entry and inspection" at least as effective as the federal right. *Id.* § 667(c)(3) (*see* note 68 *supra*); 29 C.F.R. § 1902.3(e) (1975). In addition, where entry is refused, the state agency must have the authority, "through appropriate legal process, to compel such entry and inspection. 29 C.F.R. § 1902.3(e) (1975).

201. CAL. LABOR CODE ANN. § 144(c) (West Supp. 1975).

202. *Id.* § 6314(a). Former section 6315 contained a similar provision, Law of July 17, 1945, ch. 1431, § 86, [1945] Cal. Stat. 2700, as did the 1917 act, Law of May 23, 1917, ch. 586, § 54(c), [1917] Cal. Stat. 867. There is no similar crime under OSHA.

203. CAL. LABOR CODE ANN. § 6314(b) (West Supp. 1975).

204. *Id.* A condition for approval of the state plan is that the state agency will have the legal authority for the enforcement of standards. 29 U.S.C. § 667(c)(4) (1970) (*see* note 68 *supra*). Section 6314(b), along with subdivision (c) (*see* note 206 *infra* and accompanying text), fulfill that requirement.

The federal "indices of effectiveness" require that the state agency have the necessary legal authority for the enforcement of standards, including appropriate compulsory process to obtain necessary evidence in connection with the inspection. 29 C.F.R. § 1902.4(c)(2)(ix) (1975).

205. CAL. LABOR CODE ANN. § 6314(b) (West Supp. 1975). This provision is new.

take verification or proof of written materials, and take depositions and affidavits to carry out its duties.[206]

A representative of the employees and of the employer has a right to accompany a Division representative on his inspection or investigation. He may discuss safety violations or problems with the inspector privately during the tour.[207] No one may be given advance warning of an inspection or investigation by any representative of the Division. Any person who gives advance notice is guilty of a misdemeanor, punishable by a fine of up to one thousand dollars, imprisonment for up to six months, or both.[208]

"Trade secrets" and "other information that is confidential" must be considered confidential by the Division. The Appeals Board, Standards Board, courts, or the Director of Industrial Relations must, in any

206. *Id.* § 6314(c). A similar provision was former section 6314. Law of July 17, 1945, ch. 1431, § 85, [1945] Cal. Stat. 2700. The federal regulation on "indices of effectiveness" of the state enforcement program provides that the state agency must have the necessary legal authority to enforce standards by such means as appropriate compulsory process to obtain testimony in connection with inspections or enforcement proceedings. 29 C.F.R. § 1902.4(c)(2)(ix) (1975).

The parallel OSHA provisions allow the Secretary to require the attendance and testimony of witnesses and the production of evidence under oath. 29 U.S.C. § 657(b) (1970). Whereas failure to comply with the state provision is a misdemeanor (*see* note 205 *supra* and accompanying text), the federal provision is enforced by court order and contempt. 29 U.S.C. § 657(b) (1970).

207. CAL. LABOR CODE ANN. § 6314(d) (West Supp. 1975). If an employee representative does not accompany the Division representative, that does not invalidate the inspection or investigation. Reinhardt and Wenks, Inc., CAL.-OSHA REP., Cal.-OSHA Digest ¶ 10,220 (Nov. 22, 1974).

The federal "indices of effectiveness" for approval of a state plan indicate that the plan must provide an opportunity for an employer's representative and an employees' representative to accompany the state representative during the physical inspection of the workplace, or where there is no authorized representative, it must provide for consultation by the state representative with a reasonable number of employees. 29 C.F.R. § 1902.4(c)(2)(ii) (1975).

Section 6314(d) continues that where there is no authorized employee representative, the Division must consult with a reasonable number of employees on matters of occupational safety and health. CAL. LABOR CODE ANN. § 6314(d) (West Supp. 1975). There is a parallel OSHA provision. 29 U.S.C. § 657(e) (1970).

208. CAL. LABOR CODE ANN. § 6321 (West Supp. 1975). Advance notice is authorized under special circumstances, including situations of imminent danger to the health or safety of employees. There are regulations on this "issue." 8 CAL. ADM. CODE §§ 331-331.5.

The prohibition on advance notice of inspections is a condition for approval of the state plan. 29 U.S.C. § 667(c)(3) (1970) (*see* note 68 *supra*); 29 C.F.R. § 1902.3(f) (1975). The OSHA prohibition against advance notice is included with the penalty sections of the Federal Act. 29 U.S.C. § 666(f) (1970).

proceeding, issue such orders as may be appropriate to protect the confidentiality of trade secrets. Violation of this provision is a misdemeanor.[209]

5. Citations

If, upon inspection or investigation, the Division believes that an employer has violated any safety or health standard, rule, regulation, or order, it must issue a citation to the employer. The citation must be in writing and describe with particularity the nature of the violation, including a reference to the provision alleged to have been violated. It must also fix a reasonable time for abatement.[210] The Division may also impose a civil penalty against an employer.[211] The citation must be posted at or near the referenced site of violation for three working days or until the unsafe condition is abated, whichever is longer.[212] If the violation found does not have a direct relationship with the health or safety of an employee, the Division may issue a "notice" in lieu of a citation.[213]

If the Division issues a citation, it must, within a reasonable time after the inspection or investigation, notify the employer by certified mail. The notice must indicate that the employer has fifteen working days from the receipt of the notice in which to notify the Appeals Board that he wishes to contest the citation.[214] The Division must also notify

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209. CAL. LABOR CODE ANN. § 6322 (West Supp. 1975). A "trade secret" is that which is referred to in 18 U.S.C. § 1905 (1970), and "other information that is confidential" is that which is described in the Government Code. CAL. GOV'T CODE ANN. §§ 6250-61 (West Supp. 1976).

This section is derived from the former program. Law of Dec. 26, 1972, ch. 1386, § 2, [1972] Cal. Stat. 2878. The federal "indices of effectiveness" require such a provision. 29 C.F.R. § 1902.4(c)(2)(viii) (1975). There is a parallel OSHA provision, 29 U.S.C. § 664 (1970).

210. CAL. LABOR CODE ANN. § 6317 (West Supp. 1975). The citation must issue with "reasonable promptness," but in no event after six months have elapsed since the occurrence of the violation. *Id.* The form of citation is specified by regulation. 8 CAL. ADM. CODE § 332.

The Division may not issue a citation concurrently with a "special order." Only an existing special order may be the subject of a violation. J & M Carpet Co., CAL-OSHA REP., Cal-OSHA Digest ¶ 10,021 (May 13, 1974).

There are parallel federal provisions. 29 U.S.C. §§ 658(a), (c) (1970).

211. CAL. LABOR CODE ANN. § 6317 (West Supp. 1975).

212. *Id.* § 6318; 8 CAL. ADM. CODE § 302.2. The federal "indices of effectiveness" require prompt notice to employees of violations and proposed abatement requirements. 29 C.F.R. § 1902.4(c)(2)(x) (1975). There is a parallel federal provision. 29 U.S.C. § 658(b) (1970).

213. CAL. LABOR CODE ANN. § 6137 (West Supp. 1975).

214. *Id.* § 6319(a). The language is not clear, but it indicates that the notice must

the employer by certified mail of a proposed civil penalty. The employer similarly has fifteen days to notify the Appeals Board of his intention to contest the assessment.[215] The regulations covering the assessment of civil penalties consider the size of the business being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.[216]

The Division may, after an opportunity for a hearing, modify the abatement requirements in a citation. It may do so if the employer shows that he has made a good faith effort to comply with the abatement requirement, but that factors beyond his reasonable control prevent completion according to the citation.[217] If the Division issues a citation for a serious violation, it must reinspect the workplace at the end of the abatement period or within a reasonable time thereafter.[218]

6. Immediate Restraints

The Division may apply to the superior court for an injunction against the use or operation of any machine, device, apparatus, or equipment that constitutes a serious menace to the lives or safety of persons around it.[219] In addition, the Division may obtain a temporary restraining

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also list the reasons for which the employer may contest the citation. The reasons are set forth in section 6600. *See* note 224 *infra* and accompanying text. The regulation seems to require even less than the code provision. 8 CAL. ADM. CODE § 332.1.

The federal "indices of effectiveness" require a provision for prompt notice to employers of the violation and the proposed abatement requirement. 29 C.F.R. § 1902.4(c)(2)(x) (1975).

215. CAL. LABOR CODE ANN. § 6319(b) (West Supp. 1975). The reasons for contest of the penalty are the same as for contest of the citation. These are set forth in section 6600. *See* note 224 *infra* and accompanying text. There is no explicit requirement that the time limitation or the allowed grounds for appeal be contained in the notice.

