



OSHA REGIONAL INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 02-00-002A	EFFECTIVE DATE: July 08, 2022
SUBJECT: Processing Significant and Novel Enforcement Cases	
REGIONAL IDENTIFIER: Region 9	

- Purpose:** To revise Regional policy and procedures for handling significant and novel enforcement cases and willful violations.
- Scope:** This directive applies to all area offices and the Office of Enforcement Programs within Region 9.
- References:** Memorandum from Kimberly A. Stille, Director, Directorate of Enforcement Programs and Scott C. Ketcham, Director, Directorate of Construction, Subject Procedures for Significant or Novel Enforcement Cases, June 13, 2022.
- OSHA Instruction CPL 02-00-080, Handling of Cases to be Proposed for Violation-By-Violation Penalties, October 21, 1990.
- OSHA Instruction CPL 02-00-098 (previously CPL 2.98). Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993.
- OSHA Instruction CPL 02-00-164, Field Operations Manual (FOM), April 14, 2020.
- Cancellations:** San Francisco Regional Instruction CPL 02-00-002, Handling of Significant Enforcement Cases and those with Willful or General Duty Violations, May 12, 2012.
- Significant Changes:** This revision updates policy since the issuance of new procedures mandated in the Memorandum from Patrick J. Kapust, Acting Director, Directorate of Enforcement Programs,

Subject: Procedures for Significant or Novel Enforcement Cases,
September 24, 2019.

Action Offices: All area offices in Region 9 and the Office of Enforcement
Programs in Region 9.

State Plan Impact: None.

Originating Office: Office of Enforcement Programs, Region 9

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EXECUTIVE SUMMARY

OSHA's Directorate of Enforcement Programs (DEP) revised its procedures for handling significant enforcement cases, including federal agency cases. The National Instruction defines significant and novel enforcement case types and describes the documentation required for each type. This Regional instruction identifies three significant or novel enforcement case types: National Significant Cases, National Novel Cases, and Regional Willful violations. This instruction prescribes policies and procedures on how Region 9 will process significant and novel enforcement cases and willful violations and notify the Regional Administrator (RA) and Regional Solicitor (RSOL) of developing cases.

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I. **Purpose.**

This instruction revises regional procedures for handling significant enforcement cases. This instruction standardizes the format in which significant and/or novel cases are submitted to Region 9's Office of Enforcement Programs (OEP); ensures the case is properly and thoroughly reviewed at the area office prior to submittal to OEP; provides instructions on the OEP screening process in completing a quality review in a timely manner to better aid the area offices; and outlines the case file briefing procedures.

II. **Scope.**

This directive applies to all area offices (AOs) and the Office of Enforcement Programs (OEP) within Region 9.

III. **Cancellation.**

San Francisco Regional Instruction CPL 02-00-002, Handling of Significant Enforcement Cases and those with Willful or General Duty Violations, May 12, 2012.

IV. **References.**

- A. Memorandum from Kimberly A. Stille, Director, Directorate of Enforcement Programs and Scott C. Ketcham, Director, Directorate of Construction, Subject Procedures for Significant or Novel Enforcement Cases, June 13, 2022.
- B. OSHA Instruction CPL 02-00-080, Handling of Cases to be Proposed for Violation- By-Violation Penalties, October 21, 1990.
- C. OSHA Instruction CPL 02-00-098 (previously CPL 2.98), Guidelines for Case File Documentation for Use with Videotapes and Audiotapes, October 12, 1993.
- D. OSHA Instruction CPL 02-00- 164, Field Operations Manual (FOM), April 14, 2020.

V. **State Plan Impact.**

None.

