

AMENDED IN SENATE AUGUST 10, 2010

AMENDED IN ASSEMBLY MAY 28, 2010

AMENDED IN ASSEMBLY APRIL 14, 2010

AMENDED IN ASSEMBLY APRIL 8, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 2774

Introduced by ~~Committee on Labor and Employment (Swanson (Chair), Furutani, Monning, and Yamada) Assembly Member Swanson~~

March 1, 2010

An act to ~~amend Section 6302 repeal and add Section 6432~~ of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 2774, as amended, ~~Committee on Labor and Employment Swanson~~. Occupational safety and health.

Existing law *requires an employer to provide employees with a safe workplace and authorizes the ~~Department~~ Division of Occupational Safety and Health within the Department of Industrial Relations to enforce health and safety standards in places of employment and to investigate and to issue a citation and impose civil penalties when an employer commits a serious violation that causes an employee to suffer or potentially suffer, among other things, "serious injury or illness" or "serious physical harm."* Existing law defines a "serious injury or illness," generally, as a workplace injury or illness requiring hospitalization of more than 24 hours or resulting in the loss of a body member or in permanent disfigurement.

~~This bill would define “serious physical harm” to include most categories of a “serious injury or illness,” but would also include those resulting in physical impairment of a part of the body or from a single cause or from the cumulative effect of multiple injuries or illnesses.~~

~~This bill would establish a rebuttable presumption as to when an employer commits a serious violation of these provisions and would define serious physical harm, as specified. The bill would also establish new procedures and standards for an investigation and the determination by the division of a serious violation by an employer which causes harm or exposes an employee to the risk of harm.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 ~~SECTION 1. Section 6432 of the Labor Code is repealed.~~
- 2 ~~6432. (a) As used in this part, a “serious violation” shall be~~
- 3 ~~deemed to exist in a place of employment if there is a substantial~~
- 4 ~~probability that death or serious physical harm could result from~~
- 5 ~~a violation, including, but not limited to, circumstances where~~
- 6 ~~there is a substantial probability that either of the following could~~
- 7 ~~result in death or great bodily injury:~~
- 8 ~~(1) A serious exposure exceeding an established permissible~~
- 9 ~~exposure limit.~~
- 10 ~~(2) The existence of one or more practices, means, methods,~~
- 11 ~~operations, or processes which have been adopted or are in use,~~
- 12 ~~in the place of employment.~~
- 13 ~~(b) Notwithstanding subdivision (a), a serious violation shall~~
- 14 ~~not be deemed to exist if the employer can demonstrate that it did~~
- 15 ~~not, and could not with the exercise of reasonable diligence, know~~
- 16 ~~of the presence of the violation.~~
- 17 ~~(c) As used in this section, “substantial probability” refers not~~
- 18 ~~to the probability that an accident or exposure will occur as a result~~
- 19 ~~of the violation, but rather to the probability that death or serious~~
- 20 ~~physical harm will result assuming an accident or exposure occurs~~
- 21 ~~as a result of the violation.~~
- 22 ~~SEC. 2. Section 6432 is added to the Labor Code, to read:~~
- 23 ~~6432. (a) There shall be a rebuttable presumption that a~~
- 24 ~~“serious violation” exists in a place of employment if the division~~
- 25 ~~demonstrates that there is a realistic possibility that death or~~

1 *serious physical harm could result from the actual hazard created*
2 *by the violation. The demonstration of a violation by the division*
3 *is not sufficient by itself to establish that the violation is serious.*
4 *The actual hazard may be either of the following:*
5 *(1) A serious exposure exceeding an established permissible*
6 *exposure limit.*
7 *(2) The existence in the place of employment of one or more*
8 *unsafe or unhealthful practices, means, methods, operations, or*
9 *processes that have been adopted or are in use.*
10 *(b) (1) Before issuing a citation alleging that a violation is*
11 *serious, the division shall make a reasonable attempt to determine*
12 *and consider, among other things, all of the following:*
13 *(A) Training for employees and supervisors relevant to*
14 *preventing employee exposure to the hazard or to similar hazards.*
15 *(B) Procedures for discovering, controlling access to, and*
16 *correcting the hazard or similar hazards.*
17 *(C) Supervision of employees exposed or potentially exposed*
18 *to the hazard.*
19 *(D) Procedures for communicating to employees about the*
20 *employer's health and safety rules and programs.*
21 *(E) Information that the employer wishes to provide, at any time*
22 *before citations are issued, including, any of the following:*
23 *(i) The employer's explanation of the circumstances surrounding*
24 *the alleged violative events.*
25 *(ii) Why the employer believes a serious violation does not exist.*
26 *(iii) Why the employer believes its actions related to the alleged*
27 *violative events were reasonable and responsible so as to rebut,*
28 *pursuant to subdivision (c), any presumption established pursuant*
29 *to subdivision (a).*
30 *(iv) Any other information that the employer wishes to provide.*
31 *(2) The division shall determine and consider the facts specified*
32 *in paragraph (1) if, not less than 15 days prior to issuing a citation*
33 *for a serious violation, the division delivers to the employer a*
34 *standardized form containing descriptions of the alleged violations*
35 *and clearly soliciting the information specified in this subdivision.*
36 *The director shall prescribe the form for the alleged violation*
37 *descriptions and solicitation of information. Any forms issued*
38 *pursuant to this section shall be exempt from the rulemaking*
39 *provisions of the Administrative Procedure Act (Chapter 3.5*

1 (commencing with Section 11340) of Part 1 of Division 3 of Title
2 2 of the Government Code).

