



CAL/OSHA “SERIOUS” VIOLATION MODIFIED BY AB 2774

*Prepared by Chief Executive Office, Risk Management Branch
Loss Control and Prevention Section
3333 Wilshire Blvd., Suite 1000, Los Angeles, CA 90010*

Contact Loss Control and Prevention at (213) 738-2269 for additional information

On September 30, 2010, Governor Arnold Schwarzenegger signed Assembly Bill 2774 (AB 2774) into law. Effective January 1, 2011, this law changes the way that “serious” violations are adjudicated by the Department of Industrial Relations (DIR), Occupational Safety and Health Appeals Board. The following are the changes to California Labor Code §6432:

AB 2774 provides a rebuttable presumption that a serious violation exists if the DIR, Division of Occupational Safety and Health (Cal/OSHA) shows that there is a “reasonable possibility” that death or serious physical harm could result from hazards in the workplace. This means that Cal/OSHA only needs to demonstrate that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. Before the bill was passed, Cal/OSHA had to prove that there was a “substantial probability” of resulting death or serious harm that could result from hazards in the workplace. This meant that Cal/OSHA had to prove a 51% likelihood that death or serious physical harm would result.

AB 2774 also rewrites Labor Code §6432 to define “serious physical harm” as any injury or illness, specific or cumulative, occurring in the place of employment or in connection with employment, that results in any of the following:

1. Inpatient hospitalization for purposes other than observation (in contrast to the previous standard which was based on hospitalization for more than 24-hours).
2. The loss of any part of the body.
3. Any serious degree of permanent impairment.
4. Impairment sufficient to cause part of the body or the function of any organ to become permanently and significantly reduced in efficiency on/off the job. This includes, but is not limited to second/third-degree burns, crushing injuries, respiratory illness or broken bones. [For purposes of workplace medical surveillance and evaluation of work-related illnesses and injuries, the Health Insurance Portability and Accountability Act (HIPPA) permits Cal/OSHA to collect otherwise protected medical information].

AB 2774 allows Cal/OSHA safety engineers or industrial hygienists, who can demonstrate that their Cal/OSHA mandated training is current, will be deemed competent in offering testimony to establish each element of a “serious” violation.

AB 2774 requires Cal/OSHA to make a reasonable attempt, using *Cal/OSHA Form 1BY*, to determine and consider the following before issuing a citation alleging a “serious” violation:

1. Training for employees and supervisors relevant to preventing employee exposure to the hazard or similar hazards.
2. Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
3. Supervision of employees exposed or potentially exposed to the hazard.
4. Procedures for communicating the employer’s health and safety rules and programs to employees.
5. Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
 - a. The employer’s explanation of the circumstances surrounding the alleged violative events.
 - b. Why the employer believes a serious violation does not exist.
 - c. Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut the presumption of a “serious” violation.
 - d. Any other information that the employer wishes to provide.

AB 2774 allows a rebuttal of a presumption of a “serious” violation by an employer showing that it did not know, and could not have known with the exercise of reasonable diligence, the presence of the violation. The employer would have to show that it:

1. Took all steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm and the likelihood of the harm occurring in connection with the work activity in which the violation occurred.
2. Took effective action to eliminate employee exposure to the hazard as soon as it was discovered.

HOW TO AVOID A “SERIOUS” VIOLATION

Thoroughly review Title 8, §3203, *Injury and Illness Prevention Program*, California Code of Regulations, to ensure your department has effective programs covering employee and supervisor hazard training, discovery and correction of hazards, and communication to employees about health and safety rules and programs. Keep written programs up-to-date. Document all inspections and trainings.

*Contact the Chief Executive Office, Risk Management Branch, Loss Control and Prevention Section at (213) 738-2269 if you have any questions or require assistance with any aspect of the changes resulting from **AB 2774**.*