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**The
Trickle-
Down
Effect
of
OSHA's
At-
Will
Bathroom-
Break
Regulation**

Marc Linder

**Fānpìhuà Press
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2003**

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And Bringing Up the Rear: Cal/OSHA

The best administrative machinery in the world will break down utterly if intrusted to incompetent officials.¹

California may have the most highly developed and extensive body of labor protective legislation of any jurisdiction in the United States, and its occupational safety and health agency may issue more citations for violations of the general industry (physical) toilet standards (such as number and cleanliness of toilets) than all the other state-plan programs combined, but the state also has the country's only OSHA system that expressly, insistently, and systemically refuses to enforce workers' right to go to the bathroom when they need to do so.

The general industrial sanitation standard enforced by the California Division of Occupational Safety and Health (Cal/OSHA) differs structurally somewhat from the Federal standard, retaining some of the protective language of the American National Standards Institute standard that Federal OSHA deleted in the 1970s, such as the mandatory provision of toilet paper.² The Federal OSHA Memorandum was an interpretation of section 1910.141(c)(1)(i), which states that a certain number of toilets "shall be provided" for a certain number of employees. Section 3364(a) of California's General Industry Safety Orders also contains such a provision,³ but it is followed by section 3364(b), which declares: "Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times."⁴

When the California Occupational Safety and Health Standards Board issued

¹"Report of the Standing Committee on Legal Aid Work, Appendix A: First Draft: Of a Model Statute for Facilitating Enforcement of Wage Claims," *Report of the Fiftieth Annual Meeting of the American Bar Association* 323-25 at 332 (1927).

²See above ch. 4 and below Appendix I.

³Cal. Code of Reg. tit. 8, sect. 3364(a) (2002).

⁴Cal. Code of Reg. tit. 8, sect. 3364(b).

this standard in 1975,⁵ it expanded workers' bathroom rights. The previous version, issued by the Division of Industrial Safety in 1972, contained no such language, stating merely that "[e]very place of employment shall be provided with a sufficient number of conveniently located water closets for the use of employees."⁶ In addition, as far back as 1889, the California legislature had mandated that all workplaces be "provided, within reasonable access, with a sufficient number of water-closets...for the use of the employees"—a provision formally still in force.⁷

Some light is shed on the meaning of the change in terminology introduced in 1975 by the public hearing that the Occupational Safety and Health Standards Board held on August 23, 1974. The chairman of the Board asked William Steffan, the Supervising Industrial Hygiene Engineer of the Occupational Health Section of the Standards Development Unit, to make a presentation on the sanitation standard and "the rationale for the development of it." Succinctly Steffan stated that the standard then in force in California "is not as effective as the Federal OSHA standard and there was a need to bring California's standard up to 'at least as effective' as the Federal Standard."⁸ After several government health officials

⁵It was issued as sect. 3260(e)(1)(C); *Register* 75, No. 7 (Feb. 15, 1975); the following year it was renumbered sect. 3364(c); *Register* No. 29, 1976; 8 Code of Cal. Reg. Sect. 3364(c) (1977). The California Occupational Safety and Health Standards Board held a public hearing on the proposed new standard on May 20, 1976; the file at the Board indicates that no comments were made on the renumbered section 3364 at the hearing. In those years, Cal/OSHA was not required to and did not provide the kind of supporting information at the time of publishing its proposed standards that was later required by the Administrative Procedure Act. Notice of Public Hearing and Meeting of the Occupational Safety and Health Standards Board and Notice of Proposed Changes to Title 8, California Administrative Code and Title 24, California Administrative Code (Apr. 13, 1976); Order Adopting, Amending, or Repealing Regulations of the Occupational Safety and Health Standards Board (June 24, 1976); telephone interview with Marley Hart, staff services manager, OSHSB, Sacramento (Nov. 4, 2002).

⁶8 Cal. Code of Reg. sect. 3244(d), *Register* 72, No. 23 (June 3, 1972). See also sect. 3244(d), *Register* 72, No. 6 (Feb. 5, 1972).

⁷Cal. Labor Code sect. 2350 (2002); 1889 Cal. Laws ch. 5, sect. 1 at 3. This provision was incorporated into the state Labor Code by 1937 Cal. Laws ch. 90, at 185, 253. The introductory article in the chapter of the Labor Code dealing with sanitary conditions states: "All employers shall comply with standards relating to sanitary facilities adopted by the Occupational Safety and Health Standards Board...."

