

AB 2774
(CA Labor Code § 6432)

“SERIOUS” VIOLATIONS

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WHY IS THE CHANGE SIGNIFICANT?

- “Serious” Violation = \$25,000
- “General” Violation = \$7,000
- Internet Citation History
 - <http://www.osha.gov/oshstats/>
- WCAB “Serious and Willful” Claims

BACKGROUND

(The Former Definition – Before 2011)

- Assume an Accident:
- Substantial Probability of Death or Serious Physical Harm
- Unless, With The Exercise of Reasonable Diligence, The Employer Could Not Have Known of the Presence of the Violation

REBUTTABLE PRESUMPTION

6432(a)

There shall be a **rebuttable presumption** that a "serious violation" exists in a place of employment if the division demonstrates that there is a **realistic possibility** that death or **serious physical harm** could result from the actual hazard created by the violation.

“SERIOUS PHYSICAL HARM”

6432(e) “Serious Physical Harm” means:

- (1) Inpatient hospitalization for purposes other than medical observation [**for any amount of time**].
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment 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, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

CAL/OSHA INSPECTOR DEEMED TO BE AN EXPERT IN . . . **EVERYTHING !**

6432(g)

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her **division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation**, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

[Presumption does not go to weight of inspector's testimony]

REBUTTING THE PRESUMPTION

6432(c)

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the **employer may rebut the presumption** and establish that a violation is not serious by demonstrating that the employer **did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.**

CAL/OSHA 1BY FORM

6432(b)(1)

Before issuing a citation alleging that a violation is serious, the division **shall** make a reasonable attempt to determine and consider, among other things, all of the following:

- (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
- (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

CAL/OSHA IBY FORM (CONTINUED)

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

CAL/OSHA IBY FORM (CONTINUED)

6432(b)(2)

The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a **standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision.**

IF EMPLOYER DOES NOT COMPLETE 1BY FORM

6432(d)

If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b) [the 1BY Form], the employer shall not be barred from presenting that information at the hearing and no negative inference shall be drawn.

TWO RECENT CAL/OSHA “GOTCHA” STRATEGIES

1. Objections to evidence offered by employer to prove it lacked knowledge of the violation.

Argument: the employer failed to raise the “affirmative defense” on its Appeal form.

TWO RECENT CAL/OSHA “GOTCHA” STRATEGIES

2. Motion made by Cal/OSHA – during the hearing – to amend classification of a citation from “General” to “Serious”

[and increasing the penalty from a few thousand to \$18,000].

QUESTIONS ?

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