

# National Lawyers Guild

## Labor & Employment Committee

---

April 29, 2010

Assembly Member Sandré Swanson, Chair  
Assembly Committee on Labor and Employment  
1020 N Street Room 155  
Sacramento, CA 95814

via fax (916) 319-2191

**Re: AB 2774 (Committee on Labor and Employment (Swanson (Chair), Furutani, Monning, and Yamada)**

Dear Assembly Member Swanson:

On behalf of the National Lawyers Guild Labor & Employment Committee [L&EC], this letter is to express our strong support for Assembly Bill 2774 which is a necessary first step to bring the California occupational safety and health program into compliance with Federal OSHA law. Thank you for authoring this bill, and we urge all committee members to vote in favor of it. This bill will help strengthen the Cal/OSHA program, improve enforcement, and result in better working conditions for all California workers.

**California's rate of serious citations is currently the lowest in the country.** Federal OSHA reported in November, 2009, that California issued as serious only 19% of its citations. Federal OSHA cited as serious 77% of its citations. The national average for all state plans is 43%.

**California is likely out of compliance with the Federal OSHA program.** In January, 2010, Federal OSHA informed both the Division of Occupational Safety & Health [Cal/OSHA] and the Occupational Safety & Health Appeals Board [OSHAB or Board] that it was conducting a Special Study of the state program. While Federal OSHA has not yet issued its findings, the January letters indicated the state plan was likely not as effective as the Federal OSHA program with respect to the definition of "serious physical harm".

**AB 2774 properly defines "serious physical harm" so that California law will be as effective as Federal OSHA law.** The legislation blends and closely tracks the definition of "serious physical harm" in the Federal OSHA Field Operation Manual and settled California law in the seminal 1985 Occupational Safety & Health Appeals Board case *Abatti Farms/Produce* (1985) Cal/OSHA App. Bd LEXIS 121.

**This bill is needed because there is no other avenue for defining "serious physical harm."** The Board has indicated it will not issue a regulation defining serious physical harm. And should the Department of Industrial Relations issue such a regulation, the Board noted, both in public meetings and case law, that it is not obliged to follow that regulation.

The Board recently articulated in a March 25 public meeting its position that it is not obligated to follow the dictates of a regulation issued by the Department of Industrial Relations because “director’s regulations are for agencies under the director,” and organizationally the Appeals Board is not under the Department of Industrial Relations. In case law, the Board has asserted that it is preeminent in interpreting and applying standards and regulations (*Limberg Construction*, Cal/OSHA App. 78-433, Decision After Reconsideration (Feb. 21, 1980)).

Further the Board declared it will not issue a regulation on this issue, but will continue to apply the law as it has in the past. Ms. Traeger indicated that the Board may “designate some of the cases as precedential” and that’s what the Board will do. Because “serious physical harm” is not defined in the Labor Code, the Board has interpreted the phrase to be the same as “serious injury.” Traeger noted that the Board is being “told that our interpretation is not correct, but we believe it is.” **Ms. Traeger further opined that the Board did not even have the authority to write a regulation defining “serious physical harm” and hoped there would be a “legislative fix.”**

**The definition of “serious physical harm” must be addressed through legislation.** In the its letter to the Occupational Safety & Health Appeals Board, Federal OSHA opined:

“Unfortunately it appears that in defining “serious physical harm,” the Boards current policy limits this phrase to the Labor Code definition of “serious injury,” at section 6302(h). There are other issues of concern regarding the issuance of Serious violation, however if even this finding is correct, a determination of the OSH program not being at least as effective as (ALAEA) Federal OSHA is possible.”

**California’s occupational safety and health program has been the best in the country in many regards for years. California cannot and should not risk jeopardizing the entire program because one aspect is out of compliance, particularly when this aspect of the problem may be promptly and effectively addressed through legislation.**

Since 1937, the National Lawyers Guild has provided legal support to movements for social change, principally on a volunteer basis. The Labor & Employment Committee focuses on struggles for economic and social justice. In the 1930s the Guild focused on workers’ rights, supporting New Deal legislation to assist working people and the unemployed; in the 1950s the Guild defended labor leaders and others attacked for their progressive political views. Then and now, the Guild L&EC actively supports progressive labor and employment law struggles. The L&EC is comprised of close to a thousand labor and employment attorneys across the country.

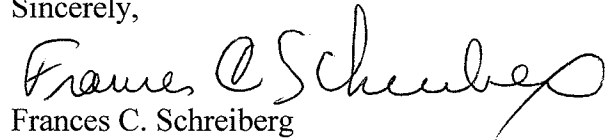
We write this letter the day following Workers’ Memorial Day. We write in the wake of the recent deaths of 29 miners at the Massey’s Upper Big Branch mine in West Virginia; of 7 refinery workers who died from a fire at Tesoro Corporation’s Anacortes, Washington facility; of 11 workers missing after an explosion and fire aboard the Deepwater Horizon drilling rig in the Gulf of Mexico.

Assembly Member Sandré Swanson, Chair  
Assembly Committee on Labor and Employment  
April 29, 2010  
page 3

**These deaths, however, should not be classified as accidents when they could have been prevented. As well, these deaths are not isolated incidents.** Fourteen workers lose their lives each day in this country from occupational safety and health hazards on the job – more than 5,000 killed on the job each year. More than 4.6 million are seriously injured. And even more lose or have shortened their lives due to the toxics they were exposed to on the job over the course of their working lives.

As advocates committed to protecting and advancing the rights of all workers, we have seen the devastating impact of a lack of strong occupational safety and health enforcement. AB 2774 is a crucial tool in the effort to improve Cal/OSHA's ability to reach the worst offenders and to level the playing field for legitimate law-abiding businesses. Please feel free to contact me with any questions.

Sincerely,



Frances C. Schreiber  
(510) 302-1071  
fcs@kazanlaw.com

cc:

Committee Vice Chair Assembly Member Tom Berryhill  
Assembly Member Warren Furutani  
Assembly Member Ted Gaines  
Assembly Member William Monning  
Assembly Member Mariko Yamada