VI. Action Information.

A. Responsible Office: Office of Enforcement Programs, Region 9.

B. Action Offices: All area offices in Region 9.

VII. Roles and Responsibilities.

A. Area Offices

1. Role of the Compliance Safety and Health Officers (CSHOs). The CSHO must notify the supervisor immediately to discuss the potential development of a significant or novel case or a willful violation. The CSHO must take time to develop the best strategy to gather and document each prima facie element and determine whether additional resources or assistance may be necessary. When developing a willful violation, supporting evidence must always include statements from or reports of interviews with witnesses, supervisors, and managers to ascertain their state of mind. CSHOs should refer to Appendix A for additional guidance on conducting witness interviews and recorded statements.
2. Role of the Area Director (AD). Upon notification of a potential significant or novel enforcement case or a willful violation, the AD (or supervisor) should confer regularly with the CSHO and provide coaching and assistance, as necessary. The AD should conduct "go/no-go" checks throughout the inspection process to validate or appropriately guide the CSHO in developing significant or novel cases and willful violations. Following the completion of fieldwork, the AD shall review the case prior to submission to the OEP. The AD shall ensure that each significant enforcement case is properly cited and documented, contains sufficient evidence, and that all relevant issues are addressed in the appropriate briefing memorandums. The AD's personal attention to the case is essential so they are prepared to knowledgeably discuss the case with OEP, RA/DRA (Deputy Regional Administrator), RSOL or the National Office (NO). The AD will then submit a copy of the entire case file and the required briefing memo to OEP along with a signed and complete copy of the Area Office Checklist (Appendix B). Signing the Area Office Checklist indicates the AD has thoroughly reviewed the case file.

3. Regional Office

- a. Role of the Regional Administrator (RA). The RA has the final approval authority for all significant cases and will resolve any disagreements that may develop between OEP and the AD regarding the evaluation and disposition of the case. The RA will review the significant briefing case memorandum (Template 1, 2, or 3) and sign it prior to EP sending the case to the National Office.
- b. Role of the Office of Enforcement Programs (OEP). It is the role of the OEP to conduct a critical review of the case file and function as a "devil's advocate" to test the evidence. OEP will work with the AD to strengthen the case and obtain needed technical information. Once the review is completed, the ARA/EP becomes the primary focal point for subsequent support for the case with the RSOL and NO. OEP will coordinate with RSOL to fully resolve all legal and factual issues. OEP will ensure the case file and briefing memorandum addresses all relevant issues and is submitted within the time frame delineated in this directive.
- c. Office of the Solicitor. The ARA OEP will notify the RSOL of potential significant, novel, or willful cases and request that a solicitor be assigned to assist the AO in further developing the case. RSOL will provide guidance throughout the development of these cases. All significant cases shall be sent to the RSOL for concurrence prior to issuance or notification to the National Office.

VIII. Definitions.

For purposes of this directive and consistent with National Office policies, the following definitions apply:

- A. **Significant Enforcement Case.** Any federal or private sector inspection that meets one of the following criteria:
 1. A case resulting in penalties ranging from **\$250,000 to \$300,000** and requires only an email notification to the National Office.
 2. A case resulting in penalties ranging from **\$300,001 to \$400,000** requires National Office approval before proposed citations can be issued. Cases in this category must be submitted using either Template # 2 (for private sector) or Template # 3 (for federal agencies).

3. A case which results in penalties ranging from **\$400,001 to \$999,999** requires national Office approval before proposed citations can be issued. Cases in this category must be submitted using either Template # 2 (for private sector) or Template # 3 (for federal agencies).
4. A case resulting in penalties **\$1,000,000** or greater with at least one willful violation, or a case with instance-by-instance violations, requiring National Office notification and screening as described in OSHA Instruction CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*. Cases in this category may be classified as egregious and must be submitted using either Template # 2 (for private sector) or Template # 3 (for federal agencies).

B. Novel Enforcement Cases. A novel enforcement case is defined as a case that falls into any one of the following categories:

1. **Novel Only:** a case which involves controversial or sensitive issues and/or is likely to attract significant regional or national media interest or Congressional attention, regardless of penalty amount. Novel Only cases must be submitted to the National Office using Template # 1 (for private sector) or Template # 3 (for federal agencies).
2. **General Duty Clause.** A case in which either (Section 5(a)(1) (for the private sector) or 29 CFR 1960.8(a) (for federal agencies) is cited to address hazards associated with:
 - a. Biological Hazards.
 - b. Workplace Violence.
 - c. Ergonomics.
 - d. A substance for which there is no Permissible Exposure Limit (PEL), or an inadequate PEL, but an occupational exposure limit exists.