⁸Summary, Public Hearing, Occupational Safety and Health Standards Board, San Francisco, August 23, 1974, at 9. Although the chairman of the board referred to Steffan as with the Health Department, a memorandum from Steffan to the Board of Oct. 3, 1974, summarizing changes made in response to the public comments identified him as in the text. Both of these documents from the Board's files were faxed to the author by Andrea

objected that the Board would be adopting regulations that might conflict with other state codes and the Uniform Plumbing Code and Uniform Building Code, an official from the state Attorney General's office gave her informal opinion that "Federal statutes superceded [sic] State statutes and on down the line to the local authority."⁹ A representative of the Pacific Telephone and Telegraph Company then raised an objection to the number of toilets required per number of workers, recommending instead that "Federal standards be used throughout."¹⁰ These ratios, which were already present in the 1972 standard and provided for somewhat lower thresholds for the next higher number of toilets, were in fact dropped in favor of the Federal OSHA ratios in the final regulations. As Steffan explained to the Board in October, "it is difficult to substantiate the need for these somewhat more restrictive requirements versus those of the corresponding Federal standard. Consequently, the revised specifications correspond to the Federal standard, in accordance with recommendations from...Pacific Telephone and Telegraph Company,...Caterpillar Tractor Company,...and McDonnell Douglas Corporation."¹¹

In a reprise of the Federal OSHA hearings of 1972,¹² Pacific Telephone next objected to the requirement that toilets should be within 200 feet of locations where workers are regularly employed: "They recommend that the 200 foot requirement be deleted and the old language 'every place of employment shall be provided with a sufficient number of conveniently located water closets for the use of employees' be restored, and, if this recommendation is not followed, the Company requests that a statement of exemption for existing buildings be added. Mr. Steffan said the standard is not mandatory, that the standard states 'should' which only gives an idea of what should be done."¹³ Although the company's objection seemed to be directed to the 200-foot rule, which was included in the sentence following the sentence providing that "[t]oilet facilities shall...be accessible to the employees at all times," both were contained in proposed section 3260(d)(1)(C)—which, as the Board's draft correctly noted, had no equivalent in

Howard on Nov. 19, 2002.

⁹Summary, Public Hearing, Occupational Safety and Health Standards Board, San Francisco, August 23, 1974, at 10-11 (Carol Hunter).

¹⁰Summary, Public Hearing, Occupational Safety and Health Standards Board, San Francisco, August 23, 1974, at 12 (W. J. Evertz).

¹¹Memorandum from William Steffan to California Occupational Safety and Health Standards Board at 2 (Oct. 3, 1974).

¹²See above ch. 4.

¹³Summary, Public Hearing, Occupational Safety and Health Standards Board, San Francisco, August 23, 1974, at 12.

the Federal OSHA standard¹⁴—and retention of the first sentence would have been quite clumsy if it had been followed by the “conveniently located” language. Presumably, then, this very influential California employer was also seeking to have the new and more protective “accessible...at all times” standard deleted. The only other light shed on the meaning of “accessible” came in the form of the Del Monte Corporation’s questioning of the term in a requirement that washing facilities be “readily accessible to all employees” (sect. 3260(f)(1)(A)). Steffan merely responded that “this applies generally to operations where a process requires washing hands.” The chairman of the Board then asked whether “readily” could be changed” to “reasonably,” and it was.¹⁵

It is the aforementioned section 3364(b), which more clearly than the Federal standard requires permanent accessibility, that could be used to cite employers for denying access. It currently reads: “Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times. Where practicable, toilet facilities should be within 200 feet of locations at which workers are regularly employed and should not be more than one floor-to-floor flight of stairs from working areas.”¹⁶ Cal/OSHA has cited employers 697 times for violating this standard since July 1990 in addition to issuing 586 citations for failure to provide the required number of toilets.¹⁷ But the only citation that it has issued since the Federal OSHA Memorandum was issued in 1998 that could even have remotely served the purpose of requiring employers to let workers go when they need to go was issued to RPS, Inc., the second largest small-package ground carrier in North America and a subsidiary of Federal Express.¹⁸ At its trucking terminal in Rialto, the Cal/OSHA inspector “observed that all the toilet facilities located in the shipping facilities were kept locked all the times [sic] and keys were in custody of the supervisors and co-ordinators. Therefore, the toilet facilities were not accessible to the employees all the times [sic].”¹⁹ Although

¹⁴Occupational Safety and Health Standards Board, General Industry Safety Order, Standards Presentation (July 16, 1974) at 12 (Aug. 1974). This document is also from the Board’s file.