3 (c) If the division establishes a presumption pursuant to
4 subdivision (a) that a violation is serious, the employer may rebut
5 the presumption and establish that a violation is not serious by
6 demonstrating that the employer did not know and could not, with
7 the exercise of reasonable diligence, have known of the presence
8 of the violation. The employer may accomplish this by
9 demonstrating both of the following:

10 (1) The employer took all the steps a reasonable and responsible
11 employer in like circumstances should be expected to take, before
12 the violation occurred, to anticipate and prevent the violation,
13 taking into consideration the severity of the harm that could be
14 expected to occur and the likelihood of that harm occurring in
15 connection with the work activity during which the violation
16 occurred. Factors relevant to this determination include those
17 listed in subdivision (b).

18 (2) The employer took effective action to eliminate employee
19 exposure to any hazard created by a violation as soon as the
20 violation was discovered.

21 (d) If the employer does not provide information in response to
22 a division inquiry made pursuant to subdivisions (b) and (c), the
23 employer shall not be barred from presenting that information at
24 the hearing and no negative inference shall be drawn. The
25 employer may offer different information at the hearing than what
26 was provided to the division and may explain any inconsistency,
27 but the trier of fact may draw a negative inference from the prior
28 out-of-court inconsistent factual information. The trier of fact may
29 also draw a negative inference from factual information offered
30 at the hearing by the division that is inconsistent with factual
31 information provided to the employer pursuant to subdivisions (b)
32 and (c), or from a failure by the division to provide the form setting
33 forth the descriptions of the alleged violation and soliciting
34 information pursuant to subdivision (b).

35 (e) "Serious physical harm," as used in this part, means any
36 injury or illness, specific or cumulative, occurring in the place of
37 employment or in connection with any employment, that results in
38 any of the following:

39 (1) Inpatient hospitalization for purposes other than medical
40 observation.

1 (2) *The loss of any member of the body.*

2 (3) *Any serious degree of permanent disfigurement.*

3 (4) *Impairment sufficient to cause a part of the body or the*
4 *function of an organ to become permanently and significantly*
5 *reduced in efficiency on or off the job, including, depending on*
6 *the severity, second-degree or worse burns, crushing injuries*
7 *including internal injuries even though skin surface may be intact,*
8 *respiratory illnesses, or broken bones.*

9 (f) *Serious physical harm may be caused by a single, repetitive*
10 *practice, means, method, operation, or process.*

11 (g) *A division safety engineer or industrial hygienist who can*
12 *demonstrate that his or her division-mandated training is current*
13 *shall be deemed competent to offer credible testimony to establish*
14 *each element of a serious violation, and may offer evidence on the*
15 *custom and practice of injury and illness prevention in the*
16 *workplace that is relevant to the issue of whether the violation is*
17 *a serious violation.*

18 ~~SECTION 1. Section 6302 of the Labor Code is amended to~~
19 ~~read:~~

20 ~~6302. As used in this division:~~

21 (a) ~~“Director” means the Director of Industrial Relations.~~

22 (b) ~~“Department” means the Department of Industrial Relations.~~

23 (c) ~~“Insurer” includes the State Compensation Insurance Fund~~
24 ~~and any private company, corporation, mutual association, and~~
25 ~~reciprocal or interinsurance exchange, authorized under the laws~~
26 ~~of this state to insure employers against liability for compensation~~
27 ~~under this part and under Division 4 (commencing with Section~~
28 ~~3201), and any employer to whom a certificate of consent to~~
29 ~~self-insure has been issued.~~

30 (d) ~~“Division” means the Division of Occupational Safety and~~
31 ~~Health.~~

32 (e) ~~“Standards board” means the Occupational Safety and Health~~
33 ~~Standards Board, within the department.~~

34 (f) ~~“Appeals board” means the Occupational Safety and Health~~
35 ~~Appeals Board, within the department.~~

36 (g) ~~“Aquaculture” means a form of agriculture as defined in~~
37 ~~Section 17 of the Fish and Game Code.~~

38 (h) ~~“Serious injury or illness” means any injury or illness~~
39 ~~occurring in a place of employment or in connection with any~~
40 ~~employment which requires inpatient hospitalization for a period~~

1 in excess of 24 hours for other than medical observation or in
2 which an employee suffers a loss of any member of the body or
3 suffers any serious degree of permanent disfigurement, but does
4 not include any injury or illness or death caused by the commission
5 of a Penal Code violation, except the violation of Section 385 of
6 the Penal Code, or an accident on a public street or highway.

7 (i) “Serious exposure” means any exposure of an employee to
8 a hazardous substance when the exposure occurs as a result of an
9 incident, accident, emergency, or exposure over time and is in a
10 degree or amount sufficient to create a substantial probability that
11 death or serious physical harm in the future could result from the
12 exposure.

13 (j) (1) “Serious physical harm” means any injury or illness,
14 specific or cumulative, occurring in the place of employment or
15 in connection with any employment, which results in any of the
16 following:

17 (A) Inpatient hospitalization for a period in excess of 24 hours
18 for other than medical observation.

19 (B) The loss of any member of the body.

20 (C) Any serious degree of permanent disfigurement.

21 (D) Impairment of the body in which part of the body is made
22 functionally useless or is substantially reduced in efficiency on or
23 off the job for more than 72 hours.

24 (E) A serious illness or impairment of the function of an organ,
25 such as the heart, lungs, liver, skin, and nervous system, that
26 substantially reduces efficiency on or off the job. An illness or
27 impairment of this type would usually require treatment beyond
28 first aid by a medical doctor or other licensed health care
29 professional.

30 (2) “Serious physical harm” may be caused by a single,
31 repetitive practice, means, method, operation, or process.