These cases require submission of Template #2 (for private sector) or #3 (for federal agencies) and must receive National Office approval before issuance.

3. **Federal Agency:** a federal agency case with either:
 - a. Willful and/or Failure to Abate (FTA) notices; or
 - b. A case where OSHA will issue a press release to the federal agency. If the press release is only being issued due to the private sector equivalent penalty, the private sector equivalent penalty must be greater than **\$250,000**.

These cases must be submitted to the National Office using Template #3, must receive National Office approval before being issued, and requires OSHA to notify the agency's Designated Agency Safety and

Health Official (DASHO) in accordance with the Field Operations Manual (FOM).

The definition of “novel” is subject to change, based on emerging issues. The National Office will keep the Regional Office apprised of revisions to novel case criteria.

- C. **Regional Significant Enforcement Cases Containing a Willful Violation.** Any case in which one or more proposed citations are classified as Willful.

IX. **Policy.**

It is the policy of the Regional Administrator to appropriately identify, investigate and issue willful, egregious, significant and novel case penalties to employers for which those enforcement actions are warranted. Such proposed citations must, in every case, be developed and fully supported by evidence contained in the case file to withstand careful and scrutiny by higher-level management, the Office of the Solicitor, and the Occupational Safety and Health Review Commission and the Courts. Federal agency cases will be held to the same evidence collection and documentation standards as the private sector cases.

- A. **General.** With the advent of the higher penalty structure passed by Congress and the Equal Access to Justice Act allowing qualified employers to recover attorney fees and other costs associated with successfully defending alleged violations, proposed significant enforcement actions must include meticulous documentation of the evidence for each violation. Further, case files must be carefully reviewed to ensure successful litigation or settlement.
- B. **Willful Case Law.** Since significant cases involve repeat and willful violations, it is important that OSHA act in a fair and consistent manner when proposing willful violations. The case law under the Act provides ample guidance in determining whether a violation is willful. A clear statement of the nature of a willful violation has been set forth by the Review Commission in its Caterpillar decision, 1993 CCH OSHD 29,962, February 5, 1993:

"A willful violation is differentiated by a heightened awareness of the illegality of the conduct or conditions, and by a state of mind - conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition, and consciously disregarded the standard. Without such evidence of familiarity with the standard's or the provision's terms, there must be

evidence of such reckless disregard for employee safety or the requirements of the law, that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation on the part of the employer, nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. A good faith reasonable belief by an employer that its conduct conformed to the requirements of the law also negates a finding of willfulness."

C. Federal Agency Significant Cases. It is the Regional Administrator's policy that violations proposed for federal agency inspections will be based on the same level of evidence collection and case file documentation, and classified using the same criteria, as violations proposed for private sector inspections. This policy includes criteria utilized to classify repeated, willful, or FTA violations as specified in the Field Operations Manual (FOM).

Since Region 9 conducts a number of federal agency inspections each year, the possibility for repeat violations is high. This can result in an equivalent private sector penalty that meets the criteria of a significant enforcement case. Some proposed federal agency significant cases have consisted of numerous low gravity repeat violations. In order to achieve the desired effect of improved employee safety and health and management involvement and accountability, additional consideration should be applied when proposing a significant enforcement case involving a federal agency. These considerations may include the following:

- Does the case contain high gravity violations?
- Has the facility/establishment been inspected in the past five years?
- Are the repeat violations based on a previous inspection of the same facility/establishment?
- Are the repeat violations based on previous inspections of facilities/establishments within a common work group, district, etc.?
- Is the management structure at the facility/establishment the same as the management present for previous inspections?

- Is the facility/establishment within the same work group where previous high gravity hazards were identified?
- Did the compliance officers identify significant deficiencies in the establishment's safety and health programs and/or management systems?

If the answer is yes: Did deficiencies in the establishment's safety and health programs or management systems constitute violations of the citable portions of 29 CFR 1960?

