



Memorandum

To: Christina Shupe, Executive Officer
Occupational Safety and Health Standards Board

Date: April 08, 2019

From: Eric Berg, Deputy Chief *Eric Berg*
Research and Standards Unit
Division of Occupational Safety and Health

Subject: Evaluation of Petition No. 572 to amend title 8 section 3203

1.0 INTRODUCTION AND BACKGROUND

On December 3, 2018, the Division of Occupational Safety and Health (Cal/OSHA) received a petition from Ms. Pamela Murcell, President of the California Industrial Hygiene Council (petitioner), to amend five subsections of title 8, General Industry Safety Orders, section 3203, Injury and Illness Prevention Program (IIPP). These recommend changes, if adopted, would also be incorporated by reference into the Construction Safety Orders, section 1509, IIPP.

Labor Code section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health, and requires the Occupational Safety and Health Standards Board (Standards Board) to consider such proposals and render a decision no later than six months following receipt.

California Labor Code section 147 requires the Standards Board to refer to Cal/OSHA for evaluation any proposed occupational safety and health standard. Cal/OSHA is required to submit a report on the proposal within 60 days of receipt

2.0 PETITIONER'S REQUEST TO AMEND SUBSECTIONS 3203(a) AND (c)

The petitioner requests the following changes and additions to section 3203:

1. Define "*effective*" for the phrase "*...every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program...*" in subsection 3203(a).
2. Require the person with authority and responsibility for implementing the IIPP (subsection 3203(a)(1)) to be a "*competent person*."
3. Require the person(s) responsible for identifying and evaluating hazards (subsection 3203(a)(4)) and investigating occupational injury or illness (subsection 3203(a)(5)) to be a "*qualified person*."
4. Require a labor/management safety committee for employers with more than 20 employees (labor/management safety committees are currently optional for all employers in subsection 3203(c)).

3.0 PROPOSED AMENDMENTS TO SECTION 3203

Below, in underline format, is the regulatory language recommended by the petitioner to require a competent person to administer the IIPP. The petitioner did not provide specific language for their other recommended changes.

Subchapter 7. General Industry Safety Orders
Introduction

§3203. Injury and Illness Prevention Program.

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(a)(1) Identify the person or persons with authority and responsibility for implementing the Program. The employer shall appoint a competent person to administer their health and safety duties. A competent person is someone with the necessary skills, knowledge and experience to manage health and safety, recognize the hazards and risks in operational activities, and assure availability of the correct measures to control and manage those hazards and risks.

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4.0 APPLICABLE TITLE 8 REGULATIONS

In addition to the IIPP regulations, sections 3203 and 1509, the definitions of qualified person and competent person in sections 3207 and 1504 are relevant to the petition.

Subchapter 7. General Industry Safety Orders
Introduction

§3203. Injury and Illness Prevention Program.

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(1) Identify the person or persons with authority and responsibility for implementing the Program.

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(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(5) Include a procedure to investigate occupational injury or occupational illness.

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(c) Employers who elect to use a labor/management safety and health committee to comply with the communication requirements of subsection (a)(3) of this section shall be presumed to be in substantial compliance with subsection (a)(3) if the committee:

- (1) Meets regularly, but not less than quarterly;
- (2) Prepares and makes available to the affected employees, written records of the safety and health issues discussed at the committee meetings and, maintained for review by the Division upon request. The committee meeting records shall be maintained for at least one (1) year;
- (3) Reviews results of the periodic, scheduled worksite inspections;
- (4) Reviews investigations of occupational accidents and causes of incidents resulting in occupational injury, occupational illness, or exposure to hazardous substances and, where appropriate, submits suggestions to management for the prevention of future incidents;
- (5) Reviews investigations of alleged hazardous conditions brought to the attention of any committee member. When determined necessary by the committee, the committee may conduct its own inspection and investigation to assist in remedial solutions;
- (6) Submits recommendations to assist in the evaluation of employee safety suggestions; and
- (7) Upon request from the Division, verifies abatement action taken by the employer to abate citations issued by the Division.

Subchapter 4. Construction Safety Orders
 Article 3. General
 §1509. Injury and Illness Prevention Program.