The regulation on this "issue" states that failure to notify the Appeals Board of the contest of either the citation or the penalty within fifteen days renders both the citation and the penalty the final orders of the Appeals Board, not subject to review or appeal by any court or agency. 8 CAL. ADM. CODE § 333. This is also indicated in section 6601. CAL. LABOR CODE ANN. § 6601 (West Supp. 1975).

The federal "indices of effectiveness" for state plans require prompt notice to employers of proposed sanctions. 29 C.F.R. § 1902.4(c)(2)(x) (1975).

The federal provision covering notice of both citations and penalties is section 659(a). 29 U.S.C. § 659(a) (1970). Notice under that provision must indicate the fifteen working-day limitation for appeal.

216. CAL. LABOR CODE ANN. § 6319(c) (1975); 8 CAL. ADM. CODE §§ 334-36. The parallel federal provision is 29 U.S.C. § 666(i) (1970)

217. CAL. LABOR CODE ANN. § 6319.5 (West Supp. 1975). The parallel federal provision is section 659(c). 29 U.S.C. § 659(c) (1970).

218. CAL. LABOR CODE ANN. § 6320 (West Supp. 1975).

219. *Id.* § 6323. The provision has roots in former section 6508 Law of July 17, 1945, ch. 1431, § 104, [1945] Cal. Stat. 2703, and in an early addition to the 1917 act,

order without posting a bond. A sufficient prima facie showing to warrant the granting of a temporary restraining order requires, in the court's discretion, an affidavit which demonstrates that the violation is a serious menace and which includes a copy of the order or standard violated.[220]

The Division must take action on its own, even if it does not apply for a court order, to prohibit entry into or use of a place of employment, machine, or equipment that is dangerous, not properly guarded, or dangerously placed so as to create an imminent hazard to employees.[221] It must attach a conspicuous notice to that effect on or at the site of danger.[222] If the Division arbitrarily or capriciously fails to take

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Law of May 22, 1919, ch. 471, § 12, [1919] Cal. Stat. 924 (adding section 46½).

The federal "indices of effectiveness" for state plans prescribe that the state program provide procedures for the prompt restraint or elimination of any conditions or practices in covered places of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through enforcement of other procedures. 29 C.F.R. § 1902.4(c)(2)(vii) (1975).

220. CAL. LABOR CODE ANN. § 6324 (West Supp. 1975). The provision is derived from former section 6509, Law of July 17, 1945, ch. 1431, § 105, [1945] Cal. Stat. 2703, and an amendment to the 1917 act, Law of May 22, 1919, ch. 471, § 12, [1919] Cal. Stat. 924 (adding section 46½).

221. Any authorized representative of the Division may make such a prohibition for twenty-four hours, but the regional manager of the Division may extend the prohibition period for seventy-two hours. The Chief of the Division of Industrial Safety may, after a hearing, extend the prohibition period until such time as the Division declares that there is no longer an immediate hazard. CAL. LABOR CODE ANN. § 6327(a), (b), (c) (West Supp. 1975). However, once any prohibition has been made, the employer may request and be granted a hearing to review the validity of the representative's order, which hearing must be within twenty-four hours after it is made. *Id.* § 6327(d). Any person who uses any place of employment or machine before it is made safe or who removes the notice is guilty of a misdemeanor. He is punishable by a fine of up to one thousand dollars, by one year in county jail, or both. *Id.* § 6326. This section is derived from former section 6511, Law of July 17, 1945, ch. 1431, § 107, [1945] Cal. Stat. 2704, and from an amendment to the 1917 act, Law of May 22, 1919, ch. 471, § 12, [1919] Cal. Stat. 924 (adding section 46½).

222. CAL. LABOR CODE ANN. § 6325 (West Supp. 1975). The prohibition of use must be limited to the immediate area of the hazard. The notice may only be removed by a representative of the Division and only when the condition is made safe. *Id.*

This section is substantially taken from former section 6510, Law of July 17, 1945, ch. 1431, § 106, [1945] Cal. Stat. 2704, and an amendment to the 1917 act, Law of May 22, 1919, ch. 471, § 12, [1919] Cal. Stat. 924 (adding section 46½).

The applicable "indices of effectiveness" provision is described in note 219 *supra.*

The comparable federal provision does not allow such a "shut-down" by the Secretary. It merely requires the inspector to inform the affected employees and employer of the danger and that court relief (an injunction or a temporary restraining order) is being sought. 29 U.S.C. § 662(c) (1970).

action to prohibit any conditions or practices which may cause death or serious physical harm before the danger can be eliminated through regular citation procedures, any employee may bring an action for a writ of mandate in any appropriate court. The court may compel the Chief of the Division to prevent or prohibit the condition.[223]

E. Appeal Proceedings

1. In General

An employer served with a citation or a notice of civil penalty may appeal to the Appeals Board within fifteen days from receipt of such notice. The appeal may concern the fact of the violation, the length of the abatement period, the amount of the proposed penalties, or the reasonableness of changes proposed by the Division to abate the condition.[224] If, within fifteen days from receipt of the notice of citation or proposed penalty, the employer fails to notify the Appeals Board of his intention to contest, and no notice of contesting the abatement period is filed by an employee, the citation or penalty becomes a final order of the Appeals Board, not subject to review by any court or agency.[225]

The Appeals Board must afford a hearing, however, if the employer or an employee notifies the Appeals Board within fifteen days. The Appeals Board must thereafter issue a decision based on findings of fact, affirming, modifying, or vacating the citation or proposed penalty,

223. CAL. LABOR CODE ANN. § 6327.5 (West Supp. 1975). There is a parallel federal provision. 29 U.S.C. §.662(d) (1970).

224. CAL. LABOR CODE ANN. § 6600 (West Supp. 1975). The regulations for appeals board proceedings are contained in 8 CAL. ADM. CODE §§ 345-384.1.

Many of these sections of CAL/OSHA concerning appeals are derived from comparable sections governing the Workmen's Compensation Appeals Board. *See* CAL. LABOR CODE ANN. §§ 5300-5956 (West 1971).

The "indices of effectiveness" indicate that a state plan must provide an employer with the right of review of violations, abatement periods, and proposed penalties, and that employees should have an opportunity to participate in review proceedings. The section suggests that there be administrative or judicial review. 29 C.F.R. § 1902.4(c)(2)(xii) (1975). California provides both. CAL. LABOR CODE ANN. §§ 6600-01 (West Supp. (1975).

The parallel section of OSHA is section 659. 29 U.S.C. § 659 (1970). The Occupational Safety and Health Review Commission (OSHRC) rules of procedure are contained in sections 2200.1 through 2200.110 of Title 29 of the Code of Federal Regulations. 29 C.F.R. §§ 2200.1-.110 (1975).

225. CAL. LABOR CODE ANN. § 6601 (West Supp. 1975). The Appeals Board may extend the fifteen working day period for good cause (*id.*), but it has been the policy of the Appeals Board to strictly enforce the appeals time limit. Melrose Metal Products, Inc., CAL-OSHA REP., Cal-OSHA Digest ¶ 10,322 (Feb. 13, 1975).

or directing other appropriate relief.[226] The Appeals Board may order a hearing officer to hear the proceedings or appeal.[227] Such a hearing officer appointed by the Appeals Board has powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the Appeals Board. Any party, however, may object to the reference of the proceeding to a particular hearing officer.[228]

The Appeals Board or hearing officer must make and file findings on all facts and file an order or decision within thirty days after the case is submitted. These must be served on the parties along with a summary of the evidence received and relied upon and the grounds for the decision.[229] Within thirty days after such filings by a hearing officer, the Appeals Board may confirm, adopt, modify, or set aside the findings, order, or decision of such hearing officer, and may, with or without notice, enter its own order, findings, and decision based on the record.[230]

If the employer fails to appear, the Appeals Board may dismiss the appeal, but it may also reinstate it upon the employer's showing of good cause for his failure to appear.[231] The Appeals Board has the additional power to take depositions of witnesses and require the production of records.[232]

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226. CAL. LABOR CODE ANN. § 6602 (West Supp. 1975). If an employer does not contest a proposed penalty, that penalty is a mere proposal until it becomes a final order of the Appeals Board (after fifteen working days). If he does contest, however, the appeals Board acts de novo. Candlerock Restaurant, CAL-OSHA REP., Cal-OSHA Digest ¶ 10,029R (June 5, 1974). The Appeals Board has adopted its own rules of procedure and practice in accordance with the California Administrative Procedure Act. CAL. LABOR CODE ANN. § 148.7 (West Supp. 1975). The proceedings may be informal, and need not follow the common law or statutory rules of evidence and procedure. *Id.* § 6612. The rules must, however, afford affected employees an opportunity to participate as parties to a hearing with regard to the abatement period. *Id.* § 6603(a). The superior courts have jurisdiction over contempt proceedings. *Id.* § 6603(b).