X. Procedures.

- A. **Initial (Early) Notification:** Area Directors (AD) will immediately notify OEP of any inspection or investigation that may result in a significant or novel enforcement case and all inspections/investigations that may result in proposed willful violations. ADs must work closely with compliance officers to monitor the development of the case and to ensure all relevant information, evidence, and interviews are collected and evaluated. Early notification to OEP will also allow OEP and the Area Offices to discuss the merits of the case early on in its development. This up-front work may prevent the Area Office from spending extensive resources on a case that may or may not develop into a significant case or meet the additional screening requirements.

OEP will notify RSOL of developing significant or novel cases, or willful violations, so RSOL can plan their involvement.

The AD must notify OEP no later than one month after the initial inspection/investigation so OEP may assist the area office and be prepared to notify DEP/DOC. The AD will email at a minimum the following information to the ARA EP:

- Company/Agency name
- Inspection type
- Inspection number(s)
- Classification of violation(s) including a brief description of the hazards
- Six-month date
- Approximate penalty amount
- Status of the inspection

- Whether OSHA is seeking a criminal referral (such as for a fatality), and
- Likelihood of case qualifying under the Severe Violator Enforcement Program (SVEP)

EP will in turn notify the NO via email to “zzOSHA-SIGCASE-NOTIFY.”

B. OEP Review:

1. OEP will review the completed case file and work with the AD to strengthen the case file and proposed violations. OEP will assign an OEP staff member to assist the area office with technical aspects of the case file development and work as a liaison between the area office and ARA EP. The assigned OEP reviewer will provide a thorough and unbiased critique of the case to ensure the successful outcome of the inspection/investigation and final citations. The ARA EP and the OEP reviewer will conduct a verbal review with the AD and CSHO to ensure OEP’s comments and requests for additional information or changes are understood. Within two weeks of receiving the case file, the ARA EP will provide the AD written review comments defining the recommended changes. The comments and recommended changes to the case will be supported by OSHA policies and procedures or consensus standards. Once the AO has amended the case file and OEP has completed their final review, the AD will provide OEP with a final copy of the entire case file, the required Template memo, and the completed Area Office checklist (Appendix B) for review. The case file may be saved on the O: Drive or an agreed upon location.
2. Notification to Office of the Solicitor: OEP will notify the Solicitor of potential significant or novel enforcement cases and proposed willful violation immediately and will collaborate with the Solicitor early in the development process to produce a successful outcome.
3. Upon completion of the OEP review, OEP will prepare the Template memorandum for the Regional Administrator's signature either forwarding the case to the SOL for concurrence or returning the case to the AD for additional investigation (or if disapproved). If the case is returned to the Area Director, a draft of the memorandum will be shared with the AD for comment prior to it being presented to the Regional Administrator for signature.
4. All significant cases shall be sent to the SOL for concurrence prior to issuance or notification to the National Office. If the case is forwarded to the Solicitor, OEP will provide the Solicitor access to the entire final documentation package **no later than five weeks prior to the six-month date** and request the Solicitor’s comments no later than two

weeks after they receive the case. It is strongly encouraged to provide the SOL with the largest amount of time possible to review the case.

5. At the same time a case is forwarded to the Solicitor for review, if it is determined that a press release will be issued, OEP will forward the template memorandum to the Region’s Office of Public Affairs (OPA) requesting a draft press release. The Office of Public Affairs will be notified of the approximate citation issuance date.
6. Once the Solicitor has reviewed and commented on the case, and the Area Office makes any changes suggested by the SOL, OEP will process the final Template memorandums for submission to DEP/DOC. The required Template memo will be forwarded to DEP or DOC using the designated email address **no later than three weeks prior to the six-month date.**

A schedule in table format is included below. All times are in weeks prior to the six-month statute of limitations. The timelines in the chart are absolute last case scenarios; Area Offices and OEP are to make every attempt to complete these steps earlier to facilitate Citation or Notice issuance and promote rapid hazard abatement.

9 Weeks	AD notifies OEP by email of impending sig or novel case
8 Weeks	AD submits complete case file, template memo, and AO checklist to OEP
8 to 5 Weeks	OEP reviews the case
5 to 3 Weeks	RSOL reviews the case and RA/RSOL briefing
3 Weeks	Transmittal of memorandum(s) to NO

7. **Formal National Office Notification:** OEP must notify the NO of all significant and novel enforcement cases **at least three weeks prior to the six-month issuance date.** Regions may informally notify the NO prior to the three-week period, but all required documentation must be received no later than three weeks before the issuance date. The National Office review procedure may include review of documents in OIS. All worksheets must be updated in OIS with any changes made in response to OEP or RSOL comments, before the case is submitted to the National Office.

