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EMPLOYMENT LAW NEWSFLASH

THE CALIFORNIA LEGISLATURE MAKES GROUNDBREAKING CHANGES
TO THE CLASSIFICATION OF "SERIOUS" VIOLATIONS BY CAL OSHA

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IN BRIEF

On January 1, 2011 California *Labor Code* section 6432 was amended to address how "serious" violations are defined and cited. Among other things, the statute reduces the burden for establishing a "serious" violation and creates a rebuttable presumption that a "serious" violation exists.

Introduction

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's program is implemented and enforced by Cal OSHA which investigates and issues citations with civil penalties to employers that violate health and safety standards.

Citations issued by Cal OSHA are classified according to their severity and include among others: "regulatory," "general," and "serious." In 2009, Cal OSHA staff members and Federal OSHA criticized the handling of citations issued by Cal OSHA for "serious violations." Federal OSHA noted that Cal OSHA's policies for classifying violations did not ensure that violations that would be categorized as "serious" under federal standards were similarly classified as "serious" under state standards. In addition, the Occupational Safety & Health Appeals Board made it too difficult for Cal OSHA to establish "serious" violations.

The response to this criticism was AB 2774 which rewrites California Labor Code section 6432. This new Labor Code section 6432 addresses how "serious" violations are defined and cited under California law. Among other things, the statute reduces the burden for establishing a "serious" violation and creates a rebuttable presumption that a "serious" violation exists. These changes make it easier for Cal OSHA to establish a "serious" violation and make it easier for "serious" violations to survive an appeal.

A Rebuttable Presumption of a Serious Violation

The newly amended Labor Code section 6432 establishes a rebuttable presumption that a "serious" violation exists if "there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation."

For the "serious" violation presumption to apply, Cal OSHA must make "a reasonable attempt to determine and consider" certain factors before issuing a citation. The factors include: (1) The employer's training to prevent exposure to the hazard at issue; (2) The employer's procedures for discovering and correcting the hazard; (3) Supervision of employees exposed to the hazard; (4) Procedures for communicating the employer's health and safety rules to employees; and, (5) Any information the employer wishes to provide.

As part of the pre-citation consultation requirement, the statute encourages Cal OSHA to submit a form to the employer containing the alleged violation descriptions and soliciting the information identified by the above factors at least 15 days before a citation for a "serious" violation is issued.

A "Realistic Possibility" Standard

Prior to January 1, 2011, California Labor Code section 6432 stated that a "serious violation" existed "if there is a substantial probability that death or serious physical

harm could result from a violation." "Substantial probability" was interpreted to mean that death or serious injury is "more likely than not" (or a likelihood of 51% or more) to result from the violative condition.

The new Labor Code section 6432 replaces the "substantial probability" requirement with a "realistic possibility" standard. Thus, a "serious" violation will now be established if there is a "realistic possibility" that death or serious physical harm could result from the actual hazard created by the violation. Although the new "realistic possibility" standard is not defined in the Labor Code, it is fairly clear that the new standard is intended to establish a lower likelihood of occurrence than the substantial probability requirement. With an expanded definition of "serious violation" it will be easier for Cal-OSHA investigators to establish that a violation rises to the level of "serious."

“Serious Physical Harm” Defined

Under the new law, "serious physical harm," which was previously undefined, is now defined as: (1) Any in-patient hospitalization for purposes other than observation; (2) The loss of any member of the body; (3) Any serious degree of permanent disfigurement; or (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.

Of note, an injury that requires in-patient hospitalization of less than 24 hours can now satisfy the definition of "serious physical harm." It is also worth noting that an impairment that causes a part of the body to become significantly reduced in efficiency can also meet the definition of "serious physical harm."

The Employer Rebuttal

Pursuant to the statute, an employer can rebut the presumption by proving that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The new law expressly provides that in order to establish the absence of employer knowledge, the employer must demonstrate that it "took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation,

taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred." In addition, the employer must demonstrate that it effectively eliminated the hazard as soon as the violation was discovered.

Cal OSHA Inspector Testimony

Labor Code section 6432 contains a provision that allows safety engineers and industrial hygienists with up-to-date training to testify to establish the elements of a "serious" violation. Thus, Cal OSHA inspectors can now offer testimony about whether there is a "realistic possibility" that death or serious injury could result.

What This Means For Employers

1. Because the burden to prove a "serious" violation has been lowered, the number of citations for "serious" violations will likely increase.
2. Appeals of citations for "serious" violations will be more difficult because Cal OSHA will be able to establish the violation via inspector testimony.
3. It is likely that "serious" penalties which were commonly reduced by negotiation with Cal OSHA will now be more difficult to negotiate.
4. Establishing a dialogue with the Cal OSHA inspector during the pre-citation consultation will be important since it provides employers with an opportunity to defend against a citation before it is issued.
5. Employers should update injury and illness prevention programs and all other safety policies and procedures.

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