227. CAL. LABOR CODE ANN. §§ 6604, 6605 (West Supp. 1975). The Appeals Board may also remove the proceeding from the hearing officer back to itself. *Id.*

228. CAL. LABOR CODE ANN. §§ 6604, 6606 (West Supp. 1975). The grounds for objection are those specified in CAL. CODE CIV. PRO. § 641 (West 1972).

229. CAL. LABOR CODE ANN. § 6608 (West Supp. 1975). The method of service is prescribed by section 6610. *Id.* § 6610.

230. CAL. LABOR CODE ANN. § 6609 (West Supp. 1975).

231. *Id.* § 6611. The Appeals Board may also take action on the employer's express admissions. Additionally, if the burden of proof is on the employer, the Appeals Board may act without taking evidence. *Id.*

232. CAL. LABOR CODE ANN. § 6613 (West Supp. 1975).

2. Reconsideration

Any party aggrieved by a final decision of the Appeals Board or of a hearing officer may petition the Appeals Board for reconsideration within thirty days after he is served with notice of the decision.[233] Grounds for reconsideration are: (1) the decision by the Appeals Board or hearing officer was rendered in excess of the powers of the Appeals Board; (2) the decision was procured by fraud; (3) the evidence does not justify the findings of fact; (4) the petitioner has discovered new evidence which even with reasonable diligence he could not have discovered and produced at the hearing; (5) the findings of fact do not support the decision.[234] Copies of the petition must be served on all parties, and any party may file an answer within ten days.[235] If the Appeals Board does not act within thirty days, the petition is deemed to have been denied.[236] The filing of the petition suspends the decision affected for ten days insofar as it applies to the parties to the petition, unless otherwise ordered by the Appeals Board.[237]

If the Appeals Board does not deny the petition for reconsideration, it may reconsider in either of two ways. First, it may, with or without notice or further proceedings, affirm, rescind, alter, or amend the decision on the basis of evidence previously submitted. The Board thus enters its reconsidered decision on the record in the case.[238] Alternatively, it may direct the taking of additional evidence and then affirm, rescind, alter, or amend the original decision.[239] Any decision, how-

233. *Id.* § 6614. The petition must specifically list in full detail the grounds upon which the petitioner considers the decision unjust or unlawful and every issue to be considered by the Appeals Board. It must be verified upon oath and contain a general statement of any evidence it relies on. *Id.* § 6616. The petitioner waives all objections, irregularities, and illegalities concerning the matter to be reconsidered which are not set forth in the petition. *Id.* § 6618.

Alternatively, the Appeals Board may grant reconsideration on its own motion within thirty days after it files a decision. *Id.* § 6614.

There are administrative regulations on this "issue." 8 CAL. ADM. CODE §§ 390-390.6.

234. CAL. LABOR CODE ANN. § 6617 (West Supp. 1975).

235. *Id.* § 6619. The answer must also be verified. *Id.*

236. CAL. LABOR CODE ANN. § 6624 (West Supp. 1975). The Appeals Board may, however, extend the time in which it may act for good cause. *Id.*

237. CAL. LABOR CODE ANN. § 6625 (West Supp. 1975). The Appeals Board may also stay the original decision pending reconsideration. *Id.*

238. CAL. LABOR CODE ANN. §§ 6620, 6621 (West Supp. 1975).

239. *Id.* §§ 6620, 6622. If there is any hearing on reconsideration, notice must be given the petitioner and adverse parties. *Id.* § 6620. A decision following reconsideration which affirms, rescinds, alters, or amends the original decision does not affect any right or enforcement of any right arising by virtue of the original decision unless so ordered by the Appeals Board. *Id.* § 6622.

ever, whether to grant or deny the petition, or to affect the original findings or decision following reconsideration, must be made by the Appeals Board and not by a hearing officer.[240] No cause of action arising out of any final decision may accrue in any court to any person unless, on its own motion, the Appeals Board sets aside such final decision and removes the proceeding to itself or such person files a petition for reconsideration that is granted or denied.[241]

3. Judicial Review

A decision of the Appeals Board is binding on the Director of Industrial Relations and the Division of Industrial Safety with regard to the parties in the particular appeal. The Director has the right to seek judicial review, however, even if he did not appear or participate in the appeal.[242]

In addition, any person affected by a decision of the Appeals Board may apply to the superior court for a writ of mandate for the purpose of inquiring into and determining the lawfulness of the decision. He must first, however, have petitioned for reconsideration. His application for a writ of mandate must then be within thirty days of the denial of the petition for reconsideration or, if the petition is granted, within thirty days of the filing of the subsequent decision.[243] The court order directs the Appeals Board to certify the record to it and the court hears the cause on that record. No new evidence may be introduced in the court.[244]

The findings and conclusions of the Appeals Board on questions of fact, including ultimate facts, are conclusive and not subject to review.[245] The court may only determine whether: (1) the Appeals Board acted within or in excess of its powers; (2) the decision was procured by fraud; (3) the decision was unreasonable; (4) the decision was supported by substantial evidence; and (5) the findings of fact support the decision.[246] The Appeals Board and each party have the

240. CAL. LABOR CODE ANN. § 6623 (West Supp. 1975). It must be in writing, signed by a majority of the Appeals Board members assigned to it, and must state the evidence relied on and specify in detail the reasons for the decision. *Id.*

241. CAL. LABOR CODE ANN. § 6615 (West Supp. 1975). The asserting of such a cause of action does not prevent the enforcement of any final decision, however. *Id.*

242. CAL. LABOR CODE ANN. § 148.6 (West Supp. 1975).

243. *Id.* § 6627. The federal provisions for judicial review are sections 660(a) and (b). 29 U.S.C. §§ 660(a), (b) (1970).

244. CAL. LABOR CODE ANN. § 6628 (West Supp. 1975).

245. *Id.* § 6630.

246. *Id.* § 6629.

right to appear before the court, which may affirm or annul the Appeals Board decision or remand the case for further proceedings.[247] Though an application for a writ of mandate does not of itself stay the operation of the Appeals Board decision, the court may stay that decision.[248]

4. Collecting Penalties

After the review proceedings, including judicial review, are exhausted, the Division may apply to the superior court for an order directing payment of a civil penalty.[249]

F. Education and Research

The Division must maintain an education and research program. Specifically, the system must include training Division personnel,[250] providing safety education for employers and employees,[251] and conducting continuing research into methods of improving occupational safety and health.[252] Additionally, the Division must have consulting services available on the request of an employer or employee group. These services may include (but are not limited to) providing information, advice, and recommendations on safety, standards, techniques, devices, methods, and programs.[253] If an employer requests these consulting services at the workplace, the Division may not issue a citation

247. *Id.* § 6630.

248. *Id.* § 6633.

249. *Id.* § 6650.

250. *Id.* § 6350. One of the necessary conditions for approval of the state plan is that the state agency will have the "qualified personnel" necessary for the enforcement of state standards. 29 U.S.C. § 667(c)(4) (1970) (*see* note 68 *supra*); 29 C.F.R. § 1902.3(h) (1975). There are sections for training personnel under Federal OSHA. 29 U.S.C. §§ 670(a), (b) (1970).

251. CAL. LABOR CODE ANN. §§ 6350-52 (West Supp. 1975). The federal "indices of effectiveness" provide that a state plan must encourage voluntary compliance by employers and employees by such means as training employers and employees. 29 C.F.R. § 1902 4(c)(xiii) (1975). There are federal provisions for educational and informational programs. 29 U.S.C. §§ 670(a), (c) (1970).

252. CAL. LABOR CODE ANN. §§ 6350, 6353 (West Supp. 1975). Research for Federal OSHA is done under sections 669 and 671. The National Institute of Occupational Safety and Health (NIOSH) is primarily responsible for carrying out this function. 29 U.S.C. §§ 669, 671 (1970).

