OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

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SUBJECT: Field Operations Manual (FOM)	

ABSTRACT

Purpose: To provide OSHA offices, State Plan programs and federal agencies with policy and procedures concerning the enforcement of occupational safety and health standards. Also, this instruction provides current information and ensures that occupational safety and health standards are enforced with uniformity.

Scope: OSHA-wide.

References: See Chapter 1, Section III.

Cancellations: See Chapter 1, Section IV.

State Impact: Notice of Intent and Equivalency required. See Chapter 1, Section VI.

Action Offices: National, Regional, and Area Offices.

Originating Office: Directorate of Enforcement Programs (DEP).

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Executive Summary

This instruction provides current information and guidance to the Occupational Safety and Health Administration (OSHA) national, regional, and area offices concerning OSHA's policy and procedures for implementing inspections, issuing citations and proposing penalties.

Significant Changes for 2019 Update

- Updated *Enforcement Follow-Up and Monitoring Inspection* in Chapter 2, Section VI.H.2.b.
- Updated *Inspection Preparation and Planning* in Chapter 3, Section II.A.
- Updated *Inspection Scope* in Chapter 3, Section III.B.
- Updated *Refusal to Permit Inspection and Interference* in Chapter 3, Section IV.C.1.
- Updated *Walkaround Representatives* in Chapter 3, Section VII.A.2.
- Updated *General Penalty Policy* in Chapter 6, Section I.
- Updated *Civil Penalties* to include the "Inflation Adjustment Act" in Chapter 6, Section II.A.
- Updated Chapter 6 to replace specific inflation-adjusted penalty amounts with references to the *Annual Adjustments to OSHA Civil Penalties* memorandum.
- Updated *Procedures for an Inspection* in Chapter 9, Section I.H.5.
- Updated *Fatality and Catastrophe Investigations* in Chapter 11 Section II.C.2.
- Updated *Federal Agency Appeals Procedures* in Chapter 13, Section VIII.G.2.f and VIII.G.3.
- Updated *Citable Program Elements* in Chapter 13, Table 13-1.
- Updated *Obtaining Warrants* in Chapter 15, Section III.

Disclaimer

This manual is intended to provide instruction regarding some of the internal operations of the Occupational Safety and Health Administration (OSHA), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor or the United States. Statements which reflect current Occupational Safety and Health Review Commission or court precedents do not necessarily indicate acquiescence to those precedents.

TABLE OF CONTENTS

CHAPTER 1
INTRODUCTION

I. PURPOSE 1-1

II. SCOPE 1-1

III. REFERENCES 1-1

IV. CANCELLATIONS 1-6

V. ACTION INFORMATION 1-6

A. RESPONSIBLE OFFICE 1-6
B. ACTION OFFICES 1-6
C. INFORMATION OFFICES 1-6

VI. FEDERAL PROGRAM CHANGE – NOTICE OF INTENT AND EQUIVALENCY REQUIRED 1-6

VII. SIGNIFICANT CHANGES 1-7

VIII. BACKGROUND 1-8

IX. DEFINITIONS AND TERMINOLOGY 1-8

A. THE ACT 1-8
B. COMPLIANCE SAFETY AND HEALTH OFFICER (CSHO) 1-8
C. HE/SHE AND HIS/HERS 1-8
D. PROFESSIONAL JUDGMENT 1-8
E. WORKPLACE AND WORKSITE 1-8

CHAPTER 2
PROGRAM PLANNING

I. INTRODUCTION 2-1

II. AREA OFFICE RESPONSIBILITIES. 2-1

A. PROVIDING ASSISTANCE TO SMALL EMPLOYERS 2-1
B. AREA OFFICE OUTREACH PROGRAM 2-1
C. RESPONDING TO REQUESTS FOR ASSISTANCE 2-1

III. OSHA COOPERATIVE PROGRAMS OVERVIEW. 2-2

A. VOLUNTARY PROTECTION PROGRAMS (VPP) 2-2
B. ON-SITE CONSULTATION PROGRAM 2-2
C. SAFETY AND HEALTH ACHIEVEMENT RECOGNITION PROGRAM (SHARP) 2-2
D. PRE-SAFTEY AND HEALTH ACHIEVEMENT RECOGNITION PROGRAM (PRE-SHARP) 2-3
E. STRATEGIC PARTNERSHIPS 2-3
F. ALLIANCE PROGRAMS 2-3

IV. ENFORCEMENT PROGRAM SCHEDULING 2-4

A. GENERAL 2-4
B. INSPECTION PRIORITY CRITERIA 2-4
C. EFFECT OF CONTEST 2-5

D. Enforcement Exemptions and Limitations 2-5
E. Preemption by Another Federal Agency 2-6
F. United States Postal Service 2-6
G. Home-Based Worksites 2-7
H. Inspection/Investigation Types 2-7

V. UNPROGRAMMED ACTIVITY – HAZARD EVALUATION AND INSPECTION SCHEDULING 2-8

VI. PROGRAMMED INSPECTIONS 2-8

A. Scheduling for Construction Inspections 2-8
B. Scheduling for Maritime Inspections 2-9
C. Special Emphasis Programs (SEPs) 2-9
D. National Emphasis Programs (NEPs) 2-10
E. Local Emphasis Programs (LEPs) and Regional Emphasis Programs (REPs) 2-10
F. Site-Specific Targeting (SST) Inspection Programs 2-11
G. Other Special Programs 2-11
H. Inspection Scheduling and Interface with Cooperative Program Participants 2-11

CHAPTER 3
INSPECTION PROCEDURES

I. GENERAL INSPECTION PROCEDURES 3-1

II. INSPECTION PREPARATION AND PLANNING 3-1

A. Review of Inspection History 3-1
B. Review of Cooperative Program Participation 3-1
C. Safety and Health Issues Relating to CSHOs 3-1
D. Advance Notice of an Inspection 3-4
E. Pre-Inspection Compulsory Process 3-5
F. Personal Security Clearance 3-5
G. Expert Assistance 3-5

III. INSPECTION SCOPE. 3-5

A. Comprehensive 3-5
B. Partial. 3-5

IV. CONDUCT OF INSPECTION 3-6

A. Time of Inspection 3-6
B. Presenting Credentials 3-6
C. Refusal to Permit Inspection and Interference 3-6
D. Employee Participation 3-8
E. Release for Entry 3-8
F. Bankrupt or Out of Business 3-9
G. Employee Responsibilities 3-9
H. Strike or Labor Dispute 3-9
I. Variances 3-10

V. OPENING CONFERENCE 3-10

A. General 3-10
B. Review of Appropriation Act Exemptions and Limitations 3-12
C. Review Screening for Process Safety Management (PSM) Coverage 3-12
D. Review of Voluntary Compliance Programs 3-13

E. Disruptive Conduct 3-14
F. Classified Areas 3-14

VI. REVIEW OF RECORDS 3-14

A. Injury and Illness Records 3-14
B. Recording Criteria 3-15
C. Recordkeeping Deficiencies 3-16

VII. WALKAROUND INSPECTION. 3-16

A. Walkaround Representatives 3-16
B. Evaluation of Safety and Health Management System 3-17
C. Record All Facts Pertinent to a Violation 3-18
D. Testifying in Hearings 3-18
E. Trade Secrets 3-18
F. Collecting Samples 3-19
G. Photographs and Video Recordings 3-19
H. Violations of Other Laws 3-19
I. Interviews of Non-Managerial Employees 3-20
J. Multi-Employer Worksites 3-23
K. Administrative Subpoena 3-23
L. Employer Abatement Assistance 3-23

VIII. CLOSING CONFERENCE 3-23

A. Participants 3-23
B. Discussion Items 3-24
C. Advice to Attendees 3-25
D. Penalties 3-25
E. Feasible Administrative, Work Practice and Engineering Controls 3-25
F. Reducing Employee Exposure 3-26
G. Abatement Verification 3-26
H. Employee Discrimination 3-27

IX. SPECIAL INSPECTION PROCEDURES 3-27

A. Follow-up and Monitoring Inspections 3-27
B. Construction Inspections 3-28
C. Federal Agency Inspections 3-29

CHAPTER 4
VIOLATIONS

I. BASIS OF VIOLATIONS 4-1

A. Standards and Regulations 4-1
B. Employee Exposure 4-3
C. Regulatory Requirements 4-5
D. Hazard Communication 4-5
E. Employer/Employee Responsibilities 4-5

II. SERIOUS VIOLATIONS. 4-6

A. Section 17(k) 4-6
B. Establishing Serious Violations 4-7
C. Four Steps to be Documented 4-7

III. GENERAL DUTY REQUIREMENTS. 4-11

A. EVALUATION OF GENERAL DUTY REQUIREMENTS 4-11
B. ELEMENTS OF A GENERAL DUTY REQUIREMENT VIOLATION 4-11
C. USE OF THE GENERAL DUTY CLAUSE 4-18
D. LIMITATIONS OF USE OF THE GENERAL DUTY CLAUSE 4-19
E. CLASSIFICATION OF VIOLATIONS CITED UNDER THE GENERAL DUTY CLAUSE 4-21
F. PROCEDURES FOR IMPLEMENTATION OF SECTION 5(A)(1) ENFORCEMENT 4-21

IV. OTHER-THAN-SERIOUS VIOLATIONS 4-21

V. WILLFUL VIOLATIONS 4-22

A. INTENTIONAL DISREGARD OF VIOLATIONS 4-22
B. PLAIN INDIFFERENCE VIOLATIONS 4-22

VI. CRIMINAL/WILLFUL VIOLATIONS 4-24

A. AREA DIRECTOR COORDINATION 4-24
B. CRITERIA FOR INVESTIGATING POSSIBLE CRIMINAL/WILLFUL VIOLATIONS 4-24
C. WILLFUL VIOLATIONS RELATED TO A FATALITY 4-25

VII. REPEATED VIOLATIONS 4-25

A. FEDERAL AND STATE PLAN VIOLATIONS 4-25
B. IDENTICAL STANDARDS 4-25
C. DIFFERENT STANDARDS 4-26
D. OBTAINING INSPECTION HISTORY 4-26
E. TIME LIMITATIONS 4-26
F. REPEATED V. FAILURE TO ABATE 4-27
G. AREA DIRECTOR RESPONSIBILITIES 4-27

VIII. DE MINIMIS CONDITIONS 4-28

A. CRITERIA 4-28
B. PROFESSIONAL JUDGMENT 4-29
C. AREA DIRECTOR RESPONSIBILITIES 4-29

IX. CITING IN THE ALTERNATIVE 4-29

X. COMBINING AND GROUPING VIOLATIONS 4-29

A. COMBINING 4-29
B. GROUPING 4-29
C. WHEN NOT TO GROUP OR COMBINE 4-30

XI. HEALTH STANDARD VIOLATIONS 4-31

A. CITATION OF VENTILATION STANDARDS 4-31
B. VIOLATIONS OF THE NOISE STANDARD 4-31

XII. VIOLATIONS OF THE RESPIRATORY PROTECTION STANDARD (§1910.134) 4-33

XIII. VIOLATIONS OF AIR CONTAMINANT STANDARDS (§1910.1000) 4-33

A. REQUIREMENTS UNDER THE STANDARD 4-33
B. CLASSIFICATION OF VIOLATIONS OF AIR CONTAMINANT STANDARDS 4-34

XIV. CITING IMPROPER PERSONAL HYGIENE PRACTICES 4-35

A. INGESTION HAZARDS 4-35
B. ABSORPTION HAZARDS 4-36

C. WIPE SAMPLING 4-36
D. CITATION POLICY 4-36

XV. BIOLOGICAL MONITORING 4-36

CHAPTER 5
CASE FILE PREPERATION AND DOCUMENTATION

I. INTRODUCTION 5-1

II. INSPECTION CONDUCTED, CITATIONS BEING ISSUED 5-1

A. INSPECTION REPORT 5-1
B. NARRATIVE 5-1
C. VIOLATION WORKSHEET 5-2

III. INSPECTION CONDUCTED BUT NO CITATIONS ISSUED 5-4

IV. NO INSPECTION 5-4

V. HEALTH INSPECTIONS 5-4

A. DOCUMENT POTENTIAL EXPOSURE 5-4
B. EMPLOYER'S OCCUPATIONAL SAFETY AND HEALTH SYSTEM 5-5

VI. AFFIRMATIVE DEFENSES 5-6

A. BURDEN OF PROOF 5-6
B. EXPLANATIONS 5-6

VII. INTERVIEW STATEMENTS 5-8

A. GENERALLY 5-8
B. CSHOS SHALL OBTAIN WRITTEN STATEMENTS WHEN 5-8
C. LANGUAGE AND WORDING OF STATEMENT 5-8
D. REFUSAL TO SIGN STATEMENT 5-8
E. VIDEO- AND AUDIO-RECORDED STATEMENTS 5-8
F. ADMINISTRATIVE DEPOSITIONS 5-9

VIII. PAPERWORK AND WRITTEN PROGRAM REQUIREMENTS 5-9

IX. GUIDELINES FOR CASE FILE DOCUMENTATION FOR USE WITH VIDEO AND AUDIO RECORDINGS 5-9

X. CASE FILE ACTIVITY DIARY SHEET 5-9

XI. CITATIONS 5-9

A. STATUTE OF LIMITATIONS 5-10
B. ISSUING CITATIONS 5-10
C. AMENDING/WITHDRAWING CITATIONS AND NOTIFICATION OF PENALTIES 5-10
D. PROCEDURES FOR AMENDING OR WITHDRAWING CITATIONS 5-11

XII. INSPECTION RECORDS 5-12

A. GENERALLY 5-12
B. RELEASE OF INSPECTION INFORMATION 5-12
C. CLASSIFIED AND TRADE SECRET INFORMATION 5-12

CHAPTER 6
PENALTIES AND DEBT COLLECTION

I. GENERAL PENALTY POLICY 6-1

II. CIVIL PENALTIES 6-2

A. AUTHORITY FOR CIVIL PENALTIES 6-2
B. APPROPRIATION ACT RESTRICTIONS 6-2
C. MINIMUM PENALTIES 6-2
D. MAXIMUM PENALTIES 6-2

III. PENALTY FACTORS 6-3

A. GRAVITY OF VIOLATION 6-3
B. PENALTY ADJUSTMENT FACTORS 6-7

IV. EFFECT ON PENALTIES IF EMPLOYER IMMEDIATELY CORRECTS. 6-10

A. QUICK-FIX PENALTY REDUCTION 6-10
B. QUICK-FIX REDUCTION SHALL APPLY TO 6-11
C. QUICK-FIX REDUCTIONS SHALL NOT APPLY TO 6-11
D. REDUCTION AMOUNT 6-11

V. REPEATED VIOLATIONS 6-12

A. GENERAL 6-12
B. PENALTY INCREASE FACTORS FOR REPEATED VIOLATIONS 6-13
C. OTHER-THAN-SERIOUS, NO INITIAL PENALTY 6-13
D. REGULATORY VIOLATIONS 6-13
E. PENALTY INCREASE 6-13

VI. WILLFUL VIOLATIONS 6-13

A. GENERAL 6-13
B. SERIOUS WILLFUL PENALTY REDUCTIONS 6-14
C. WILLFUL REGULATORY VIOLATIONS 6-14

VII. PENALTIES FOR FAILURE TO ABATE 6-14

A. GENERAL 6-14
B. CALCULATION OF ADDITIONAL PENALTIES 6-15
C. PARTIAL ABATEMENT 6-16

VIII. VIOLATION-BY-VIOLATION (EGREGIOUS) PENALTY POLICY 6-16

A. PENALTY PROCEDURE 6-16
B. CASE HANDLING 6-16
C. CALCULATION OF PENALTIES 6-16

IX. SIGNIFICANT ENFORCEMENT ACTIONS 6-16

A. DEFINITION 6-16
B. MULTI-EMPLOYER WORKSITES 6-16
C. FEDERAL AGENCY SIGNIFICANT CASES. 6-16
D. ASSISTANT SECRETARY CONCURRENCE 6-17

X. PENALTY AND CITATION POLICY FOR PARTS 1903 AND 1904 REGULATORY REQUIREMENTS 6-17

A. POSTING REQUIREMENTS UNDER PART 1903 6-17
B. ADVANCE NOTICE OF INSPECTION – §1903.6 6-18

C. ABATEMENT VERIFICATION REGULATION VIOLATIONS – §1903.19 6-18
D. INJURY AND ILLNESS RECORDS AND REPORTING UNDER PART 1904 6-18

XI. FAILURE TO PROVIDE ACCESS TO MEDICAL AND EXPOSURE RECORDS – §1910.1020 6-19

A. PROPOSED PENALTIES 6-19
B. USE OF VIOLATION-BY-VIOLATION PENALTIES 6-19

XII. CRIMINAL PENALTIES 6-19

A. OSH ACT AND U.S. CODE 6-19
B. COURTS 6-19

XIII. HANDLING MONIES RECEIVED FROM EMPLOYERS 6-19

A. RESPONSIBILITY OF THE AREA DIRECTOR 6-19
B. RECEIVING PAYMENTS 6-20
C. REFUNDS 6-22

XIV. DEBT COLLECTION PROCEDURES 6-22

A. POLICY 6-22
B. TIME ALLOWED FOR PAYMENT OF PENALTIES 6-22
C. NOTIFICATION PROCEDURES 6-23
D. NOTIFICATION OF OVERDUE DEBT 6-23
E. ASSESSMENT OF ADDITIONAL CHARGES 6-24
F. ASSESSMENT PROCEDURES 6-25
G. APPLICATION OF PAYMENTS 6-26
H. UNCOLLECTIBLE PENALTIES 6-26
I. NATIONAL OFFICE DEBT COLLECTION PROCEDURES 6-27

CHAPTER 7
POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

I. CONTESTING CITATIONS, NOTIFICATIONS OF PENALTY AND ABATEMENT DATES 7-1

A. NOTICE OF CONTEST 7-1
B. CONTEST PROCESS 7-2

II. INFORMAL CONFERENCES. 7-2

A. GENERAL 7-2
B. ASSISTANCE OF COUNSEL 7-2
C. OPPORTUNITY TO PARTICIPATE 7-2
D. NOTICE OF INFORMAL CONFERENCES 7-3
E. POSTING REQUIREMENT 7-3
F. CONDUCT OF THE INFORMAL CONFERENCE 7-3

III. PETITION FOR MODIFICATION OF ABATEMENT DATE (PMA) 7-4

A. FILING 7-4
B. WHERE FILING REQUIREMENTS ARE NOT MET 7-4
C. APPROVAL OF PMA 7-5
D. OBJECTION TO PMA 7-5

IV. OSHA'S ABATEMENT VERIFICATION REGULATION, §1903.19 7-6

A. IMPORTANT TERMS AND CONCEPTS 7-6
B. WRITTEN CERTIFICATION 7-8
C. VERIFICATION PROCEDURES 7-8
D. SUPPLEMENTAL PROCEDURES 7-8
E. REQUIREMENTS 7-8

V. ABATEMENT CERTIFICATION 7-9

A. MINIMUM LEVEL 7-9
B. CERTIFICATION REQUIREMENTS 7-9
C. CERTIFICATION TIMEFRAME 7-9

VI. ABATEMENT DOCUMENTATION 7-9

A. REQUIRED ABATEMENT DOCUMENTATION 7-9
B. ADEQUACY OF ABATEMENT DOCUMENTATION 7-10
C. ABATEMENT DOCUMENTATION FOR SERIOUS VIOLATIONS 7-10
D. CSHO OBSERVED ABATEMENT 7-11

VII. MONITORING INFORMATION FOR ABATEMENT PERIODS GREATER THAN 90 DAYS 7-12

A. ABATEMENT PERIODS GREATER THAN 90 DAYS 7-12
B. ABATEMENT PLANS 7-12
C. PROGRESS REPORTS 7-12
D. SPECIAL REQUIREMENTS FOR LONG-TERM ABATEMENT 7-13

VIII. EMPLOYER FAILURE TO SUBMIT REQUIRED ABATEMENT CERTIFICATION 7-13

A. ACTIONS PRECEDING CITATION FOR FAILURE TO CERTIFY ABATEMENT 7-13
B. CITATION FOR FAILURE TO CERTIFY 7-14
C. CERTIFICATION OMISSIONS 7-14
D. PENALTY ASSESSMENT FOR FAILURE TO CERTIFY 7-14

IX. TAGGING FOR MOVABLE EQUIPMENT 7-15

A. TAG-RELATED CITATIONS 7-15
B. EQUIPMENT WHICH IS MOVED 7-15

X. FAILURE TO NOTIFY EMPLOYEES BY POSTING 7-15

A. EVIDENCE 7-15
B. LOCATION OF POSTING 7-15
C. OTHER COMMUNICATION 7-15

XI. ABATEMENT VERIFICATION FOR SPECIAL ENFORCEMENT SITUATIONS 7-16

A. CONSTRUCTION ACTIVITY CONSIDERATIONS 7-16
B. FIELD SANITATION AND TEMPORARY LABOR CAMPS 7-16
C. FOLLOW-UP POLICY FOR EMPLOYER FAILURE TO VERIFY ABATEMENT UNDER §1903.19 7-17

XII. ONSITE VISITS: PROCEDURES FOR ABATEMENT VERIFICATION AND MONITORING 7-17

A. FOLLOW-UP INSPECTIONS 7-17
B. SEVERE VIOLATOR ENFORCEMENT PROGRAM (SVEP) FOLLOW-UP 7-18
C. SEVERE INJURY REPORTING MONITORING 7-18

D. INITIAL FOLLOW-UP 7-18
E. SECOND FOLLOW-UP 7-19
F. OSH ACT SECTION 11(B) 7-19
G. FOLLOW-UP INSPECTIONS 7-19

XIII. MONITORING INSPECTIONS 7-21

A. GENERAL 7-21
B. CONDUCT OF MONITORING INSPECTION (PMAS AND LONG-TERM ABATEMENT) 7-21
C. ABATEMENT DATES IN EXCESS OF ONE YEAR 7-21
D. MONITORING ABATEMENT EFFORTS 7-22
E. MONITORING CORPORATE-WIDE SETTLEMENT AGREEMENTS 7-23

XIV. NOTIFICATION OF FAILURE TO ABATE 7-23

A. VIOLATION 7-23
B. PENALTIES 7-23
C. CALCULATION OF ADDITIONAL PENALTIES 7-23

XV. CASE FILE MANAGEMENT 7-23

A. CLOSING OF CASE FILE WITHOUT ABATEMENT CERTIFICATION 7-23
B. REVIEW OF EMPLOYER-SUBMITTED ABATEMENT 7-23
C. WHETHER TO KEEP ABATEMENT DOCUMENTATION 7-23

XVI. ABATEMENT SERVICES AVAILABLE TO EMPLOYERS 7-24

CHAPTER 8
SETTLEMENTS

I. SETTLEMENT OF CASES BY AREA DIRECTORS 8-1

A. GENERAL 8-1
B. PRE-CONTEST SETTLEMENT (INFORMAL SETTLEMENT AGREEMENT) 8-1
C. PROCEDURES FOR PREPARING THE INFORMAL SETTLEMENT AGREEMENT 8-4
D. POST-CONTEST SETTLEMENT (FORMAL SETTLEMENT AGREEMENT) 8-4
E. CORPORATE-WIDE SETTLEMENT AGREEMENT 8-5

CHAPTER 9
COMPLAINT AND REFERRAL PROCESSING

I. SAFETY AND HEALTH COMPLAINTS AND REFERRALS 9-1

A. DEFINITIONS 9-1
B. CLASSIFYING AS A COMPLAINT OR A REFERRAL 9-3
C. CRITERIA WARRANTING AN INSPECTION 9-3
D. SCHEDULING AN INSPECTION OF AN EMPLOYER IN AN EXEMPT INDUSTRY 9-4
E. ELECTRONIC COMPLAINTS RECEIVED THROUGH THE OSHA PUBLIC WEBSITE 9-4
F. INFORMATION RECEIVED BY TELEPHONE 9-5
G. PROCEDURES FOR HANDLING COMPLAINTS FILED IN MULTIPLE AREA OFFICES OR REGIONS 9-6
H. PROCEDURES FOR AN INSPECTION 9-6
I. PROCEDURES FOR AN INQUIRY 9-7
J. COMPLAINANT PROTECTION 9-9
K. RECORDING IN OIS 9-10