(a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

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Subchapter 7. General Industry Safety Orders
 Group 1. General Physical Conditions and Structures
 Article 1. Definitions
 §3207. Definitions.

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Competent Person. One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

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Qualified Person, Attendant or Operator. A person designated by the employer who by reason of his training and experience has demonstrated his ability to safely perform his duties and, where required, is properly licensed in accordance with federal, state, or local laws and regulations.

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Subchapter 4. Construction Safety Orders
 Article 2. Definitions
 §1504. Definitions.

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Competent Person. One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

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Qualified Person, Attendant or Operator. A person designated by the employer who by reason of training, experience or instruction has demonstrated the ability to safely perform all assigned duties and, when required, is properly licensed in accordance with federal, state, or local laws and regulations.

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5.0 APPLICABLE FEDERAL OSHA REGULATIONS

Federal OSHA does not have any regulation comparable or similar to the IIPP regulations in title 8. The definitions of competent and qualified persons in the federal OSHA electrical and construction regulations are similar to the definitions in title 8.

Title 29 Code of Federal Regulations
1910 Occupational Safety and Health Standards
Subpart S Electrical
1910.399 Definitions applicable to this subpart.

Competent Person. One who is capable of identifying existing and predictable hazards in the surroundings or working conditions that are unsanitary, hazardous, or dangerous to employees and who has authorization to take prompt corrective measures to eliminate them.

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Qualified person. One who has received training in and has demonstrated skills and knowledge in the construction and operation of electric equipment and installations and the hazards involved.

Title 29 Code of Federal Regulations
1926 Safety and Health Regulations for Construction
Subpart C General Safety and Health Provisions
1926.32 Definitions

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1926.32(f) "Competent person" means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

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1926.32(m) "Qualified" means one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project.

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6.0 APPLICABLE CONSENSUS STANDARDS

6.1 ANSI/AIHA Z10-2012 Occupational Health and Safety Management Systems

The American National Standards Institute and the American Industrial Hygiene Association publish the ANSI/AIHA standard Z10-2012, *Occupational Health and Safety Management Systems*. The purpose of the standard is to provide guidance on continual improvement of occupational safety and health programs and on methods to minimize risks and reduce workplace incidents.

ANSI/AIHA Z10-2012 contains elements similar to those in section 3203, but contains more details on specific methods to develop, implement, and maintain an occupational safety and health program.

The standard also contains information relevant to the petition on the meaning of an effective program and qualifications of persons responsible for implementing occupational safety and health programs.

6.1.1 An Effective Occupational Safety and Health Program in ANSI/AIHA Z10-2012

ANSI/AIHA Z10-2012 does not define effective. However, the standard explains that for an occupational safety and health program to be effective, it must:

- Have leadership and participation by top level management. Visible leadership by management sets the tone for the entire organization which is much more effective than if driven by the health and safety staff.
- Have participation by employees at all levels including those working closest to the hazards in activities such as incident investigations, procedure development, health and safety audits, training development, job safety analysis, use of occupational risk management processes, etc. Employees who are performing the work tasks can contribute valuable insight from the hands-on perspective.
- Make safety improvements through a design process that involves employees rather than to attempt to improve safety through efforts to correct human error.
- Raise employee awareness of safety and health through training, communication, and active participation.
- Define safety and health roles, responsibilities, accountability, and authority.
- Integrate safety and health programs into an organization's other business systems and processes.
- Provide for organization readiness to plan, promote, and support successful implementation of a large-scale changes.
- Document steps taken to implement the program.

ANSI/AIHA Z10-2012 also provides information on how to measure the effectiveness of an occupational safety and health program through

- average exposure levels,

- the rate and timeliness of completion of corrective actions,
- timeliness of completion of required maintenance, and
- completion of required training.

6.1.2 Requirements for a competent person in ANSI/AIHA Z10-2012

ANSI/AIHA Z10-2012 section 5.2 requires organizations to define and assess the competence needed for employees and contractors and ensure that employees and contractors are competent to carry out their responsibilities as defined in safety and health programs.

ANSI/AIHA Z10-2012 section 6.3 requires audits to determine if safety and health programs have been established, implemented, and maintained in conformance with the standard. The standard requires such audits to be conducted by competent persons who are independent of the activity being audited.

