

AMENDED IN SENATE AUGUST 19, 2010

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 Assembly Member Swanson**

March 1, 2010

---

---

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

LEGISLATIVE COUNSEL'S DIGEST

AB 2774, as amended, Swanson. Occupational safety and health.

Existing law requires an employer to provide employees with a safe workplace and authorizes the 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."

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: 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 Section 6432 of the Labor Code is repealed.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 SEC. 2. Section 6432 is added to the Labor Code, to read:
- 3 6432. (a) There shall be a rebuttable presumption that a
- 4 “serious violation” exists in a place of employment if the division
- 5 demonstrates that there is a realistic possibility that death or serious
- 6 physical harm could result from the actual hazard created by the
- 7 violation. The demonstration of a violation by the division is not
- 8 sufficient by itself to establish that the violation is serious. The
- 9 actual hazard may ~~be either of the following~~ *consist of, among*
- 10 *other things:*
- 11 (1) A serious exposure exceeding an established permissible
- 12 exposure limit.
- 13 (2) The existence in the place of employment of one or more
- 14 unsafe or unhealthful practices, means, methods, operations, or
- 15 processes that have been adopted or are in use.
- 16 (b) (1) Before issuing a citation alleging that a violation is
- 17 serious, the division shall make a reasonable attempt to determine
- 18 and consider, among other things, all of the following:
- 19 (A) Training for employees and supervisors relevant to
- 20 preventing employee exposure to the hazard or to similar hazards.
- 21 (B) Procedures for discovering, controlling access to, and
- 22 correcting the hazard or similar hazards.
- 23 (C) Supervision of employees exposed or potentially exposed
- 24 to the hazard.
- 25 (D) Procedures for communicating to employees about the
- 26 employer’s health and safety rules and programs.
- 27 (E) Information that the employer wishes to provide, at any time
- 28 before citations are issued, including, any of the following:
- 29 (i) The employer’s explanation of the circumstances surrounding
- 30 the alleged violative events.
- 31 (ii) Why the employer believes a serious violation does not
- 32 exist.

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

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

6 (2) The division shall *satisfy its requirement to* determine and  
7 consider the facts specified in paragraph (1) if, not less than 15  
8 days prior to issuing a citation for a serious violation, the division  
9 delivers to the employer a standardized form containing  
10 ~~descriptions of the alleged violations~~ *the alleged violation*  
11 *descriptions* (“AVD”) *it intends to cite as serious* and clearly  
12 soliciting the information specified in this subdivision. The director  
13 shall prescribe the form for the alleged violation descriptions and  
14 solicitation of information. Any forms issued pursuant to this  
15 section shall be exempt from the rulemaking provisions of the  
16 Administrative Procedure Act (Chapter 3.5 (commencing with  
17 Section 11340) of Part 1 of Division 3 of Title 2 of the Government  
18 Code).

19 (c) If the division establishes a presumption pursuant to  
20 subdivision (a) that a violation is serious, the employer may rebut  
21 the presumption and establish that a violation is not serious by  
22 demonstrating that the employer did not know and could not, with  
23 the exercise of reasonable diligence, have known of the presence  
24 of the violation. The employer may accomplish this by  
25 demonstrating both of the following:

26 (1) The employer took all the steps a reasonable and responsible  
27 employer in like circumstances should be expected to take, before  
28 the violation occurred, to anticipate and prevent the violation,  
29 taking into consideration the severity of the harm that could be  
30 expected to occur and the likelihood of that harm occurring in  
31 connection with the work activity during which the violation  
32 occurred. Factors relevant to this determination include, *but are*  
33 *not limited to*, those listed in subdivision (b).

34 (2) The employer took effective action to eliminate employee  
35 exposure to ~~any hazard created by a~~ *the hazard created by the*  
36 violation as soon as the violation was discovered.

37 (d) If the employer does not provide information in response to  
38 a division inquiry made pursuant to ~~subdivisions (b) and (e)~~  
39 *subdivision (b)*, the employer shall not be barred from presenting  
40 that information at the hearing and no negative inference shall be

1 drawn. The employer may offer different information at the hearing  
 2 than what was provided to the division and may explain any  
 3 inconsistency, but the trier of fact may draw a negative inference  
 4 from the prior ~~out-of-court~~ inconsistent factual information. The  
 5 trier of fact may also draw a negative inference from factual  
 6 information offered at the hearing by the division that is  
 7 inconsistent with factual information provided to the employer  
 8 pursuant to ~~subdivisions (b) and (e)~~ *subdivision (b)*, or from a  
 9 failure by the division to provide the form setting forth the  
 10 descriptions of the alleged violation and soliciting information  
 11 pursuant to subdivision (b).

12 (e) “Serious physical harm,” as used in this part, means any  
 13 injury or illness, specific or cumulative, occurring in the place of  
 14 employment or in connection with any employment, that results  
 15 in any of the following:

16 (1) Inpatient hospitalization for purposes other than medical  
 17 observation.

18 (2) The loss of any member of the body.

19 (3) Any serious degree of permanent disfigurement.

20 (4) Impairment sufficient to cause a part of the body or the  
 21 function of an organ to become permanently and significantly  
 22 reduced in efficiency on or off the job, including, *but not limited*  
 23 *to*, depending on the severity, second-degree or worse burns,  
 24 crushing injuries including internal injuries even though skin  
 25 surface may be intact, respiratory illnesses, or broken bones.

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

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