II. WHISTLEBLOWER COMPLAINTS 9-10

III. DECISION TREES 9-11

CHAPTER 10
INDUSTRY SECTORS

I. AGRICULTURE 10-1

A. INTRODUCTION 10-1
B. DEFINITIONS 10-1
C. APPROPRIATIONS ACT EXEMPTIONS FOR FARMING OPERATIONS 10-2
D. STANDARDS APPLICABLE TO AGRICULTURE 10-3
E. PESTICIDES 10-4
F. WAGE & HOUR/OSHA SHARED AUTHORITY UNDER SECRETARY'S ORDER 10-5

II. CONSTRUCTION [RESERVED] 10-6

III. MARITIME 10-7

A. MARITIME INDUSTRY PRIMARY RESOURCES 10-8
B. SHIPYARD EMPLOYMENT (PART 1915) 10-13
C. MARINE CARGO HANDLING INDUSTRY (PARTS 1917 & 1918) 10-22
D. OTHER MARINE ACTIVITIES 10-30
E. SECURITY PROCEDURES 10-32

CHAPTER 11
IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE

I. IMMINENT DANGER SITUATIONS 11-1

A. GENERAL 11-1
B. PRE-INSPECTION PROCEDURES 11-1
C. IMMINENT DANGER INSPECTION PROCEDURES 11-2
D. ELIMINATION OF THE IMMINENT DANGER 11-3

II. FATALITY AND CATASTROPHE INVESTIGATIONS 11-5

A. DEFINITIONS 11-5
B. INITIAL REPORT 11-5
C. INVESTIGATION PROCEDURES 11-6
D. INTERVIEW PROCEDURES 11-6
E. INVESTIGATION DOCUMENTATION 11-8
F. POTENTIAL CRIMINAL PENALTIES IN FATALITY AND CATASTROPHE CASES 11-9
G. FAMILIES OF VICTIMS 11-10
H. PUBLIC INFORMATION POLICY 11-12
I. RECORDING AND TRACKING FOR FATALITY/CATASTROPHE INVESTIGATIONS 11-12
J. PRE-CITATION REVIEW 11-14
K. POST-CITATION PROCEDURES/ABATEMENT VERIFICATION 11-14
L. AUDIT PROCEDURES 11-15
M. RELATIONSHIP OF FATALITY AND CATASTROPHE INVESTIGATIONS TO OTHER PROGRAMS AND ACTIVITIES 11-16
N. SPECIAL ISSUES RELATED TO WORKPLACE FATALITIES 11-17

III. RESCUE OPERATIONS AND EMERGENCY RESPONSE 11-18

A. OSHA'S AUTHORITY TO DIRECT RESCUE OPERATIONS 11-18
B. VOLUNTARY RESCUE OPERATIONS PERFORMED BY EMPLOYEES 11-18
C. EMERGENCY RESPONSE 11-19

CHAPTER 12
SPECIALIZED INSPECTION PROCEDURES

I. MULTI-EMPLOYER WORKPLACE/WORKSITE [RESERVED] 12-1

II. TEMPORARY LABOR CAMPS 12-1

A. INTRODUCTION 12-1
B. DEFINITIONS 12-1
C. WAGE & HOUR/OSHA SHARED AUTHORITY UNDER SECRETARY'S ORDER 12-1
D. ENFORCEMENT OF TEMPORARY LABOR CAMP STANDARDS FOR AGRICULTURE 12-3
E. OSHA ENFORCEMENT FOR NON-AGRICULTURE WORKSITES 12-3
F. EMPLOYEE OCCUPIED HOUSING 12-4
G. PRIMARY CONCERNS 12-4
H. DIMENSIONS 12-6
I. DOCUMENTATION FOR HOUSING INSPECTIONS 12-6
J. CONDITION OF EMPLOYMENT 12-6

CHAPTER 13
FEDERAL AGENCY FIELD ACTIVITIES

I. INTRODUCTION 13-1

A. SCOPE 13-1
B. OVERVIEW 13-1
C. IMPORTANT DEFINITIONS 13-2
D. LAWS AND REGULATIONS AFFECTING FEDERAL AGENCIES 13-3
E. OSHA CONTACTS FOR INFORMATION REGARDING FEDERAL AGENCIES 13-5

II. COVERAGE OF FEDERAL AGENCIES UNDER 29 CFR PART 1960 13-5

A. ENFORCEMENT 13-5
B. MILITARY PERSONNEL, EQUIPMENT AND OPERATIONS 13-6
C. FEDERAL AGENCIES EXEMPT FROM UNANNOUNCED INSPECTIONS 13-6
D. FEDERAL AGENCIES WITH PRIVATE SECTOR EMPLOYEES ON-SITE 13-7
E. UNITED STATES POSTAL SERVICE 13-8

III. FEDERAL AGENCY INSPECTION SCHEDULING 13-8

A. TARGETED INSPECTIONS 13-8
B. SPECIAL EMPHASIS INSPECTIONS 13-8
C. INCIDENT INSPECTIONS 13-9
D. COMPLAINT HANDLING 13-9
E. REPORTS OF REPRISAL OR DISCRIMINATION 13-10
F. ALTERNATE AND SUPPLEMENTARY STANDARDS 13-12
G. REFUSAL OF ENTRY 13-13

IV. FEDERAL AGENCY RECORDKEEPING AND REPORTING REQUIREMENTS 13-13

A. General Background 13-13
B. Recording and Reporting Injuries and Illnesses at Federal Agencies 13-13
C. Summary of Major Federal Recordkeeping Requirements Differences Compared to Private Sector 13-14
D. Reports and Investigations of Fatalities/Catastrophes 13-14
E. Federal Agency Recordkeeping Forms 13-15

V. ACCESS TO FEDERAL EMPLOYEE OCCUPATIONAL SAFETY AND HEALTH-RELATED RECORDS 13-15

A. Access to Federal Employee Injury and Illness Records 13-15
B. Federal Employee Access to Exposure and Medical Records 13-15

VI. EVALUATIONS OF FEDERAL AGENCY PROGRAMS 13-16

A. Purpose 13-16
B. Time Frames 13-16
C. Office Responsibilities 13-17

VII. AGENCY TECHNICAL ASSISTANCE REQUEST (ATAR) 13-17

A. Definition 13-17
B. Agency Procedures for Requesting an ATAR 13-17
C. OSHA Response to ATARs 13-17
D. Visit Procedures 13-18
E. Abatement 13-18

VIII. NOTICE(S) OF UNSAFE OR UNHEALTHFUL WORKING CONDITIONS ... 13-18

A. Issuance of an OSHA Notice 13-19
B. Cover Letter for Federal Agencies 13-20
C. Violations of Citable Program Elements of 29 CFR Part 1960 13-20
D. Repeat OSHA Notice for Federal Agencies 13-20
E. Multi-Employer Worksite Policy for Federal Agencies 13-21
F. Informal Conference Procedures for Federal Agencies 13-21
G. Federal Agency Appeals Procedure 13-22
H. Verification of Abatement 13-25
I. Petition for Modification of Abatement Dates (PMA) 13-25
J. Failure to Abate 13-25

CHAPTER 14
HEALTH INSPECTION ENFORCEMENT POLICY

I. HEALTH ENFORCEMENT PROGRAMS [RESERVED] 14-1

CHAPTER 15
LEGAL ISSUES

I. ADMINISTRATIVE SUBPOENAS 15-1

A. When to Issue 15-1
B. Two Types of Subpoenas 15-1

C. AREA DIRECTOR DELEGATED AUTHORITY TO ISSUE ADMINISTRATIVE SUBPOENAS 15-1
D. REGIONAL ADMINISTRATOR AUTHORITY TO ISSUE ADMINISTRATIVE SUBPOENAS..... 15-2
E. ADMINISTRATIVE SUBPOENA CONTENT AND SERVICE 15-2
F. COMPLIANCE WITH THE SUBPOENA..... 15-3
G. REFUSAL TO HONOR SUBPOENA..... 15-3

II. SERVICE OF SUBPOENA ON OSHA PERSONNEL..... 15-4

A. PROCEEDINGS TO WHICH THE SECRETARY OF LABOR IS A PARTY 15-4
B. PROCEEDINGS TO WHICH THE SECRETARY OF LABOR IS NOT A PARTY 15-4

III. OBTAINING WARRANTS..... 15-5

A. WARRANT APPLICATIONS 15-5
B. GENERAL INFORMATION NECESSARY TO OBTAIN A WARRANT 15-5
C. SPECIFIC WARRANT INFORMATION BASED ON INSPECTION TYPE 15-7
D. WARRANT PROCEDURES 15-8
E. SECOND WARRANT 15-8
F. REFUSED ENTRY OR INTERFERENCE..... 15-8
G. FEDERAL MARSHAL ASSISTANCE..... 15-9

IV. EQUAL ACCESS TO JUSTICE ACT (EAJA) 15-9

A. PREVAILING PARTY MAY BE AWARDED FEES..... 15-9
B. OSHA'S POSITION MUST BE SUBSTANTIALLY JUSTIFIED..... 15-9
C. EAJA SHOULD NOT AFFECT HOW THE AGENCY OPERATES 15-9

V. NOTICE OF CONTEST 15-10

A. TIME LIMIT FOR FILING A NOTICE OF CONTEST 15-10
B. CONTEST OF ABATEMENT PERIOD ONLY 15-10
C. COMMUNICATION WHERE THE INTENT TO CONTEST IS UNCLEAR..... 15-10

VI. LATE NOTICE OF CONTEST 15-11

A. FAILURE TO NOTIFY OSHA OF INTENT TO CONTEST 15-11
B. NOTICE RECEIVED AFTER THE CONTEST PERIOD..... 15-11
C. RETENTION OF DOCUMENTS..... 15-11

VII. CONTESTED CASE PROCESSING PROCEDURES..... 15-12

A. TRANSMITTAL OF NOTICE OF CONTEST TO COMMISSION 15-12
B. TRANSMITTAL OF FILE TO REGIONAL SOLICITOR..... 15-13

VIII. COMMUNICATIONS WHILE PROCEEDINGS ARE PENDING BEFORE THE COMMISSION..... 15-13

A. CONSULTATION WITH REGIONAL SOLICITOR 15-13
B. COMMUNICATIONS WITH COMMISSION REPRESENTATIVES WHILE PROCEEDINGS ARE PENDING BEFORE THE COMMISSION 15-13

IX. COMMISSION PROCEDURES..... 15-13

A. TWO LEVELS OF ADJUDICATION 15-13
B. RULES OF PROCEDURE 15-13

X. DISCOVERY METHODS 15-14

A. INTERROGATORIES 15-15
B. PRODUCTION OF DOCUMENTS 15-15
C. DEPOSITIONS..... 15-15

XI. TESTIFYING IN HEARINGS 15-15

A. Review Documents and Evidence 15-15
B. Attire 15-15
C. Responses to Questions 15-15
D. Judge's Instruction(s) 15-16

XII. COMMISSION SIMPLIFIED PROCEEDINGS 15-16

A. Proposed Penalty Threshold 15-16
B. Prompt Disclosure of Inspection Documents 15-16

XIII. CITATION FINAL ORDER DATES 15-16

A. Citation/Notice of Penalty Not Contested 15-16
B. Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA) 15-17
C. Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA) 15-17
D. Cases Resolved by an ALJ Decision 15-17
E. ALJ Decision Reviewed by Commission 15-17
F. Commission Decision Review by the U.S. Court of Appeals 15-17

XIV. FEDERAL COURT ENFORCEMENT UNDER SECTION 11(B) OF THE OSH ACT 15-17

A. Section 11(b) Summary Enforcement Orders 15-17
B. Selection of Cases for Section 11(b) Action 15-18
C. Drafting of Citations and Settlements to Facilitate Section 11(b) Enforcement 15-18
D. Follow-up Inspections 15-19
E. Conduct of Verification Inspections 15-19

CHAPTER 16
DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT (FOIA)

I. DISCLOSURE [RESERVED] 16-1

CHAPTER 17
PREEMPTION BY OTHER AGENCIES

I. INTRODUCTION 17-1

II. TESTING EXEMPTIONS 17-1

III. STATUTORY EXERCISE 17-2

IV. OTHER AGENCIES WHICH MAY PREEMPT OSHA 17-3

A. Department of Transportation 17-3
B. Department of Labor 17-4
C. Environmental Protection Agency 17-4
D. Nuclear Regulatory Commission 17-4
E. Department of Energy 17-5
F. Department of Homeland Security 17-5
G. Department of Justice 17-5
H. Department of Interior 17-6

Chapter 1

INTRODUCTION

I. Purpose.

This FOM is a reference document for field personnel, providing enforcement policies and procedures in conducting OSHA investigations.

II. Scope.

This Instruction applies OSHA-wide.

III. References.

A. The Equal Access to Justice Act, 5 U.S.C. § 504.

B. Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. § 611.

C. Disclosure of Confidential Information, 18 U.S.C. § 1905.

D. Rules Implementing the Equal Access to Justice Act; Costs and Fees, 28 U.S.C. § 2412.

E. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.

F. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802.

G. Debt Collection Improvement Act, 31 U.S.C. § 3717.

H. The Postal Employee Safety Enhancement Act of 1998, 39 U.S.C. § 101.

I. Employees Served with Subpoenas, 29 C.F.R. 2.21 and 2.22.

J. Federal Claims Collection, 29 C.F.R. Part 20.

K. Applicable Federal Standards: ETA and OSHA Housing Standards, 29 C.F.R. 500.132.

L. Social Responsibilities of the Employment Service System, 20 C.F.R. Part 654.

M. Advance Notice of Inspections, 29 C.F.R. 1903.6.

N. Policy Regarding Employee Rescue Activities, 29 C.F.R. 1903.14.

O. Abatement Verification, 29 C.F.R. 1903.19.

P. Recording and Reporting Occupational Injuries and Illness, 29 C.F.R. 1904.35.

Q. Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye as a Result of Work Related Incidents to OSHA, 29 C.F.R. 1904.39.

R. Consultation Agreements, 29 C.F.R. Part 1908.

S. Occupational Safety and Health Standards, 29 C.F.R. Part 1910.

T. Occupational Safety and Health Standards for Shipyard Employment, 29 C.F.R. Part 1915.

U. Marine Terminals, 29 C.F.R. Part 1917.

V. Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1918.

W. Gear Certification, 29 C.F.R. Part 1919.

X. Safety and Health Regulations for Construction, 29 C.F.R. Part 1926.

Y. Occupational Safety and Health Standards for Agriculture, 29 C.F.R. Part 1928.

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CC. Rules of Procedure, 29 C.F.R. Part 2200.

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EE. Housing for Agricultural Workers: Final Rule, *Federal Register*, March 4, 1980 (45 FR 14180).

FF. Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines, *Federal Register*, January 16, 1989 (54 FR 3904).

GG. Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, *Federal Register*, August 12, 1996 (61 FR 41738).

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JJ. Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits, *Federal Register,* July 28, 2000 (65 FR 46498).

KK. Secretary's Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, *Federal Register*, October 22, 2002 (67 FR 65007).

LL. Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014 (79 FR 56129).

MM. OSHA Instruction ADM 01-00-003, Redelegation of Authority and Responsibility of the Assistant Secretary for Occupational Safety and Health, March 6, 2003.

NN. OSHA Instruction ADM 03-01-005, OSHA Compliance Records, August 3, 1998.

OO. OSHA Instruction CPL 02-00-025, Scheduling System for Programmed Inspections, January 4, 1995.

PP. OSHA Instruction CPL 02-00-028, Compliance Assistance the Powered Industrial Truck Operator Training Standards, November 30, 2000.

QQ. OSHA Instruction CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, May 28, 1998.

RR. OSHA Instruction CPL 02-00-080, Handling of Cases to be Proposed for Violation-By-Violation Penalties, October 21, 1990.

SS. OSHA Instruction CPL 02-00-152, Guidelines for Administering Corporate-Wide Settlement Agreements, June 22, 2011.

TT. OSHA Instruction CPL 02-00-094, OSHA Response to Significant Events of Potentially Catastrophic Consequences, Edited on November 21, 2015.

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WW. OSHA Instruction CPL 02-00-158, Inspection Procedures for the Respiratory Protection Standard, June 26, 2014.

XX. OSHA Instruction CPL 02-00-121, Providing Assistance to Smaller Employers, March 12, 1998.

YY. OSHA Instruction CPL 02-00-122, Enforcement Guidance for the U.S. Postal Service, April 16, 1999.

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BBB. OSHA Instruction CPL 02-00-135, Recordkeeping Policies and Procedures Manual (RKM), December 30, 2004.

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III. OSHA Instruction CPL 02-01-055, Maritime Cargo Gear Standards and 29 CFR Part 1919 Certification, September 30, 2013.

JJJ. OSHA Instruction CPL 02-01-058, *Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence*, January 10, 2017.

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RRR. OSHA Instruction CPL 02-02-063, Inspection Procedures for Occupational Exposure to Asbestos Final Rule 29 CFR Parts 1910.1001, 1926.1101, 1915.1001, January 9, 1996.

SSS. OSHA Instruction CPL 02-02-072, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, August 22, 2007.

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VVV. OSHA Instruction CPL 02-02-076, National Emphasis Program – Hexavalent Chromium, February 23, 2010.

WWW. OSHA Instruction CPL 03-00-010, Petroleum Refinery Process Safety Management National Emphasis Program, August 18, 2009.

XXX. OSHA Instruction CPL 03-00-008, Combustible Dust National Emphasis Program (Reissued), March 11, 2008.

YYY. OSHA Instruction CPL 03-00-009, National Emphasis Program – Lead, August 14, 2008.

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FFFF. OSHA Instruction CSP 04-01-002, OSHA Alliance Program, July 29, 2015.

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MMMM. Memorandum on Procedures for Significant Enforcement Cases, for Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, dated March 24, 2004.

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SSSS. *Marion Stevens dba Chapman & Stephens Company*, 5 BNA OSHC 1395 (No.13535, 1977).

TTTT. Darragh Company, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980).

UUUU. J. C. Watson Company, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008). (Aff'd D.C. Cir. No. 08-1230, April 17, 2009.) (unpubl.)

VVVV. *Chao v. Mallard Bay Drilling, Inc.*, 212 F.3d 898, (534 U.S. 235, 2002).

IV. Cancellations.

This Instruction supersedes OSHA Instructions CPL 02-00-160, Field Operations Manual (FOM), issued August 2, 2016; CPL 02-00-045 [CPL 2.45B CH-5] - Changes to the Field Operations Manual (FOM) [03/03/1995]; CPL 02-00-045 [CPL 2.45B CH-4] - Changes to the Field Operations Manual (FOM) [12/13/1993]; CPL 02-00-045 [CPL 2.45B CH-3] - Changes to the Field Operations Manual (FOM) [06/15/1992]; CPL 02-00-045 [CPL 2.45B CH-2] - Changes to the Field Operation Manual (FOM) [03/01/1991]; CPL 02-00-045 [CPL 2.45B CH-1] - Changes to the Revised Field Operations Manual (FOM) [12/31/1990]; and CPL 02-00-045 [CPL 2.45B] - Revised Field Operations Manual (FOM) [06/15/1989].

V. Action Information.

A. Responsible Office. Directorate of Enforcement Programs (DEP).

B. Action Offices. National, Regional, and Area Offices.

C. Information Offices. State Plan States, OSHA Training Institute, Consultation Program Managers, VPP Managers and Coordinators, OSHA Strategic Partnership Coordinators, Compliance Assistance Coordinators, Compliance Assistance Specialists, Assistant Regional Administrators, and Regional EEP Coordinators.

VI. Federal Program Change – Notice of Intent and Equivalency Required.

This Instruction describes a Federal Program Change that consolidates and updates OSHA's field enforcement policies and procedures. States must have, as a part of their State Plan, formal written policies and procedures on all aspects of their compliance program, including inspections, targeting, citations, penalties, and post citation processes, which are at least as effective as the procedures in this revised Field Operations Manual (FOM). State Plans have the option of adopting identical or different, but at least as effective, enforcement policies as those contained in this FOM, and in doing so, State Plans must address each chapter and/or policy area in this manual. Significant changes to this manual are listed in section VII of this chapter.

An identical State Plan change is one in which the State Plan adopts the same program provisions as the federal program with the only differences being those modifications necessary to reflect a State Plan's unique structure. With respect to this FOM, State Plans can adopt identically without adopting the internal OSHA

administrative procedures set out in this manual, such as those relating to organizational structure and such matters as penalty collection. However, State Plans must provide for their own comparable internal administrative procedures and processes.

Within 60 days of the date of issuance of this Directive, State Plans must submit a notice of intent indicating if the State Plan will adopt or already has in place enforcement policies and procedures that are identical to or different from the federal program. State adoption, either identically or different, should be accomplished within six months. If adopting identically, the State Plan must provide the date of adoption to OSHA, due within 60 days of adoption. If the State Plan adopts or maintains enforcement policies that differ from the FOM, the State Plan must either post its different policies on its State Plan website and provide a link to OSHA, or provide OSHA with an electronic copy and the name and contact information of someone within the State Plan who can assist the public with obtaining a copy. This action must occur within 60 days of the date of adoption. OSHA will post summary information of the State Plan responses to this Instruction on its website.

VII. Significant Changes.

A. Changes made by the 2019 Update.

1. Updated *Enforcement Follow-Up and Monitoring Inspection* in Chapter 2, Section VI.G.2.b.
2. Updated *Inspection Preparation and Planning* in Chapter 3, Section II.A.
3. Updated *Inspection Scope* in Chapter 3, Section III.B.
4. Updated *Refusal to Permit Inspection and Interference* in Chapter 3, Section IV.C.1.
5. Updated *Walkaround Representatives* in Chapter 3, Section VII.A.2.
6. Updated *General Penalty Policy* in Chapter 6, Section I.
7. Updated *Civil Penalties* to include the "Inflation Adjustment Act" in Chapter 6, Section II.A.
8. Updated Chapter 6 to replace specific inflation-adjusted penalty amounts with references to the *Annual Adjustments to OSHA Civil Penalties* memorandum.
9. Updated *Procedures for an Inspection* in Chapter 9, Section I.H.5.
10. Updated *Fatality and Catastrophe Investigations* in Chapter 11, Section II.C.2.
11. Updated *Federal Agency Appeals Procedures* in Chapter 13, Section VIII.G.2.f and VIII.G.3.
12. Updated *Citable Program Elements* in Chapter 13, Table 13-1.
13. Updated *Obtaining Warrants* in Chapter 15, Section III.

VIII. Background.

The Field Inspection Reference Manual (FIRM) was issued September 26, 1994, and later replaced with the Field Operations Manual (FOM), dated November 9, 2009. The FOM was later revised in April 22, 2011, October 1, 2015, and August 2, 2016, to include additional directives, memoranda, and interpretations.

This instruction cancels and replaces OSHA Instruction CPL 02-00-160, Field Operations Manual, August 2, 2016, and includes revisions to Chapters 1, 2, 3, 6, 9, 11, 13, and 15. The FOM is designed to be updated on a regular basis by amending chapters or sections thereof to embody modifications and clarifications to OSHA's general enforcement policies and procedures.

IX. Definitions and Terminology.

A. The Act. This term refers to the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.).

B. Compliance Safety and Health Officer (CSHO). This term refers to Safety Engineers, Safety Compliance Officers, and Industrial Hygienists.

C. He/She and His/Hers. The terms *he* and *she*, as well as *his* or *her*, when used throughout this manual, are interchangeable. That is, male(s) applies to female(s), and vice versa.

D. Professional Judgment. All OSHA employees are expected to exercise their best judgment as safety and health professionals and as representatives of the United States Department of Labor in every aspect of carrying out their duties.

E. Workplace and Worksite. The terms *workplace* and *worksite* are interchangeable. *Workplace* is used more frequently in general industry, while *worksite* is more commonly used in the construction industry.

Chapter 2

PROGRAM PLANNING

I. Introduction.

OSHA's mission is to assure the safety and health of America's working men and women by promulgating and enforcing standards and regulations; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health as well as the development of comprehensive safety and health management systems. Effective and efficient use of resources requires careful, flexible planning. In this way, the overall goal of hazard abatement and employee protection is best served.

II. Area Office Responsibilities.

A. Providing Assistance to Small Employers.

1. In 1996, Congress passed the Small Business Regulatory Enforcement Fairness Act (SBREFA) to respond to the concern expressed by the small business community that federal regulations were too numerous and complex, and that small business needed special assistance in understanding and complying with those regulations.
2. SBREFA requires all federal agencies regulating small businesses to have in place programs to provide guidance and compliance assistance. These programs must contain procedures to answer inquiries by small entities (small businesses). These programs also provide information on and advice about compliance with the statutes and regulations, interpretations, and applications of the law to specific sets of facts supplied by the small entity. See OSHA's Small Business Assistance webpage.

