

In This Issue:

February 2011

California recently expanded the definition of what constitutes a “serious violation” of workplace safety standards. The amendment creates significant consequences for employers subject to enforcement by the California Division of Occupational Safety and Health (Cal/OSHA). In addition, this new law establishes a rebuttable presumption that a serious violation occurred and enables Cal/OSHA to rely on the testimony of its inspectors to prove the existence of serious violations.

## Redefining a “Serious Violation” of Workplace Safety Standards in California

By Eugene Ryu and Arturo Tafolla

On January 1, 2011, California expanded the definition of what constitutes a “serious violation” of workplace safety standards. AB 2774, which amended California Labor Code section 6432 on that date, creates significant consequences for California employers subject to enforcement by the California Division of Occupational Safety and Health (Cal/OSHA). The new law also establishes a rebuttable presumption that a serious violation occurred and enables Cal/OSHA to rely on the testimony of its inspectors – which was previously impermissible – to prove the existence of these serious violations.

### Background to Passage of AB 2774

The Federal Occupational Safety and Health Act of 1970 allows states to develop and enforce occupational safety and health standards in the context of an OSHA-approved state plan. California is one of 27 states or territories that have obtained approval for state-run OSH programs. Because of this, California is required to set standards that are at least as effective as those of the federal Occupational Safety and Health Administration (“Fed/OSHA”). California’s program is implemented and enforced by Cal/OSHA.

Cal/OSHA issues citations when investigations reveal that an employer committed violations of applicable safety and health standards, including serious violations that cause an employee to suffer or potentially suffer, among other things, “serious injury or illness” or “serious physical harm.” Under the California Labor Code, Cal/OSHA can also issue citations for violations that are not “serious,” such as for a regulatory violation or a general violation.

AB 2774 was introduced in response to mounting criticism from Fed/OSHA about both Cal/OSHA and the California Occupational Safety and Health Appeals Board (“Appeals Board”), a three-member adjudicative body appointed by the governor and confirmed by the senate that handles appeals from employers regarding citations issued by Cal/OSHA. In its 2009 report on state occupational safety and health plans, Fed/OSHA found that Cal/OSHA’s policies on classifying violations failed to ensure that violations that would have been categorized as serious under federal standards were classified

as serious by Cal/OSHA.<sup>1</sup> Fed/OSHA also concluded that the Appeals Board's understanding of "substantial probability" and its rules for expert testimony were more stringent than those under Fed/OSHA and thus made it too challenging for Cal/OSHA to prove serious violations.<sup>2</sup>

According to data provided by the U.S. Department of Labor for fiscal year 2009, Cal/OSHA classified 19% of violations as serious, compared to 43% percent for other state plans and 77% for Fed/OSHA.<sup>3</sup> Serious violations are an important issue because they typically carry significant penalties, which usually begin at a minimum of \$5,000 in California. These violations could also affect criminal liability of employers and have the potential to influence employer insurance rates and contracting ability.

## **Assembly Bill 2774**

AB 2774 changes how violations are classified in California.

### ***Changing The Definition of a "Serious" Violation***

Before AB 2774, the California Labor Code deemed a serious violation to exist if there was "a substantial probability that death or serious physical harm could result from a violation." AB 2774 loosens this standard in two ways: (1) it relaxes the "substantial probability" requirement; and (2) it expands the definition of "serious physical harm."

Under prior law, "substantial probability" referred to "the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation." The Appeals Board interpreted this requirement to mean that Cal/OSHA must prove that death or serious injury is "more likely than not."<sup>4</sup>

AB 2774 changes the "substantial probability" requirement to "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." The "realistic possibility" standard is not defined in the new legislation or elsewhere in the Labor Code, but the legislative history of AB 2774 indicates that the new standard was designed to be a significantly lower likelihood of occurrence of death or serious physical harm than previously required under the law. However, a question remains regarding how low the standard is. As a result, there will likely be some litigation over what a "realistic possibility" actually means.