C. Case File Briefings: OEP will conduct a thorough review of the case file and work with the AD and CSHO to develop the final product prior to briefing the case file. Once OEP and the AD agree that the case file is complete, OEP will share the final case file and Template Memo with the RA, DRA, and RSOL. OEP will schedule the case for a briefing to the RA, DRAs, and RSOL. The purpose of these briefings is to obtain RA and RSOL final approval for issuing violations. The table below outlines what types of cases are required to be briefed and when they should be briefed. If OEP or an AD wishes to brainstorm or obtain assistance from other members of the Region, this should be done in a less formal manner which may or may not include the RA, DRA, and RSOL.

Briefing Type	Briefing Method
<p>Initial Notification to RA, DRA, OEP</p>	<p>AD will initially notify the RA, DRA, OEP of FATCATs, developing significant, novel, or willful cases during the weekly manager’s meeting. This also includes novel 5(a)(1) citations. This will be a “head’s up” briefing describing the initial details, proposed action, and six-month date.</p>
<p>Final Briefing to RA, DRA, RSOL on:</p> <ul style="list-style-type: none"> • Unique FAT/CAT Investigations • Significant or Novel Cases • Willful citations/notices • FTA citations/notices • Unique 5(a)(1) citations/notices 	<p>This briefing will take place after OEP and the AO have finalized the case file and OEP has sent the case file to the RA, DRA, RSOL. The intent of this briefing is to address final questions by the RA, DRA, RSOL. The AD or CSHO will summarize the investigation and explain the proposed violations. Please see Appendix C of this directive for a recommended briefing outline.</p>

Appendix C provides a suggested outline of how to develop the briefing, so the information is provided concisely and thoroughly.

APPENDIX A: Interviewing Witnesses, Collecting Witness Statements and Establishing the "State of Mind"

Willful violations are based on the "**state of mind**" of the employer or employer representative that allowed the violation or hazardous condition to occur. To establish this state of mind, it is essential to conduct interviews of the employer representatives, employees, and other third parties that may have relevant information. Formal statements of employer, supervisor, or foreman, either recorded or written, are imperative to document the employer's "state of mind". Interviews documented in CSHO notes are also useful.

This appendix will provide general guidelines and a checklist of information to collect and questions to ask. This guide does not mandate a procedure or provide a required list of questions. Each investigation is different, and the professional judgment of the compliance officer is required for successful prosecution of willful citations.

General for all Interviews

Plan Ahead. Make a list of questions you know you want to ask prior to the interview and build on these during the interview. Do not lock yourself into a rigid set of questions but use the list as a memory jogger of points you wish to cover. Plan to conduct follow up questions, especially "Why" questions to determine the employer's state of mind. The "Why" questions are essential to establishing a willful violation and the more you ask "Why" the better information and evidence you will collect.

Interview Early. Conduct important interviews such as the employer representative and witnesses to an event as early in the investigation as possible to obtain the employer's independent, first thoughts and impressions of the incident. You can always re-interview later if needed. It is important to document the information while fresh in their minds, and before people think about what to say to protect themselves or their employer.

Interview Privately. Unless mandated as a condition of the interview by the person being interviewed, do not allow others to be present at the interview. If possible, secure a quiet, private location. If other non-governmental parties are allowed to attend the interview, most likely confidentiality protections have been waived. Always document in the statements who is present (refer to section on Governmental Informant's Privilege).

Rights and Responsibilities. During formal statements, advise the person being interviewed of the governmental informant's privilege, if it applies, and

Section 17g of the OSH Act, which requires truthful testimony during an investigation.

Minimize the Use of Leading Questions. Leading questions in general are those where you make a statement and ask the person to agree or disagree. Get the witness to tell what happened in his or her own words. Leading questions are appropriate in some cases, such as summarizing facts of an accident as provided by the person being interviewed and asking if the summary is correct.