253. CAL. LABOR CODE ANN. §§ 6350, 6354 (West Supp. 1975). The federal "indices of effectiveness" provide that the state plan must provide for programs to encourage voluntary compliance by employers and employees by such means as conducting consultations. 29 C.F.R. § 1902.4(c)(2)(xiii) (1975). There is a parallel federal provision. 29 U.S.C. § 670(c) (1970).

or institute a prosecution for violation of standards discovered while providing the services.[254]

IV. CAL/OSHA AND THE FOURTH AMENDMENT

There have been constitutional attacks on Federal OSHA by commentators and litigants.[255] The disposition of those issues will necessarily affect CAL/OSHA, because the state plan, designed to meet federal requirements, is in fact modeled on the Federal Act. Thus, judicial construction of the Federal Act, if it does not directly affect the continued existence or organization of the state program, will at least be highly persuasive in interpreting California's version. Furthermore, CAL/OSHA is independently vulnerable to challenge under California law. However, should the Department of Industrial Relations or the state courts respond to such attacks prior to disposition of similar issues at the federal level, or arrive at a result which is different from the federal disposition of the issues, the state runs the risk of losing federal approval of the plan and relinquishing jurisdiction to the federal government.[256]

One issue which has reached the federal courts under OSHA is the relationship between the act and the employer's fourth amendment right

254. CAL. LABOR CODE ANN. §§ 6355, 6319(d) (West Supp. 1975). The Division may, however, take any otherwise authorized action if it finds an imminent hazard to the lives or safety of employees. *Id.* § 6355.

255. These challenges have been on a variety of issues. For example, there have been questions as to the true nature of the "civil" penalties assessed by the Occupational Safety and Health Appeals Board. The claim is that the penalties are, in fact, "criminal," and thus the entire administrative enforcement scheme contravenes certain constitutional rights of the accused, such as the right to trial by jury. Dan J. Sheehan Co. v. OSAHRC, 520 F.2d 1036 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1458 (1976); Frank Irey, Jr., Inc. v. OSAHRC, 519 F.2d 1200 (3d Cir. 1975), *cert. granted*, 96 S. Ct. 1458 (1976); Atlas Roofing Co. v. OSAHRC, 518 F.2d 990 (5th Cir. 1975), *cert. granted*, 96 S. Ct. 1458 (1976). *See, e.g.*, McClintock & Bohrnsen, *Constitutional Challenges*, 9 GONZAGA L. REV. 361, 371-93 (1974); Comment, *OSHA: Employer Beware*, 10 HOUSTON L. REV. 426, 437-46 (1973). Questions have also been presented as to due process under OSHA enforcement procedures, (*see, e.g.*, Comment, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures*, 84 YALE L.J. 1380 (1975)), and as to the fourth amendment right to be free of unreasonable searches and seizures (this part of this Comment is addressed to this issue with respect to both OSHA and CAL/OSHA).

256. The Secretary may withdraw approval of a state plan. 29 U.S.C. § 667(f) (1970).

CAL/OSHA may even be subject to different or additional challenges from those directed at OSHA. Though the language in some sections is substantially derived from the Federal Act, other sections have roots in both the Federal Act and former state law, or only in former state law.

to be free of "unreasonable" searches and seizures.[257] The language of CAL/OSHA is curious on this aspect of the plan, not only because it is different from the federal language, but because it seems to override state statutory and case law. Therefore, what follows is an analysis of administrative search law and its relationship to sections 6314 and 6315 of CAL/OSHA, the provisions authorizing entry into places of employment by inspectors and investigators.

A. The Supreme Court on Administrative Inspections

In 1967, the Supreme Court proclaimed that the fourth amendment protects individuals against warrantless administrative searches. *Camara v. Municipal Court*[258] applied this rule to private residences, and the companion case of *See v. City of Seattle*[259] applied it to commercial premises.[260]

The *Camara* decision identified the "basic purpose" of the fourth amendment as the safeguarding of the privacy and security of individuals against arbitrary invasion by government officials.[261] The "governing principle" is that, except in certain carefully defined cases, searches of private property without consent are "unreasonable" unless authorized by a search warrant.[262] The assessment of the "reasonableness" of a search is essentially a question of balancing the governmental interest against the individual right to privacy, and such decision should

257. U.S. CONST. amend. IV.

258. 387 U.S. 523 (1967).

259. 387 U.S. 541 (1967).

260. In both cases, refusal to permit an inspector's entry was punishable as a misdemeanor. Camara v. Municipal Court, 387 U.S. at 527; See v. City of Seattle, 387 U.S. at 541-42. Neither individual, however, would admit the inspector, because neither inspector had a warrant. *Id.* In both cases, the fourth amendment as applied to the states by the fourteenth amendment was held to prohibit prosecution for refusal to permit the inspection.

261. 387 U.S. at 528.

262. *Id.* at 528-29. The Court overruled its earlier decision in Frank v. Maryland, 359 U.S. 360 (1959), noting that the earlier case had been interpreted as "carving out an additional exception to the rule that warrantless searches are unreasonable under the Fourth Amendment." 387 U.S. at 529.

The *Camara* majority disapproved of *Frank*'s reliance on a distinction between administrative inspections and criminal investigations, based upon a broader reading of the fourth amendment:

> But we cannot agree that the Fourth Amendment interests at stake in these inspections are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Id.

not be left to the discretion of the official in the field, but rather should be reviewed by an independent judicial officer.[263]

Noting that the fourth amendment provides that " 'no Warrants shall be issued, but upon probable cause,' "[264] the Court went on to discuss the cause requirement for an administrative search. The governmental interest in the inspection at issue, it said, was the securing of city-wide compliance with minimum physical standards for private property in order to prevent even unintentional development of conditions which are hazardous to the public health and safety.[265] The only effective way to get universal compliance with minimum standards is through routine periodic inspections.[266] The Court said that facts which justify an inference of probable cause to inspect are different from those that would justify a criminal investigation.[267] It concluded that probable cause to issue an inspection warrant exists if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[268]

See extended the rationale and holding of *Camara* to administrative searches of commercial premises. It recognized, however, that business premises may be inspected in many more situations than private homes.[269] "[N]or do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."[270] Constitutional challenges to those types of programs, the Court continued, must be on a case by case basis.[271]

Two subsequent Supreme Court cases defined exceptions to the holdings of *Camara* and *See*.[272] *Colonnade Catering Corp. v. United States*[273] involved a warrantless and forcible entry into a locked liquor storeroom by federal agents of the Alcohol and Tax Division of the Internal Revenue Service.[274] The Court noted that in its opinion in

263. *Id.* at 529, 532-33.
264. *Id.* at 534.
265. *Id.* at 535.
266. *Id.* at 535-36.
267. *Id.* at 538.
268. *Id.*
269. 387 U.S. at 545-46.
270. *Id.* at 546.
271. *Id.*
272. For further discussion of the development of administrative search law after *Camara* and *See*, *see* Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?*, 1972 WASH. U.L.Q. 313.
273. 397 U.S. 72 (1970).
274. *Id.* at 72-73.

See, it had reserved decision on the question of the fourth amendment and "licensing programs."[275]

The Court concluded that Congress may design such inspection powers under the liquor laws as it deems necessary to fulfill the governmental interest being served, including the power to make forcible warrantless searches and seizures.[276] However, despite the fact that the Congress could have authorized forcible entry without a warrant, the Court held that it did not do so.[277] Instead, Congress merely imposed a fine for refusal to permit a warrantless entry.[278] Thus, once the federal agents were refused such lawful warrantless entry, their only recourse was to request imposition of a fine and obtain a warrant. Evidence obtained in a forcible warrantless entry, moreover, could not be admitted in a proceeding for violation of the liquor laws because, where Congress has made no rules governing inspection procedures, the fourth amendment and its various restrictions apply.[279]

The Court examined "licensing" law again in *United States v. Biswell*.[280] There, a Federal Treasury Agent sought entry under the Gun Control Act of 1968 into the business premises of a pawn shop operator who was federally licensed to deal in sporting weapons.[281] The Court pointed out that, if the inspection had been under the liquor laws, as in *Colonnade*, clearly the fourth amendment would not bar the seizure of illicit liquor. The opinion drew an analogy between Biswell's submission to lawful authority and a householder's acquiescence in a search pursuant to a warrant. The issue of consent was immaterial because the warrantless search is lawful under the statute.[282]

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275. *Id.* at 77-78. The liquor industry, it pointed out, has a history of two centuries of close government supervision and inspection. Thus, warrantless searches and seizures of liquor, as a means of protecting the revenue laws from various types of fraud, have traditionally been regarded as reasonable.