B. Area Office Outreach Program.

The Area Director or designee will ensure that the Area Office maintains an outreach program appropriate to local conditions and the needs of the service area. The plan can include Regional and National Office support services, compliance assistance services including assistance in developing compliance safety and health management systems, training and education services, referral services, cooperative programs, abatement assistance, and technical services. Area Office staff that conduct outreach should enter their activities into the OIS Compliance Assistance module.

C. Responding to Requests for Assistance.

All requests from employers or employees for compliance information or assistance shall receive timely, accurate, and helpful responses from OSHA. See the section on Information Requests in this chapter for additional information.

III. OSHA Cooperative Programs Overview.

OSHA offers a number of avenues for businesses and organizations to work cooperatively with the agency. Compliance Officers should discuss the various cooperative programs with employers.

A. Voluntary Protection Programs (VPP).

The Voluntary Protection Programs (VPP) are designed to recognize and promote effective safety and health management. A hallmark of VPP is the principle that management, workers, and OSHA can work together in pursuit of a safe and healthy workplace. VPP participants are employers who have successfully designed and implemented a health and safety management system at their worksites, and are exempt from programmed inspections.

NOTE: See CSP 03-01-003, *Voluntary Protection Programs (VPP): Policies and Procedures Manual*, April 18, 2008, for additional information.

B. On-Site Consultation Program.

OSHA On-Site Consultation Programs offer no-cost and confidential occupational safety and health services to small- and medium-sized businesses in all 50 states, the District of Columbia, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands under Section 21(d) or 23(g) funding agreements with Federal OSHA. On-Site Consultation programs established by the states or U.S. territories in their local agencies or universities have consultants who provide occupational safety and health services. Consultants work with employers to identify workplace hazards and how to fix them, provide advice for compliance with OSHA standards, provide occupational safety and health training and education to employers and employees, and assist in establishing and improving safety and health programs, with priority given to high-hazard worksites. On-Site Consultation services are separate from OSHA's enforcement efforts and do not result in penalties or citations. However, employers must agree to correct any serious and imminent danger hazards identified in a timely manner. Employers can locate their nearest OSHA On-Site Consultation program by calling 1-800-321-OSHA (6742) or visiting www.osha.gov/consultation.

Each of OSHA's Regions has Regional Consultation Project Officers (RPOs) that directly liaise with the On-Site Consultation programs within their Regions to provide implementation guidance and oversight in accordance with regulatory (see 29 CFR 1908, Consultation Agreements) and Federal OSHA policy requirements. At the national level the On-Site Consultation Program is administered by OSHA's Directorate of Cooperative and State Programs, Office of Small Business Assistance.

C. Safety and Health Achievement Recognition Program (SHARP).

The Safety and Health Achievement Recognition Program (SHARP) acknowledges small- and medium-sized businesses that have used the no-cost and confidential OSHA On-Site Consultation Program services and operate exemplary workplace safety and health programs. SHARP applicants receive a full-service, comprehensive consultation visit that involves a complete

safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system. Acceptance of a worksite into SHARP by OSHA is an achievement that identifies employers as models for occupational safety and health among their business peers. Businesses that achieve SHARP status receive an exemption from OSHA programmed inspections for the period that the SHARP certification is valid.

NOTE: See CSP 02-00-003, *Consultation Policies and Procedures Manual*, November 19, 2015, for additional information or visit http://www.osha.gov/dcsp/smallbusiness/sharp.html.

D. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP).

Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones within the set time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP applicants receive a full-service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system. Upon achieving Pre-SHARP status, employers receive an exemption from OSHA programmed inspections for the specified period.

E. Strategic Partnerships.

Organizations can enter into Strategic Partnerships with OSHA to address specific safety and health issues. In these partnerships, OSHA enters into extended, voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of worker safety and health.

NOTE: See CSP 03-02-003, *OSHA Strategic Partnership Program for Worker Safety and Health*, November 6, 2013, for additional information.

F. Alliance Program.

Through the Alliance Program, OSHA works with groups committed to worker safety and health to prevent workplace fatalities, injuries, and illnesses. These groups include unions, consulates, trade or professional organizations, businesses, faith- and community-based organizations, and educational institutions. OSHA and the groups work together to develop compliance assistance tools and resources, share information with workers and employers, and educate workers and employers about their rights and responsibilities. Alliance Program participants do not receive exemptions from OSHA inspections or any other enforcement benefits.

NOTE: See CSP 04-01-002, *OSHA Alliance Program*, July 29, 2015, for additional information.

NOTE: See Section VI.H, of this chapter, Enforcement Scheduling and Interface with Cooperative Program Participants, for additional information.

IV. Enforcement Program Scheduling.

A. General.

1. OSHA's priority system for conducting inspections is designed to allocate available OSHA resources as effectively as possible to ensure that maximum feasible protection is provided to working men and women. The Area Director or designee will ensure that inspections are scheduled within the framework of this chapter, that they are consistent with the objectives of the agency, and that appropriate documentation of scheduling practices is maintained.

2. The Area Director or designee will also ensure that OSHA resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Area Director or designee may consider utilizing additional OSHA resources (e.g., the Health Response Team). In other circumstances, the use of outside resources may aid the Area or District Office to deploy available resources more effectively. The Area Office will retain control of the inspection.

B. Inspection Priority Criteria.

Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 2-1:

Table 2-1: Inspection Priorities

Priority	Category
First	Imminent Danger
Second	Fatality/Catastrophe (NOTE)
Third	Complaints/Referrals
Fourth	Programmed Inspections

NOTE: OSHA Area Offices will determine the inspection priority of a **catastrophe** using the Memorandum entitled, "*Revised Interim Enforcement Procedures for Reporting Requirements under 29 C.F.R. 1904.39*," dated March 04, 2016, or unless superseded by future agency-approved correspondence.

1. Efficient Use of Resources.

Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective worker protection. An example of such a deviation would be when the Agency, Regional Administrator or an Area Director commits a certain percentage of resources to programmed Special Emphasis Program (SEP) inspections such as a National Emphasis Program (NEP), a Regional Emphasis Program (REP), or Local Emphasis Program (LEP). Inspection scheduling deviations must be documented in the case file.

2. Follow-up Inspections.

   In cases where follow-up inspections are necessary, it shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any unprogrammed inspection in which the hazards are anticipated to be other-than-serious.

   NOTE: See Chapter 7, Post-Citation Procedures and Abatement Verification, for additional information.

3. Monitoring Inspections.

   When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.

   NOTE: See Chapter 7, Post-Citation Procedures and Abatement Verification, for additional information.

4. Employer Information Requests.

   Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs established by the Agency.

5. Reporting of Imminent Danger, Catastrophe, Fatality, Amputations, Accidents, Referrals or Complaints.

   The Area Director or designee will act in accordance with established inspection priority procedures.

   NOTE: See Section Vof this chapter, Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling, for additional information.

C. Effect of Contest.

   If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending before the Review Commission, the following guidelines apply to additional inspections of the employer at that worksite:

   1. If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest.
   2. If the employer has contested the citation itself or any items therein, then programmed and unprogrammed inspections will be scheduled, but all violative conditions under contest will be excluded from the inspection unless a potential imminent danger is involved.

      NOTE: See Section IV.B, Inspection Priority Criteria, of this chapter for additional information.

D. Enforcement Exemptions and Limitations.

   1. In providing funding for OSHA, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries.
   2. Before initiating an inspection of an employer in these categories, the Area Office will evaluate whether the Appropriations Act for the fiscal year

would prohibit the inspection. Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspection shall immediately be discontinued.

NOTE: See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998, for additional information.

E. Preemption by Another Federal Agency.

1. Section 4(b)(1) of the Act states that the Act does not apply to working conditions over which other federal agencies exercise statutory responsibility "to prescribe or enforce standards or regulations affecting occupational safety or health."
2. If a question arises, usually upon receipt of a complaint, referral, or other inquiry, consult the list of Memoranda of Understanding (MOU) on the OSHA website to determine if the issue has been previously addressed. A MOU is an agreement created to address/resolve coverage issues and to improve the working relationships between other federal agencies and organizations regarding employee safety and health.
3. At times an inspection may have already begun when the coverage jurisdiction question arises. Any such situation will be brought to the attention of the Area Director, Regional Solicitor, or designee as soon as it arises, and dealt with on a case-by-case basis.
4. Two examples of MOUs include the following:
   a. Mine Safety and Health Administration - Interagency Agreement between the Mine Safety and Health Administration and OSHA, March 29, 1979.
   b. United States Coast Guard/U.S. Department of Transportation - Authority of Coast Guard and OSHA regarding enforcement of safety and health standards aboard vessels inspected and certified by the Coast Guard, March 4, 1983.

F. United States Postal Service.

1. The Postal Employee Safety Enhancement Act of 1998 applies the Act to the U.S. Postal Service in the same manner as the Act applies to a private sector employer.
2. All State Plan States elected not to cover the U.S. Postal Service. Thus, Federal OSHA retains authority to cover the U.S. Postal Service nationwide. Federal coverage in State Plan States encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Coverage includes contractor-operated facilities engaged in mail operations and postal stations in public or commercial facilities. State Plan States continue to exercise jurisdiction over all other private sector contractors working on U.S. Postal Service sites who are not engaged in U.S. Postal Service mail operations, such as building

maintenance and construction employees. (See the Final Rule on *State Plans Coverage of the U.S. Postal Service* (65 FR 36618, June 9, 2000)).

3. Violations documented during inspections initiated at a U.S. Postal Service site will be cited with penalties in accordance with the FOM and other applicable OSHA policies for the private sector.

   NOTE: See CPL 02-00-122, *Enforcement Guidance for the U.S. Postal Service*, April 16, 1999, for additional information.

G. Home-Based Worksites.

1. OSHA will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksite (e.g., filing, keyboarding, computer research, reading, writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).
2. OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality.

   NOTE: See CPL 02-00-125, *Home-Based Worksites*, February 25, 2000, for additional information.

H. Inspection/Investigation Types.

1. Unprogrammed.

   Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:

   a. Imminent Dangers;
   b. Fatalities/catastrophes; and
   c. Complaints/referrals; and
   d. It also includes follow-up and monitoring inspections scheduled by the Area Office.

      NOTE: This category includes all employers/employees directly affected by the subject of the unprogrammed inspection activity, and is especially applicable on multi-employer worksites.
      NOTE: Not all complaints and referrals qualify for an inspection. See Chapter 9, Complaint and Referral Processing, for additional information.

      NOTE: See CPL 02-00-124, *Multi-Employer Worksite Citation Policy*, December 10, 1999, for additional information.

2. Unprogrammed Related.

   Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.

An example would be: A trenching inspection conducted at the unprogrammed worksite where the trenching hazard was not identified in the complaint, accident report, or referral.

3. Programmed.

   Worksite safety and health inspections that have been scheduled based upon objective or neutral selection criteria are programmed inspections. The worksites are selected according to national scheduling plans or under local, regional, and national special emphasis programs.

4. Program Related.

   Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers.

V. Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling.

Enforcement procedures relating to unprogrammed activity are located in subject-specific chapters of this manual:

- Follow-ups and Monitoring, see Chapter 7, Post-Citation Procedures and Abatement Verification.
- Complaint/Referral Processing, see Chapter 9, Complaint and Referral Processing.
- Whistleblower Complaints, see Chapter 9, Complaint and Referral Processing.
- Imminent Danger, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.
- Fatality/Catastrophe, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.
- Emergency Response, see Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.

VI. Programmed Inspections.

A. Scheduling for Construction Inspections.

Due to the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. The OSHA National Office will provide to each Area/District Office a randomly selected list of construction projects from identified or known covered active projects. This list will contain the projected number of sites that the field office has reported that it plans to inspect during the next month. Projects are selected in accordance with the inspection schedule for construction.

NOTE: See CPL 02-00-155, *Inspection Scheduling for Construction*, September 6, 2013.

B. Scheduling for Maritime Inspections.

Maritime inspection activities are covered in greater detail in Chapter 10, Section III., Maritime.

1. Marine Cargo Handling Industry.
   The marine cargo handling industry is made up of longshoring activities (i.e., cargo handling aboard vessels, 29 C.F.R. Part 1918) and activities within marine terminals (i.e., cargo handling ashore; 29 C.F.R. 1917). Because these activities are different, several scheduling methods are necessary. Consequently, marine cargo handling industry inspections can be scheduled as National Emphasis Programs (NEPs), Regional Emphasis Programs (REPs), Local Emphasis Programs (LEPs), or from lists developed in accordance with CPL 02-00-025, *Scheduling System for Programmed Inspections*, January 4, 1995.
   NOTE: See CPL 02-00-154, *Longshoring and Marine Terminals "Tool Shed" Directive*, July 31, 2012, for more information.
2. Shipbreaking.
   CPL-03-00-020, *OSHA's National Emphasis Program (NEP) on Shipbreaking,* March 7, 2016, describes policies and procedures to reduce or eliminate workplace hazards associated with shipbreaking operations. Also, OSHA has entered into a *Memorandum of Understanding on Coordination and Information Sharing of Domestic Ship Recycling Operations between DOD/DOT/EPA/DOL-OSHA,* July 30, 2015.
3. Shipyard Employment.
   The shipyard employment industry is made up of several industrial activities. Because these activities are different, several scheduling methods are necessary. Consequently, shipyard employment inspections can be scheduled under NEPs, REPs, LEPs, or from lists developed in accordance with CPL 02-00-025, *Scheduling System for Programmed Inspections*, January 4, 1995, and CPL 02-01-060, *Enforcement Guidance for Personal Protective Equipment (PPE) in Shipyard Employment*, May 22, 2019.
   NOTE: See CPL 02-00-162, *Shipyard Employment "Tool Bag" Directive*, May 22, 2019, for more information.

C. Special Emphasis Programs (SEPs).

Special Emphasis Programs provide for programmed inspections of establishments in industries with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. SEPs are also based on potential exposure to health hazards. Special emphasis programs can also be used to develop and implement alternative scheduling procedures or other departures from national procedures. Special emphasis programs can include National Emphasis Programs, Regional Emphasis Programs, and Local Emphasis Programs.

1. Identification of Special Emphasis Programs.

   The description of the particular Special Emphasis Program shall be identified by one or more of the following:

   a. Specific industry;
   b. Trade/craft;
   c. Substance or other hazard;
   d. Type of workplace operation;
   e. Type/kind of equipment; and
   f. Other identifying characteristics.

2. Special Emphasis Program Scope.

   The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by geographic boundaries, size of worksite, or similar considerations.

3. Pilot Programs.

   National or local pilot programs can also be established under Special Emphasis Programs. Such programs can be conducted for the purpose of assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures, or for any other legitimate reason.

D. National Emphasis Programs (NEPs).

OSHA develops National Emphasis Programs to focus outreach efforts and inspections on specific hazards in a workplace. NEPs may include targeting of employers with 10 or fewer employees, as long as they do not conflict with restrictions under congressional Appropriations Act riders described in OSHA Instruction CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, or any successor guidance. All NEPs should advance the Department of Labor's strategic goal of ensuring safe and healthy workplaces and align with Agency goals. NEPs can be developed to support OSHA's annual Operating Plan, but can also be developed in response to an emerging hazard.

In general, each NEP should include the same elements and considerations as listed in OSHA's CPL 04-00-002. *Procedures for the Approval of Local Emphasis Programs (LEPs)*, November 13, 2018. Additionally, an assessment shall be conducted to determine whether State Plan adoption should be mandatory. This assessment shall take into account the applicability of the program within each state's area of coverage. DEP/DOC shall consult with DCSP in making that determination.

E. Local Emphasis Programs (LEPs) and Regional Emphasis Programs (REPs).

LEPs and REPs are types of special emphasis programs in which one or more Area Offices of a Region participate. LEPs and REPs are generally based on knowledge of local industry hazards or local industry injury/illness experience. LEPs and REPs must be developed and approved when one or more Area Offices within a Region target inspections to a specific industry(s),

hazard(s), or other workplace characteristic(s) - e.g., as part of, or in conjunction with, a local initiative or problem-solving project. A list of LEPs is on the OSHA website under the Enforcement tab.

NOTE: See CPL 04-00-002, *Procedures for Approval of Local Emphasis Programs (LEPs)*, November 13, 2018.

OSHA directives include topic-specific scheduling procedures in addition to the general information provided in this section.

F. Site-Specific Targeting (SST) Inspection Programs.

The SST inspection program is OSHA's main site-specific programmed inspection initiative for non-construction workplaces that have 20 or more employees. The SST program uses data received from injury and illness information that employers submitted under 1904.41.

G. Other Special Programs.

The Agency may develop programs to cover special categories of inspections that are not covered under a Special Emphasis Program.

H. Inspection Scheduling and Interface with Cooperative Program Participants.

Employers who participate in voluntary compliance programs can be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Area Director or designee will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity:

- VPP Program;
- Pre-SHARP and SHARP Participants;
- Consultation and 90-Day Deferrals.

1. Voluntary Protection Program.

a. Regional VPP Manager Responsibilities.

The Regional VPP managers must keep Area Directors or their designees informed about VPP applicants and the status of participants in VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. Area Directors or their designee should be informed:

- That the site can be removed from the programmed inspection list. Such removal can occur no more than 75 days prior to the on-site evaluation;
- Of the site's approval for the VPP program;
- Of the site's withdrawal or termination from the VPP program; and

- If the Regional VPP Manager is the first person notified by the site of an event requiring enforcement, then the VPP Manager must instruct the site to contact the appropriate Area Office.

b. Programmed Inspections and VPP Participation.

- Inspection Deferral. Approved sites must be removed from any programmed inspection lists for the duration of participation, unless a site chooses otherwise. The applicant worksite will be deferred starting no more than 75 calendar days prior to the commencement of its scheduled pre-approval on-site review.
- Inspection Exemption. The exemption from programmed inspections for approved VPP sites will continue for as long as they continue to meet VPP requirements. Sites that have withdrawn or have been terminated from VPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.

c. Unprogrammed Enforcement Activities at VPP Sites.

When an Area Office receives a complaint, or a referral other than from the OSHA VPP on-site team, or is notified of a fatality, catastrophe, or other event requiring an enforcement inspection at a VPP site, the Area Director or designee must initiate the inspection following normal OSHA enforcement procedures.

- The Area Office must immediately notify the Regional VPP Manager of any fatalities, catastrophes or other incidents occurring at a VPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a VPP worksite, including complaint inquiries that would receive a letter response.
- If the Regional VPP Manager is the first person notified by the site of an event requiring an enforcement inspection, the VPP Manager must instruct the site to contact the appropriate Area Office.
- The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the Regional VPP Manager. When an Area Office receives a referral from the VPP on-site team, the Area Director must notify the participant and the **Assistant Secretary**. Enforcement action can be initiated only after the **Assistant Secretary** approves such action. See CSP 03-01-003, *Voluntary Protection Programs (VPP): Policies and Procedures Manual*, April 18, 2008.
- The Area Director will send the VPP Manager a copy of any report resulting from an enforcement case.

2. Consultation.

a. Consultation Visit in Progress.

- If an On-Site Consultation Visit is in progress, it will take priority over OSHA programmed inspections as outlined below. An On-Site Consultation Visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. If an On-Site Consultation Visit is already in progress, it will terminate when one of the following OSHA unprogrammed inspections is about to take place:
  - Imminent danger inspection;
  - Fatality/catastrophe inspection;
  - Complaint inspections; and/or
  - Other critical inspections, as determined by the **Assistant Secretary**.

NOTE: Referrals and reportable injuries (except fatalities and catastrophes) must be forwarded to the Consultation Project for follow-up.

- "Other critical inspections" can include, but are not limited to, referrals as defined in Chapter 9, Complaint and Referral Processing. Following an evaluation of the hazards alleged in a referral, if the **Assistant Secretary** determines that enforcement action is required prior to the end of an abatement period established by the state consultation project, then the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.
- For purposes of efficiency and expediency, an employer's worksite shall not be subject to concurrent consultation and enforcement-related visits. The following excerpts from CSP 02-00-003*, Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement*, November 19, 2015, clarify the interface between enforcement and consultation activity at the worksite:
  - Full Service On-Site Consultation Visits. While a worksite is undergoing a full service on-site consultation visit for safety **and** health, programmed enforcement activity may not occur until after the end of the worksite's visit "In Progress" status.
  - Full Service Safety or Health On-Site Consultation Visits. When an on-site consultation visit "in progress" is discipline-related, whether for safety **or** health, programmed enforcement activity cannot proceed until

after the end of the worksite's visit "In Progress" status and is limited to the discipline examined, safety or health.

- Limited Service On-Site Consultation Visits. If a worksite is undergoing a limited service on-site consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity cannot proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited to those areas that were not addressed by the scope of the consultative visit (posted List of Hazards).

b. Enforcement Follow-Up and Monitoring Inspections.

If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an on-site consultation visit, then the inspection shall not be deferred. However, the scope of the follow-up/monitoring inspection shall be limited to those areas required to be covered by the follow-up or monitoring inspection, unless there is a reasonable belief, based on specific evidence (e.g., injuries or illnesses recorded in both OSHA forms 300 and 301, employee statements, or "plain view" observations), that violative conditions may be found in other areas of the workplace. See Chapter 3, Section IV.C.1.c for steps to take when the employer objects to a broader inspection, and Chapter 15, Section III.A regarding the circumstances under which a broader inspection warrant can be sought. In either case, the consultant must halt the on-site visit until the enforcement inspection is completed. In the event OSHA issues a citation(s) as a result of the follow-up or monitoring inspection, an on-site consultation visit cannnot proceed until the citation(s) becomes a final order(s).

- On-Site Consultation Follow-up and/or Training and Assistance Visits. On-Site Consultation follow-up and/or training and assistance visits must be deferred if an OSHA enforcement inspection is to be conducted. The consultant may continue with follow-up and/or training and assistance activity only after enforcement inspection activity at the worksite is final and any cited item(s) have become final order(s).
- Severe Violator Enforcement Program (SVEP). A company identified on OSHA's Severe Violator Enforcement Program (SVEP) list may still receive On-Site Consultation Services. Although the company is receiving consultation services, in this situation Consultation visit-in-progress status does not block enforcement from performing an inspection.

c. Enforcement Programmed Inspections.

On-Site Consultation and 90-Day Deferral.

- If an establishment has requested an initial full-service comprehensive consultation visit for safety **and** health from an

OSHA On-Site Consultation program, and that visit has been scheduled by the consultation program, a programmed inspection can be deferred for 90 calendar days from the date of the notification by the consultation program to the Regional Office. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is "in progress."

- OSHA can, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

  NOTE: See CSP 02-00-003, *Consultation Policies and Procedures Manual,* November 19, 2015, of Chapter 7, Relationship to Enforcement, for additional information.

3. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status.

   a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, can be granted Pre-SHARP status. Pre-SHARP participants receive a full-service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system.

   b. The deferral time frame recommended by the State Consultation Program Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving Pre-SHARP status, employers can be granted a deferral from OSHA programmed inspections. The following types of incidents can trigger an OSHA enforcement inspection at Pre-SHARP sites:

      - Imminent danger;
      - Fatality/catastrophe; and
      - Formal complaints.

4. Safety and Health Achievement Recognition Program (SHARP).

   SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from OSHA programmed inspections. See §1908.7(b)(4).

   a. Duration of SHARP Status.

      All initial approvals of SHARP status will be for a period of up to two years, commencing with the date the Regional Office approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of up to three years.

b. OSHA Inspection(s) at SHARP Worksites.

As noted above, employers who meet all the requirements for SHARP status will have the names of their establishments deleted from OSHA's Programmed Inspection Schedule. However, pursuant to §1908.7(b)(4)(ii), the following types of incidents can trigger an OSHA enforcement inspection at SHARP sites: imminent danger; fatality/catastrophe; or formal complaints.

NOTE: See CSP 02-00-003, *Consultation Policies and Procedures Manual, Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-SHARP*, November 19, 2015, for additional information.

5. OSHA Strategic Partnership Program (OSPP).

a. Deferral from Programmed Inspection List for Non-Construction OSHA Strategic Partnerships (OSP).