ANSI/AIHA Z10-2012 does not define the term competent, competent person, or refer to any regulatory language, so it is assumed the common meaning of competent is intended rather than the regulatory definition found in title 8 or federal OSHA regulations. The common meaning of competent¹ is “*having the necessary ability, knowledge, or skill to do something successfully.*”

6.1.3 Requirements for a qualified person in ANSI/AIHA Z10-2012

ANSI/AIHA Z10-2012 does not use the term “qualified” or “qualified person.”

6.1.4 Requirements for labor/management safety committees in ANSI/AIHA Z10-2012

ANSI/AIHA Z10-2012 emphasizes that employee participation is critical to a successful safety and health program. The standard does not require or recommend safety committees, but states they are a common mechanism for employee participation.

6.2 Occupational Health and Safety Assessment Series (OHSAS) 18001-2007. Occupational Health and Safety Management Systems – Requirements

The Occupational Health and Safety Assessment Series, OHSAS 18001:2007, *Occupational Health and Safety Management Systems – Requirements*, is published by the British Standards Institution, the national standards body of the United Kingdom.

The purpose of OHSAS 18001:2007 is to aid organizations in establishing, maintaining, implementing, and continually improving their safety and health programs to eliminate or minimize risks to employees. OHSAS 18001:2007 contains elements similar to ANSI/AIHA Z10-2012, but it is much less detailed.

¹ From “*Oxford English Dictionary*” at <https://en.oxforddictionaries.com/definition/competent>

6.2.1 An Effective Occupational Safety and Health Program in OHSAS 18001:2007

OHSAS 18001:2007 does not define effective, but section 4.5 of the standard requires procedures to periodically monitor and measure the performance of safety and health programs. Section 4.6 of the standard also requires top management to periodically review the effectiveness of safety and health programs with general guidelines on what information and records should be included in the review.

6.2.2 Requirements for a competent person in OHSAS 18001:2007

OHSAS 18001:2007 states the following regarding competent persons:

OHSAS 18001:2007

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4.4.2 Competence, training and awareness.

The organization shall ensure that any person(s) under its control performing tasks that can impact on OH&S is (are) competent on the basis of appropriate education, training or experience, and shall retain associated records.

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Similar to ANSI/AIHA Z10-2012, there is no definition of competent or competent person and no reference to regulatory language. It is assumed the common meaning of these words is intended.

6.2.3 Requirements for a qualified person in OHSAS 18001:2007

OHSAS 18001:2007 does not use the term “qualified” or “qualified person.”

6.2.4 Requirements for labor/management safety committees in OHSAS 18001:2007

OHSAS 18001:2007 does not require or recommend the use of labor/management safety committees.

6.3 International Organization for Standardization (ISO) 45001-2018 Occupational Health and Safety Management Systems – Requirements with Guidance for Use

ISO 45001-2018, *Occupational Health and Safety Management Systems – Requirements with Guidance for Use*, is another standard which contains components similar to 3203. The purpose of ISO 45001-2018 is to provide a framework for managing occupational risks and to provide opportunities for improving workplace safety and health.

6.3.1 An Effective Occupational Safety and Health Program in ISO 45001-2018

ISO 45001-2018 defines effectiveness as follows:

ISO 45001

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3 Terms and definitions

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For the purposes of this document, the following terms and definitions apply.

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3.13 effectiveness

Extent to which planned activities are realized and planned results are achieved

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6.3.2 Requirements for a competent person in ISO 45001-2018

ISO 45001-2018 contains the following relevant to the petitioner’s request to require a competent person administer the IIPP.

ISO 45001-2018 Occupational health and safety management systems - Requirements with guidance for use

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7.0 Support

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7.2 Competence

The organization shall:

- a) determine the necessary competence of workers that affects or can affect its OH&S performance;
- b) ensure that workers are competent (including the ability to identify hazards) on the basis of appropriate education, training or experience;
- c) where applicable, take actions to acquire and maintain the necessary competence, and evaluate the effectiveness of the actions taken;
- d) retain appropriate documented information as evidence of competence.

Similar to the ANSI/AIHA and BSI standards, ISO 45001-2018 does not define competent or competent person.

6.2.3 Requirements for a qualified person in ISO 45001-2018

ISO 45001-2018 does not use the term “qualified” or “qualified person.”