276. *Id.* at 77.

277. *Id.* at 78. The statute gave federal agents broad authority to enter and inspect the premises of retail liquor dealers, during specified time periods. *See* 26 U.S.C. §§ 5146(b) (during business hours), 7606(a) (in the daytime), 7606(b) (in the evening while open) (1970).

278. 397 U.S. at 78. *See* 26 U.S.C. § 7342 (1970) ($500).

279. 397 U.S. at 78.

280. 406 U.S. 311 (1972).

281. *Id.* at 312. *See* 18 U.S.C. § 923(g) (authorizes official entry during business hours). The agent did not have a search warrant, but explained that he was authorized to enter by law, and gave a copy of the code section to the shop operator. The operator allowed entry, and was subsequently convicted based on the evidence that the agent found during the inspection.

282. 406 U.S. at 316. Though the majority does not consider the question, it would seem that, according to *Colonnade*, if Biswell had refused to allow entry, the agent would

The Court proceeded to analyze federal regulation of interstate traffic in firearms. It concluded that, though federal firearms regulation is not as deeply rooted in history as is governmental control of the liquor industry, urgent federal interests are at stake. Moreover, inspection is a crucial part of the regulatory scheme,[283] and in the firearms context, unannounced and even frequent inspections are essential. The prerequisite of a warrant could easily frustrate the protection of governmental interests.[284] The Court added that such inspections pose only limited threats to a gun dealer's privacy, and at any rate, it is a dealer's choice to engage in this pervasively regulated business.[285] Furthermore, he is annually furnished with a revised compilation of ordinances that describe his obligation and define the inspector's authority.[286] Thus, what the Court construed to be a provision for warrantless searches under the Gun Control Act is consistent with the fourth amendment.

The underlying principle in all of these cases is recognition of the "basic principle" of the fourth amendment: safeguarding the "privacy and security of individuals against arbitrary invasion by government officials."[287] *Camara* and *See* disallowed prosecution for refusal to permit a warrantless administrative search. In general, therefore, a private citizen cannot be convicted for exercising his fourth amendment rights by refusing to allow a warrantless administrative inspection. A fortiori, it must be inferred that he could not be convicted for violation of the "substantive" regulatory law with evidence obtained in that warrantless inspection.

This general rule does not obtain in all circumstances. The "*Colonnade* exception" would uphold convictions under a statute providing for forcible entries in an industry with a long history of governmental regulation. Under *Biswell*, a forcible warrantless search would be proper if authorized by statute in a licensing program where unannounced inspections are essential to the regulatory scheme, and where urgent federal interests outweigh the threat to an individual's

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have been forced to obtain a warrant. In fact, Justice Douglas, in his dissent, pointed out that the statute in *Biswell* is "virtually identical" to the statute in *Colonnade*. Therefore, he continued, it necessarily follows that "forcible entry" would be precluded in this situation, as well. *Id.* at 318-19 (Douglas, J., dissenting).

283. Those interests are the prevention of crime and the assistance of the states in the regulation of firearms traffic. 406 U.S. at 316.

284. *Id.* at 316-18.

285. *Id.* at 318.

286. *Id.* at 317.

287. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

privacy. This "*Biswell* exception," however, is limited by the *Colonnade* holding that a statutory scheme which administers penalties for refusal to permit such a lawful warrantless search does not authorize forcible entry without a warrant.

The Supreme Court had occasion to discuss all of these cases in the subsequent decision of *Almeida-Sanchez v. United States*.[288] In that case, the United States Border Patrol, having no warrant, stopped an individual twenty-five miles north of the Mexican border and thoroughly searched his car. The individual was convicted of a federal crime with the evidence found in the search.[289] The Supreme Court overturned the conviction, holding the search unconstitutional.

The Court pointed out that the inspectors had neither consent nor a warrant, as required by *Camara*. The Court further noted that neither *Colonnade* nor *Biswell* would support the search, explaining that those cases approved warrantless inspections of commercial enterprises closely regulated and licensed by the government.[290]

Furthermore, in *Colonnade* and *Biswell*, the inspectors were certain that the premises searched were in fact used for the sale of liquor or guns. In the case at bar, however, there was no assurance that the individual had even crossed the border. This "unfettered discretion" is the precise evil that the warrant requirement is designed to eliminate.[291]

Almeida-Sanchez indicates that, taken together, *Colonnade* and *Biswell* create an exception for licensed and regulated businesses. It does not necessarily confine the exception to those circumstances, but it does demonstrate that the exceptions have not taken the teeth out of the *Camara* and *See* rulings.

B. Warrant Requirement Under Federal OSHA?

The federal program authorizes the Secretary, upon presenting appropriate credentials, to enter any workplace, to inspect and investigate that workplace, and to question privately any employer or employee.[292] This authority is subject to a reasonable time and manner test.[293] There is, however, no provision making refusal to permit

288. 413 U.S. 266 (1973).
289. *Id.* at 267-68.
290. 413 U.S. at 271.
291. *Id.* at 270, 271-72.
292. 29 U.S.C. § 657(a) (1970).
293. *Id.*

inspection a crime.[294]

In 1971, the Secretary of Labor promulgated a regulation which provided that, if an employer refuses to permit entry into a workplace or any area therein by a Compliance Safety and Health Officer, that officer must terminate the inspection or confine it to the areas in which no objection is raised. He must immediately report such refusal to his superiors. The Regional Solicitor must "take appropriate action, including compulsory process, if necessary."[295] As will be seen in the two cases below, this regulation, if it provides for the obtaining of a warrant when consent to inspect is refused, is not always followed.

There have been two district court cases dealing with Federal OSHA and the fourth amendment. The first was *Brennan v. Buckeye Industries, Inc.*[296] After an Occupational Safety and Health Compliance Officer was denied entry into the business premises of Buckeye Industries, Inc., the Secretary of Labor filed an application under OSHA in the federal district court requesting an order requiring Buckeye to submit to an inspection.[297] Buckeye contended that the order should not issue because the Compliance Officer did not have a warrant for the inspection.[298]

The court ordered Buckeye to submit to an OSHA inspection,[299] holding that the entry was reasonable under the fourth amendment.[300] This conclusion was based on what the court perceived to be a developing trend in administrative search law.[301] However, the court did not examine OSHA in light of that law. It did not even outline what it considered to be the relevant questions.

The gist of the opinion is that *Camara* and *See* were " 'promptly narrowed, as, indeed, had been foreshadowed by *Camara* and *See*

294. Assuming that warrantless entries are authorized by the statute, and that they are constitutional, under the terms of *Biswell*, an employer who acquiesces in a warrantless entry could not later successfully challenge the absence of a warrant (there would be no issue of consent). *See* note 282 *supra* and accompanying text.

295. 29 C.F.R. § 1903.4 (1975).

296. 374 F. Supp. 1350 (S.D. Ga. 1974).

297. *Id.* at 1351. The opinion does not indicate whether the Secretary applied for an order under any specific provision of OSHA. It is noteworthy that the Secretary did not just force a warrantless entry, nor did he attempt to get a warrant as "compulsory process" under the regulation. See note 294 *supra.*

298. 374 F. Supp. at 1352.

299. *Id.* at 1356.

300. *Id.* at 1354.

301. "Buckeye Industries is, constitutionally speaking, marching to the beat of an antique drum." *Id.* at 1356.

themselves' " in *Colonnade*.[302] It quoted a second circuit case, *United States ex rel. Terraciano v. Montanye*[303] and another district court decision, *Youghiogheny & Ohio Coal Co. v. Morton*,[304] in support of its conclusion that *Camara* and *See* have been increasingly subjected to exceptions as set forth in *Colonnade* and *Biswell*.

It is nevertheless possible to infer the factors that the court considered by examining the language which it quoted from other cases. It apparently thought that OSHA furthers a significant governmental interest,[305] one which outweighs any right to privacy which an employer might have.[306] Unannounced inspections are essential to the regulatory scheme.[307] Since the powers are limited by the statute,[308] a warrant would not give any more protection than an employer is already afforded: it would simply "track the statute."[309] Finally, either the court does not question the Congress' formation of the definition of reasonableness, or it affirmatively approves of it.[310]

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302. 374 F. Supp. at 1355, *quoting* United States *ex rel.* Terraciano v. Montanye, 493 F.2d 682, 684 (2d Cir. 1974).

303. 493 F.2d 682 (2d Cir. 1974).

304. 364 F. Supp. 45 (S.D. Ohio 1973).

