

# New Cal/OSHA Law Makes Large Fines More Likely

By: Michael Boldt, NHA, ARM

On January 1, 2011, California State Assembly Bill 2774 (AB 2774), significantly changed the way Cal/OSHA deals with employers in regard to hazards in the workplace. Specifically, the issuing of serious safety violations is now a more interactive process between the inspector and employer, but employers will be hard pressed to win any appeal after the new definitions associated with a Serious Violation.

"The previous definition was inadequate and made it exceedingly difficult to prove that a serious violation existed," said DIR Director John C. Duncan. "This significant clarification will allow Cal/OSHA to better identify serious violations, as well as provide improved guidance for the Appeals Board in cases where the issuance of a serious citation is in question. The new law also establishes procedures for notifying employers of the possibility that they may face a citation for a serious violation and requires that Cal/OSHA staff consider certain factors before issuing a serious citation."

The new law was prompted by the view that courts in California had made it nearly impossible for Cal/OSHA to defend an appeal against a serious violation. The courts had required Cal/OSHA to prove, through medical expert testimony, that unsafe acts or conditions must be more than 50% likely to cause serious physical harm to an employee (i.e. **substantial probability** that death or "serious physical harm" could result from a violation). The supporters of the new law pointed to Cal/OSHA's low rate of issuing serious violations as proof that this very high legal standard was having a chilling effect on Cal/OSHA inspectors. It was successfully argued that California employers were disregarding safety as a result of this perceived impunity.

The amended code now defines "serious physical harm" as anything which "Could reasonably lead to impairment of a part of the body by substantially reducing its efficiency on or off the job for more than 24 hours". DOSH need only show a "**realistic possibility**" that death or serious physical harm could result from the workplace hazard to issue a serious violation.

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## FY 2009 Inspection Activity Percent of All Violations Cited as Serious

State	Percentage
California	19%
Arizona	23%
Alaska	26%
Connecticut	28%
Nevada	28%
Washington	34%
Michigan	37%
North Carolina	38%
Oregon	43%
All State Plans	43%
Maryland	45%
Puerto Rico	47%
Virgin Islands	53%
Tennessee	55%
Wyoming	55%
Indiana	57%
New York	58%
Hawaii	60%
Virginia	61%
Kentucky	63%
Iowa	65%
Vermont	66%
New Mexico	67%
South Carolina	70%
Utah	71%
Minnesota	74%
Fed OSHA	77%
New Jersey	82%

Source: U.S. Department of Labor, OSHA, FY 2009, State Plan ENFC Report, 11.19.2009, Public and Private Sectors included.

*...the new law does make an effective Injury and Illness Prevention Program a defense against a serious violation...*

Division of Occupational Safety and Health (DOSH) Chief Counsel and prosecutor Amy Martin noted at the 2011 professional development conference of the American Society of Safety Engineers' Sacramento chapter on October 19, 2011 that the term "realistic possibility" is defined nowhere, and ultimately it will be up to the Appeals Board to decide how it is applied. The phrase was crafted by a coalition of stakeholders, including Cal/OSHA, employer representatives and labor unions. "We made it up," she admitted. The law and language was shepherded through the process by former Chief Len Welsh who negotiated the deal between the stakeholders.

In a nod to employers, the new law does make an effective Injury and Illness Prevention Program a defense against a serious violation (\$25,000 fine) being issued. Businesses are not expected to be omniscient (all-knowing), and predict all possible injuries. An employer is expected, however, to make a reasonable effort at hazard identification, and at mitigating those hazards identified. Cal/OSHA inspectors will be required to warn a company of their intent to issue a serious violation and allow for an explanation from management regarding their efforts to maintain a safe workplace.

Having an effective IIPP has become more important as a result of this new law. Contact your CESA safety consultant for help.

## About the Author



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