- New or renewed OSP will no longer include any programmed inspection deferral or deletion provisions. Only active VPP or SHARP worksites are eligible for this incentive. (See CSP 03-02-003, *OSHA Strategic Partnership Program for Worker Safety and Health*, November 6, 2013, for additional information.)

b. Programmed Inspection with a Limited Scope.

- For non-construction worksites, OSHA will no longer offer a limited-scope inspection to an establishment operated by an OSHA partnering employer. However, a National partnership agreement can include a limited-scope inspection where it can be clearly demonstrated to result in a more effective partnership. Therefore, any partnership agreement that contains a provision for a limited-scope inspection must be approved by the **Assistant Secretary** in advance of the OSP's development based on a detailed statement of the benefits to the partnership. For inspections with limited scope, the workplace hazards to be addressed will be determined by OSHA with input from the partner(s). OSHA can expand the scope of the inspection when there is reasonable belief, based on specific evidence (e.g., injuries or illnesses recorded in both OSHA forms 300 and 301, employee statements, or "plain view" observations), that violative conditions may be found in other areas of the workplace. See Chapter 15, Legal Issues.

c. Deletion from Programmed Inspection List.

- Only cooperative worksites qualifying for VPP or SHARP are eligible for this benefit. In addition, new or renewed OSPs will not allow the use of OSHA's "Phone & Fax" procedures beyond the scope of those permitted in the FOM.

6. Alliances.

Alliance Program signatories do not receive exemptions from OSHA inspections, or any other enforcement benefit.

Chapter 3

INSPECTION PROCEDURES

I. General Inspection Procedures.

The conduct of effective inspections requires judgment in the identification, evaluation, and documentation of safety and health conditions and practices. Inspections can vary considerably in scope and detail depending on the circumstances of each case.

II. Inspection Preparation and Planning.

It is important that the Compliance Safety and Health Officer (CSHO) adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection.

A. Review of Inspection History.

1. Compliance Officers will carefully review data available at the Area Office for information relevant to the establishment that is scheduled for inspection. This can include inspection files and source reference due to possible company name changes and status (e.g., LLC, Inc.). CSHOs shall document that the history review has been conducted in their case file, even if there is no prior inspection history.
2. If an establishment has an inspection history that includes citations received while performing work in a State Plan state, CSHOs should be aware of this information. This inspection history can be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and can be considered in determining eligibility for the history penalty reduction. Relevant prior violations, together with other evidence, can also be used to support a warrant for inspection where necessary. However, the State Plan citation **cannot** be used to support a repeat violation.

B. Review of Cooperative Program Participation.

CSHOs will access the Regional homepage to obtain information about employers who are currently participating in cooperative programs. CSHOs will verify whether the employer is a current program participant during the opening conference. CSHOs will be mindful of whether they are preparing for a programmed or unprogrammed inspection, as this can affect whether the inspection should be conducted and/or its scope. See Section V.D of this chapter, Review of Voluntary Compliance Programs.

C. Safety and Health Issues Relating to CSHOs.

1. Hazard Assessment.

If the employer has a written certification that a hazard assessment has been performed pursuant to §1910.132(d), then the CSHO shall request a

copy. If the hazard assessment itself is not in writing, then the CSHO shall ask the person who signed the certification to describe all potential workplace hazards and then select appropriate protective equipment. If there is no hazard assessment, then the CSHO will determine potential hazards from sources such as the OSHA 300 Log of Work-Related Injuries and Illnesses and shall select personal protective equipment accordingly.

2. Respiratory Protection.

   CSHOs must be medically certified and have completed suitable fit testing in accordance with the OSHA Respiratory Protection Standard (§1910.134 and CPL 02-02-054). They must wear respirators when and where required, and must care for and maintain respirators in accordance with the CSHO training provided.

   a. CSHOs should conduct a pre-inspection evaluation for potential exposure to chemicals. Prior to entering any hazardous areas, the CSHO should identify those work areas, processes, or tasks that require respiratory protection. The hazard assessment requirement in §1910.132(d) does not apply to respirators; see CPL 02-02-054, *Respiratory Protection Program Guidelines*, July 14, 2000. CSHOs should review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable about the industrial processes and potential respiratory hazards that may be encountered. During the opening conference, a list of hazardous substances should be obtained or identified, along with any air monitoring results. CSHOs should determine if they have the appropriate respirator to protect against chemicals present at the worksite.

   b. CSHOs must notify their supervisor or the respiratory protection program administrator:

      - If a respirator no longer fits well (CSHOs should request a replacement that fits properly);
      - If CSHOs encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed during the site visit; or
      - If there are any other concerns about the program.

3. Safety and Health Rules and Practices.

   Section 1903.7(c) requires CSHOs to comply with all employer safety and health rules and practices at the establishment being inspected; CSHOs shall wear and use appropriate protective clothing and equipment.

4. Restrictions.

   CSHOs will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Area Director's responsibility to determine whether an inspection can be conducted without exposing the CSHO to hazardous situations and to

procure whatever materials and equipment are needed for the safe conduct of the inspection.

NOTE: Also such restrictions apply 1) to facilities where incidents of workplace violence precipitated the inspections, and 2) in industries that OSHA has identified as having a high risk for workplace violence (specifically: late-night retail, social service and health care settings, and correctional facilities).

5. Workplace Violence – CSHO Training and Workplace Violence Prevention Programs.

   a. CSHO Training.

      Prior to conducting an inspection in response to a complaint of workplace violence, a CSHO must have received training that addresses the issues of workplace violence. Such training should include OSHA's 1000 Course, Area Office training, or other similar course work.

   b. DOL Workplace Violence Prevention Programs.

      - CSHOs should be aware and familiar with the DOL workplace violence program, http://www.labornet.dol.gov/me/worklife/dol-workplace-violence-program.htm.
      - CSHOs should also be aware and familiar with the OSHA Safety and Health Management System, ADM 04-00-002, (October 5, 2016).

   c. Establishment Workplace Violence Prevention Programs.

      If the employer is in an industry that OSHA has identified as a high risk for workplace violence (such as late-night retail, social service and healthcare settings, and correctional facilities), then the CSHO should inquire about the existence of a workplace violence prevention program. If such a program exists, then the CSHO shall ask the person responsible for the program to describe all the potential workplace hazards. If there is no workplace violence prevention plan, then the CSHO will determine potential workplace violence hazards from sources such as the OSHA 300 log of injuries and illnesses and other relevant records. See CPL 02-01-058, *Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence*, January 10, 2017, for further guidance.

      NOTE: If training is provided to staff members on workplace violence, then the CSHO should conduct the inspection with a staff member who has received the training. If the CSHO does not deem that the existing protections are sufficient, then the CSHO should not enter the facility or area within the facility that he or she considers dangerous.

   d. CSHOs must notify their supervisor if they experience or witness any incident of workplace violence.

D. Advance Notice of an Inspection.

1. Policy.

Section 17(f) of the Act and §1903.6 contain a general prohibition against the giving of advance notice of inspections, except as authorized by the Secretary or the Secretary's designee. The Act regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Act prohibits unauthorized advance notice.

a. Advance Notice Exceptions.

There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice. Advance notice of inspections can be given only with the authorization of the Area Director or designee and only in the following situations:

- In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
- When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
- To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
- When giving advance notice would enhance the probability of an effective and thorough inspection (e.g., in complex fatality investigations).

NOTE: The regulation at 29 CFR 1903.6(b) says that, except in imminent danger situations and in other unusual circumstances, the advance notice authorized here "shall not be given more than 24 hours before the inspection is scheduled to be conducted."

b. Delays.

Advance notice exists whenever the Area Office sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Area Director or designee. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the Area Director or designee can decide that a delay is necessary. In those cases, the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

2. Documentation.

   The conditions requiring advance notice and the procedures followed shall be documented in the case file.

E. Pre-Inspection Compulsory Process.

Section 1903.4(b) authorizes OSHA to seek a warrant in advance of an attempted inspection if circumstances are such that "pre-inspection process (is) desirable or necessary." Section 8(b) of the Act authorizes the Agency to issue administrative subpoenas to obtain evidence related to an OSHA inspection or investigation. See Chapter 15, Legal Issues.

F. Personal Security Clearance.

Some establishments have areas that contain material or processes that are classified by the U.S. Government in the interest of national security. Whenever an inspection is scheduled for an establishment containing classified areas, the Area Director or designee shall assign a CSHO who has the appropriate security clearances. The Regional Administrator shall ensure that an adequate number of CSHOs with appropriate security clearances are available within the Region and that the security clearances are current.

G. Expert Assistance.

1. The Area Director or designee shall arrange for a specialist and/or specialized training, preferably from within OSHA, to assist in an inspection or investigation when the need for such expertise is identified.
2. OSHA specialists may accompany CSHOs or perform their tasks separately. CSHOs must accompany outside consultants. OSHA specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.

III. Inspection Scope.

Inspections, either programmed or unprogrammed, fall into one of two categories, depending on the scope of the inspection:

A. Comprehensive.

A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment. An inspection can be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or practices within those areas are inspected.

B. Partial.

A partial inspection is one whose scope is limited to certain potentially hazardous areas, operations, conditions, or practices at the establishment.

1. Generally, unprogrammed inspections (i.e., inspections resulting from an employee complaint, referral, reported accident or incident, etc.) will be conducted as partial inspections. The scope of the partial inspection should be limited to the specific work areas, operations, conditions, or practices forming the basis of the unprogrammed inspection.

For example: An Area Office receives an employee complaint alleging that a specific machine in a manufacturing plant poses an amputation hazard to employees. If no other information is provided to OSHA, the resulting onsite inspection should be limited to the specific machine referenced in the employee's complaint.

2. A partial inspection can be expanded based on information gathered by the CSHO during the inspection process, including from injury and illness records found in both OSHA forms 300 and 301, employee interviews, and plain view observations. The CSHO should not expand a partial inspection based on 300 data ***alone***. See note in Chapter 15, Section III.A.1.b.
3. CSHOs shall consult established written guidelines and criteria, such as Agency directives, REPs and LEPs, in conjunction with information gathered during the records or program review and walkaround inspection, to determine whether expanding the scope of an inspection is warranted. See also Chapter 15, Section III., Obtaining Warrants.

IV. Conduct of Inspection.

A. Time of Inspection.

1. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.
2. The Area Director or designee and the CSHO shall determine if alternate work schedules are necessary for entry into an inspection site during other-than-normal working hours.

B. Presenting Credentials.

1. While conducting inspections, CSHOs are to present their credentials whenever making contact with management representatives, employees (to conduct interviews), or organized labor representatives.
2. At the beginning of the inspection, the CSHO shall locate the owner representative, operator, or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.
3. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. If the employer representative is coming from off-site, the inspection should not be delayed in excess of one hour. If the workforce begins to depart from the worksite, the CSHO should contact the Area Director or designee for guidance. If the person in charge at the workplace cannot be determined, then the CSHO should record the extent of the inquiry in the case file and proceed with the physical inspection.

C. Refusal to Permit Inspection and Interference.

Section 8 of the Act specifies that CSHOs, without delay and at reasonable times, can enter any establishment covered under the Act for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement (e.g., consent, third-party consent, plain

view, open field, open construction site, or exigent circumstances), an employer has a right to require the CSHO to seek an inspection warrant prior to entering an establishment and the employer can refuse entry without such a warrant.

1. Refusal of Entry or Inspection.

   Please note that on a military base or other federal government facility, the following guidelines do not apply. Instead, a representative of the controlling authority shall be informed of the contractor's refusal and directed to take appropriate action to obtain cooperation.

   a. When the employer refuses to permit entry upon being presented proper credentials, or allows entry but then refuses to permit or hinders the inspection in some way, an attempt shall be made to obtain as much information as possible about the establishment. See Chapter 15, Obtaining Warrants for additional information.

   b. If the employer refuses to allow an inspection of the establishment to proceed, then the CSHO shall leave the premises and immediately report the refusal to the Area Director or designee. The Area Director shall notify the Regional Solicitor of Labor (RSOL).

   c. If the employer raises no objection to inspection of certain areas of the workplace but objects to inspection of other areas, then this shall be documented. The CSHO shall continue the inspection, confining it only to those certain areas to which the employer has raised no objections. If, however, during the limited scope inspection the CSHO becomes aware that there may be violative conditions in other portions of the workplace, then the CSHO shall inform the employer and request permission to inspect those areas. If the employer continues to object, then the CSHO shall report this refusal to the Area Director or designee. The Area Director shall then consult with the RSOL to determine if an inspection warrant is needed. See Chapter 15, Legal Issues, for additional information.

   d. In either case, the CSHO shall advise the employer that the refusal will be reported to the Area Director or designee and that the Agency may take further action, which may include obtaining legal process.

   e. On multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.

2. Employer Interference.

   Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine whether or not to consider this action as a refusal. See §1903.7(b).

   Examples of interference are employer refusals to permit:

   - the walkaround;
   - the examination of records essential to the inspection;
   - the taking of essential photographs and/or video recordings;

- the inspection of a particular part of the premises;
- private employee interviews; or
- the attachment of sampling devices.

3. Forcible Interference with Conduct of Inspection or Other Office Duties.

   Whenever an OSHA official or employee encounters forcible resistance, opposition, or interference, or is assaulted or threatened with assault while engaged in the performance of official duties, all investigative activity shall cease.

   a. If a CSHO is assaulted while attempting to conduct an inspection, then the CSHO shall contact the proper authorities such as the Federal Protective Services or local police and immediately notify the Area Director.
   b. Upon receiving a report of such forcible interference, the Area Director or designee shall immediately notify the Regional Administrator.
   c. If working at an off-site location, CSHOs should leave the site immediately pending further instructions from the Area Director or designee.

4. Obtaining Compulsory Process.

   If it is determined, upon refusal of entry or refusal to produce evidence required by subpoena, that a warrant will be sought, then the Area Director shall proceed according to guidelines and procedures established in the Region for warrant applications. See Chapter 15, Legal Issues.

D. Employee Participation.

CSHOs shall advise employers that Section 8(e) of the Act and §1903.8 specifies that an employee representative must be given an opportunity to participate in the inspection.

1. CSHOs shall determine as soon as possible after arrival whether the workers at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.
2. If an employer resists or interferes with participation by employee representatives in an inspection and if the interference cannot be resolved by the CSHO, then the resistance shall be construed as a refusal to permit the inspection and the Area Director or designee shall be contacted.

E. Release for Entry.

1. CSHOs shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.
2. CSHOs can obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution for liability under the Act.

F. Bankrupt or Out of Business.

1. If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the CSHO shall report the facts to the Area Director or designee.
2. If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, then the inspection shall proceed.
3. An employer must comply with the Act until such time as the business actually ceases to operate.

G. Employee Responsibilities.

1. Section 5(b) of the Act states: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to the Act which are applicable to his own actions and conduct." The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
2. In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Area Director who shall consult with the Regional Administrator.
3. Under no circumstances are CSHOs to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with the Act. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

H. Strike or Labor Dispute.

Plants or establishments can be inspected regardless of the existence of labor disputes, such as work stoppages, strikes, or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection worksite, the Area Director or designee shall be consulted before any contact is made.

1. Programmed Inspections.

   Programmed inspections can be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

2. Unprogrammed Inspections.

   a. Unprogrammed inspections (complaints, fatalities, or referrals)will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Area Director or designee prior to scheduling an inspection.
   b. If there is a picket line at the establishment, CSHOs shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.

c. During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.

I. Variances.

The employer's requirement to comply with a standard can be modified through granting of a variance, as outlined in Section 6 of the Act.

1. An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.
2. In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

V. Opening Conference.

A. General.

CSHOs shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The opening conference should be brief so that the compliance officer can quickly proceed to the walkaround. Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. At the start of the opening conference, CSHOs will inform both the employer and the employee representative(s) of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace. Publications OSHA 3000, *Employer Rights & Responsibilities Following a Federal OSHA Inspection* and OSHA 3021, *Workers Rights* should be distributed. The CSHO should also remind the employer and employees that Section 11(c) provides redress for employees who exercise their rights under the Act.

CSHOs shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with §1910.132(d). CSHOs should then ask the person who signed the certification about any potential worksite exposures and select appropriate personal protective equipment.

1. Attendance at Opening Conference.
   a. CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.
   b. If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.
2. Scope of Inspection.

   CSHOs shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records (including OSHA 300 logs, 300A summaries, and 301 incident reports), possible referrals, rights during an inspection,

discrimination complaints, and the closing conference(s). For partial inspections, the CSHO shall also disclose that he/she may seek to expand the scope of the inspection if there is evidence (e.g., from injury and illness records, plain view hazards, or employee interviews) that there may be violative conditions in other portions of the workplace.

3. Video/Audio Recording.

   CSHOs shall inform participants that a video camera and/or an audio recorder can be used to provide a visual and/or audio record, and that the video and audio records can be used in the same manner as handwritten notes and photographs in OSHA inspections.

   NOTE: If an employer clearly refuses to allow video recording during an inspection, CSHOs shall contact the Area Director to determine if video recording is critical to documenting the case. If it is, this can be treated as a denial of entry.

4. Immediate Abatement.

   CSHOs should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See Chapter 7, Post-Citation Procedures and Abatement Verification.

5. Quick-Fix Penalty Reduction.

   CSHOs shall advise both the employer and employee representatives, if applicable, that the Quick-Fix penalty reduction can be applied to each qualified violation (i.e., those which meet the criteria noted in Chapter 6), that the employer immediately abates during the inspection and that is visually verified by the CSHO. CSHOs shall explain the Quick-Fix criteria and answer any questions concerning the program. See Chapter 6, Penalties and Debt Collection.

6. Recordkeeping Rule.

   a. The recordkeeping regulation at §1904.40(a) states that once a request is made, an employer must provide copies of the required recordkeeping records within four (4) business hours.

   b. Although the employer has four business hours to provide injury and illness records, the compliance officer is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed, the compliance officer is to begin the walkaround portion of the inspection.

      NOTE: 29 CFR Part 1904 requires reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting

Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

7. Abbreviated Opening Conference.

   An abbreviated opening conference shall be conducted whenever the CSHO believes that circumstances at the worksite dictate that the walkaround should begin as promptly as possible.

   a. In such cases, the opening conference shall be limited to:
      - presenting credentials;
      - stating the purpose of the visit;
      - explaining employer and employee rights; and
      - requesting employer and employee representatives.

      All other elements shall be fully addressed during the closing conference(s).

   b. Pursuant to §1903.8, employer and employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

B. Review of Appropriation Act Exemptions and Limitations.

   CSHOs shall determine if the employer is covered by any exemptions or limitations noted in the current Appropriations Act. See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998.

C. Review Screening for Process Safety Management (PSM) Coverage.

   CSHOs shall request a list of the chemicals on-site and their respective maximum intended inventories. CSHOs shall review the list of chemicals and quantities, and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, Appendix A or flammable liquids or gases at or above the specified threshold quantity. CSHOs can ask questions, conduct interviews, and/or conduct a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

   1. If there is an HHC present at or above threshold quantities, CSHOs shall use the following criteria to determine if any exemptions apply:

      a. CSHOs shall confirm that the facility is not: a retail facility; oil or gas well drilling or servicing operation; or a normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.

      b. If management believes that the process is exempt, CSHOs shall ask the employer to provide documentation or other information to support that claim.

   2. According to §1910.119 (a)(1)(ii), a process can be exempt if the employer can demonstrate that the covered chemical(s) are:

      a. Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling);

if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard; or

b. Flammable liquids with a flashpoint below 100 ºF (37.8ºC) stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

NOTE: Current Agency policies for applying exemptions are on the OSHA website. See CPL 03-00-010, *Petroleum Refinery Process Safety Management National Emphasis Program*, August 18, 2009.

D. Review of Voluntary Compliance Programs.

Employers who participate in selected voluntary compliance programs may be exempted from programmed inspections. CSHOs shall determine whether the employer falls under such an exemption during the opening conference.

1. OSHA On-Site Consultation Visits.

   a. In accordance with §1908.7 and Chapter VII., of CSP 02-00-003, *The Consultation Policies and Procedures Manual*, CSHOs shall ascertain at the opening conference whether an OSHA-funded consultation visit is in progress. A consultation visit in progress extends, from the beginning of the opening conference to the end of the correction due dates (including extensions).

   b. An On-Site Consultation visit in progress has priority over programmed inspections except for imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the **Assistant Secretary**. See §1908.7(b)(2).

2. Safety and Health Achievement Recognition Program (SHARP).

   a. Upon verifying that the employer is a current participant, the CSHO shall notify the Area Director or designee so that the company can be removed from the OSHA General Programmed Inspection Schedule for the approved exemption period, which begins on the date that the Regional Office approves the employer's participation in SHARP or Pre-SHARP.

   b. The initial exemption period is up to two years for SHARP and up to eighteen months for pre-SHARP. The renewal exemption period is up to three years for SHARP.

3. Voluntary Protection Programs (VPP).

   Inspections at a VPP site can be conducted in response to referrals, formal complaints, fatalities, and catastrophes.

   NOTE: A Compliance Officer who was previously a VPP on-site team member will generally not conduct an enforcement inspection at that VPP site for the following 2 years or until the site is no longer a VPP participant, whichever occurs first. See CSP 03-01-003, *Voluntary Protection Programs (VPP): Policies and Procedures Manual*, April 18, 2008. On a case-by-case basis, the Regional Solicitor may override this provision.

E. Disruptive Conduct.

CSHOs can deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. See §1903.8(d). If disruption or interference occurs, the CSHO shall contact the Area Director or designee as to whether to suspend the walkaround inspection or take other action. The employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

F. Classified Areas.

In areas containing information classified by an agency of the U.S. government in the interest of national security, only persons authorized to have access to such information can accompany a CSHO on the inspection. See §1903.8(d).

VI. Review of Records.

A. Injury and Illness Records.

1. Collection of Data.

a. At the start of each inspection, the CSHO shall review the employer's injury and illness records (including the employer's OSHA 300 logs, 300A summaries, and 301 incident reports) for three prior calendar years, record the relevant information on a copy of the *OSHA-300* screen, and enter the employer's data into OIS. This shall be done for all general industry, construction, maritime, and agriculture inspections and investigations.

b. CSHOs shall use these data to calculate the Days Away, Restricted, or Transferred (DART) rate and to observe trends, potential hazards, types of operations and work-related injuries.

c. If recordkeeping deficiencies or unsound employer safety incentive policies are discovered, the CSHO and the Area Director (or designee) can request assistance from the Regional Recordkeeping Coordinator.

2. Information to be Obtained.

a. CSHOs shall request copies of the *OSHA-300 Logs*, the total hours worked and the average number of employees for each year, and a roster of current employees, including a list of each employee's job classification, work hours, and assigned work area(s).

b. CSHOs shall request copies of the *OSHA-301 Incident Reports* or equivalent forms.

c. CSHOs shall check whether the establishment has an on-site medical, nursing, health, or first aid facility and/or the location of the nearest emergency room where employees can be treated.

NOTE: The total hours worked and the average number of employees for each year can be found on the *OSHA-300A* for all past years.

3. Automatic DART Rate Calculation.

   CSHOs will not normally need to calculate the Days Away, Restricted, or Transferred (DART) rate since it is automatically calculated when the *OSHA-300* data are entered into the OIS. If one of the three years is a partial year, so indicate and the software will calculate accordingly.

4. Manual DART Rate Calculation.

   The DART rate includes cases involving days away from work, restricted work activity, and transfers to another job. If it is necessary to calculate rates manually, the CSHO will need to calculate the DART Rates individually for each calendar year using the following procedures.

   The formula is:

   (N/EH) x (200,000) where:

   - ***N*** is the number of cases involving days away and/or restricted work activity and job transfers.
   - ***EH*** is the total number of hours worked by all employees during the calendar year; and
   - ***200,000*** is the base number of hours worked for 100 full-time equivalent employees.

     EXAMPLE 3-1: Employees of an establishment (XYZ Company), including management and temporary workers, worked 645,089 hours at XYZ company. There were 22 injury and illness cases involving days away and/or restricted work activity and/or job transfer from the *OSHA-300 Log* (total of column H plus column I). The DART rate would be (22÷645,089) x (200,000) = 6.8.

5. Construction.

   For construction inspections/investigations, only the *OSHA-300* information for the prime/general contractor needs to be recorded (where such records exist and are maintained). It will be left to the discretion of the Area Director or the CSHO as to whether *OSHA-300 and 301* data should also be recorded for any of the subcontractors.