¹⁵Summary, Public Hearing, Occupational Safety and Health Standards Board, San Francisco, August 23, 1974, at 13; Memorandum from Steffan to Board at 3. The provision is now located at sect. 3266(a).

¹⁶Cal. Code of Regulation sect. 3364(b).

¹⁷Search (“California and 3364(a)”) and (“California and 3364(b)”) in Lexis-Nexis OSHAIR file (Dec. 31, 2002).

¹⁸<http://www.fedex.com/us/about/ground/pressreleases/pressrelease040799.html?link=4>.

¹⁹RPS, Inc., Insp. No. 119952893 (Feb. 11, 2000). See also Alpha Recycling, Inc. Insp. No. 119944973 (Oct. 13, 2000), which cited an employer one of whose restrooms “is kept locked and all male employees do not have access to it.”

250 employees had been exposed to this hazard, the proposed penalty amounted to only \$560 and it was reduced to a mere \$100 through informal settlement.²⁰ To be sure, this act of enforcement was continuous with the position that Federal OSHA itself had taken even before 1998 with respect to the unlawfulness of locking toilets.²¹

Cal/OSHA's total failure and refusal to enforce the right to go to the bathroom set forth in the OSHA Memorandum is underwritten by its personnel from the bottom to the top of its organizational hierarchy. Interviews revealed that several of Cal/OSHA's district offices, which constitute the program's front-line system of inspection, compliance, and enforcement, are managed by officials whose knowledge and attitudes are so strikingly deficient that they augur poorly for the protection of workers' right to a safe and healthful workplace. For example, the manager of the Concord office (located near Oakland), who, when asked whether his office received complaints from workers about lack of toilet access, allowed as how it received many complaints from workers—most of them from employees wanting to harass their employers. Even if some of these complaints had merit, he insisted that Cal/OSHA lacked any power to require employers to give workers access to the bathroom and all he could (and did) do was refer such workers to the state Division of Labor Standards Enforcement (DLSE), although he could not identify any legal provision under which that agency could cite an employer. Immediately after being read the main point of the OSHA Memorandum, he opined that he "could not enforce" such a provision because Cal/OSHA's sanitation standard deals with physical structures and not with access.²²

Similarly, the manager of the Oakland office at first asserted that OSHA dealt only with the provision of toilets and not with access, and he, too, mentioned that workers could seek relief from the DLSE. When reminded that the Industrial Welfare Orders administered by that agency did not deal with toilet breaks, but only with mandatory 10-minute rest breaks during each four hours of a shift,²³ he noted that employers often did not comply with that mandate and seized on such rest breaks as precisely the solution for workers needing to go to the bathroom (although they are in fact no solution at all for workers needing to go between such breaks and no solution in any respect since the sanction for employers'

²⁰<http://www.osha.gov/cgi-bin/est/est1vd?11995289301003>.

²¹Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 56 (1998).

²²Telephone interview with Bob McDowell, manager, Cal/OSHA Concord District Office (Oct. 31, 2002).

²³E.g., Industrial Welfare Commission Order No. 1-2001 Regulating Wages, Hours and Working Conditions in the Manufacturing Industry (Effective July 1, 2002 as amended), 8 Cal. Code of Regulations sect. 11010(12)(A).

failure to provide rest periods is one hour's wage and not an injunction to provide the rest period).²⁴ Then, when read the aforementioned Cal/OSHA sanitation provision requiring that toilet facilities be "accessible to the employees at all times,"²⁵ without an audible blink, he immediately said that that phrase meant that employers had to let workers go when they needed to go. Although he had no recollection of ever having seen the Federal OSHA Memorandum, he commented that that was the way Cal/OSHA had always viewed the matter and it did not really need Federal OSHA's advice in this area. Nevertheless, he related that he was unaware of any complaints to his office from workers whose employers had been "metaphorically chaining" them to their work stations: employers had moved far enough into the twentieth century not to do that, though he admitted that failure to provide enough—or, in construction and agriculture, any—toilets was a problem.²⁶