305. The court identified that interest by quoting section 651(b) of Title 29 of the United States Code: " 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . .' " 374 F. Supp. 1352 n.4. The magnitude of that interest is inferrable from the quotation from *Youghiogheny* relating to the government interest in regulating health and safety for coal miners. *Id.* at 1356.

306. The court quoted the language from *Biswell* regarding the balancing of an " 'urgent federal interest' " with the " 'possibilities of abuse and the threat to privacy.' " 374 F. Supp. at 1355.

307. The court referred to the provision in OSHA prohibiting advance notice of inspections (29 U.S.C. § 651(b)(10)), 374 F. Supp. at 1352, and quoted *Yougiogheny* on the " 'comprehensive statutory scheme which depends, for its successful implementation, upon frequent, unannounced inspections.' " *Id.* at 1356.

308. The court listed the requirements of "reasonableness" in section 657(a). 374 F. Supp. at 1354. The opinion also concludes the act clearly confines inspections to searches connected with the objects of the legislation. *Id.* at 1354 n.7.

309. *Id.* at 1356, *quoting* United States *ex rel.* Terraciano v. Montanye, 493 F.2d 682, 685 (2d Cir. 1974).

310. *Buckeye* indicated this by a quotation from *Youghiogheny*. 374 F. Supp. at 1356. *Youghiogheny* pointed out that Congress had substituted a legislative pronouncement of reasonableness for a case by case judicial determination. 364 F. Supp. at 50. It concluded:

> [i]n the Fourth Amendment area, where the essence of the right hinges on a concept of reasonableness, the Congressional definition is entitled to great weight. In the case at bar, as we conclude there was some basis, both in fact and in law, for Congress' approach, we refuse to second guess its determination.

Id. at 52. The *Youghiogheny* court added a footnote indicating that its acquiescence in the Congressional definition was in the context of an inherently dangerous business, and that it might not come to the same result in different circumstances. *Id.* at 52 n.7.

The only other judicial pronouncement on the relationship between OSHA and the fourth amendment is *Brennan v. Gibson's Products, Inc.*[311] In that case, OSHA Compliance Officers attempted to make a routine inspection of the nonpublic portions of Gibson's, a retail store. Gibson's refused to permit this. The Secretary did not seek a warrant, but, as in *Buckeye*, sought a court order compelling Gibson's to submit to the inspection.[312]

The district court in Texas approached the issue from a viewpoint opposite to that of *Buckeye*. Instead of concentrating on *Colonnade* and *Biswell* as restricting the holdings of *Camara* and *See*, this court emphasized the fact that more recent Supreme Court cases have reaffirmed the basic requirement of a warrant in administrative searches. Thus, it cited *Almeida-Sanchez v. United States*[313] and *Air Pollution Variance Board v. Western Alfalfa Corp.*,[314] in which the Court referred to *Camara* and *See* with continued approval.[315] From *Western Alfalfa* and *Almeida-Sanchez*,

> we deduce that broad and indiscriminate inroads on fourth amendment safeguards, wrought in the name of administrative expedience and weighty governmental interests, are to be viewed with no greater favor now than at the time of *See* and *Camara*. However, where the inroad is narrow, supported by specific and clear Congressional findings, and the object or practice to be regulated is inherently dangerous and (perhaps or) traditionally regulated . . . it is more likely to be tolerated.[316]

Applying that view of the law to OSHA, the court was convinced that, facially, the inspection provisions of OSHA are tantamount to a broad partial repeal of the fourth amendment.[317] The opinion notes that OSHA's sweep is extremely broad, since is covers every private concern engaged in business affecting commerce that has employees.[318] Congress identified the governmental interest behind this regime, moreover, in a general statement that interstate commerce is substantially burdened by work injuries and illnesses.[319]

The particular business in the case was not licensed and did not have a history of close regulation. Furthermore, the inspectors were exercis-

311. 407 F. Supp. 154 (E.D. Tex. 1976).
312. *Id.* at 155-56.
313. 413 U.S. 266 (1973).
314. 416 U.S. 861 (1974).
315. 413 U.S. at 270; 416 U.S. at 864.
316. 407 F. Supp. at 161.
317. *Id.* at 157.
318. *Id.* at 161.
319. *Id.*

ing "unfettered discretion" because there was no showing of probable cause that hazardous conditions existed in the place to be searched.[320] The court did not declare the inspection provision unconstitutional, however. It merely construed it as not authorizing warrantless searches.[321]

This decision comes to an opposite result from *Buckeye*, based on a different interpretation of the current status of administrative search law. Should the same issue arise with respect to CAL/OSHA, a California court would do well to make an independent evaluation of the Supreme Court decisions in light of California's own law.

C. *California Administrative Searches: Statutory and Case Law*

Soon after the *Camara* and *See* decisions, the California legislature added Title 13 to the Code of Civil Procedure, relating to inspection warrants.[322] Section 1822.51 provides that an inspection warrant shall be issued only upon cause, which, under section 1822.52, exists if reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to a particular place, or if there is reason to believe that a condition of nonconformity exists in a particular place.[323] Inspections pursuant to such a warrant must be made between 8:00 a.m. and 6:00 p.m., and unless specifically authorized by a judge, may not be made in the absence of an owner.[324] Force may not be used to execute the warrant unless the judge authorizes it because there is a reasonable suspicion that a violation of state law or regulations would be an immediate threat to health or safety.[325] Consent should be sought before obtaining a warrant;[326] when it is

320. *Id.* at 162. The court suggested that if Congress had made a specific finding that such conditions exist in most workplaces, that "might throw a different light on the subject." *Id.* at 162.

321. *Id.* at 162-63.

322. Law of Aug. 8, 1968, ch. 1097, [1968] Cal. Stat. 2105 (codified at CAL. CODE CIV. PRO. §§ 1822.50-.57 (West 1972)).

323. CAL. CODE CIV. PRO. §§ 1822.51, .52 (West 1972).

324. *Id.* § 1822.56.

325. *Id.*

326. *See id.* § 1822.51. The *Camara* Court said that, as a practical matter and in light of the fourth amendment requirement that a warrant specify the property to be searched, it seems likely that "warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry." 387 U.S. at 539-40.

See also considered this issue, in a footnote:

> We do not decide whether warrants to inspect business premises may be issued only after access is refused; since surprise may often by a crucial aspect of routine in-

refused, notice that a warrant has been issued must be given at least twenty-four hours before the warrant is executed, except where the judge finds that immediate execution is reasonaby necessary.[327] Wilful refusal to permit an inspection by warrant is a misdemeanor.[328]

Though the issue has not reached the California Supreme Court, the appellate cases are clear: where there is a possibility that a criminal charge may result from an administrative inspection, a statute which purports to authorize a warrantless entry is unconstitutional under the fourth amendment. In *Tellis v. Municipal Court*,[329] a county ordinance allowed a health officer to inspect vessels " 'when he has reasonable cause to believe that the vessel is occupied in violation' " of the ordinance.[330] The court held that the statute was not an attempt to authorize warrantless searches, adding that such a provision would be unconstitutional under *Camara*.[331] At any rate, it was subject to the "overriding mandate" of the Code of Civil Procedure, which requires warrants for administrative searches.[332]

Similarly, *Vidaurri v. Superior Court*[333] involved a warrantless inspection by an agent from the Agriculture Department. The statute authorizing his entry provided that " 'the commissioner, whenever necessary, may enter and make an inspection of any premises, plant . . . or thing in his jurisdiction.' "[334] The court held that the statute would be unconstitutional if it were not subject to the "overriding mandate" of the Code of Civil Procedure, citing *Camara* and *Tellis*.[335]

Finally, in *Currier v. City of Pasadena*,[336] there was a city ordinance which authorized warrantless searches of residences.[337] The important

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spections of business establishments, the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes.

387 U.S. at 545 n.6.

327. CAL. CODE CIV. PRO. § 1822.56 (West 1972).

328. *Id.* § 1822.57.

329. 5 Cal. App. 3d 455, 85 Cal. Rptr. 459 (1970).

330. *Id.* at 458, 85 Cal. Rptr. at 460.

331. *Id.*

332. *Id.*

333. 13 Cal. App. 3d 550, 91 Cal. Rptr. 704 (1970).

334. CAL. AGRIC. CODE ANN. § 5023 (West 1970) *cited in* 13 Cal App. 3d at 553.

335. 13 Cal. App. 3d at 553, 91 Cal. Rptr. at 706.

336. 48 Cal. App. 3d 810, 121 Cal. Rptr. 913 (1975).