6. Federal Agencies.

   Federal agency injury and illness recording and reporting requirements shall comply with the requirements under §1904, subparts C, D, E, and G, except that the definition of "establishment" found in §1960.2(h) will remain applicable to federal agencies.

B. Recording Criteria.

   Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions.

   1. Death;
   2. Days Away from Work;
   3. Restricted Work;

4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in §1904.8 through §1904.11.

C. Recordkeeping Deficiencies.

1. If recordkeeping deficiencies are suspected, the CSHO and the Area Director or designee can request assistance from the Regional Recordkeeping Coordinator. If there is evidence that the deficiencies or inaccuracies in the employer's records impair the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.
2. Other information related to this topic:
   a. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, December 30, 2004, and CPL 02-02-072, *Rules of Agency Practice and Procedure concerning OSHA Access to Employee Medical Records*, August 22, 2007.
   b. Other OSHA programs and records will be reviewed, including hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary.
   c. Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.
   d. There are several types of workplace policies and practices that could discourage employee reports of injuries and could constitute a violation of section 11(c) of the OSH Act. These policies and practices, otherwise known as employer safety incentive and disincentive policies and practices, can also violate OSHA's recordkeeping regulations.

VII. Walkaround Inspection.

The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. CSHOs shall conduct the inspection in such a manner as to avoid unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

A. Walkaround Representatives.

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employees. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection.

More than one employer and/or employee representative can accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid, and not interfere with, the inspection. See §1903.8(a).

The importance of worker participation to an effective workplace safety and health inspection was clearly established in Section 8(e) of the OSH Act, 29 U.S.C. § 657 (e), which provides that "[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace…for the purpose of aiding such inspection."

However, §1903.8(d) states that "Compliance Safety and Health Officers are authorized to deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection," which includes any activity not directly related to conducting an effective and thorough physical inspection of the workplace.

1. Employees Represented by a Certified or Recognized Bargaining Agent.

   During the opening conference, the highest ranking union official or union employee representative on-site shall designate who will participate in the walkaround. OSHA regulation §1903.8(b) gives the CSHO the authority to resolve all disputes about the representative authorized by the employer and employees. Section 1903.8(c) states that the representative authorized by the employees shall be an employee of the employer. If in the judgement of the CSHO, good cause has been shown why accompaniment by a third party, who is not an employee of the employer (such as an industrial hygienist or a safety engineer), is reasonably necessary to conduct an effective and thorough physical inspection of the workplace, then such third party can accompany CSHOs during the inspection.

   Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with reasonable number of employees during the walkaround.

2. Safety Committee or Employees at Large.

   Employee members of an established workplace safety committee ***or*** employees at large can designate an employee representative for OSHA inspection purposes.

B. Evaluation of Safety and Health Management System.

The employer's safety and health management system shall be evaluated to determine its good faith effort for the purposes of penalty calculation. See Chapter 6, Penalties and Debt Collection.

C. Record All Facts Pertinent to a Violation.

1. Safety and health violations shall be brought to the attention of employer and employee representatives at the time they are documented.
2. CSHOs shall record, at a minimum, the identity of the exposed employee, the hazard to which the employee was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, the manner in which important measurements were obtained, and how long the condition has existed.
3. CSHOs will document interview statements in a thorough and accurate manner; including names, dates, times, locations, types of materials, positions of pertinent articles and witnesses.

   NOTE: If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination can be made whether an employee has been or could be exposed. See Chapter 4, Violations and Chapter 5, Case File Preparation and Documentation.

D. Testifying in Hearings.

CSHOs can be required to testify in hearings on OSHA's behalf, and shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

E. Trade Secrets.

A trade secret, as referenced in Section 15 of the Act, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. See 18 USC 1905.

1. Policy.

   CSHOs and OSHA personnel shall preserve the confidentiality of trade secrets.

2. Restriction and Controls.

   At the commencement of an inspection, the employer may identify areas in the establishment that contain or that might reveal a trade secret. If the CSHO has no clear reason to question such identification, information obtained in such areas, including all negatives, photographs, video recordings, environmental samples, and OSHA documentation forms, shall be labeled:

   "Confidential – Trade Secret"

   a. Under Section 15 of the Act, all information reported to or obtained by CSHOs in connection with any inspection or other activity that contains or that might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other OSHA officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

b. Title 18 USC 1905 provides criminal penalties for Federal employees who disclose such information. These penalties include fines of up to $1,000 or imprisonment for up to one year, or both, and removal from office or employment.

c. Trade secret materials shall not be labeled as "Top Secret," "Secret," or "Confidential," nor shall these security classification designations be used in conjunction with other words unless the trade secrets are also classified by an agency of the U.S. government in the interest of national security.

3. If the employer objects to the taking of photographs and/or video recordings because trade secrets would or may be disclosed, CSHOs should advise the employer of the protection against such disclosure afforded by Section 15 of the Act and §1903.9. If the employer still objects, CSHOs shall contact the Area Director or designee.

F. Collecting Samples.

1. CSHOs shall determine, early in the inspection, whether sampling (such as, but not limited to, air sampling and surface sampling) is required by using the information collected during the walkaround and from the pre-inspection review. CSHOs are highly encouraged to conduct self-sampling.

2. Summaries of sampling results shall be provided on request to the appropriate employees (including those exposed or likely to be exposed to a hazard), to employer representatives, and to employee representatives.

G. Photographs and Video Recordings.

1. Photographs and/or video recordings, shall be taken whenever CSHOs determine there is a need.

a. Photographs that support violations shall be properly labeled, and may be attached to the appropriate *Violation Worksheet.*

b. CSHOs shall ensure that any photographs relating to confidential trade secret information are identified as such and are kept separate from other evidence.

2. All film and photographs or video recordings shall be retained in the case file. If lack of storage space does not permit retaining the film, photographs or videotapes with the file, they may be stored elsewhere with a reference to the corresponding inspection. Video recordings shall be properly labeled. For more information regarding guidelines for case file documentation with video, audio and digital media, see OSHA Instruction CPL 02-00-098, *Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, October 12, 1993.

H. Violations of Other Laws.

If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency. Referrals shall be made using appropriate regional procedures.

I. Interviews of Non-Managerial Employees.

A free and open exchange of information between CSHOs and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

1. Background.

   a. Section 8(a)(2) of the Act authorizes CSHOs to question **any employee privately** during regular working hours or at other reasonable times during the course of an OSHA inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is OSHA's statutory right.

   b. Employee interviews are an effective means to determine if any advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.

   c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health program to prevent or control workplace hazards.

   d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Area Director or designee, in determining the need for the employee's statement.

2. Employee Right of Complaint.

   CSHOs can consult with any employee who desires to discuss a potential violation. Upon receipt of such information, CSHOs shall investigate the alleged hazard, where possible, and record the findings.

3. Time and Location of Interviews.

   CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround, but can be conducted at any time during an inspection. If necessary, interviews can be conducted at locations other than the workplace. CSHOs should consult with the Area Director if an interview is to be conducted someplace other than the workplace. Where appropriate, OSHA has the authority to subpoena an employee to appear at the Area Office for an interview.

4. Conducting Interviews of Non-Managerial Employees in Private.

   CSHOs shall inform employers that interviews of non-managerial employees will be conducted in private. CSHOs are entitled to question

such employees in private regardless of employer preference. If an employer interferes with a CSHOs ability to do so, the CSHO should request that the AD consult with the RSOL to determine appropriate legal action. Interference with a CSHOs ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.

5. Conducting Employee Interviews.

   a. General Protocols.

   - At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials, and provide the employee with a business card. This allows employees to contact CSHOs if they have further information at a later time.
   - CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand OSHA's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If an interpreter is needed, CSHOs should contact the General Services Administration (GSA) tele-interpreter.
   - Every employee should be asked to provide his or her name, home address and phone number. CSHOs should request identification and make clear the reason for asking for this information.
   - CSHOs shall inform employees that OSHA has the right to interview them in private and of the protections afforded under Section 11(c) of the Act. See also, OSHA Fact Sheet: Filing Whistleblower Complaints under Section 11(c) of the OSH Act of 1970.
   - In the event that an employee requests that a representative of the union to be present, CSHOs shall make a reasonable effort to honor the request.
   - If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Area Director for guidance.
   - An attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Area Director, who will contact the RSOL.

b. Interview Statements.

Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations. Interviews shall normally be reduced to writing and written in the first person in the language of the individual. Employees shall be encouraged to sign and date their statement.

- Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.
- Statements shall include the words, "I request that my statement be held confidential to the extent allowed by law" and end with the following; "I have read the above, and it is true to the best of my knowledge."
- If the person making the declaration refuses to sign, then the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and then noted in the case file.
- A transcription of any recorded statement shall be made when necessary to the case.
- Upon request, if a management employee requests a copy of his/her interview statement, one shall be given to them.

c. The Informant Privilege.

- The informant privilege allows the government to withhold the **identity** of individuals who provide information about the violation of laws, including OSHA rules and regulations. CSHOs shall inform employees that their statements will remain confidential to the extent permitted by law. However, each employee giving a statement should be informed that disclosure of his or her identity may be necessary in connection with enforcement or court actions.

  NOTE: Whenever CSHOs make an assurance of confidentiality as part of an investigation (i.e., informs the person giving the statement that their identity will be protected), the pledge shall be reduced to writing and included in the case file.
- The privilege also protects the contents of statements to the extent that disclosure may reveal the witness identity. Where the contents of a statement will not disclose the identity of the informant (i.e., do not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that

they provided information to OSHA. Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the Agency's ability to invoke the privilege.

J. Multi-Employer Worksites.

On multi-employer worksites (in all industry sectors), more than one employer can be cited for a hazardous condition that violates an OSHA standard. A two-step process must be followed to determine whether more than one employer is to be cited. See CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999, for further guidance.

K. Administrative Subpoena.

Whenever there is a reasonable need for records, documents, testimony,and/or other supporting evidence necessary for completing an inspection scheduled in accordance with any current and approved inspection scheduling system or an investigation of any matter properly falling within the statutory authority of the Agency, the Regional Administrator, or authorized Area Director or designee, can issue an administrative subpoena. See Chapter 15, Legal Issues.

L. Employer Abatement Assistance.

1. Policy.

CSHOs shall offer appropriate abatement assistance during the walkaround to explain how workplace hazards might be eliminated. The information shall provide the employee with guidance to develop acceptable abatement methods or to seek appropriate professional assistance. CSHOs shall not imply OSHA endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

2. Disclaimers.

The employer shall be informed that:

a. The employer is not limited to the abatement methods suggested by OSHA;

b. The methods explained are general and may not be effective in all cases; and

c. The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.

VIII. Closing Conference.

A. Participants.

At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference can be conducted on-site or by telephone as CSHOs deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in OIS and the case shall be processed as if a closing conference had been held.

NOTE: When conducting separate closing conferences for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), CSHOs shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.

B. Discussion Items.

1. CSHOs shall discuss the apparent violations and other pertinent issues found during the inspection and note relevant comments on the *Violation Worksheet*, including input for establishing correction dates.
2. CSHOs shall give employers the publication, "Employer Rights and Responsibilities Following a Federal OSHA Inspection," (OSHA-3000) which explains the responsibilities and courses of action available to the employer if a citation is issued, including their rights under the Small Business Regulatory Enforcement Fairness Act (SBREFA). (See SBREFA on OSHA's public webpage.) CSHOs shall then briefly discuss the information in the booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.
3. CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health program and any other applicable programs, and advise the employer of the benefits of an effective program and provide information, such as OSHA's website, describing program elements.
4. Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.
5. Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference can be held by telephone or in person.
6. CSHOs shall advise employee representatives that:
   a. Under 29 CFR 2200.20 of the Occupational Safety and Health Review Commission regulations, if an employer contests a citation, the employees have a right to elect "party status" before the Review Commission;
   b. The employer should notify them if a notice of contest or a petition for modification of abatement date is filed;
   c. They have Section 11(c) rights (See also, OSHA Fact Sheet: Filing Whistleblower Complaints under Section 11(c) of the OSH Act of 1970.); and

d. They have a right to contest the abatement date. Such contests must be in writing and must be postmarked within 15 working days after receipt of the citation.

C. Advice to Attendees.

1. The CSHO shall advise those attending the closing conference that a request for an informal conference with the OSHA Area Director is encouraged, as it provides an opportunity to:
   a. Resolve disputed citations and penalties without the need for litigation, which can be time-consuming and costly;
   b. Obtain a more complete understanding of the specific safety or health standards that apply;
   c. Discuss ways to correct the violations;
   d. Discuss issues concerning proposed penalties;
   e. Discuss proposed abatement dates;
   f. Discuss issues regarding employee safety and health practices; and
   g. Learn more about other OSHA programs and services available.
2. If a citation is issued, an informal conference or the request for one does not extend the 15-working-day period during which the employer or employee representatives can contest.
3. Oral disagreement or expression(s) during an informal conference, of intent to contest a citation, penalty, or abatement date does not replace the requirement that the employer's Notice of Contest be in writing.
4. Employee representatives have the right to participate in informal conferences or negotiations between the Area Director and the employer in accordance with the guidelines given in Chapter 7, Section II, Informal Conferences.

D. Penalties.

CSHOs shall explain that penalties must be paid within 15 working days after the employer receives a *Citation and Notification of Penalty (OSHA-2)*. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the date that the citation/notification of penalty becomes a final order.

E. Feasible Administrative, Work Practice, and Engineering Controls.

Where appropriate, CSHOs will discuss control methodology with the employer during the closing conference.

1. Definitions.
   a. Engineering Controls: Consist of substitution, isolation, ventilation and equipment modification.
   b. Administrative Controls: Any procedure that significantly limits daily exposure by manipulation of the work schedule or altering the organization of accomplishing the work is considered an

administrative control. The use of personal protective equipment is not considered an administrative control.

c. Work Practice Controls: Methods such as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job, in order to reduce or eliminate employee exposure to the hazard.

d. Feasibility: Abatement measures required to correct a citation item are feasible when they are capable of being done. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made about whether engineering or administrative controls are feasible.

e. Technical Feasibility: The existence of technical know-how about materials and methods available or adaptable to specific circumstances, which can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced.

f. Economic Feasibility: This means that the employer is financially able to undertake the measures necessary to abate the citations received.

NOTE: If an employer's level of compliance lags significantly behind that of its industry, an employer's claim of economic infeasibility will not be accepted.

2. Documenting Claims of Infeasibility.

a. CSHOs shall document the underlying facts that may support an employer's claim of infeasibility.

b. When economic infeasibility is claimed, the CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it can be considered during an informal conference or during settlement negotiations.

c. CSHOs should avoid discussing complex issues regarding feasibility. These should be referred to the Area Director or designee for determination.

F. Reducing Employee Exposure.

Employers shall be advised that, whenever feasible, engineering, administrative, or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard completely (or to reduce exposure to or below the permissible exposure limit). Such controls are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.

G. Abatement Verification.

During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements. See Chapter 7, Post Inspection Procedures and Abatement Verification.

1. Abatement Certification.

   Abatement certification is required for each citation item(s) that the employer receives, except those identified as "Corrected During Inspection."

2. Corrected During Inspection (CDI).

   Violations that will reflect on-site abatement and will be identified in the citations as "Corrected During Inspection" shall be reviewed at the closing conference.

3. Abatement Documentation.

   Abatement documentation, the employer's physical proof of abatement, is required to be submitted along with each willful, repeat, and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.

4. Placement of Abatement Verification Tags.

   The required placement on movable equipment of either abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection. See §1903.19(i).

5. Requirements for Extended Abatement Periods.

   Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

H. Employee Discrimination.

The CSHO shall emphasize that the Act prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under the Act, including the right to raise safety concerns, request personal protective equipment, report work-related injuries or illnesses, make safety or health complaints, or to request or participate in an OSHA inspection.

IX. Special Inspection Procedures.

A. Follow-up and Monitoring Inspections.

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated, and high gravity serious violations; failure to abate notifications; and/or citations related to imminent danger situations are examples of candidates for follow-up or monitoring inspections. The Area Director has discretion to conduct a follow-up inspection where the employer fails to submit the required abatement certification or documentation within the time permitted by §1903.19, or where the employer submits abatement documentation that does not adequately demonstrate that the cited violations have been corrected. (See Chapter 7, Section X.C).

1. Failure to Abate.
   a. A failure to abate violation exists when a previously cited violation continues unabated and the abatement date (as issued or amended by a settlement agreement) has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.
   b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall normally be issued.

      NOTE: If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) can be considered in accordance with Chapter 7, Section III, Petition for Modification of Abatement (PMA).
   c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.
   d. If, after issuing a Failure to Abate Violation, a subsequent inspection indicates the condition has still not been abated, the RSOL shall be consulted for further guidance.
2. Follow-Up Inspections.
   a. For any items found to be abated, a copy of the previous *Violation Worksheet* or citation can be noted as "corrected," along with a brief explanation of the abatement measures taken. This information can also be included in the narrative of the investigative file.
   b. In the event that any item has not been abated, complete documentation shall be included on a *Violation Worksheet.* Failure to Abate violations are issued as a part of the inspection where the hazardous condition, practice, or non-complying equipment was previously cited. Repeated violations, if any, are issued only in the follow-up inspection, although a reference to previous inspections should be made in the AVD (see Chapter 4, Sections VII.F and VII.G.5).
3. Monitoring Inspections.
   Monitoring Inspections shall be coded as such in OIS. If monitoring inspections are part of a Corporate-Wide Settlement Agreement (CSA) or other settlement agreement, then notification shall be sent to the National Office through the respective Regional Offices where the monitoring inspections occur.

B. Construction Inspections.
1. Standards Applicability.
   The standards published as 29 CFR Part 1926 have been adopted as occupational safety and health standards under Section 6(a) of the Act and §1910.12. They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction.

2. Definition.

   The term "construction work" as defined by §1926.32(g) means work for construction, alteration, and/or repair, including painting and decorating. These terms are also discussed in §1926.13. If any question arises as to whether an activity is deemed to be "construction" for purposes of the Act, the Director of the Directorate of Construction shall be consulted.

3. Employer Worksite.

   a. Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite. In cases when such large geographical areas overlap between Area Offices, generally only operations of the employer within the jurisdiction of any Area Office will be considered as the worksite of the employer.

   b. When a construction worksite extends beyond a single Area Office and the CSHO believes that the inspection should be extended, the affected Area Directors shall consult with each other and take appropriate action.

4. Upon Entering the Workplace.

   a. CSHOs shall ascertain whether there is a representative of a federal contracting agency at the worksite. If so, they shall contact the representative, advise him/her of the inspection and request that the representative attend the opening conference.

   b. If the inspection is being conducted as a result of a complaint, a copy of the complaint should be given to the general contractor and any affected sub-contractors.

5. Closing Conference.

   Upon completion of the inspection, the CSHO shall confer with the general contractor(s) and all appropriate subcontractors or their representatives, together or separately, and advise each one of all the apparent violations disclosed by the inspection to which each establishments employees were exposed, or violations which the employer created or controlled. Employee representatives participating in the inspection shall also be afforded the right to participate in the closing conference(s).

C. Federal Agency Inspections.

   Policies and procedures for federal agencies are to be the same as those followed in the private sector. See Chapter 13, Federal Agency Field Activities.

Chapter 4

VIOLATIONS

I. Basis of Violations.

A. Standards and Regulations.

1. Section 5(a)(2) of the Act states that each employer has a responsibility to comply with occupational safety and health standards promulgated under the Act, which includes standards incorporated by reference. For example, the American National Standards Institute (ANSI) standard A92.2 – 1969, "Vehicle Mounted Elevating and Rotating Work Platforms," including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions (i.e., those containing the word "shall" or other mandatory language of standards incorporated by reference) are adopted as standards under the Act.
2. The specific standards and regulations are found in Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards, which serve as the basis for violations. Standards are subdivided as follows as per OIS Application. For example, §1910.305(j)(6)(ii)(A)(*2*) would be entered as follows:

Subdivision Naming Convention	Example
Title	29
Part	1910
Section	305
Paragraph	(j)
Subparagraph	(6)
Item	(ii)
Sub Item	(A)
Sub Item 2	(*2*)

NOTE: The most specific provision of a standard shall be used for citing violations.

3. Definition and Application of Vertical and Horizontal Standards.

Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

4. Application of Horizontal and Vertical Standards.

   If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the supervisor or the Area Director shall be consulted. The following guidelines shall be considered:

   a. When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1915) and a horizontal (e.g., 29 CFR 1910) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.

   b. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard can be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

      EXAMPLE 4-1: When employees are connecting structural steel, §1926.501(b)(15) cannot be cited for fall hazards above 6 feet since that specific situation is covered by §1926.760(b)(1) for fall distances of more than 30 feet.

   c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.

   d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity in which an employer is engaged in rather than on the nature of the employer's general business.

   e. Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard shall not normally be cited under 29 CFR 1910 unless that standard has been identified as being applicable to construction. See *Incorporation of General Industry Safety and Health Standards Applicable to Construction Work*, 58 FR 35076 (June 30, 1993).

   f. If a question arises about whether an activity is deemed "construction" for purposes of the Act, contact the Directorate of Construction (DOC). See §1910.12, Construction Work.

   g. For the application of standards in the maritime industries (29 CFR Parts 1915, 1917, 1918, and 1919) see Chapter 10 Section III., Maritime.

5. Violation of Variances.

   The employer's requirement to comply with a standard can be modified by granting a variance, as outlined in Section 6(d) of the Act.

a. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.

b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Area Director or designee shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition can be issued.

B. Employee Exposure.

A hazardous condition that violates an OSHA standard or the general duty clause shall be cited only when employee exposure can be documented. The exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled OSHA, in which case the citation must be issued within six months from the date when OSHA learns, or should have known, of the condition. The RSOL should be consulted in such cases.

1. Determination of Employer/Employee Relationship.

Whether or not workers are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees cannot be the key factor. For cases where determination of the employer/employee relationship is complex, the Area Director shall seek the advice of the RSOL.

2. Proximity to the Hazard.

The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented (i.e., photos, measurements, and employee interviews).

3. Observed Exposure.

a. Employee exposure is established if CSHOs witness, observe, or monitor the proximity or access of an employee to the hazard or potentially hazardous condition.

b. The use of personal protective equipment cannot, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures can be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

4. Unobserved Exposure.

Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure can be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

a. Past Exposure.

In fatality/catastrophe (or other "accident/incident") investigations, prior employee exposure(s) can be established if CSHOs establish, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. Prior exposures also can serve as the basis for a violation when:

- The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
- It is reasonably predictable that employee exposure to a hazardous condition could recur when:
  - The employee exposure has occurred in the previous six months;
  - The hazardous condition is an integral part of an employer's normal operations; and
  - The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. Potential Exposure.

Potential exposure to a hazardous condition can be established if there is evidence that employees have access to the hazard, and can include one or more of the following:

- When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
- When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area; or
- When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; *however*
- If the inspection reveals an adequately communicated *and* effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

c. Documenting Employee Exposure.

CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:

- Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee's family;
- Recorded statements or signed written statements;
- Photographs, video recordings, and/or measurements; and
- All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, *OSHA-300/301*, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies).

C. Regulatory Requirements.

Violations of 29 CFR Part 1903 and Part 1904 shall be documented and cited when an employer does not comply with posting, recordkeeping and reporting requirements contained in these Parts as provided by OSHA policy. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual* (December 30, 2004). See also CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*, dated November 27, 1995.

NOTE: If prior to the lapse of the 8 hour or 24 hour reporting periods, the Area Director becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, then there is no violation for failure to report.

NOTE: 29 CFR Part 1904 has requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The rule updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

D. Hazard Communication.

Under 29 CFR 1910.1200 chemical manufacturers and importers are required to classify the chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, regardless of any employee exposure at the manufacturing or importing location. See CPL 02-02-079, *Inspection Procedures for the Hazard Communication Standard (HCS 2012)*, dated July 9, 2015.

E. Employer/Employee Responsibilities.

1. Employer Responsibilities.

Section 5(a) of the Act states that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or

serious physical harm to his employees." This section also states that each employer "shall comply with occupational safety and health standards promulgated under this Act."

2. Employee Responsibilities.

   a. Section 5(b) of the Act states: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to the Act which are applicable to his own actions and conduct." The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

   b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Area Director who shall consult with the Regional Administrator or designee.

   c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Act. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

3. Affirmative Defenses.

   An affirmative defense is a claim which, if established by the employer, will excuse the employer from a violation that has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence to rebut an employer's potential argument supporting any such defenses. See Chapter 5, Section VI, Affirmative Defenses, for additional information.