6.2.4 Requirements for labor/management safety committees in ISO 45001-2018

ISO 45001-2018 states the following regarding health and safety committees

ISO 45001-2018 Occupational health and safety management systems - Requirements with guidance for use

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5.1 Leadership and commitment

Top management shall demonstrate leadership and commitment with respect to the OH&S management system by:

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- m) supporting the establishment and functioning of health and safety committees,

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7.0 PETITIONER’S BASIS FOR AMENDMENTS TO SECTION 3203

The petitioner provided little to no rationale for the changes and additions requested to section 3203.

7.1 Petitioners basis for adding a definition for “effective”

The petitioner states that a definition of effective is needed in section 3203 for the following reasons:

- The IIPP regulations (sections 3203 and 1509) were the most frequently cited title 8 sections from 2014 to 2018.
- To allow employers to know when their IIPP achieves effectiveness.

7.2 Petitioners basis for requiring the person with authority and responsibility for implementing the IIPP to be a “competent person.”

The petitioner states that having a competent person administer the IIPP is one of the basic elements of establishing an effective IIPP. The petitioner did not explain how the current regulation cannot address situations where an IIPP administrator is incapable of implementing an IIPP.

7.3 Petitioners basis for requiring the person responsible for identifying and evaluating hazards and for investigating occupational injury or illness to be a “qualified person.”

The petitioner did not provide rationale for why a qualified person is needed to identify and evaluate hazards or to investigate occupational injury or illness. The petitioner also did not explain how the current regulation cannot address situations where the persons responsible for identifying hazards, evaluating hazards, and investigating occupational injuries and illnesses are incapable of performing their tasks.

7.4 Petitioners basis for requiring a labor/management safety committee for employers with more than 20 employees).

The petitioner did not explain or provide any rationale for why labor/management safety committees should be mandatory.

8.0 ANALYSIS

8.1 A definition for “effective” is not needed

8.1.1 An “effective” IIPP consists of many components that vary between industries and employers.

There are many components needed to make an IIPP effective, such as management commitment and involvement, employee participation, good communication between management and employees, the ability of employees to raise safety and health issues without fear of reprisal, appropriate training, and well-designed policies and procedures to identify and correct hazards.

Although an effective IIPP will contain all the above components, IIPPs will vary from employer to employer, depending on the industry, the workplace hazards, the workplace culture and environment, and many other variables.

It would be nearly impossible to attempt to define “effective” to capture all the necessary elements that make an IIPP effective and at the same time capture how they vary between industries and work sites. For example, the appropriate training and identified hazards will be starkly different at an agricultural farm site than a manufacturing plant. Any attempt to define effective would inappropriately oversimplify the IIPP requirements and result in an unsafe working environment.

8.1.2 The Occupational Safety and Health Appeals Board has already defined “effective” in relation to the IIPP

There is also no need to define the term effective because the Occupational Safety and Health Appeals Board (OSHAB) has already issued decisions defining effective in relation to IIPPs and specifically section 3203. These decisions provide guidance and assist employers in determining how to comply with the regulations. The OSHAB decisions describe the bare minimum required for an IIPP to be effective.² Additionally, there are numerous decisions which analyze what “effective” means in relation to section 3203.³ Therefore, there is no need to define effective since the Appeals Board, who is tasked with resolving disputes related to title 8 and providing clear guidance to the public, has already provided guidance to employers how to ensure that their IIPP is effective.

8.1.3 A definition of “effective” in section 3203 could create inconsistency and confusion with other title 8 regulations that use the term “effective”

The term “effective” is used many times throughout title 8. Cal/OSHA is concerned that an attempt to define “effective” under the IIPP regulations would create inconsistency and cause confusion in the interpretation of other regulations that use the term. There could also be a push to either use this definition to interpret other regulations or to try to implement different definitions. This would likely lead to multiple and inconsistent definitions of the same term throughout title 8 and contrary decisions in the interpretation of the regulations.