AB 2774 also expands the definition of "serious physical harm" as used in Section 6432. This phrase was previously undefined in Section 6432. The Appeals Board interpreted it to mean an injury or illness occurring in a place of employment or in connection with any employment which: (1) requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation; (2) involves a loss of any member of the body; or (3) results in any serious degree of permanent disfigurement. The new definition first removes the requirement that the inpatient hospitalization last more than 24 hours. Thus, any inpatient hospitalization for purposes other than medical observation, for any period of time, will fall under the new definition. Second, the new legislation includes an additional category for an "[i]mpairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job," such as, "second degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illness, or broken bones."

### ***Rebutting the Presumption that a Serious Violation Exists***

AB 2774 also establishes a rebuttable presumption that a serious violation exists when Cal/OSHA demonstrates "that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Before AB 2774 took effect, Cal/OSHA was never entitled to presume that any violation exists.

For the presumption to apply, Cal/OSHA must make "a reasonable attempt to determine and consider" certain factors before issuing a citation for a serious violation. These factors include the employer's training relevant to preventing employee exposure to the hazard at issue, procedures for discovering and correcting the hazard, and other information the employer wishes to provide, including information about why a presumption should not apply.

The new legislation encourages Cal/OSHA to submit a standardized form to the employer containing the alleged violation descriptions

and soliciting the information identified by these factors at least 15 days before issuing a serious violation. Although a response to the form is voluntary, an employer should view the form as a legitimate opportunity to demonstrate why it should not be cited for a serious violation. However, with only 15 days to reply, the employer will have to move expeditiously if it wishes to demonstrate that it should not be cited for a serious violation. In the event that Cal/OSHA fails to provide the standardized form to the employer, the Appeals Board is permitted to draw a negative inference against Cal/OSHA.<sup>5</sup>

On its part, the employer can rebut the presumption by showing that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” Employers must show that they both “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” and “took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.”<sup>6</sup> This abatement requirement is a new addition per AB 2774 and provides extra incentive for the employer to abate the condition as soon as possible to preserve its right at a later hearing to establish lack of knowledge of the alleged condition.

**Permitting Cal/OSHA Inspector Testimony**

Under AB 2774, Cal/OSHA inspectors can now provide testimony and offer “expert opinions” regarding each element of a serious violation, including whether there is a “realistic possibility” that death or serious physical injury could result, and the custom and practice of injury and illness prevention in the workplace. In the past, the Appeals Board had rejected such testimony because Cal/OSHA’s inspectors were deemed to lack sufficient expertise with the alleged condition at issue. AB 2774 addresses the Appeal Board’s prior position by adding language into the Labor Code that permits Cal/OSHA inspectors meeting current training requirements to testify and establish the elements of a serious violation through their testimony.

**Things for Employers to Consider Moving Forward**

In light of AB 2774, California employers should take proactive measures that will leave them better prepared to rebut the presumption of a serious citation and present their arguments in the best light, whether in response to a standardized request form from Cal/OSHA prior to the issuance of a citation or at an Appeals Board hearing.

These measures include:

- Reviewing, implementing and updating Injury and Illness Prevention Program (“IIPP”) documents, as well as all other safety policies and procedures.
- Reviewing & updating training materials.
- Documenting training of both supervisors and employees regarding general safe practices as well as particular hazards that may result in death or serious injury.
- Conducting a privileged audit to determine the existence of serious violations and promptly correcting them.
- Enforcing work place safety rules by using effective disciplinary tools.

.....  
 If you have questions regarding AB 2774 and how you can take specific steps to prevent a citation for a serious violation, Littler Mendelson’s Workplace Safety Practice Group attorneys are available to help employers address these issues. Eugene Ryu is a Shareholder, and Arturo Tafolla is an Associate, in Littler Mendelson’s San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Ryu at erylittler.com, or Mr. Tafolla at atafolla@littler.com.

<sup>1</sup> U.S. Department of Labor, OSHA – California State Plan FAME Report (23g), FY 2009, Appendix A.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Department of Labor, OSHA – California State Plan ENFC Report, FY 2009.

<sup>4</sup> The “more likely than not” standard was found to be a likelihood of 51% or more that death or serious injury would result from the violation. See, e.g., *Pacific Steel Casting Co., Cal/OSHA App. 79-1514 Decision After Reconsideration* (Nov. 15, 1984).

<sup>5</sup> Cal. Lab. Code § 6432(d).

<sup>6</sup> Cal. Lab. Code § 6432(c).