4. Multi-Employer Worksites.

   On multi-employer worksites in all industry sectors, more than one employer can be cited for a hazardous condition that violates an OSHA standard. For specific and detailed guidance, see the multi-employer policy contained in CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999.

II. Serious Violations.

A. Section 17(k).

Section 17(k) of the Act states that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

B. Establishing Serious Violations.

1. CSHOs shall consider four factors in determining whether a violation is to be classified as serious.
   a. The first three factors address whether there is a substantial probability that death or serious physical harm could result from an accident/incident or exposure relating to the violative condition. The probability that an incident or illness will occur is not to be considered in determining whether a violation is serious, but is considered in determining the relative gravity of the violation.
   b. The fourth factor addresses whether the employer knew or could have known of the violative condition.
2. The classification of a violation need not be completed for each instance. It should be done once for each citation or, if violation items are grouped in a citation, once for the group.
3. If the citation consists of multiple instances or grouped violations, the overall classification shall normally be based on the most serious item.
4. The four-factor analysis outlined below shall be followed in making a determination of whether the violation is serious. Potential violations of the general duty clause shall also be evaluated on the basis of these steps to establish whether they may cause death or serious physical harm.

C. Four Steps to be Documented.

1. Type of Hazardous Exposure(s).

   The first step is to identify the type of potential exposures to a hazard that the violated standard or the general duty clause is designed to prevent.

   a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness **resulting** from a potential accident or hazardous exposure.
   b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that hazard.
   c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

      EXAMPLE 4-2: Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1). The regulation requires that employees be protected from falls by the use of guardrail systems, safety net systems, or personal fall arrest systems. The type of hazard that the standard is designed to prevent is a fall from the edge of the floor to the ground below.

      EXAMPLE 4-3: Employees are observed working in an area in which debris is located in apparent violation of §1915.81(c)(2). The

type of hazard that the standard is designed to prevent here, is employees tripping on debris.

EXAMPLE 4-4: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL, mandated by the standard.

2. The Type of Injury or Illness.

   The second step is to identify the most serious injury or illness that could reasonably be expected to result from the potential hazardous exposure identified in Step 1.

   a. In making this determination, CSHOs shall consider all factors that would affect the severity of the injury or illness that could reasonably result from the exposure to the hazard. CSHOs shall not give consideration at this point to factors relating to the **probability** that an injury or illness will occur.

   b. The following are examples of types of injuries that could reasonably be predicted to result from exposure to a particular hazard:

      EXAMPLE 4-5: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a bodily function.

      EXAMPLE 4-6: If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing.

   c. For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. The *Occupational Chemical Database* webpage shall be used to determine both toxicological properties of substances listed and a Health Code Number. (See also the Label Abbreviations and Descriptions webpage).

   d. To support a classification of "serious," a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:

      - The nature of the operation from which the exposure results;

- Whether the exposure is regular and on-going or is of limited frequency and duration;
- How long employees have worked at the operation;
- Whether employees are performing functions that can be expected to continue; and
- Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.

e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are some examples of illnesses that could reasonably result from exposure to a health hazard:

EXAMPLE 4-7: If an employee is exposed regularly to methylene chloride above 25 ppm, it is reasonable to predict an increased risk of developing cancer, adverse effects on the heart, central nervous system, and liver, and skin or eye irritation.

EXAMPLE 4-8: If an employee is exposed regularly to acetic acid above 10 ppm, it is reasonable that the resulting serious physical harm or illnesses would be irritation to eyes, nose, throat, lungs, and skin, rhinitis, sinusitis, bronchitis, and irritant-induced occupational asthma.

3. Potential for Death or Serious Physical Harm.

The third step is to determine whether the type of injury or illness identified in Step 2 could include death or a form of serious physical harm. In making this determination, the CSHO shall utilize the following definition of "serious physical harm."

NOTE: Impairment of the body occurs when part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.

a. Injuries that constitute serious physical harm include, but are not limited to:

- Amputations (loss of all or part of a bodily appendage);
- Concussion;
- Crushing (internal, even though skin surface may be intact);
- Fractures (simple or compound);
- Burns or scalds, including electrical and chemical burns;
- Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
- Sprains and strains; and

- Musculoskeletal disorders.

b. Illnesses that constitute serious physical harm include, but are not limited to:
   - Cancer;
   - Respiratory illnesses (e.g., silicosis, asbestosis, byssinosis);
   - Hearing impairment;
   - Central nervous system impairment;
   - Visual impairment; or
   - Poisoning.

c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

   EXAMPLE 4-9: An employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body that requires treatment by a medical doctor. This injury would be classified as serious.

   EXAMPLE 4-10: An employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand, requiring suturing, and the use of the hand is substantially reduced. This injury would be classified as serious.

   EXAMPLE 4-11: An employee develops chronic beryllium disease after long-term exposure to beryllium above 0.2 micrograms per cubic meter of air ($\mu g/m^3$), and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

   NOTE: The key determination is the likelihood that death or serious harm will result **if** an accident or exposure occurs. **The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.**

4. Knowledge of Hazardous Condition.

   The fourth step is to determine whether the employer knew, or with the exercise of reasonable diligence could have known, of the presence of the **hazardous condition**.

   a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation.

      Examples include: the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

   b. If it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement can be established if there is evidence that the employer could have known of it through the

exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include:

- The violation/hazard was in plain view and obvious;
- The duration of the hazardous condition was not brief;
- The employer failed to regularly inspect the workplace for readily identifiable hazards; and
- The employer failed to train and supervise employees about the particular hazard.

c. The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge. In cases where the employer contends that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine whether the supervisor violated an established work rule, and the extent to which the supervisor was trained in the rule and supervised regarding compliance to prevent such conduct.

III. General Duty Requirements.

Section 5(a)(1) of the Act specifies that "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." The general duty requirement also exists for federal agencies. See §1960.8.

A. Evaluation of General Duty Requirements.

In general, Review Commission and court precedent have established that the following elements are necessary to prove a violation of the general duty clause:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer's own employees.

B. Elements of a General Duty Requirement Violation.

1. Definition of a Hazard.

a. In a Section 5(a)(1) citation, a "hazard" is defined as a *workplace condition* or *practice* to which employees are exposed, creating the *potential for death or serious physical harm* to employees.

b. Such a condition or practice must be **clearly stated in a citation** so as to apprise employers of their obligations regarding the hazard. The

hazard must therefore be defined in terms of the **presence of a hazardous condition or practice** that presents a particular danger to employees. Also, the hazard must be a condition or practice that can reasonably be abated by the employer.

2. Do Not Cite the Lack of a Particular Abatement Method.

   a. General duty clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures, but rather addresses the failure to prevent or remove a particular hazard. Section 5(a)(1) therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to use.

   b. In situations where a question arises regarding distinguishing between a hazardous workplace condition or practice and the lack of an abatement method, the Area Director shall consult with the Regional Administrator or designee, or RSOL for assistance in correctly identifying the hazard.

      EXAMPLE 4-12: Employees are conducting sanding operations that create sparks near magnesium dust (workplace condition or practice), exposing them to the serious injury of burns from a fire (potential for physical harm). One proposed method of abatement can be engineering controls such as adequate ventilation. The *hazard* is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

      EXAMPLE 4-13: Employees are operating tools that generate sparks in the presence of an ignitable gas (workplace condition) exposing them to the danger of an explosion (physical harm). The *hazard* is use of tools that create sparks in a volatile atmosphere that may cause an explosion capable of seriously injuring employees, not the lack of approved equipment.

      EXAMPLE 4-14: An employer has failed to abate three hazards in a specific work area: High-pressure machinery that vents gases next to a work area, improper installation of the equipment that is in place, and no established work rules addressing the dangers of high-pressure gas. However, there is only *one hazard* (i.e., employee exposure to the venting of high-pressure gases into the work area that may cause serious burns from steam discharges).

3. The Hazard is Not a Particular Accident/Incident.

   a. The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 5(a)(1), although the accident/incident may be evidence of a hazard. In some cases, a Section 5(a)(1) violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the **hazard in the**

workplace that existed prior to the accident/incident, not the occurrence of the accident/incident itself.

EXAMPLE 4-15: A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must address the underlying workplace fire hazard, not the accident/incident involving the employee.

4. The Hazard Must be Reasonably Foreseeable.

   The hazard for which a citation is issued must be reasonably foreseeable. All the factors that could cause a hazard need not be present in the same place or at the same time to prove foreseeability of the hazard (e.g., an explosion need not be imminent).

   EXAMPLE 4-16: If sufficient quantities of combustible gas and oxygen are present in a confined area to cause an explosion if ignited, but no ignition source is present or could be present, no Section 5(a)(1) violation would exist. However, if the employer has not taken sufficient safety precautions to preclude the presence or use of ignition sources in the confined area, then a foreseeable hazard may exist.

   NOTE: It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.

   EXAMPLE 4-17: A titanium dust fire spreads from one room to another because an open can of gasoline was in the second room. An employee who usually worked in both rooms is burned in the second room as a result of the gasoline igniting. The presence of gasoline in the second room may be a rare occurrence. However, it is not necessary to demonstrate that a fire in both rooms could reasonably occur, but only that a fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

5. The Hazard Must Affect the Cited Employer's Employees.

   a. The employees exposed to the Section 5(a)(1) hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a Section 5(a)(1) violation if his own employees are not exposed to the hazard.

   b. In complex situations, such as multi-employer worksites, where it can be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Area Director shall consult with the Regional Administrator or designee and the RSOL to determine the sufficiency of the evidence regarding the employment relationship.

c. The fact that an employer denies that exposed workers are his/her employees, does not necessarily determine the employment relationship issue. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays employees, by itself cannot be the determining factor to establish a relationship. (See OSHA INTRANET Region I Legal Resources entitled, Employee Relationships and Determining an Employment Relationship under the OSH Act.)

6. The Hazard Must Be Recognized.

Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or "common-sense" recognition. The use of common sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by the following evidence and adequate documentation in the file:

a. Employer Recognition.

- A recognized hazard can be established by evidence of actual employer knowledge of a hazardous condition or practice. Evidence of employer recognition can consist of written or oral statements made by the employer or other management or supervisory personnel during or before the OSHA inspection.
- Employer awareness of a hazard can also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, "near misses" (close calls) known to the employer, injury and illness reports, or workers' compensation data may also show employer knowledge of a hazard.
- Employer awareness of a hazard can also be demonstrated by prior Federal OSHA or OSHA State Plan state inspection history that involved the same hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard, if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

NOTE: CSHOs are to gather as many of these facts as possible to support establishing a Section 5(a)(1) violation.

b. Industry Recognition.

- A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 5(a)(1) violation. Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Area Director shall consult with the Regional Administrator or designee on such an issue. Industry recognition of a hazard can be established in several ways:
  - Statements by safety or health experts who are familiar with the relevant conditions (regardless of whether they work in the employer's industry);
  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the employer's industry;
  - Manufacturers' warnings on equipment or in literature that are relevant to the hazard;
  - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;
  - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
  - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended; and/or
  - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards **cannot** be enforced as OSHA standards, but they can be used to provide evidence of industry recognition,

seriousness of the hazard, or feasibility of abatement methods.

- In cases where state and local government agencies have codes or regulations covering hazards not addressed by OSHA standards, the Area Director, upon consultation with the Regional Administrator or designee, shall determine whether the hazard is to be cited under Section 5(a)(1) or referred to the appropriate local agency for enforcement.

  EXAMPLE 4-18: A safety hazard on a factory personnel elevator is documented during an inspection. It is determined that the hazard cannot be cited under Section 5(a)(1), but there is a local code that addresses this hazard and a local agency actively enforces the code. The situation normally shall be referred to the local enforcement agency instead of citing Section 5(a)(1).

- References that can be used to supplement other evidence to help demonstrate industry recognition include the following:
  - NIOSH criteria documents.
  - EPA publications.
  - National Cancer Institute and other agency publications.
  - OSHA Hazard Alerts.
  - OSHA Technical Manual.

c. Common Sense Recognition.

If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), hazard recognition can still be established if a hazardous condition is so obvious that any reasonable person would have recognized it. This form of recognition should be used only in flagrant or obvious cases.

EXAMPLE 4-19: In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees worked. In construction, Section 5(a)(1) could not be cited in this situation because §1926.252 or §1926.852 applies. In the context of a chemical processing plant, common sense recognition was established where hazardous substances were being vented into a work area.

7. The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm.

a. This element of a Section 5(a)(1) violation is virtually identical to the substantial probability element of a serious violation under Section 17(k) of the Act. Serious physical harm is defined in Section II.C.3 of this chapter.

b. This element of a Section 5(a)(1) violation can be established by showing that:

- An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
- If an accident/incident occurred, the likely result would be death or serious physical harm.

EXAMPLE 4-20: An employee is standing at the edge of an unguarded floor 25 feet above the ground. If a fall occurred, death or serious physical harm (e.g., broken bones) is likely to result.

c. In the health context, establishing serious physical harm at the cited levels can be challenging if the potential for illness/harm requires the passage of a substantial period of time. In such cases, expert testimony is crucial in establishing that there is reasonable probability that long-term serious physical harm will occur. It will be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death or serious physical harm when such illness or death will occur only after the passage of time:
    - Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;
    - An illness reasonably could result from such regular and continuing employee exposures; and
    - If illness does occur, its likely result is death or serious physical harm.

8. The Hazard May be Corrected by a Feasible and Useful Method.
    a. To establish a Section 5(a)(1) violation, the Agency must also identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard. Evidence of feasible abatement measures shall indicate that the recognized hazard, rather than a particular accident/incident, is preventable.
    b. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures that the employer may be taking, a Section 5(a)(1) citation can be issued. A citation will not be issued merely because the Agency is aware of an abatement method different from that of the employer, if the proposed method would not reduce the hazard significantly more than the employer's method. In some cases, only a series of abatement methods will materially reduce a hazard; all potential abatement methods shall be listed. For example, an abatement note shall be included on the *Violation Worksheet* and *Citation and Notification of Penalty (OSHA-2)*, such as "Among other methods, one feasible and acceptable means of abatement would be to ____." (Fill in the blank with the specified abatement recommendation.)

c. Examples of such feasible and acceptable means of abatement include, but are not limited to:

- The employer's own abatement method, which existed prior to the inspection but was not implemented;
- The implementation of feasible abatement measures by the employer after the accident/incident or inspection;
- The implementation of abatement measures by other employers/companies; and
- Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as suggested abatement methods contained in trade journals, national consensus standards and individual employer work rules. National consensus standards shall not solely be relied on to mandate specific abatement methods.

EXAMPLE 4-21: An ANSI standard addresses the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials that create the gas and the provision(s) for ventilation. The ANSI standard can be used as general evidence of the existence of feasible abatement measures.

In this example, the citation shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed (e.g., preventing the buildup of gas by providing an adequate ventilation system). It would not be correct to base the citation on the employer's failure to prevent the buildup of materials that could create the gas and to provide a ventilation system, since both of these are abatement methods, not recognized hazards.

d. Evidence provided by expert witnesses can be used to demonstrate feasibility of abatement methods. In addition, although it is not necessary to establish that an industry recognizes a particular abatement measure, such evidence can be used if available.

C. Use of the General Duty Clause.

1. The general duty clause shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by workplace conditions or practices that are not covered by a standard. See §1910.5(f).

EXAMPLE 4-22: A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in walls, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install

reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

EXAMPLE 4-23: The powered industrial truck standard at §1910.178 does not address all potential hazards associated with forklift use. For instance, while this standard deals with the hazards associated with a forklift operator leaving his vehicle unattended or dismounting the vehicle and working in its vicinity, it does not contain requirements for the use of operator restraint systems. An employer's failure to address the hazard of a tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty clause. See CPL 02-01-028, *Compliance Assistance for the Powered Industrial Truck Operator Training Standards*, dated November 30, 2000, for additional guidance.

2. The general duty clause can also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry).
   a. Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an assessment of hazards that may be encountered, providing appropriate protective equipment, and conducting necessary training and instruction, for all employees.
   b. An employer, who has failed to take such steps and allows its employees to be exposed to a hazard can be cited under the general duty clause.

D. Limitations of Use of the General Duty Clause.

Section 5(a)(1) is to be used only within the guidelines given in this chapter.

1. **Section 5(a)(1) Shall Not be Used When a Standard Applies to a Hazard**.

   As discussed above, Section 5(a)(1) cannot be cited if an OSHA standard applies to the hazardous working condition or practice. If there is a question as to whether a standard applies, the Area Director shall consult with the Regional Administrator or designee. The RSOL will assist the Regional Administrator or designee in determining the applicability of a standard prior to the issuance of a citation.

   EXAMPLE 4-24: Section 5(a)(1) shall not be cited for electrical hazards since §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical harm to employees.

2. **Section 5(a)(1) Shall Normally Not Be Used to Impose a Stricter Requirement than that Imposed by the OSHA Standard.**

   When an existing standard is inadequate to protect worker safety and health, a section 5(a)(1) citation can be considered. All of the section

5(a)(1) elements discussed above must be satisfied, AND there must be actual employer knowledge that the standard was inadequate to protect employees from death or serious physical harm. See *Int'l Union UAW v. Gen. Dynamics Land Sys. Div*., 815 F.2d 1570 (D.C. Cir. 1987). **Area Offices shall contact the RSOL early in the investigation of these types of cases, which will also be subject to pre-citation review by DEP and NSOL.**

EXAMPLE 4-25: An OSHA standard provides for a permissible exposure limit (PEL) of 15 ppm, and a recognized occupational exposure limit (OEL)—such as an ACGIH® Threshold Limit Value (TLV®) or NIOSH Recommended Exposure Limit (REL)—is 3 ppm. A 5(a)(1) citation can be considered only for exposures between the OEL and the PEL if the data establishes that exposures at the measured level are likely to cause death or serious physical harm ***and*** the employer has actual knowledge that the PEL is inadequate to protect its employees.

3. **Section 5(a)(1) Shall Normally Not be Used to Require Additional Abatement Methods Not Set Forth in an Existing Standard**.

   If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 5(a)(1) shall not be cited to additionally require medical surveillance. Area Directors shall evaluate the circumstances of special situations in accordance with guidelines stated herein and consult with the Regional Administrator or designee to determine whether a 5(a)(1) citation can be issued.

4. Alternative Standards.

   The following standards shall be considered carefully before issuing a Section 5(a)(1) citation for a health hazard.

   a. There are a number of standards that shall be considered rather than Section 5(a)(1) in situations where the hazard is not covered by a particular standard. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.

   b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable (e.g., the air contaminant levels contained in §1910.1000 in general industry and in §1926.55 for construction).

   c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.

   d. Violations of §1910.141(g)(2) or §1915.88(h) can be cited when employees are allowed to consume food or beverages in an area

exposed to a toxic material, and §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

E. Classification of Violations Cited under the General Duty Clause.

Only hazards presenting serious physical harm or death can be cited under the general duty clause (including willful and/or repeated violations that would otherwise qualify as serious violations). Other-than-serious citations shall not be issued for general duty clause violations.

F. Procedures for Implementation of Section 5(a)(1) Enforcement.

To ensure that citations of the general duty clause are defensible, the following procedures shall be followed:

1. Gathering Evidence and Preparing the File.

   a. The evidence necessary to establish each element of a Section 5(a)(1) violation shall be documented in the file. This includes all photographs, video recordings, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.

   b. If copies of documents relied on to establish the various Section 5(a)(1) elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.

   c. If experts are necessary to establish any element(s) of a Section 5(a)(1) violation, such experts and RSOL shall be consulted **prior to the citation being issued** and their opinions noted in the file.

2. Pre-Citation Review.

   The Area Director shall review and approve all proposed Section 5(a)(1) citations. These citations shall undergo additional pre-citation review as follows:

   a. The Regional Administrator or designee and RSOL shall be consulted prior to the issuance of all Section 5(a)(1) citations where complex issues or exceptions to the outlined procedures are involved; and

   b. If a standard does not apply and all criteria for issuing a Section 5(a)(1) citation are not met, yet the Area Director determines that the hazard warrants some type of notification, a Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

IV. Other-than-Serious Violations.

This type of violation shall be cited in situations where the accident/incident or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

V. Willful Violations.

A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. Area Directors are encouraged to consult with RSOL when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

A. Intentional Disregard of Violations.

An employer commits an intentional and knowing violation if:

1. An employer was aware of the requirements of the Act or of an applicable standard or regulation and was also aware of a workplace condition or practice in violation of those requirements, but did not abate the hazard; or
2. An employer was not aware of the requirements of the Act or standards, but had knowledge of a comparable legal requirement (e.g., state or local law) and was also aware of a workplace condition or practice in violation of that requirement.

   NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Area Director or designee if a willful classification is under consideration.
3. A willful citation can also be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes his or her judgment for the requirements of the standard. See the internal Memorandum on *Procedures for Significant and Novel Enforcement Cases*, and CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation*, dated October 21, 1990.

   EXAMPLE 4-26: The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

B. Plain Indifference Violations.

1. An employer commits a violation with plain indifference to employee safety and health where:
   a. Management officials were aware of an OSHA requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.
   b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

      EXAMPLE 4-27: The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations, and amputations in the past and has done nothing to abate the hazard.
   c. An employer was not aware of any legal requirement, but knows that a workplace condition or practice is a serious hazard to the safety or

health of employees and makes little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, or complaints by employees or their representatives.

NOTE: Voluntary employer self-audits that assess workplace safety and health conditions and practices shall not normally be used as a basis of a willful violation. However, once an employer's self-audit identifies a hazardous workplace condition or practice, the employer must promptly take appropriate measures to correct a violative hazard and provide interim employee protection. See *OSHA's Policy on Voluntary Employer Safety and Health Self-Audits* (Federal Register, July 28, 2000 (65 FR 46498)).

d. Willfulness can also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

EXAMPLE 4-28: An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary, or intentional as distinguished from inadvertent, accidental, or ordinarily negligent.
3. CSHOs shall develop and record on the *Violation Worksheet* all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness can exist if an employer is informed by employees or employee representatives about an alleged hazardous workplace condition or practice and the employer does not make a reasonable effort to verify or correct the hazard. Other factors to consider in determining whether to characterize a violation as willful include:
   a. The nature of the employer's business and the knowledge of safety and health matters that could reasonably be expected in the industry;
   b. Any precautions taken by the employer to limit the hazardous workplace conditions or practices;
   c. The employer's awareness of the Act and of the responsibility to provide safe and healthful workplace; and
   d. Whether similar violations and/or hazardous workplace conditions and practices have been brought to the attention of the employer through prior citations, accidents, warnings from OSHA or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

NOTE: This includes prior citations or warnings from OSHA State Plan officials.

4. Also, include facts showing that even if the employer was not consciously violating the Act, it was aware that the violative condition or practice existed and made no reasonable effort to eliminate it.

VI. Criminal/Willful Violations.

Section 17(e) of the Act, as amended, provides that: "Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both."

A. Area Director Coordination.

The Area Director, in coordination with the RSOL, shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of Section 17(e) of the Act. Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions among the CSHO, the Area Director, the Regional Administrator, and the RSOL to develop all evidence when there is a potential Section 17(e) violation.

B. Criteria for Investigating Possible Criminal/Willful Violations.

The following criteria shall be considered when investigating possible criminal/willful violations:

1. To establish a criminal/willful violation, OSHA must prove that:
   a. The employer violated an OSHA standard. A criminal/willful violation cannot be based on the general duty clause, Section 5(a)(1).
   b. The violation was willful in nature.
   c. The violation of the standard caused the death of an employee. To prove that the violation caused the death of an employee, there must be evidence that clearly demonstrates that the violation of the standard was the direct cause of, or a contributing factor to, an employee's death.
2. If asked during an investigation, CSHOs should inform employers that any violation found to be willful which has caused or contributed to the death of an employee, is evaluated for potential criminal referral to the U.S. Department of Justice.
3. Following the investigation, if the Area Director decides to recommend criminal prosecution, a memorandum shall be forwarded promptly to the Regional Administrator. It shall include an evaluation of the possible criminal charges, taking into consideration the burden of proof requiring that the government's case to be proven beyond a reasonable doubt. In

addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

4. The Area Director shall normally issue a civil citation in accordance with current procedures even if the citation involves charges under consideration for criminal prosecution. The Regional Administrator shall be notified of such cases. In addition, the case shall be promptly forwarded to the RSOL for possible referral to the U.S. Department of Justice.