8.1.4 A definition of “effective” would transform section 3203 from a performance standard to a prescriptive standard

The Government Code requires that agencies consider and attempt to impose performance standards rather than prescriptive standards (Government Code sections 11340.1(a), 11346.2(b)(1), and 11346.2(b)(4)(A)). Section 3203 currently is a performance standard as it provides an objective of having an effective IIPP and includes the criteria, in subsection 3203(a), to achieve this objective (Government

² The OSHAB decisions hold that, at a minimum, in order to be effective an IIPP must be in writing and contain the seven elements enumerated in section 3203(a). (See Mountain Cascade, Inc., OSHAB 01-3561, Decision After Reconsideration (“DAR”) (October 17, 2003); Robert Schultz and James A. Noll dba The Showboat Lounge, OSHAB 01-124, DAR (November 19, 2002); BHC Fremont Hospital, Inc., OSHAB 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

³ The Appeals Board has also issued decisions which provide guidance as to what is deemed an effective IIPP pursuant to section 3203. (see National Distribution Center, LP, OSHAB 12-0391, DAR (October 5, 2015) [“Training is the touchstone of any effective IIPP.”, citing Cranston Steel Structures, OSHAB 98-3268, DAR (March 26, 2002)]; Jim Blessing Contractor & Equipment Rental, OSHAB 93-2101, DAR (June 10, 1997) [Even if a safety program is thorough, it “is wholly ineffective if employees are not aware of it.”].)

Code section 11342.570; BHC Fremont Hospital, Inc., OSHAB 13-0204, Denial of Petition for Reconsideration (May 30, 2014)).

If a definition of “effective” is included in section 3203, as specified in the petition, the regulation will become a prescriptive standard because the regulation would contain the sole means of compliance with the regulation. This change is not necessary and is contrary to the goals of the government code and agencies tasked with complying with the codes.

8.1.5 A definition of “effective” would not improve occupational safety and health

Lastly, Cal/OSHA did not find any evidence indicating that a definition of effective would improve workplace safety and health or compliance with section 3203. The provisions which the petition seeks to include are mostly already contained in the requirements under subsection (a). The petition does not propose any additional requirements that are not generally already listed in the regulation.

8.2 There is insufficient evidence to support a requirement that IIPP administrators must be competent persons

Cal/OSHA agrees with the petitioner that IIPP administrators must be knowledgeable on occupational safety and health matters and be capable of managing the program.

However, section 3203, as currently written, is adequate to address situations where an IIPP administrator is incompetent. If an IIPP administrator is incompetent, the program will not be implemented successfully and will not be effective. As a result, the program will not comply with existing subsection 3203(a)(1), which requires the IIPP to be effective.

8.3 There is insufficient evidence to support a requirement that persons performing inspections and investigations must be qualified persons

Cal/OSHA agrees with the petitioner that persons responsible for identifying hazards, evaluating hazards, and investigating occupational injuries and illness must be knowledgeable on occupational safety and health matters applicable to their workplace. However, Cal/OSHA did not find evidence that such persons must necessarily be a qualified person as defined in sections 3207 and 1504.

Section 3203, as currently written, is adequate to address situations when hazard identification, hazard evaluation, and injury/illness investigations are ineffective. If an employer fails to carry out its responsibilities due to the incompetence of the staff assigned, the IIPP would not be effective and not comply with existing section 3203.

8.4 There is insufficient evidence to support a requirement that labor/management safety committees must be used by all employers with more than 20 employees

Cal/OSHA believes that for certain high hazard industries, labor/management committees can be effective measures to improve hazard awareness, improve identification and correction of hazards, and as a result, prevent injuries and illness. However, Cal/OSHA did not find evidence to support a

requirement for mandatory labor/management safety committees for all employers in all industries with more than 20 employees.

Employers should not uniformly be compelled to utilize such committees, as they will not be effective for certain businesses, such as an employer with individual or small number of employees spread out over several locations statewide. Additionally, an employer in a low-hazard industry (for example, finance and insurance) may not benefit appreciably from a labor/management safety committee.

9.0 CONCLUSION – PETITION SHOULD BE DENIED

Government Code section 11340.6 allows any interested person to petition a state agency to adopt, change, or repeal a regulation. The petition must state clearly and concisely the reason for the request. In this case, the petitioner did not clearly and concisely state the reason for its proposed changes to section 3203. Additionally, research done by Cal/OSHA did not find compelling evidence supporting the petitioner's request. As a result, Cal/OSHA recommends the petition be denied.