

New Safety & Health Legislation: AB2774

Serious Violations to Impact Employers and Brokers

The most important piece of occupational safety and health legislation in the past decade - AB 2774 - and one of the most important since Cal/OSHA came into existence, is now law. Now, when the Division of Occupational Safety and Health (DOSH) comes into a workplace to investigate a possible serious violation, (no injury necessary) it has a clear series of steps to establish such a serious violation. And if those steps are properly followed, major fines - like \$25,000, imposed on employers are far more than likely to stick - and to stick without reduction.

It isn't much of a hurdle for DOSH to surmount. In fact, the law, AB 2774, essentially was written by DOSH to make it easier for serious violations to survive an appeal. After Fed-OSHA chided Cal/OSHA for what it sees as too few violations classified as serious, and for reductions in fines, some observers criticized the old law as sparing DOSH the work of having to prove its allegations at hearing. But no more.

Get ready for the World Series of serious violations, experts warn.

Starting now, if an employer has an injury in its workplace or even allegations of a serious hazard, both DOSH and the Appeals Board have clearer rules to make their case. Those rules are designed to make it easier to establish that a violation was serious in the appeals process. And those rules also provide for defenses to those violations - a proper - Injury & Illness Prevention Plan, or IIPP as they are commonly known.

No longer will those cheap and canned IIPPs be acceptable. An incomplete or amateur IIPP can generate as much as a \$5000 fine for an employer. And employers are starting to realize they can come back against brokers' E&O for the fine and legal expenses if the broker provides it and a ticket is generated.

But there is something in the new law for employers, too. An employer will have the opportunity to avoid the hated black mark on its safety record, providing it can show it did all it could to prevent serious hazards. That's because the law gives employers the opportunity to talk DOSH out of issuing a serious citation, providing the proper processes are followed. One of those is a credible unique for the employer IIPP. But there are many other requirements.

"I don't think the sky is falling, by any means," says Southern California defense expert Kevin Bland, Esq. He defends employers in Cal/OSHA cases and represents trade associations in safety appeals. "But you should be alarmed if you only have a paper safety program that doesn't have any teeth."

AB 2774 was born out of DOSH frustrations about the high bar the Cal/OSH Appeals Board has set to establish a serious violation. That bar is now lower. But DOSH Chief Len Welsh says the overall aim of the law is to foster communication between the division and employers to abate and prevent serious hazards. "Those who are paying attention will be rewarded," he says, but "those who are not may find themselves in trouble."

In other words, the most important thing an employer can do is to provide the proper safety environment and understand its rights and responsibilities.

The core principle of the new law is that a hazard posing a risk of serious physical harm that is unacceptable by modern standards should be treated as a serious violation and penalized accordingly, Welsh says. Under previous rules, the division had the extremely difficult burden of showing that the hazard was 51% likely to cause serious injury or death. But no more...

"One way to look at it is it's a complete reboot on how to approach serious violations in California," Welsh explains. "From my point of view, it's a clean slate. Instead of having that impossible formula the Appeals Board was forcing on us, we now have an approach that at least conceptually comports to a modern concept of how to approach hazards."

"It's an extremely important change in the law," agrees DOSH Chief Counsel Amy Martin. "It changes a fundamental definition in classifications. It's certainly the largest change in the eight years I've been here."

Embedded in AB 2774 is the concept that employers are not omnipotent or omniscient, and incidents sometimes occur that aren't an employer's fault.

It establishes the factors Cal/OSHA inspectors must consider before issuing a serious violation, which is defined as "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Inspectors must consider the employer's training and safety communication programs, procedures for discovering and dealing with hazards, how it supervises exposed employees, the circumstances surrounding the incident and why the employer does not believe a serious violation exists.

If DOSH decides to issue the serious citation in spite of this information, the employer can rebut the allegation by demonstrating that it took all of the steps a "reasonable and responsible" employer in similar circumstances would be expected to take.

For Welsh, the "dialogue" that inspectors and employers must now have is the most important part of the new process. "For those in the employer community who are not paying attention, they may be losing tremendous opportunities to work with DOSH even in an enforcement setting to make sure they get a proper result." Smart employers, he adds, will pay attention to DOSH's inspection "work product" as it develops and challenge the division when they think a conclusion is incorrect. "Those who are in a position of strength, having done their homework and paid attention to the inspection, and knowing their operation better than DOSH, can bring facts to our attention that we may have missed," Welsh explains.

Once a serious violation is issued, it is a permanent black mark on an employer's safety record, regardless of the outcome of the case. "It's in IMIS [the federal Integrated Management Information Service] forever and it can't be removed," he says. "Employers don't like that and I don't blame them. What this does is give employers an opportunity to dialogue with Cal/OSHA and challenge what we think we found in terms of serious violations, and persuade us that perhaps we're not correct."

Bland agrees that the law provides employers who pay attention to safety with another tool in defending against serious citations. "By applying the 'realistic probability' standard, we as employers get to assert an affirmative defense," he explains. An employer can argue that because of its safety and training programs, it would be highly unusual that an incident would occur as the result of a violation. Or if there were an incident that led to an investigation, the employer could assert that it was an isolated incident because the firm's safety program is robust.

"There's a chance for everybody here," Welsh observes. "Most people think of an inspection as a poker game, where you hold your cards close to the vest. The message this bill is trying to get out is that poker is not the game to play when it comes to a Cal/OSHA investigation. The game to play is communication and forthright discussion of safety issues. That's all we're trying to do - make the workplace safer."

Martin, the DOSH official in charge of prosecuting enforcement actions through the system, can't predict whether AB 2774 will lead to the division issuing a higher number of serious violations, but he says that if all parties follow the intent of the new law, the serious violations that are issued "should be more accurate and fair, because of the discussion that goes on."

Carriers and brokers, for their part, if they are involved in safety have to do a more professional job. If they are advising on safety issues or providing safety materials they have to provide materials and advice that are up to standards.