Governmental Informant's Privilege

This privilege allows us to promise a witness that their statement is confidential until they are called to testify in a formal hearing. The statement will be released during discovery in preparation for the hearing. Not all witnesses are entitled to this privilege, and the privilege can be lost in some situations. The following is a summary of the key issues to consider ensuring confidentiality, when appropriate, and know when we cannot promise confidentiality.

Who is protected?

- Non-supervisory personnel of this employer and other employers.
- Management officials and corporate officers of other employers who wish their identities kept confidential from the employer under investigation. (These statements may be obtainable by the corporation under FOIA, since these individuals might be deemed to be the corporation, which has a right to obtain its own statements.)
- Working supervisors may be protected, but the issue is debatable.

Who is not protected?

- Officers or directors of a corporate Respondent.
- High level supervisory employees who oversee substantial portions of Respondent's operation are not protected including:
 - Project superintendents.
 - Supervisors responsible for different divisions or plants.
 - Supervisors who supervise other high or middle level supervisory personnel and are not directly involved in production.
- Lead persons are undoubtedly not protected.
- Federal, state, and local government employees who make statements to you in the course of their normal duties.
- Experts who we eventually decide to call to testify as experts.

What should witnesses be told?

- Non-supervisory employees should be told their statements will be held in confidence unless they authorize its release, divulge to others their statements or they are called to testify by OSHA at which point their statements may be released to Respondent. Advise them they do not have to tell their employer that they gave a statement or what they said.
- Witnesses who ask for a copy of their signed statement should be provided an electronic copy of the statement either through a photo or emailing a copy.
- Directors, officers, or high-level supervisors should not be given assurance of confidentiality.
- Working supervisors may be given limited confidentiality assurance, such as everything will be done to keep your statement confidential unless they authorize its release, divulge their statements to others, or they are called to testify by OSHA at which point their statement may be released to Respondent.

Protecting witness confidentiality.

- Never divulge to another witness or non-DOL employee that a witness with confidentiality privileges said something to you. We may release the statement to other governmental officials with approval of SOL.
- Once you reveal a portion of what a witness said, you have waived the privilege for their entire statement, and we will have to release it to the employer.
- If a witness told you something that dozens of other persons could have had knowledge of, it is okay to summarize what they said. Once this is done, upon request, we are obligated to release to Respondent all portions of the witness's statement that can be released without identifying the declarant.
- If a witness told you something only a handful of people would know, then you cannot reveal this to someone else without waiving the privilege even if you do not say who said this. If in doubt, do not divulge the statement.

Information to Collect During Interview

Basic Information. Collect the following information for all interviews:

- Interviewed person's name, address, phone number, email address, and employee number and the name and contact information for their immediate supervisor. If the employee frequently moves, also record a permanent address, such as parents.
- Employer and nature of employer's work.
- Job title, duties performed, and work shift times.

- Time of employment in current job and with this employer.
- Experience in the job/activity.
- Did this person witness the incident or condition?

Safety and Health Program Information. Collect information on this person's understanding of the employer's safety and health program.

- Is this person familiar with the written safety and health program?
- Are systems in place for employees to turn in hazards, and how does the employer respond to these notices?
- Has the hazardous condition been discussed before? What was said? By whom?
- What efforts were made to correct the hazardous condition?
- What happens if you are caught not following the safety procedures?
- Have you or do you know if anyone has been disciplined for not following safety procedures?
- Were specific work rules established to address the hazardous condition and what are they? How were the rules communicated to the workers?
- Are work procedures to address the hazardous condition enforced, and how? By whom?
- Has the hazardous condition existed before, were there near misses, what action was taken, and who in management was aware of this? How long has the hazardous condition existed?
- What is the person's level of training on safety and health issues? How is training done?
- How long has the hazardous condition been there?
- How many employees are exposed to this hazard daily?
- How long is each employee exposed to the hazard?

Information on the Accident or Hazardous Condition. Document who, what, when, where, and how for the accident or hazardous condition.