C. Willful Violations Related to a Fatality.

Where a willful violation is related to a fatality and a decision is made not to recommend a criminal referral, the Area Director shall ensure that the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case unsuitable for referral.

VII. Repeated Violations.

A. Federal and State Plan Violations.

1. An employer can be cited for a repeated violation if that employer has been cited previously for the same or a substantially similar condition or hazard **and the citation has become a final order of the Occupational Safety and Health Review Commission** (hereafter, OSHRC). A citation can become a final order by operation of law when an employer does not contest the citation, or pursuant to court decision or settlement. The underlying citation which the repeated violation will be based on must have become a final order *before* the occurrence or observation of the second substantially similar violation.

2. Prior citations by State Plan states cannot be used as a basis for Federal OSHA repeated violations. Only violations that have become final orders of the federal OSHRC can be considered.

B. Identical Standards.

Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions.

EXAMPLE 4-29: A citation was previously issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hard hats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar and, therefore, a repeated citation would not be appropriate.

C. Different Standards.

In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

NOTE: There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.

D. Obtaining Inspection History.

For purposes of determining whether a violation is repeated, the following criteria shall apply:

1. High-Gravity Serious Violations.

   a. When high-gravity serious violations are to be cited, the Area Director shall obtain a history of citations previously issued to this employer at all its identified establishments nationwide, within the same two digit Standard Industrial Classification (SIC) or three-digit North American Industry Classification System (NAICS) code. The history of repeated violations is based on the employer's establishments nationwide and cannot be limited to region-wide.

   b. If these violations have been previously cited within the time limitations (described in Section VII.E of this chapter) and have become final orders of the OSHRC, a repeated citation can be issued.

   c. Citations from previous inspections upon which a proposed repeated citation will be based must have become a final order before the initiation of the second inspection.

   d. Under special circumstances, the Area Director, in consultation with the RSOL, can also issue citations for repeated violations without regard for the NAICS code.

2. Violations of Lesser Gravity.

   When violations are of lesser gravity than high-gravity serious, Area Directors should obtain a national inspection history whenever the circumstances of the current inspection would result in multiple serious, repeat, or willful citations. This is particularly essential if the employer is known to have establishments nationwide and has been subject to a significant case in other areas or at other mobile worksites.

E. Time Limitations.

1. Although there are no statutory limitations on the length of time that a previously issued citation can be used as a basis for a repeated violation, the following policy shall generally be followed.

   A citation will be issued as a repeated violation if:

   a. The citation is issued within five years of the final order date of the previous citation or within five years of the final abatement date, whichever is later, or

   b. The occurrence of the new violation is within five years of OSHRC's final order or the U.S. Court of Appeals, final mandate.

2. When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation can be classified as a second instance repeated violation with a corresponding increase in penalty.

   EXAMPLE 4-30: An inspection is conducted in an establishment and a violation of §1910.217(c)(1)(i) is found. That citation is not contested by the employer and becomes a final order of the OSHRC on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the December inspection can be treated as a second instance repeated.

3. In cases of multiple prior repeated citations, the Regional Administrator or designee shall be consulted for guidance.

F. Repeated v. Failure to Abate.

A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (i.e., the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later recurs, the subsequent occurrence is a repeated violation.

G. Area Director Responsibilities.

After the CSHO makes a recommendation that a violation should be cited as repeated, the Area Director shall:

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section.
2. Ensure that the case file includes a copy of the citation for the prior violation, the *Violation Worksheets* describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not available, the basis for the repeated citation shall nevertheless, be adequately documented in the case file. The file shall also include all documents showing that the citation is a final order and on what date it became final, as follows: If the case was not contested, the **certified mail card** (final 15 working days from employer's receipt of the citation); **signed Informal Settlement** (on the date of the last signature of both parties as long as the contest period has not expired); **Formal Settlement Agreements and Notice of Docketing** (final 30 days after docketing date); or **Judge's Decision and Notice of Docketing** (final 30 days after docketing).
3. OIS information shall not be used as the sole means to establish that a prior violation has been issued.
4. In circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Regional Administrator or designee before issuing a repeated citation.
5. If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated

citation by notation in the Alleged Violation Description (AVD) portion of the citation. For example, following the AVD state appropriate language such as:

[*Employer Name or Establishment Name*] was previously cited for a violation of this Occupational Safety and Health Standard [*insert previously cited standard*], which was contained in OSHA inspection number_____, citation number _____, item number _____ and was affirmed as a final order on [*insert date*], with respect to a workplace located at_____.

OR

[*Employer Name or Establishment Name*] was previously cited for a violation of an equivalent Occupational Safety and Health Standard [*insert previously cited standard*], which was contained in OSHA inspection number_____, citation number _____, item number _____ and was affirmed as a final order on [*insert date*], with respect to a workplace located at _____.

VIII. De Minimis Conditions.

De minimis conditions are those where an employer has implemented a measure different from one specified in a standard, that has no direct or immediate relationship to safety or health. Whenever *de minimis* conditions are found during an inspection, they shall be documented in the same manner as violations.

A. Criteria.

The criteria for finding a *de minimis* condition are as follows:

1. An employer complies with the intent of the standard, yet deviates from its particular requirements in a manner that has no direct or immediate impact on employee safety or health. These deviations may involve, for example, distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations.

   EXAMPLE 4-31: §1910.27(b)(1)(ii) allows 12 inches as the maximum distance between ladder rungs. Where the rungs are 13 inches apart, the condition is *de minimis*.

   EXAMPLE 4-32: §1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

2. An employer complies with a proposed OSHA standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection, and the employer's action clearly provides equal or greater employee protection.

3. An employer complies with a written interpretation issued by the OSHA National Office or an OSHA Regional Office.

4. An employer's workplace protections are state-of-the-art and technically more enhanced than the requirements of the applicable standard, and provides equivalent or more effective employee safety or health protection.

B. Professional Judgment.

Professional judgment should be exercised in determining whether noncompliance with a standard constitutes a *de minimis* condition.

C. Area Director Responsibilities.

Area Directors shall ensure that all proposed *de minimis* notices meet the criteria set out above.

IX. Citing in the Alternative.

In rare cases, the same factual situation can present a possible violation of more than one standard.

Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) that clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be proposed for the violative condition.

X. Combining and Grouping Violations.

A. Combining.

Separate violations of a single standard, for example §1910.212(a)(3)(ii), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the Standard Alleged Violation Elements (SAVEs) of the same standard shall normally also be combined. Each instance of the violation shall be separately noted within that item of the citation.

NOTE: Except for standards which address multiple hazards (e.g., Tables Z-1, Z-2, and Z-3 cited under §1910.1000 (a), (b), or (c)), the same standard cannot normally be cited more than once on a single citation. However, the same standard can be cited on different citations based on separate classifications and facts for the same inspection.

B. Grouping.

When a source of an identified hazard involves interrelated violations of different standards, the violations can be grouped into a single violation. The following situations normally call for grouping violations:

1. Grouping Related Violations.

If violations classified either as serious or other-than-serious are so closely related that they may constitute a single hazardous workplace condition or

practice, such violations shall be grouped and the overall classification shall normally be based on the most serious item.

2. Grouping Other-than-Serious Violations Where Grouping Results in a Serious Violation.

   When two or more violations are found which, if considered individually, represent other-than-serious violations but together create a substantial probability of death or serious physical harm, the violations shall be grouped as a serious violation.

3. Where Grouping Results in a High-Gravity Other-than-Serious Violation.

   Where the CSHO finds, during the course of the inspection, that a number of other-than-serious violations are present, the violations shall be considered in relation to each other to determine the overall gravity of possible injury resulting from an accident or incident involving the hazardous condition.

4. Penalties for Grouped Violations.

   If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the *Citation and Notification of Penalty (OSHA-2)*.

C. When Not to Group or Combine.

1. Multiple Inspections.

   Violations discovered during multiple inspections of a single establishment or worksite cannot be grouped. Where only one *Inspection Report* has been completed, an inspection at the same establishment or worksite shall be considered a single inspection even if it continues for a period of more than one day, or is discontinued with the intention of later resuming it.

2. Separate Establishments of the Same Employer.

   The employer shall be issued separate citations for each establishment or worksite where inspections are conducted, either simultaneously or at different times. If CSHOs conduct inspections at two establishments belonging to the same employer and instances of the same violation are discovered during each inspection, then the violations shall not be grouped.

3. General Duty Clause.

   Because a Section 5(a)(1) citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate Section 5(a)(1) violations. This policy, however, does not prohibit grouping a Section 5(a)(1) violation with a related violation of a specific standard.

4. Egregious Violations.

   Violations, which are proposed as instance-by-instance citations, shall not normally be combined or grouped. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, October 21, 1990.

XI. Health Standard Violations.

A. Citation of Ventilation Standards.

In cases where a citation of a ventilation standard is appropriate, consideration shall be given to standards intended to control exposure to hazardous levels of air contaminants, prevent fire or explosions, or regulate operations that may involve confined spaces or specific hazardous conditions. In such cases, the following guidelines shall be observed:

1. Health-Related Ventilation Standards.

   a. Where an overexposure to an airborne contaminant is present, the appropriate air contaminant engineering control requirement shall be cited (e.g., §1910.1000(e)). Citations under this standard shall not be issued to require specific volumes of air to reduce such exposures.

   b. Other requirements contained in health related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

2. Fire and Explosion-Related Ventilation Standards.

   Although not normally considered health violations, fire and explosion-related ventilation standards shall be cited using the following guidelines:

   a. Adequate Ventilation.

      An operation is considered to have **adequate** ventilation when **both** of the following criteria are present:

      - The requirement(s) of the specific standard has been met.
      - The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

        EXCEPTION: Some maritime standards require levels to be kept to below 10 percent of the LEL (e.g., §1915.36(a)).

   b. Citation Policy.

      If 25 percent (10 percent when specified for maritime operations) of the LEL has been exceeded and:

      - The standard's requirements have not been met, then violations of the applicable ventilation standard normally shall be cited as serious.
      - If there is no applicable ventilation standard, then Section 5(a)(1) of the Act shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

B. Violations of the Noise Standard.

Current enforcement policy regarding §1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program, rather than engineering and/or administrative controls, when hearing

protectors will effectively attenuate the noise to which employees are exposed to acceptable levels. (See Tables G-16 or G-16a of the standard).

1. Citations for violations of §1910.95(b)(1) shall be issued when technologically and economically feasible engineering and/or administrative controls have not been implemented; and
   a. Employee exposure levels are so elevated that hearing protectors alone cannot reliably reduce noise levels received to levels specified in Tables G-16 or G-16a of the standard, (e.g., hearing protectors which offer the greatest attenuation can reliably be used to protect employees when their exposure levels border on 100 dba). See CPL 02-02-035, *29 CFR 1910.95 (b)(1), Guidelines for Noise Enforcement; Appendix A,* December 19, 1983; or
   b. The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.
2. When an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees, no additional controls may be necessary. In making this assessment, factors such as exposure levels present, number of employees tested, and duration of the testing program shall be considered.
3. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program, or results of audiometric testing indicate that the employer's existing program is inadequate, the CSHO shall consider whether:
   a. Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.
   b. An effective hearing conservation program can be established or improvements made in an existing program that could bring the employer into compliance with Tables G-16 or G-16a.
   c. Engineering and/or administrative controls are both technologically and economically feasible.
4. If noise workplace levels can be reduced to the levels specified in Tables G-16 or G-16a by means of hearing protectors along with an effective hearing conservation program, then a citation for any missing program elements shall be issued rather than for lack of engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot reasonably be expected to reduce exposures, but feasible controls exist to address the hazard, then §1910.95(b)(1) shall be cited.
5. When hearing protection is required but not used and employee exposures exceed the limits of Table G-16, then §1910.95(i)(2)(i) shall be cited and classified as serious (per 8), whether or not the employer has instituted a hearing conservation program. Only in the oil and gas drilling industry shall §1910.95(a) be cited.

NOTE: Citations of §1910.95(i)(2)(ii)(b) shall also be classified as serious.

6. Where an employer has instituted a hearing conservation program and a violation of one or more elements (other than §1910.95(i)(2)(ii)(a)) is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dBA.
7. If an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dBA, then a citation for §1910.95(c) only shall be issued.
8. Violations of §1910.95(i)(2)(i) can be grouped with violations of §1910.95(b)(1) and classified as serious when employees are exposed to noise levels above the limits of Table G-l6 and:
   a. Hearing protection is not utilized or is not adequate to prevent overexposures; or
   b. There is evidence of hearing loss that could reasonably be considered:
      - To be work-related, and
      - To have been preventable, if the employer had been in compliance with the cited provisions.

      NOTE: No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented a hearing conservation program.

XII. Violations of the Respiratory Protection Standard (§1910.134).

If an inspection reveals the presence of potential respirator violations, CPL 02-00-158, *Inspection Procedures for the Respiratory Protection Standard*, June 26, 2014, shall be followed.

XIII. Violations of Air Contaminant Standards (§1910.1000).

A. Requirements under the standard:

1. Section §1910.1000(a) through (d) provides ceiling values and 8-hour time-weighted averages applicable to employee exposure to air contaminants.
2. Section §1910.1000(e) specifies that to achieve compliance with exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, personal protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.
3. Section §1910.134(a) specifies that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used.

4. There may be cases where workplace conditions require that employers to provide engineering controls as well as administrative controls (including work practice controls) **and** personal protective equipment. Section §1910.1000(e) allows employers to implement feasible engineering controls and/or administrative and work practice controls in any combination, provided that the selected means of abatement eliminates the overexposure.
5. Where engineering and/or administrative controls are feasible, but do not or would not reduce air contaminant levels below applicable ceiling values or threshold limit values, an employer must nevertheless institute such controls to reduce the exposure levels. In cases where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels, employers must also provide personal protective equipment to reduce exposures.

B. Classification of Violations of Air Contaminant Standards.

Where employees are exposed to a toxic substance in excess of the PEL established by OSHA standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or other-than-serious on the criteria set forth in the Occupational Chemical Database webpage and based on whether respirators are being used. Classification of these violations is dependent upon the determination that an illness is reasonably predictable at the measured exposure level.

1. Classification Considerations.

Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described in Section II.C.3. of this chapter.

a. In general, substances are considered as posing a serious health hazard at any level above the Permissible Exposure Limit (PEL) when they have a single health code of 13 or less. However, substances in categories 6, 8 and 12, are not considered serious at levels where only mild, temporary effects would be expected to occur.
b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.
c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where a serious health effect(s) could be expected to occur.
d. For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH-recommended value, but no OSHA PEL, a citation for exposure in excess of the recommended value can be considered under Section 5(a)(1) of the Act. Prior to citing a Section 5(a)(1) violation under these circumstances, CSHOs must document that a *hazardous exposure* is occurring or has occurred at the workplace, not just that a

recognized occupational exposure recommendation has been exceeded. See instructions in Section III of this chapter, General Duty Requirements.

e. If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.

NOTE: An exception to this can apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his/her workers against the specific hazard that it is intended to address.

f. For a substance having an 8-hour PEL with no ceiling PEL, but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Regional Administrator in accordance with Section III.D.2. of this chapter. If no citation is issued, the CSHO shall advise the employer(s) that a ceiling value is recommended.

2. Additive and Synergistic Effects.

a. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination with each other shall be evaluated using the formula found in §1910.1000(d)(2). Use of this formula specifies that exposures have an additive effect on the **same** body organ or system.

b. If CSHOs suspect that synergistic effects are possible, they shall consult with their supervisor, who shall then refer the question to the Regional Administrator. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to accurately reflect severity and/or penalty.

XIV. Citing Improper Personal Hygiene Practices.

The following guidelines apply when citing personal hygiene violations:

A. Ingestion Hazards.

A citation under §1910.141(g)(2) and (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

1. For citations under §1910.141(g)(2) and (4), wipe sampling results shall be taken to establish the potential for a serious hazard.

2. Where, for any substance, a serious hazard is determined to exist due to potential for ingestion or absorption for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under Section 5(a)(1) of the Act.

B. Absorption Hazards.

A citation for exposure to materials that can be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, then a Section 5(a)(1) citation can be considered. Engineering or administrative (including work practice) controls can be required in these cases to prevent the hazard. See §1910.132(a).

C. Wipe Sampling.

In general, wipe samples and not measurements for air concentrations, will be necessary to establish the presence of a toxic substance posing a potential absorption or ingestion hazard. (See TED 01-00-015, *OSHA Technical Manual*, January 20, 1999, for sampling procedures.)

D. Citation Policy.

The following criteria should be considered prior to issuing a citation for ingestion or absorption hazards:

1. A health risk exists as demonstrated by one of the following:
   a. A potential for an illness, such as dermatitis, and/or
   b. The presence of a toxic substance that could be ingested or absorbed through the skin. (See the Occupational Chemical Database webpage.)
2. The potential for employee exposure by ingestion or absorption can be established by taking both qualitative and quantitative wipe samples. The substance must be present on surfaces that employees contact (such as lunch tables, water fountains, work areas, etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption.
3. The sampling results must reveal that the substance has properties and exists in quantities that pose a serious hazard.

XV. Biological Monitoring.

If an employer has been conducting biological monitoring, CSHOs shall evaluate the results of such testing. These results may assist in determining whether a significant quantity of the toxic substance is being ingested or absorbed through the skin.

Chapter 5

CASE FILE PREPARATION AND DOCUMENTATION

I. Introduction.

These instructions are provided to help CSHOs in determining the minimum level of written documentation necessary to prepare an inspection case file. All necessary information for documenting violations shall be obtained during the inspection, (including but not limited to notes, audio/video recordings, photographs, employer and employee interviews and employer maintained records). CSHOs shall develop detailed information for the case file to establish the specific elements of each violation.

CSHOs and Area Directors shall follow all Regional consultation procedures, including those established by the RSOL's Office, when an inspection involves important or novel facts or presents potentially complex litigation issues. If consultation is necessary, it shall be conducted at the earliest possible stage of the inspection.

II. Inspection Conducted, Citations Being Issued.

All case files must include the following forms and documents:

A. Inspection Report.

The CSHO shall obtain available information to complete the *Inspection Report* and other appropriate forms.

B. Narrative.

The *Narrative* shall include the following:

1. Establishment Name;
2. Inspection Number;
3. Additional Citation Mailing Addresses;
4. Names and Addresses of all Organized Employee Groups;
5. Names, Addresses, and Phone Numbers of Authorized Representatives of Employees;
6. Employer Representatives contacted and the extent of their participation in the inspection;
7. CSHO's evaluation of the Employer's Safety and Health System, and if applicable, a discussion of any penalty reduction for good faith efforts;
8. A written narrative containing accurate and concise information about the employer and the worksite;
9. Date that the closing conference(s) was held and description of any unusual circumstances encountered;
10. Any other relevant comments/information that CSHOs believe may be helpful, based on his/her professional judgment;

11. Names, Addresses, and Phone Numbers of other persons contacted during the inspection, such as the police, coroner, attorney;
12. Names and Job Titles of any individuals who accompanied the CSHO on the inspection;
13. Calculation of the DART rate for at least three full calendar years and the current year;
14. Discussion clearly addressing all items on any applicable Complaint or Referral;
15. Type of Legal Entity: indicate whether the employer is a corporation, partnership, sole proprietorship. Do not use the word "owner." If the employer named is a subsidiary of another firm, indicate this; and
16. Coverage Information.

C. Violation Worksheet.

1. A separate *Violation Worksheet* should normally be completed for each alleged violation. Describe the observed hazardous conditions or practices, including all relevant facts, and all information pertaining to how and/or why a standard is violated. Specifically identify the hazard to which employees have been or could be exposed. Describe the type of injury or illness which the violated standard was designed to prevent in this situation, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been, or could be potentially exposed. If employee exposure was not actually observed during the inspection, state the facts on which the determination was made (i.e., tools left inside an unprotected trench) that an employee has been or could have been exposed to a safety or health hazard.
2. The following information shall be documented:
   a. Explanation of the hazard(s), hazardous workplace condition(s), or practice(s);
   b. Identification of the machinery or equipment (such as equipment type, manufacturer, model number, serial number);
   c. Specific location of the hazard and employee exposure to the hazard;
   d. Injury or illness likely to result from exposure to the hazard;
   e. Employee proximity to the hazard and specific measurements taken, (describe how measurements were taken, identify the measuring techniques and equipment used, identify those who were present and who observed the measurements being made, and include calibration dates of equipment used);
   f. For contaminants and physical agents, any other facts that clarify the nature of employee exposure. A representative number of Safety Data Sheet (SDS) should be collected for hazardous chemicals that employees could be exposed to;
   g. Names, addresses, phone numbers, and job titles for exposed employees;

h. Approximate duration of time that the hazard has existed and frequency of exposure to the hazard;

i. Employer knowledge;

j. Any and all facts establishing that the employer actually knew of the hazardous condition, or what reasonable steps the employer failed to take (including regular inspections of the worksite) that could have revealed the presence of the hazardous condition. The mere presence of the employer in the workplace is not sufficient evidence of knowledge. There must be evidence that demonstrates why the employer reasonably could have recognized the presence of the hazardous condition. Avoid relying on conclusory statements such as "reasonable diligence" to establish employer knowledge. See Chapter 4, Section II.C.4., Knowledge of the Hazardous Condition, for more information.

- In order to establish that a violation can be potentially classified as willful, facts shall be documented to show either that the employer knew of the applicable legal requirements and intentionally violated them or that the employer showed plain indifference to employee safety or health (See Chapter 4, Section V, Willful Violations). For example, document evidence that the employer knew that the condition existed and that the employer was required to take additional steps to abate the hazard. Such evidence could include prior OSHA citations, previous warnings by a CSHO, insurance company or city/state inspector statements regarding the requirements of the standard(s), the employer's familiarity with the standard(s), contract specifications requiring compliance with applicable standards, or warnings by employees or employee safety representatives of the presence of a hazardous condition or practice and what protections are required by OSHA standards.
- Also include evidence showing that even if the employer was not consciously or intentionally violating the Act, the employer acted with such plain indifference for employee safety that had the employer known of the standard, it probably would not have complied anyway. This type of evidence would include instances where an employer was aware of an employee exposure to an obviously hazardous condition(s) or practice(s) and made no reasonable effort to eliminate it.
- Any relevant comments made by the employer or employee during the walkaround or closing conference, including any employer comments regarding why it violated the standard, that can be characterized as admissions of the specific violations described; and
- Include any other facts, that could assist in evaluating the situation or in reconstructing the total inspection picture in preparation for testimony in possible legal actions.

k. Appropriate and consistent abatement dates should be assigned and documented for abatement periods longer than 30 days. The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation. An abatement period should be indicated in the citation as a specific date, not a number of days. When abatement is witnessed by the CSHO during an inspection, the abatement period shall be listed on the citation as "Corrected During Inspection."

l. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO. Abatement periods exceeding 30 days shall not normally be offered, particularly for simple safety violations. Situations can arise, however, especially for complex health or program violations, where abatement cannot be completed within 30 days (e.g., ventilation equipment needs to be installed, new parts or equipment need to be ordered, delivered and installed or a process hazard analysis needs to be performed as part of a PSM program). When an initial abatement date is granted that is in excess of 30 calendar days, the reason should be documented in the case file.

3. Records obtained during the course of the inspection that the CSHO determines are necessary to support the violations.

4. For violations classified as repeated, the file shall include a copy of the previous citation(s) on which the repeat classification is based and documentation of the final order date of the original citation.

III. Inspection Conducted But No Citations Issued.

For inspections that do not result in citations being issued, a lesser amount of documentation can be included in the case file. At a minimum, the case file shall include the *Inspection Report*, the *Narrative*, and a general statement that at the time of the inspection no conditions were observed in violation of any standard, and a complaint/referral response letter, if appropriate shall clearly address all of the item(s).

IV. No Inspection.

For "No Inspections," the CSHO shall include in the case file an *Inspection Report*, which indicates the reason why no inspection was conducted. If there was a denial of entry, then the information necessary to obtain a warrant or an explanation of why a warrant is not being sought shall be included. The case file shall also include a complaint/referral response letter, if appropriate, that explains why an inspection was not conducted.