337. The ordinance provided that a vacated housing unit could not be re-occupied until a certificate of occupancy had been issued. *Id.* at 813, 121 Cal. Rptr. at 914-15. The owner had to file an application for the Certificate, and then the "Administrator shall cause an inspection of the unit to be made for compliance with the City's Housing Code." *Id.* at 813 n.4, 121 Cal. Rptr. at 915 n.4.

factor was that there was a possibility of criminal prosecution under the ordinance.

> [T]he searches herein involved are, like the typical police search, conducted in order to secure evidence of criminal violations. That the city represents that it would not resort to that procedure is immaterial. *The ordinance must be judged by what could happen under it.*[338]

The court quoted the language of the ordinance in *Camara*, which was even more restrictive of the right to inspect ("at reasonable times").[339] Pointing out that the Supreme Court had declared that language unconstitutional,[340] *Currier* held that the Pasadena ordinance could not be constitutionally enforced, unless read together with the Code of Civil Procedure.[341] It noted that the warrant requirements authorized not only "the so-called 'area' searches," but also the " 'routine' inspections based on reasonable standards. We conclude it is that portion of the statute which is material here."[342]

The state courts have recognized an exception to the warrant requirement for administrative searches in the cases of licensing programs. *People v. White*[343] involved a criminal prosecution for violation of the California Administrative Code based on evidence obtained in a warrantless routine inspection of a hospital by the Health Department. *Camara* and *See* had come down the previous year, but *Colonnade* and *Biswell* were to come later. The court referred to the language in *See* which allowed inspections "prior" to operating a business in licensing programs. Refusing to accept that as the literal rule, *White* pointed out that California and the lower federal court decisions had established that warrantless searches and seizures under licensing statutes which require inspections as part of the regulatory scheme are permissible on the theory that accepting the license is the equivalent of implied consent.

Subsequent to *Colonnade* but before *Biswell*, a California court

338. 48 Cal. App. 3d at 815, 121 Cal. Rptr. at 916 (emphasis added).

339. *Id.* at 815-16, 121 Cal. Rptr. at 916-17.

340. Actually, the Supreme Court did not render such a specific holding. It said only that there could be no prosecution under the ordinance for exercising fourth amendment rights and remanded to the California courts for further proceedings consistent with the opinion. This infers that the ordinance was unconstitutional as applied, but not necessarily on its face. Thus, the state court was not foreclosed from construing the ordinance in a manner consistent with the Constitution, reading into it the requirement of a warrant. This is, in fact, how *Currier* handled this particular ordinance.

341. 48 Cal. App. 3d at 815, 816-17, 121 Cal. Rptr. at 916-17.

342. *Id.* at 817, 121 Cal. Rptr. at 918.

343. 259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923 (1968).

upheld a warrantless investigation as part of a licensing program in *People v. Grey*.[344] There, the California Highway Patrol inspected an automobile at a place of business under a Vehicle Code section which said they "may inspect" automobiles in repair shops and used car lots. The purpose of such inspections was to locate stolen vehicles. The court distinguished the inspection statutes in *Camara* and *See* as allowing searches of all residences and all businesses, whether or not they involved a specific public danger. In the instant situation, however, there was a licensing program of business "fraught with danger."[345]

Finally, there was dictum in *Currier* regarding the "exceptions" to the warrant requirement. The court held that no exception applied to the inspection under consideration because the cases which allowed warrantless searches concerned licensed businesses that had a high risk of illegal conduct or serious danger to the public, citing *Colonnade, Biswell, Terraciano, Grey,* and *White.*

California law appears to hold that an administrative inspection statute that contemplates the possibility of a criminal prosecution must be read together with the Code of Civil Procedure sections on inspection warrants. Otherwise, it would be unconstitutional. There is an exception for licensing programs, which may be limited to inspections of businesses which have a high risk of illegal conduct or serious danger to the public.

D. How Does CAL/OSHA Fit In?

It is important to note at the outset that the statute provides for a "Bureau of Investigations" which seems to be responsible for investigating and enforcing the criminal penalties. If there were a total and distinct division between its actions and those of the Division of Industrial Safety generally (which would enforce the "civil" penalties only), a discussion of the administrative warrant requirement would be limited to the Bureau. However, under a statute, at least, there is a possibility that representatives of the Division who are not part of the Bureau could uncover evidence that would lead them to request that criminal penalties be imposed.[346] Thus, under *Currier,* all CAL/OSHA inspec-

344. 23 Cal. App. 3d 456, 100 Cal. Rptr. 245 (1972).

345. *Id.* at 461, 100 Cal. Rptr. at 249.

346. The Division of Industrial Safety is specifically responsible for the "investigation" of complaints under section 6309 (*see* notes 186-87 *supra* and accompanying text), and for the "investigation" of certain accidents (which may be termed "mandatory" accident investigations) under section 6313(a) (*see* notes 193-95 *supra* and accompanying text). The Division may, but need not, "investigate" certain other accidents (which

tion activities carry the possibility of criminal prosecution, and therefore the entire enforcement program must be examined in light of the administrative warrant requirement.

Section 6314 provides, in part:

> (a) To make an investigation or inspection, the chief of the division and all employees authorized by him shall, upon presenting appropriate credentials to the employer, have *free access to any place of employment.* Any person who obstructs or hampers such an investigation or inspection which is authorized by the division, is guilty of a misdemeanor.
>
> (b) Any employer or authorized representative, who *upon demand* by the division *neglects or refuses to furnish* statistics, information or any physical materials in his possession or under his control, which is

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may be termed "discretionary" accident investigations) under section 6313(b) (*see* notes 194-95 *supra* and accompanying text). The Division policy for the priority of assigning its manpower ranks the types of inspections/investigations. "Discretionary" accident investigations are not included in this list. STATE OF CALIFORNIA, AGRICULTURE AND SERVICES AGENCY, DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL SAFETY, OPERATIONS 5.

The Bureau of Investigations within the Division (*see* notes 196-98 *supra* and accompanying text) has two responsibilities. First, it must direct the investigation of accidents in which there is a serious injury to five or more employees, or death. CAL. LABOR CODE ANN. § 6315 (West 1971). This corresponds to the "mandatory" accident investigations under section 6313(a). Whereas section 6313(a) requires investigations of all accidents which are "fatal to one or more employees or which [result] in a serious injury . . . to five or more employees," (CAL. LABOR CODE ANN. § 6313(a) (West Supp. 1975)), section 6315 directs the Bureau of Investigations to investigate accidents in those same circumstances when they involve "violations of standards, orders, or special orders." *Id.* § 6315. It is conceivable, therefore, that the Division, but not specifically the Bureau, would perform those mandatory accident investigations which do not involve specific violations of standards or orders. If the Division requested prosecution, however, the Bureau would have to make an investigation anyway, because it is responsible for those accident investigations in which there is a request for prosecution by a Division representative. *Id.* § 6315. Thus, its accident investigations are not limited to "mandatory" circumstances. The result is that the Bureau must make any investigation that could result in a criminal prosecution under section 6425. *See* note 169 *supra* and accompanying text.

Second, the Bureau must prepare cases for prosecution, including evidence and findings. CAL. LABOR CODE ANN. § 6425 (West Supp. 1975).

Therefore, under the statute, at least, for investigations pursuant to complaint, discretionary accident investigations in which there is no request for prosecution, and routine inspections, the Division, and not the Bureau, would send its representatives into the workplace. For mandatory accident investigations or other accident investigations in which prosecution is requested, the Bureau would send its representative into the workplace. In any case where there may be criminal prosecution, however, the Bureau prepares the report. The problem is that prosecution may be requested after the Division inspector enters the workplace, so that even if the Bureau makes a subsequent investigation and prepares the evidence, the original information leading to the prosecution was obtained through a Division inspector or investigator.

directly related to the purpose of the investigation or inspection, or who *refuses to admit* the chief or his authorized representatives engaged in the performance of their duties to a place of employment is *guilty of a misdemeanor.*

(c) The chief and his authorized representatives may issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, and physical materials, administer oaths, examine witnesses under oath, take verification or proof of written materials, and take depositions and affidavits for the purpose of carrying out the duties of the division.[347]

Specific grants of authority are contained in subdivisions (a) and (c). Subdivision (b) implies the right to demand statistics, information, and physical materials during an inspection.