- Ask about the time and location of events.
- Ask about environmental conditions such as weather.
- Location of the witness: distance, relative position.
- Document everything the witness saw.
- Document everything the witness said and heard.
- Document everything the witness did.
- Anything the witness was told and who specifically told him/her about it.
- Were any other persons present?
- Were any videos or pictures taken?
- Are there videos or security cameras in the area that may have captured the incident?

Follow-up Questions for Potential Willful Citations. These are the "hard" questions or pointed questions for the employer representative to determine why he/she failed to act or took action that resulted in the hazardous condition. Interrogate the employer representative as early in the investigation as possible. Examples of these questions in one situation could be:

- Who has the responsibility for repair of such equipment?
- Did anyone advise you of the hazardous condition i.e., that the valve was broken or leaking? When and who?
- What was done to protect employees while the hazardous condition existed?
- If you were made aware of the leaking valve, why wasn't it corrected?
- If the hazard was brought to your attention, why were workers allowed to continue?
- Are there any company policies or procedures regarding broken or unsafe equipment? If so, then obtain copies.

Specific Guidelines for Written Statements

- **Write Statement from Notes.** Take notes during the interview, and then construct the statement from the notes and write it in the general language of the witness.
- **Review Statement with Witness.** Allow the person to review the statement making changes to ensure the statement accurately reflects the facts as known by the person. Have the witness initial all changes. Have witness initial each page of the statement.
- **Obtain Signature from Witness.** Have the person sign and date the statement. If he/she refuses to sign the statement, ask the person to review the statement and tell you if it is accurate. If they agree it is accurate, note this on the statement and sign it as a witness to the statement. Also, have the person initial and date each correction made to the statement and initial and date the bottom of each page of the statement.
- **Providing statement to witness.** If the witness requests a copy of his/her statement, you may provide a copy only if the witness has signed the statement. If the witness does not sign the statement, explain that since it is not signed, they are only your notes. If the attorney for the company or the employee states that the witness requests a copy of their statement, you should explain that the witness needs to provide a written request for the statement and a copy will be provided to them in person or sent to their address listed on the statement. Also let the witness know that if a copy is provided, you cannot guarantee confidentiality.

Specific Guidelines for Video Taped or Recorded Statements

- **Use Standard Recorded Format.** Initiate each interview by reading the recorded statement format at the end of this appendix.
- **Keep the number of interviewers to as few as possible.** More than one interviewer can be confusing, to both the witness and any party reviewing the interview later. It can also lead to the lack of focus on the material facts you are attempting to obtain. If more than one interviewer is present, always state your name prior to asking questions each time the interviewer changes.
- **Video Witness During Statements.** Video may provide non-verbal indicators relating to the witness's credibility. Other factors to consider is whether a video picture of the witness is necessary; the willingness of the witness; and location of the interview.
- **Only Accept Verbal Answers.** Do not allow the witness to give non-verbal answers such as nodding his/her head, or answers which use references such as, "from here to the wall."
- **Do Not Interrupt.** Do not allow more than one to engage in conversation with the witness during the recording. However, try to focus the statement on the collection of information important to your investigation. **Do not engage in general conversation on the recording.**
- **Keep Statements Concise.** Since tapes may have to be transcribed if a case is contested, it is important to keep the statements on point and directly relevant to the investigation. Try to keep the interview on the subject matter at hand by using the list of questions you prepared prior to the interview and refer to your list during the interview. **Do not make statements, opinions, and extraneous comments while conducting the interview.**
- **Transcribe recorded statements.** In accordance with Reference 4, these statements shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases so that it may be signed. CSHOs are encouraged to produce a written statement for correction and signature as soon as possible, identifying the transcriber. Please consult with your Area Director before beginning a full transcription.

Format for Recorded Statements

The following is a tool to use when collecting a recorded statement. Following this guide will ensure you collect the basic information needed for a statement,

and that the witness is given warnings, rights and responsibilities related to this statement.

Today's date is (date)_____. I am (name) _____, a compliance officer with the U.S. Department of Labor, Occupational Safety and Health Administration. **(Have other people in the room attending the interview, besides the witness, state their name and position/title. This establishes the identity of each voice for later transcription.)** The location of this interview is_. Prior to asking you any questions, I must inform you that this interview is being taped. Do you have any objections to having your statement recorded?