The manager of the Foster City office in the Bay Area observed that although he did get complaints about bathroom access, he had never cited an employer because, when an inspector goes to a workplace, it is "easier" to count the number of toilets and to cite an employer for failing to have an adequate number than to cite for restricting access, which requires sorting out contradictory claims of employees and management.²⁷ The Senior Industrial Hygienist in the Research and Standards Development Unit of the Division of Occupational Safety and Health, while not condoning this approach, sought to explain that since considerably greater amounts of inspectors' time would have to be devoted to resolving issues of credibility in such disputes than with respect to objectively quantifiable violations, it would not be surprising if few employers were cited for restricting workers' access.²⁸

The manager of the Santa Rosa office reported that in 13 years he had never issued a citation for denial of access; the only telephone calls he received on the matter came from employers asking whether they had to let workers go to the bathroom, and his only response to them was to read them the provision.²⁹ An inspector in the Modesto office stated that when she received telephone complaints from manufacturing workers, she resolved them by faxing employers

²⁴8 Cal. Code of Regulations sect. 11010(12)(B).

²⁵Cal. Code of Regulations, tit. 8, sect. 3364(b).

²⁶Telephone interview with Michael Horowitz, manager, Cal/OSHA Oakland District Office (Nov. 1, 2002).

²⁷Telephone interview with Michael Frye, manager, Cal/OSHA Foster City District Office (Oct. 30, 2002).

²⁸Telephone interview with Bob Barish, San Francisco (Nov. 5, 2002).

²⁹Telephone interview with Jimmie Jones, manager, Cal/OSHA Santa Rosa District Office (Oct. 30, 2002).

information without follow-up investigations.³⁰

Nor was this policy and attitude confined to the district offices. The manager of Cal/OSHA's Anaheim regional office in charge of four district offices unequivocally stated on a speaker telephone, together with an official of the agency's Research and Standards Development Unit (who was also a former district office manager), that according to enforcement history, "accessible" in section 3364(b) merely means "not locked." Any other aspect of access, such as denial of permission, would, they both agreed, be a matter of labor-management relations or for referral to the DLSE, although they too were at a loss to cite a relevant legal provision that the DLSE could enforce in this regard. Neither had ever heard of the OSHA Memorandum, while the regional director commented that she had never heard of a worker who had said that his employer would not let him go to the bathroom.³¹

This cavalier approach becomes somewhat more understandable against the background of this pithy response by Cal/OSHA's Professional Development and Training Unit Coordinator to a question about enforcement of the OSHA Memorandum: "We don't enforce Federal interpretations."³² The only serious, albeit inadequate, response the author was able to secure came from Cal/OSHA's chief legal counsel, who at least suggested that the author write a letter to all the highest officials of the agency explaining that inspectors and district managers denied that Cal/OSHA had any authority to require employers to let workers go to the bathroom and another letter to Federal OSHA explaining that Cal/OSHA was failing to enforce the standard as interpreted by the Memorandum.³³

When asked, the DLSE stated that it often receives complaints from workers (especially in fruit and vegetable packing houses) who are not allowed to go to the bathroom between their statutory rest and meal breaks; it informs such workers that under the law they must be allowed to go. Unsurprisingly, the law the DLSE has in mind is not the labor standards regulations that it enforces, but

³⁰Telephone interview with Karen Helton-Jorgensen, inspector, Cal/OSHA Modesto District Office (Oct. 30, 2002).

³¹Telephone interview with M. Kenady and Joel Foss, Cal/OSHA, Anaheim (Nov. 18, 2002).

³²Email from Jack Oudiz to Marc Linder (Oct. 31, 2002). When the author replied that California, like all state-plan states, was required both by the Memorandum itself and as a condition of being approved by Federal OSHA to enforce OSHA standards, including this interpretation, at least as effective as Federal OSHA's, and that if Cal/OSHA was openly refusing to enforce the interpretation, he would like to get that statement officially confirmed by the director of Cal/OSHA for presentation to Federal OSHA, the official responded: "Thanks for the lecture. This conversation is over. Take your business elsewhere." Email from Jack Oudiz to Marc Linder (Oct. 31, 2002).