Section 6315 provides, in part:

There shall be within the division a Bureau of Investigations. The bureau shall be responsible for directing accident investigations involving violations of standards, orders, or special orders in which there is a serious injury to five or more employees, death, or request for prosecution by a division representative, and for preparing cases for prosecution, including evidence . . . and findings.

. . . .

(c) The supervisor of the bureau and such investigators as are designated by him shall have *a right of access* to all places of employment necessary to the investigation, *may collect any evidence or samples* they deem necessary to an investigation, and shall have *all of the powers enumerated in Section 6314.*

. . . .

(e) In any case where the bureau is required to conduct an investigation and in which there is a serious injury or death, the results of the investigation shall be referred by the bureau to the city attorney or district attorney having jurisdiction for appropriate action.[348]

The "right of access" and the right to "collect any evidence or samples" seems to be a general grant of power necessary for the operation of any inspecting body. They would not, then, limit the powers conferred on the Bureau by section 6314.

The policy of the Division regarding routine inspections by "Compliance Safety Engineers" is set forth in an official pamphlet.[349] Inspec-

347. CAL. LABOR CODE ANN. §§ 6314(a), (b), (c) (West Supp. 1975) (emphasis added).

348. *Id.* §§ 6315(c), (e) (emphasis added).

349. STATE OF CALIFORNIA, AGRICULTURE AND SERVICES AGENCY, DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL SAFETY, OPERATIONS 7-12.

tions are made during regular working hours. In special circumstances, however, entry may be made at other than daytime working hours upon the approval of the District Manager. The Compliance Safety Engineer may enter "without delay and at reasonable times," and will present his credentials and explain the nature and purpose of his visit.[350] A significant statement of policy is as follows:

> In cases where a Compliance Safety Engineer encounters a refusal to permit entry, he will contact his District Manager and discuss appropriate steps to gain access, such as having the company of a police officer *or* obtaining an inspection warrant.[351]

The pamphlet does not contain a description of the Bureau of Investigation procedures for entry to a workplace. The policy of obtaining a warrant, standing alone, would not save the statute from facial unconstitutionality. Under *Currier*, what is significant is that criminal prosecution pursuant to a warrantless entry is possible under the statute.

The grant of "free access" appears to be a deliberate attempt to override the requirements of *Camara* and *See* and the Code of Civil Procedure. *Vidaurri* pointed out the insufficiency of the language "whenever necessary, may enter." *Tellis* suggested that the language "when he has reasonable cause to believe" is independently constitutional without reading it in conjunction with the Code of Civil Procedure, but rested its conclusion on the overriding effect of those warrant sections. OSHA itself emphasizes the requirement of "reasonableness" in inspections. Nevertheless, the Appeals Board has held that a warrantless entry by Division representatives in spite of a "no trespassing" sign was proper because of sections 6313 and 6314.[352]

Under the California cases, this language would be unconstitutional unless it were read together with the inspection warrant section of the Code of Civil Procedure. While it undoubtedly is enforced as to certain businesses which threaten serious danger to the public, it allows searches of all businesses, not just those "dangerous" ones referred to in *Grey* and *Currier*. Most significantly, however, CAL/OSHA is not a licensing program.

A California court examining the possibility of extending the "licensing" exception to include CAL/OSHA would do well to analyze federal law. The "*Biswell* exception," taken together with *Buckeye*

350. *Id.* at 8.

351. *Id.* (emphasis added). The "or" may not necessarily signify that the Division will make forcible warrantless entries. It may merely account for emergency situations.

352. Pacific Corp., CAL-OSHA REP., Cal-OSHA Digest ¶ 10,118 (Aug. 26, 1974).

and *Youghiogheny* (the latter construed the Federal Coal Mine Health & Safety Act) provide fertile ground for analysis.

There are three basic requirements for a forcible warrantless search under *Biswell*. The first is that it be authorized by statute. CAL/OSHA has a misdemeanor provision for refusal to permit entry. If it was a federal statute, such language would preclude warrantless entries without consent under *Colonnade*. Assuming it does not, however, the second requirement is that unannounced searches be essential to the regulatory scheme. This may not be difficult for the government to prove.

Finally, the search must meet the test of "reasonableness." In *Biswell*, that involved balancing an "urgent" federal interest with the possibility of abuse and the threat to individual privacy. California may have an "urgent" state interest in protecting the safety and health of workers. Attention must then be focused on the possibility of abuse and the threat to individual privacy. This is inextricably intertwined with the "licensing" idea.

Referring to statutory limitations on inspectors' authority, *Buckeye* indicated that a warrant would give the individual no more protection than he already had; it would "track the statute." Thus, the danger of abuse by inspectors was already eliminated by Congressional pronouncement. Similarly, *Youghiogheny*, upholding the Mine Safety Act, saw small danger of abuse because the businessmen were in fact familiar with the law and knew the limits of inspectors' powers.

Both of these cases are concerned with the danger of abuse in the extent of a search. They overlook, however, the initial danger inherent in the power to choose "who" to search, and "how often" to search. This is where the "licensing" requirement is pertinent. Licensing statutes involve a limited group of businesses which choose to participate in the regulated activity. They have little expectation of privacy in such activity, and therefore impliedly consent to whatever inspections are necessary in furtherance of that regulation. Furthermore, since licensing programs apply to select industries, the question of "who" must be searched is likely to be obviated by statute, as is the question of "how often."

Youghiogheny concerned a regulated industry and a statute that prescribed the subjects and frequency of searches. Thus, the danger of abuse and threat to privacy are minimal. Under CAL/OSHA (and OSHA), however, employers are not "licensed" to employ. Many are not "regulated" with respect to the particular nature of their businesses,

and thus cannot be said to impliedly consent to inspections that are part of a governmental program. Their expectations of privacy may well be reasonable. More importantly, however, there is danger that particular employers could be "harassed" because other employers or classes of employers are not searched, or are not searched as often.[353]

Therefore, if lack of "licensing" itself does not prohibit forcible warrantless entries under CAL/OSHA, even an "urgent" state interest may not outweigh the danger of abuse and the threat to privacy. Consequently, the "probable cause" requirement as set forth in *Camara* and the inspection warrant sections of the Code of Civil Procedure should be applied to CAL/OSHA. If a particular class of businesses is chosen on a reasonable basis (such as according to the degree of danger of working conditions, or perhaps according to the number of persons employed), and defined in a reasonable manner, and a particular place of employment fits into that category, then probable cause to search that place would exist. Without this safeguard, however, there is danger that individual rights would be subject to the "discretion of the official in the field." Requiring the state plan to be constitutionally enforced would not pose as great a threat to state independence as would a declaration of facial unconstitutionality.[354]

For certain investigations under CAL/OSHA, perhaps an "emergency" exception would apply. *Camara* referred to such an exception,[355] the inspection warrant sections provide for special circumstances, and California cases use similar reasoning for airport searches, where the obtaining of a warrant would cause unreasonable delay.[356]

There are many other possible problems in the enforcement procedures of CAL/OSHA. Though a detailed analysis is beyond the scope of this Comment, at least two questions may be raised. Despite the technical absence of a custodial situation, should not *Miranda*

353. Perhaps an administrative policy designed to eliminate this problem could take the place of a legislative definition of reasonableness (as discussed in *Youghiogheny* (see note 310 *supra* and accompanying text)). The discretion is still left with the executive branch, however. The court did not want to second guess the Congressional definition of reasonableness in *Youghiogheny*. It is a large step, however, from Congressional findings in a regulatory program to administrative policy in a non-"regulatory" program that covers virtually all businesses.

354. A bill was introduced in the legislature which would have specifically required an inspection warrant. It died. A.B. 4179 (1973-74 Sess.).

355. 387 U.S. at 539.

356. *See, e.g.*, People v. Hyde, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974); People v. Goodyear, 54 Cal. App. 3d 157, 126 Cal. Rptr. 368 (1974); People v. Kluga, 32 Cal. App. 3d 409, 108 Cal. Rptr. 160 (1973).

warnings be given employers who are being investigated pursuant to a request for prosecution? Or, should the exclusionary rule apply to the Appeals Board hearings where a forcible warrantless entry is made, the statute has been declared constitutional only in conjunction with the Code of Civil Procedure warrant sections, and there is no prosecution in fact?[357] These and many more questions remain to be answered. Continued attention to the disposition of similar issues at the federal level will be at least persuasive, if not mandatory.

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357. This assumes that the Appeals Board hearings impose "civil" penalties, as the statute defines them. Of course, should the Supreme Court determine that the "civil" penalties under OSHA are in fact "criminal," it would seem that the exclusionary rule would have to apply.