(Read if applicable based on the Governmental Informant's Privilege)

This statement will be held in confidence until such time as you may be called to testify in a court proceeding, at which time it may be produced upon demand of opposing counsel.

Additionally, this statement may be made available to other agencies if it will assist them in the performance of their statutory functions. Upon the closing of this case, this statement may be subject to disclosure only in accordance with applicable statutes and agency policy.

It is important that this statement contains facts which are true and correct to the best of your knowledge and belief. Public Law 91-596, Paragraph 17(g) makes it a criminal offense to knowingly make a false statement or misrepresentation in this statement. Do you understand your obligation to provide a true and correct statement? _____

Would you provide your full name and spell it for the record? What is your mailing address?
What is your home phone number?
What is your email address?
What is (was) your employee number (if applicable)? How long have (had) you worked for this employer? What is (was) the address of your place of employment? What is (was) your job classification/title?
How long have (had) you worked in this job classification/title? What is your experience in this type of work?
What shifts do (did) you work?

Note: Collect information related to the inspection.

Note: At the end of the statement finish with: This completes the statement of (Employee name)

APPENDIX B: Area Director’s Checklist and Certification

AD Initials	AAD Initials	Documents Reviewed
		Completed & Signed Area Office Checklist
		Significant or Novel Case Memorandum(s) & Violation Table
		OSHA Inspection Report
		OSHA Inspection narrative
		OSHA Violation Worksheets – 4 elements of a 5(a)(2) violation
		General Duty Clause – 4 elements of a 5(a)(1) violation
		Willful Violation and Willful Worksheets – 4 elements of a willful violation
		Previous OSHA violation worksheets with final order dates and abatements
		At least 1 color photo depicting the violation associated (linked) to each violation worksheet. Include the photo number of each applicable photo in Box 21 (or equivalent) of the violation worksheet.
		Previous settlement agreement and proof of abatement for repeat violations
		Copies of OSHA 300s and/or 300As in the case file.
		Inspection History
		Additional research conducted by CSHO and included in the case file
		SVEP evaluation
		Additional evidence considered for each violation
		NAME
CSHO		
AAD		
AD		

AAD’s Signature: _____ **Date:**

AD’s Signature: _____ **Date:**

APPENDIX C: Case File Briefing Format

Purpose

The purpose of the briefing is to notify the RA and SOL on fatality investigations, significant or novel cases, or unique 5(a)(1) citations early in the investigations and then again when citations have been developed. This is an opportunity to brainstorm so that a solid defensible case can be developed. You are telling the story of what you saw, and did while conducting the investigation, who did you speak to and what did they say. Keep in mind your audience has not been to the site or has not heard your interview statements, so you must paint the picture of what you saw and did.

The following are some questions that are commonly asked during the briefing.

If the questions are applicable, it is fine to acknowledge that the answer is unknown. If this is the case, then there should be some outline on how we can get an answer or identify that assistance from the collective resources is needed.

1. Sequence of events

- What was the event?
- What was being done prior to the event?
- Who was doing what?
- Who was responsible for which action?
- Where personnel were in relation to the event?
- What was the condition of the equipment?

2. Assistance

- Have you contacted any Subject Matter Experts for assistance?
- Are there, or should we get, any outside agencies involved?
- Have samples been taken?

3. Who's who

- Who has been interviewed and who else needs to be interviewed?
- Who is the direct supervisor?
 - Does he speak for the employer?
 - Does he have the authority to stop work and get hazards corrected?
- Who are the upper managers?
 - What are they responsible for?
 - Do they have the authority to stop work and get hazards corrected?

4. Documents

- Have you requested programs, equipment manuals?

5. Hazards

- Does the hazard still exist?
 - What has been done to mitigate the hazard?
 - What might be a reasonable means of abatement?
- Has employer knowledge of the hazard been established?
 - Actual
 - Constructive

Reminder. For a willful violation:

 - Heightened awareness, and
 - Plain indifference or intentional disregard
- Did anyone recognize that there was a hazard?
 - Was it ever reported?
 - Was there any attempt to mitigate/remove the hazard?