³³Telephone interview with Michael Mason, San Francisco (Nov. 27, 2002).

those under the jurisdiction of Cal/OSHA, to which it also refers complaining workers for help. Informed of all the high- and low-ranking Cal/OSHA officials who had denied having such jurisdiction and had declared that they referred all such complainants to the DLSE, one of the Division's field investigators laughed and offered to get to the bottom of the confusion. Although he failed to do so, he did refer the author to the DLSE legal staff.³⁴ A lawyer in the DLSE San Francisco office, who initially stated unequivocally that under the law workers did have a right to go to the bathroom, cited the following sections of the agency's *Interpretations Manual* as the relevant legal authority:

Rest Period Is Not Limited To Toilet Breaks. The intent of the Industrial Welfare Commission regarding rest periods is clear: the rest period is not to be confused with or limited to breaks taken by employees to use toilet facilities. This conclusion is required by a reading of the provisions of IWC Orders, Section 12, Rest Periods, in conjunction with the provisions of Section 13(B), Change Rooms and Resting Facilities, which requires that "Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours."

Allowing employees to use toilet facilities during working hours does not meet the employer's obligation to provide rest periods as required by the IWC Orders. This is not to say, of course, that employers do not have the right to reasonably limit the amount of time an employee may be absent from his or her work station; and, it does not indicate that an employee who chooses to use the toilet facilities while on an authorized break may extend the break time by doing so. DLSE policy simply prohibits an employer from requiring that employees count any separate use of toilet facilities as a rest period.³⁵

When the author pointed out to the DLSE attorney that these provisions not only in no way vindicated an independent right to go to the bathroom apart from and outside of the rest breaks mandated by the DLSE, but in fact stated that no such right existed even as an extension of a legally required break, the official made a complete about-face, stating abruptly: "This is all the law there is—we have no jurisdiction. All we can do is collect wages."³⁶

The acting chief counsel of the DLSE, confirming, after reading the text aloud, that the aforementioned interpretation did not confer any such right to go to the bathroom, added that the question of the right to go to the bathroom "hasn't

³⁴Telephone interview with Ruben Navarrete, field investigator, California DLSE, Fresno (Nov. 19, 2002).

³⁵Division of Labor Standards Enforcement, *The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual* sect. 45.3.4-45.3.4.1 at 45-8 (June 2002), on http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf.

³⁶Telephone interview with Ramon Garcia, attorney, DLSE, San Francisco (Nov. 20, 2002).

come up in our enforcement.” Moreover, whatever enforcement the agency engaged in with regard to employers’ failure to give their employees rest periods focused on securing workers an hour’s wages, not on enjoining employers to comply with the law. When prompted, she promised to speak to someone at Cal/OSHA about the fact that the two agencies have been pointing at each other.³⁷

Finally, the author contacted Federal OSHA’s San Francisco Regional Office, which has oversight over the Cal/OSHA program. The official in charge of state plans, the Director of Analysis and Evaluation, had never heard of the April 6, 1998 Memorandum and wondered why his interlocutor knew so much about the general industry sanitation standard. Although at first he strenuously contended that Cal/OSHA had been correct in claiming that it had no obligation to insure that its standard and interpretation be at least as effective as the Federal OSHA standard, after heated discussion he was finally constrained to agree that, if Cal/OSHA officials did in fact make the statements and formulate the policy reported in the preceding paragraphs, the agency was not in compliance with its legal obligations. He stated that if the author presented these facts in writing, he would investigate and the author would be pleased with the result, although it might take six months for the policy to be changed and the agreement to do so would not be in writing.³⁸

³⁷Telephone interview with Anne Stevason, acting chief counsel of the DLSE (November 27, 2002). The DLSE’s web-based Info Line invites the “general public” to email inquiries to receive “information...concerning the rights and responsibilities of employees and employers in the State of California.” http://www.dir.ca.gov/dlse/dlse_infoline.htm. An email inquiry concerning bathroom breaks generated this instantaneous response: “Due to staffing constraints, DLSE is unable to answer the high volume of emails sent to this mailbox.” DLSEInfo@dir.ca.gov (Nov. 23, 2002).

³⁸Telephone interview with Alan Traenkner (Dec. 5, 2002).