



October 10, 2010

Dear Refuse Industry Employer:

The attached bulletin announcing that the Governor has signed AB2774 is of vital interest to all of you that are employers.

This legislation now makes it more than ever important that you document all training of employees and supervisors no matter how insignificant the training may be. In addition, it is now very important to interrupt any unsafe behavior and document it with follow-up documentation of any additional training, discipline, or any additional action. This legislation will allow you to offer evidence to the OSHA inspector during his/her inspection that may influence them to not write a citation.

**Note:** This legislation came about due to the fact that many citations were being questioned by administrative law judges, as far as the authenticity and applicability of the OSHA inspector's knowledge of specific industry standards applied.

In my opinion, the refuse industry has many specific anomalies that can be interpreted in many ways by inspectors that do not have specific knowledge of our industry. This is very obvious by many citations that have been issued to various refuse employers in the past.

In summary, when a serious accident or injury occurs, you do not want to be scrambling to defend yourself and your company. Knowledge and preparation are the keys to being in a position to defend yourself and your company, instead of running scared and reacting to the unknown bureaucratic forces.

Please take a moment to read the attached information, and call me if you have any questions.

Best Regards,

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*Dialogue Should Strengthen the Process*

## **AB 2774: Employers, DOSH and Labor Reach 'Serious' Consensus**

SACRAMENTO — In a significant breakthrough, and after a lot of work by the combined stakeholder community and the legislature, the California Chamber of Commerce and most other employer groups have removed their opposition to AB 2774. It is the comprehensive occupational safety and health bill addressing serious violations. The Chamber's concerns are addressed to the point that they feel comfortable with the bill moving forward.

Not only does AB 2774 contain a definition of a serious violation, but it would require that inspectors initiate dialogue with employers to advance the understanding of what violation is being cited and why. It's this language that likely helped sway opponents, stakeholders and staffers say.

It is hoped that the language on serious violations will appease the concerns of the federal Occupational Safety and Health Administration regarding what it considers to be Cal/OSHA's inadequate definition. It should also eliminate what some in the health and safety community call the recalcitrance of the Cal/OSHA Appeals Board in addressing the problem of serious violations through the regulatory process. The situation has caused more than its share of acrimony at Appeals Board stakeholder meetings.

For their part employers are happy to have been part of such a productive legislative process. Marti Fisher, lobbyist for the CalChamber, wouldn't comment on what specifically led to its dropping its opposition, but complimented all the parties involved.

"We worked hard to come to a place to make sure it would not negatively impact employers going forward," Fisher says. "We were very really pleased to be in discussions with labor that were very fruitful."

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In its current form AB 2774, authored by Sandre Swanson (D-Oakland), would require that before issuing a citation alleging a serious violation an inspector will be required to attempt obtain information from the employer, including details on the employer's training procedures, supervision and communication with employees regarding hazardous conditions. The employer will be given the opportunity to rebut an alleged serious violation and explain what steps have been taken to address the problems. The employer's cooperation is voluntary, but it's hoped is that with a better understanding of what the inspector sees as a problem and what the possible citation will be employers may be more willing to work with the Division of Occupational Safety of Health (DOSH).

Employers balked at earlier versions they say blurred the line between a serious and general violation, all but eliminating the general category. But the feds say the current standard is too high a burden to meet, resulting in a very low number of serious violations. Labor Code §6432 defines a "serious violation" to exist where there is a "substantial probability" that death or serious physical harm could result from the violation. The Appeals Board has interpreted this to mean a greater than 50% likelihood, legislative staffers say.

The proposed definition says 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.

### The importance of communication

Ben Ebbink, chief consultant for the Assembly Committee on Labor and Employment, says the Department of Industrial Relations brought the parties together and with prompting from DOSH chief Len Welsh, the stakeholders decided to take a more comprehensive approach rather than simply focusing on a definition of serious violation.

"We'll all came together and looked at this more comprehensive solution ... It all just kind of fell into line," Ebbink says, adding that last year's discussion over an abatement bill brought up the notion of communication.

"Employers did not really know what the division was looking at. Just giving the employer some advanced notice on what Cal/OSHA is going to write a citation on ... provides communication," he says.

The compromise is the culmination of several months of negotiations between labor and employer interests, DOSH and the Appeals Board. The effort was in response to a letter sent by Fed-OSHA to both. The complaint was that Cal/OSHA doesn't have a definition of a serious violation equivalent to that of the federal standard. This contributes to the fact that very few employers get cited for serious violations regardless of how egregious a situation is.

Welsh tells *Cal-OSHA Reporter* that the absence of dialogue is something that DOSH has been criticized for in the past. An inspection takes place and out pops a citation, catching the employer off guard.

"[Employers] didn't realize that DOSH was calling something a problem until there was a violation," Welsh says. "Had they known, they might have fixed it on the spot."

According to labor representatives, California's low rate of serious violations —only 19%— is still a concern, but they hope AB 2774 will improve communication and safety in workplaces.

"It's never been required that an inspector actually ask questions and talk to employers as they were doing an inspection," says Jeremy Smith, lobbyist with the State Building and Construction Trades Council of California. "I think every inspector would do it differently. This makes it consistent across the board."

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**—Len Welsh, DOSH**

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According to Smith, during the negotiation process, representatives from the Appeals Board expressed concern that the bill would require the hiring of additional administrative law judges or support staff and perhaps lead to more serious violations. He says there is no way to tell what impact it will have on the number of serious violations. There might actually be fewer with more communication.

"Who knows how this is going to work? There will perhaps be more serious violations and perhaps more appeals. We want to make sure that the things that are serious stick," Smith says.

Dan Leacox, director of government affairs for Greenberg Traurig, says DOSH will benefit equally from the dialogue.

"All the employers saw that as a positive thing ... more dialogue in the process. For the division, it's an opportunity to get more information early in the process," Leacox says, adding that the back-and-forth with inspectors early can guarantee that more alleged violations are properly classified.

"It is one of the hopes that the citations become more accurate. [A citation] gets dropped because it wasn't supported by the facts," he says.

Ebbink says there is still some technical cleanup needed and the bill will go to the Senate floor next. It will also need to return to assembly for concurrence. There is still some opposition, but all in all it appears that a final product will make it to the governor's desk.

"It's important to have a formula that makes sense and is perceived as being fair," Welsh says.