V. Health Inspections.

A. Document Potential Exposure.

In addition to the documentation indicated above, CSHOs shall document all relevant information concerning potential exposure(s) to chemical substances

or physical agents (including, as appropriate, collection and evaluation of applicable SDSs), such as symptoms experienced by employees, duration and frequency of exposures to the hazard, employee interviews, sources of potential health hazards, types of engineering or administrative controls implemented by the employer, and personal protective equipment being provided by the employer and used by employees.

B. Employer's Occupational Safety and Health System.

CSHOs shall request and evaluate information on the following aspects of the employer's occupational safety and health system as it relates to the scope of the inspection:

1. Monitoring.
   The employer's system for monitoring safety and health hazards in the establishment should include a program for self-inspection. CSHOs shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning activities such as sampling and calibration procedures, ventilation measurements, preventive maintenance procedures for engineering controls, and laboratory services. Compliance with the monitoring requirements of any applicable substance-specific health standards shall be determined.
2. Medical.
   CSHOs shall determine whether the employer provides the employees with pre-placement and periodic medical examinations. The medical examination protocol shall be requested to determine the extent of the medical examinations and, if applicable, compliance with the medical surveillance requirements of any applicable substance-specific health standards.
3. Records Program.
   CSHOs shall determine the extent of the employer's records program, such as whether records pertaining to employee exposure and medical records are being maintained in accordance with §1910.1020.
4. Engineering Controls.
   CSHOs shall identify any engineering controls present, including substitution, isolation, general dilution and local exhaust ventilation, and equipment modification.
5. Work Practice and Administrative Controls.
   CSHOs shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, and employee training and education. Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.
   NOTE: Employee rotation is not permitted as a control under some standards.
6. Personal Protective Equipment.
   An effective personal protective equipment program should exist for the worksite. A detailed evaluation of the program shall be documented to determine compliance with specific standards, such as, §1910.95, §1910.134, and §1910.132.

7. Regulated Areas.
   CSHOs shall investigate compliance with the requirements for regulated areas as specified by certain standards. Regulated areas must be clearly identified and known to all appropriate employees. The regulated area designation must be maintained according to the prescribed criteria of the applicable standard.
8. Emergency Action Plan.
   CSHOs shall evaluate the employer's emergency action plan when such a plan is required by a specific standard. When standards specify that specific emergency procedures must be developed where certain hazardous substances are handled, CSHOs evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees, and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

VI. Affirmative Defenses.

An affirmative defense is a claim that, if established by the employer and found to exist by the CSHO, will excuse the employer from a citation that has otherwise been documented.

A. Burden of Proof.

Although employers have the burden of proving any affirmative defenses at the time of a hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. CSHOs shall keep in mind all potential affirmative defenses, and shall attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s). CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Area Director or designee.

B. Explanations.

The following are explanations of common affirmative defenses.

1. Unpreventable Employee or Supervisory Misconduct or "Isolated Event."
   a. To establish this defense in most jurisdictions, employers must show all the following elements:
      - A work rule adequate to prevent the violation;
      - Effective communication of the rule to employees;
      - Methods for discovering violations of work rules; and
      - Effective enforcement of rules when violations are discovered.
   b. CSHOs shall document whether these elements are present, including whether the work rule at issue tracks the requirements of the standard addressing the hazardous condition.
      EXAMPLE 5-1: An unguarded table saw is observed. However, a guard is reattached while the CSHO watches. Facts to be documented include:
      - Who removed the guard and why?

- Did the employer know that the guard had been removed?
- How long or how often had the saw been used without the guard?
- Were there any supervisors in the area while the saw was operated without a guard?
- Did the employer have a work rule that the saw should be operated only when the guard is on?
- How was the work rule communicated to employees?
- Did the employer monitor compliance with the rule?
- How was the work rule enforced by the employer when it found noncompliance?

2. Impossibility/Infeasibility of Compliance.
   Compliance is considered impossible or infeasible when compliance with the requirements of a standard is impossible or would prevent performance of required work **and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available**.
   EXAMPLE 5-2: An unguarded table saw is observed. The employer states that a guard would interfere with the nature of the work. Facts to be documented include:
   - Would a guard make performance of the work impossible or merely more difficult?
   - Could a guard be used some of the time or for some of the operations?
   - Has the employer attempted to use a guard?
   - Has the employer considered any alternative means of avoiding or reducing the hazard?
3. Greater Hazard.
   A greater hazard exists when compliance with a standard would result in a greater hazard(s) to employees than would noncompliance **and** the employer took reasonable alternative protective measures, or there are no alternative means of employee protection. Also, an application for a variance would be inappropriate.
   EXAMPLE 5-3: The employer indicates that a saw guard had been removed because it caused the operator to be struck in the face by particles thrown from the saw. Facts to be documented include:
   - Was the guard initially properly installed and used?
   - Would a different type of guard eliminate the problem?
   - How often was the operator struck by particles and what kind of injuries resulted?
   - Would personal protective equipment such as safety glasses or a face shield worn by the employee solve the problem?
   - Was the operator's work practice causing the problem and did the employer attempt to correct the problem?
   - Was a variance requested?

VII. Interview Statements.

A. Generally.

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. Statements shall normally be in writing and the individual shall be encouraged to sign and date the statement. During management interviews, CSHOs are encouraged whenever possible to take immediate, detailed notes, and verbatim quotes, as these tend to be more credible than later, general recollections.

B. CSHOs shall obtain written statements when:

1. There is an actual or potential controversy related to the material facts of a violation;
2. There is a conflict or difference among employee statements concerning the facts of the case;
3. There is a potentially willful or repeated violation; and
4. In incident investigations, attempting to determine whether potential violations existed at the time of the incident.

C. Language and Wording of Statement.

Interview statements shall normally be written in the first person and in the language of the individual when feasible. (Statements taken in a language other than English shall be subsequently translated.) The wording of the statement shall be understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections to the statement; otherwise, the statement shall not be modified, added to, or altered in any way. The statement shall end with the wording: "I have read the above, or the statement has been read to me, and it is true to the best of my knowledge." Where appropriate, the statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." Only the individual interviewed can later waive the confidentiality of the statement. The individual shall sign and date the interview statement and the CSHO shall sign it as a witness.

D. Refusal to Sign Statement.

If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement. A note to this effect shall be documented in the case file. Recorded statements shall be transcribed whenever possible.

E. Video and Audio-Recorded Statements.

Interview statements can be video-or audio-recorded, with the consent of the person being interviewed. The statement shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases, so that it can be signed. CSHOs are encouraged to produce the written statement for correction and signature as soon as possible, and identify the transcriber.

F. Administrative Depositions.

When necessary to document or develop investigative facts, a management official or other individual can be administratively deposed.
NOTE: See Chapter 3, Section VII.I.4, Interviews of Non-Managerial Employees, for further guidance about interviews of non-managerial employees.

VIII. Paperwork and Written Program Requirements.

In certain cases, violations of standards requiring employers to have a written program to address a hazard or make a written certification (e. g., hazard communication, personal protective equipment, permit required confined spaces, and others) are considered paperwork deficiencies. However, in some circumstances, violations of such standards can have an adverse impact on employee safety and health. See CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*.

IX. Guidelines for Case File Documentation for Use with Video and Audio Recordings.

The use of video recording as a method of documenting violations and of gathering evidence for inspection case files is encouraged. Certain types of inspections, such as fatalities, imminent danger, and ergonomics shall include video recording. Other methods of documentation, such as handwritten notes, audio recording, and photography, continue to be acceptable and are encouraged to be used whenever they add to the quality of the evidence and whenever video recording equipment is not available. See CPL 02-00-098, *Guidelines for Case File Documentation for use with Videotapes and Audiotapes*, October 12, 1993.

X. Case File Activity Diary Sheet.

All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file. Diary entries should be clear, concise, and legible and should be dated in chronological order to reflect a timeline of the case development. Information provided should include, at a minimum, the date of the action or event, a brief description of the action or event and the initials of the person making the entry. When a case file is completed, the CSHO must ensure that it is properly organized. See ADM 03-01-005, *OSHA Compliance Records*, August 3, 1998.

XI. Citations.

Section 9 of the OSH Act addresses the form and issuance of citations.

Section 9(a) provides: "…Each citation shall be in writing and shall describe with particularity the nature of the violation including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In

addition, the citation shall fix a reasonable time for the abatement of the violation…."

A. Statute of Limitations.

Section 9(c) specifies "…No citation may be issued under this Section after the expiration of six months following the occurrence of any violation." Accordingly, a citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the citation is actually signed, dated and served by certified mail as provided by Section 10(a) of the Act. Where the actions or omissions of the employer concealed the existence of the violation, the six-month issuance limitation is tolled until such time that OSHA learns or could have learned of the violation. The RSOL shall be consulted in such cases. In some cases, particularly those involving fatalities or other incidents, the six-month period begins to run from the date of the incident, not from the opening conference date.

B. Issuing Citations.

1. Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service, can be used **in addition** to certified mail if it is believed that these methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The circumstances of delivery shall be documented in the diary sheet.
2. Citations shall be mailed to employee representatives after the certified mail receipt card is received by the Area Office. Citations shall also be mailed to any employee upon request and without the need to make a written request under the Freedom of Information Act (FOIA). In the case of a fatality, the family of the victim shall be provided with a copy of the citations without charge or the need to make a written request.

C. Amending/Withdrawing Citations and Notification of Penalties.

1. Amendments/Withdrawal Justification.
   Amendments to, or withdrawal of, a citation shall be made when information is presented to the Area Director or designee, which indicates a need for such action and may include administrative or technical errors such as:
   a. Citation of an incorrect standard;
   b. Incorrect or incomplete description of the alleged violation;
   c. Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;
   d. Additional facts not available to the CSHO at the time of the inspection that establish there was no employee exposure to the hazard; or
   e. Additional facts establish a need for modification of the abatement date or the penalty, or reclassification of citation items.

2. When Amendments/Withdrawal is not Appropriate.
   Amendments to, or withdrawal of, a citation shall not be made by the Area Director or designee for any of the following:
   a. Timely Notice of Contest received;
   b. The 15 working days for filing a Notice of Contest has expired and the citation has become a Final Order; or
   c. Employee representatives were not given the opportunity to present their views (unless the revision involves only an administrative or technical error).

D. Procedures for Amending or Withdrawing Citations.

The following procedures apply whenever amending or withdrawing citations. NOTE: The instructions contained in this section, with appropriate modifications, are also applicable to the amendment of the *Notification of Failure to Abate Alleged Violation (OSHA-2B)*.

1. Withdrawal of, or modifications to, the *Citation and Notification of Penalty (OSHA-2)*, shall normally be accomplished by means of Informal or Formal Settlement Agreements.
2. In exceptional circumstances, the Area Director or designee can initiate a change to a *Citation and Notification of Penalty (OSHA-2)* without an informal conference. If proposed amendments to citation items (individual violations) change the original classification of the items, such as willful to repeated, then the original items shall be withdrawn and the new, appropriate items will be issued. The amended *Citation and Notification of Penalty (OSHA-2)* shall clearly indicate that the employer is obligated under the Act to post the amendment to the citation along with the original citation, until the amended violation has been corrected, or for three working days, whichever is longer.
3. The 15-working-day contest period for the amended portions of the citation will begin on the day following the day of receipt of the amended *Citation and Notification of Penalty (OSHA-2)*.
4. The contest period is not extended for the un-amended portions of the original citation. A copy of the original citation shall be attached to the amended *Citation and Notification of Penalty (OSHA-2)*, when the amended form is forwarded to the employer.
5. When circumstances warrant, the Area Director or designee can withdraw a *Citation and Notification of Penalty (OSHA-2)* in its entirety. Justification for the withdrawal must be noted in the case file. A letter withdrawing the *Citation and Notification of Penalty (OSHA-2)* shall be sent to the employer. The letter, signed by the Area Director or designee, shall refer to the original *Citation and Notification of Penalty (OSHA-2)*, state that they are withdrawn and direct that the employer to post the letter for three working days in the same location(s) where the original citation was posted. When applicable, a copy of the letter shall also be sent to the employee representative(s) and/or complainant.

XII. Inspection Records.

A. Generally.

1. Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty.
2. All official forms and notes constituting the basic documentation of a case must be part of the case file. All original field notes are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, video recordings, DVDs, and audio recordings. Inspection records are the property of the United States Government and not the property of the CSHO, and are not to be retained or used for any private purpose.

B. Release of Inspection Information.

The information obtained during inspections is confidential, but can be disclosable or non-disclosable based on criteria established in the Freedom of Information Act. Requests for release of inspection information shall be directed to the Area Director or designee.

C. Classified and Trade Secret Information.

1. Any classified or trade secret information and/or personal knowledge of such information by Agency personnel shall be handled in accordance with OSHA regulations. Trade secrets are matters that are not of public or general knowledge. A trade secret, as referenced in Section 15 of the Act, includes information concerning or related to processes, operations, style of work, or apparatus, or related to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. (See 18 USC 1905). The collection of such information and the number of agency personnel with access to it shall be limited to the minimum necessary for the conduct of investigative activities. CSHOs shall specifically identify any classified and trade secret information in the case file. Title 18 USC 1905, as referenced by Section 15 of the *OSH Act*, specifies criminal penalties in the event of improper disclosure.
2. It is essential to the effective enforcement of the *OSH Act* that CSHOs and all OSHA personnel preserve the confidentiality of all information and investigations that could reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless, after following proper procedures, including consulting with the Solicitor's Office, the Agency determines that the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, video, and audio recordings and documentation forms shall be labeled:

   "ADMINISTRATIVELY CONTROLLED INFORMATION"
   "RESTRICTED TRADE INFORMATION"

3. Under Section 15 of the *OSH Act*, all information reported to or obtained by CSHOs in connection with any inspection or other activity thatcontains or may reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other OSHA officials concerned with the enforcement of the *OSH Act* or, when relevant, in any proceeding under the *OSH Act*.
4. Title 18 USC 1905, specifies criminal penalties for federal employees who disclose such information. These penalties include fines up to $1,000 or imprisonment up to one year, or both, and removal from office or employment.
5. Trade secret materials shall not be labeled as "Top Secret," "Secret," or "Confidential," nor shall these security classification designations be used in conjunction with other words, unless the trade secrets are also classified by an agency of the U.S. Government in the interest of national security.
6. If the employer objects to the taking of photographs and/or video recordings because trade secrets would or may be disclosed, CSHOs should advise employers of the protection against such disclosure afforded by Section 15 of the *OSH Act* and §1903.9. If the employer still objects, CSHOs shall contact the RSOLs office, Area Director, or designee for guidance.

Chapter 6

PENALTIES AND DEBT COLLECTION

I. General Penalty Policy.

The penalty structure in Section 17 of the OSH Act is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers. While penalties are not intended as punishment for violations, Congress has made clear that penalty amounts should be sufficient to serve as a deterrent to violations. Proposed penalties, therefore, serve the Act's intent and criteria approved for such penalties by the **Assistant Secretary** accomplishes this purpose.

The penalty structure described in this chapter is part of OSHA's general enforcement policy and shall normally be applied as set forth below. An Area Director can exercise discretion to depart from the penalty policy in cases where penalty adjustments do not advance the deterrent goal of the Act. The application of penalty adjustments can therefore result in the issuance of citations with all or zero adjustments. An inspection should maintain consistent penalty adjustments throughout all recommended citations.

A decision not to apply the penalty adjustments should normally be based on consideration of one or more of the factors listed below. However, this list is not intended to be exhaustive. If the decision not to apply the penalty adjustments is based on a consideration other than the factors listed below, the decision must be fully explained in the case file and approved by the Regional Administrator or his/her designee. The factors to be considered include:

- The proposed citations are related to a fatality/catastrophe;
- The employer has received a willful or repeat violation within the past five years related to a fatality;
- The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39;
- The employer is currently on the Severe Violator Enforcement List (SVEP);
- The proposed citations meet the requirements for inclusion in SVEP;
- The proposed citations are being considered for an egregious case.
- The employer has numerous recordkeeping violations related to a large number or rate of injuries and illnesses at the establishment;
- The proposed failure to abate notification is based on a previous citation for which the employer failed to submit abatement verification; or
- The employer has been referred to debt collection for past unpaid OSHA penalties;

II. Civil Penalties.

A. Authority for Civil Penalties.

Section 17 of the OSH Act, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 ("Inflation Adjustment Act"), provides the Secretary with the statutory authority to propose civil penalties for violations. Civil penalties advance the purposes of the Act by encouraging compliance and deterring violations. **Proposed penalties** are the penalty amounts OSHA issues with citation(s).

Penalties are adjusted annually based on the Consumer Price Index for All Urban Consumers (CPI-U) as determined by the Office of Management and Budget. Current penalties are listed in the OSHA Memorandum *Annual Adjustments to OSHA Civil Penalties*.

NOTE: While OSHA proposes penalties, the Occupational Safety and Health Review Commission assesses penalties.

B. Appropriation Act Restrictions.

In providing funding for OSHA, Congress has placed restrictions on enforcement activities for two categories of employers: small farming operations and small businesses in low-hazard industries. The Appropriations Act contains limits for OSH Act activities on a year-by-year basis.

NOTE: See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, issued May 28, 1998, for more information. Appendix A of this directive contains the list of low-hazard industries, which is updated annually.

C. Minimum Penalties.

The following policies apply:

1. The proposed penalty for any willful violation shall not be less than the statutory minimum. This minimum penalty applies to all willful violations, whether serious or other-than-serious.
2. For serious, repeat, other-than-serious, and posting violations, minimum penalties are set by policy and can be found in the *Annual Adjustments to OSHA Civil Penalties* Memorandum.
3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than the current minimum, no penalty shall be proposed for that violation.
4. When the proposed penalty for a posting violation (i.e., posting citations in the workplace for workers to view) would amount to less than the current minimum, the minimum penalty shall be proposed for that violation if the company was previously provided a poster by OSHA.

D. Maximum Penalties.

The civil penalty amounts included in Section 17 are generally maximum amounts before any permissible reductions are taken. The maximum penalty amounts can be found in the *Annual Adjustments to OSHA Civil Penalties*

Memorandum. When calculating penalty amounts for failure to abate violations, the maximum total proposed penalty shall not exceed 30 times the amount of the daily proposed penalty [See Section VII.B.4.b of this chapter].

III. Penalty Factors.

Section 17(j) of the Act provides that penalties shall be assessed giving due consideration to four factors:

- The **gravity** of the violation;
- The **size** of the employer's business;
- The **good faith efforts** of the employer; and
- The employer's **history** of previous violations.

A. Gravity of Violation.

The gravity of the violation is the **primary consideration** in determining penalty amounts. Gravity shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

- The **severity** of the injury or illness which could result from the alleged violation.
- The **probability** that an injury or illness could occur as a result of the alleged violation.

1. Severity Assessment.

The first step in the classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness. The following categories shall be considered in assessing the severity of potential injuries or illnesses:

a. Serious.

- High Severity. Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.
- Medium Severity. Injuries or temporary, reversible illnesses resulting in hospitalization for a variable but limited period of disability.
- Low Severity. Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

b. For Other-Than-Serious.

- Minimal Severity. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium, or high severity and would not require medical treatment or cause death or serious physical harm.

2. Probability Assessment.

   The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation, but does affect the amount of the proposed penalty.

   a. Probability shall be categorized either as greater or as lesser.

      - Greater Probability: Results when the likelihood that an injury or illness will occur is judged to be relatively high.
      - Lesser Probability: Results when the likelihood that an injury or illness will occur is judged to be relatively low.

   b. How to Determine Probability.

      The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

      - Number of employees exposed;
      - Frequency and duration of employee exposure to hazardous conditions, including overexposures to contaminants;
      - Employee proximity to the hazardous conditions;
      - Use of appropriate personal protective equipment;
      - Medical surveillance program;
      - Age of employees;
      - Training on the recognition and avoidance of the hazardous condition;
      - Other pertinent working conditions.

      EXAMPLE 6-1: Greater probability may include an employee exposed to the identified hazard for four hours a day, five days a week. Where an employee has performed a non-routine task with exposures one or two times a year and no injuries or illnesses can be attributed to the hazard, a lesser probability may apply.

   c. Final Probability Assessment.

      All the factors outlined above shall be considered in determining a final probability assessment.

      When adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the assessment can be adjusted at the discretion of the Area Director as appropriate. Such decisions shall be fully explained in the case file.

3. Gravity-Based Penalty (GBP).

   a. The gravity-based penalty (GBP) for each violation shall be determined by combining the severity assessment and the final probability assessment.

   b. GBP is an unreduced penalty and is calculated in accordance with the procedures below.

4. Serious Violation & GBP.
   a. The gravity of a violation is defined by the GBP as high, moderate, or low gravity, based on amounts listed in the *Annual Adjustments to OSHA Civil Penalties* Memorandum.
   b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness.
   c. If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, a high GBP can be proposed instead of a moderate GBP. Such discretion should be exercised based on the facts of the case. The reasons for this determination shall be fully explained in the case file.
   d. For serious violations, the GBP shall be assigned on the basis of the following scale in Table 6-1:

Table 6-1: Serious Violations

Severity	Probability	Gravity	OIS Code
High	Greater	High	10
Medium	Greater	Moderate	5
Low	Greater	Moderate	5
High	Lesser	Moderate	5
Medium	Lesser	Moderate	5
Low	Lesser	Low	1

5. Other-Than-Serious Violations & GBP.
   a. For other-than-serious safety and health violations, there is only minimal severity.
   b. If the Area Director determines that it is appropriate to achieve the necessary deterrent effect, the maximum GBP can be proposed. Such discretion should be exercised based on the facts of the specific case. The reasons for this determination shall be fully explained in the case file.
6. Exception to GBP Calculations.

   For some cases, a GBP can be assigned without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for doing so shall be fully explained in the case file.
7. Egregious Cases.

   In egregious cases, violation-by-violation penalties are applied. Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21,

1990. Penalties calculated under this policy shall not be proposed without the concurrence of the Assistant Secretary and the National Office of the Solicitor (NSOL).

8. Gravity Calculations for Combined or Grouped Violations.

   Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

   NOTE: Multiple violations of a single standard can be **combined** into one citation item. When identifying a hazard that involves interrelated violations of different standards, the violations can be **grouped** into a single item.

   a. Combined Violations.

      The severity and probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

   b. Grouped Violations.

      The following procedures shall be followed:

      - Grouped Severity Assessment.

        There are two considerations for calculating the severity of grouped violations:

        - The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; AND
        - If the injury or illness that is reasonably predictable from the grouped items is more serious than that from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

      - Grouped Probability Assessment.

        There are two factors for calculating the probability of grouped violations:

        - The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness; AND
        - If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, then the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

B. Penalty Adjustment Factors.

1. General.

   a. Penalty adjustments will vary depending upon the employer's "size" (maximum number of employees), "good faith," and "history of previous violations."

      - A 10 percent reduction can be given for **history**.
      - A maximum of 25 percent reduction is permitted for **good faith efforts**; and
      - A maximum of 70 percent reduction is permitted for **size**;

   b. Since the good faith efforts and history adjustment factors are based on the general character of an employer's safety and health performance, they shall be calculated once for each employer. However, an Area Director can use discretion to withhold the **size** reduction factor for each violation. Any variation in application must be consistently applied and the justification must be documented in the case file. For example, in the case of a reported amputation, the Area Director can decide to withhold the size reduction from all machine guarding violations that cause amputation hazards. Withholding the size reduction factor for an electrical hazard in the same inspection would not meet the test of consistency. The size reduction factor must be applied as outlined in Section III.B.4 or withheld completely.

      After the classification (as serious or other-than-serious) and the gravity-based penalty have been determined for each violation, the penalty reduction factors (for size, good faith, history) shall be applied subject to the following limitations:

      - Penalties proposed for violations classified as **repeated** shall be reduced **only for size**.
      - Penalties proposed for violations classified as **willful**, shall be reduced **only for size and history**.
      - Penalties proposed for **serious** violations classified as high severity/greater probability shall be reduced **only for size and history**.

2. History Adjustment.

   a. Allowable Percent Reduction.

      A reduction of 10 percent shall be given to employers who have been inspected by OSHA nationwide, or by any State Plan state in the previous five years, and who were found to be in compliance or were not issued serious violations.

   b. Allowable Percent Increase.

      An increase of 10 percent shall be applied to employers who have been issued serious high gravity citations that have become a **final order** by the Commission or a final order of the state plan's adjudicated body

within the past five years. The penalty shall not exceed the statutory maximum.

c. No Reduction or Increase.

- To employers being cited under abatement verification for any §1903.19 violations.
- To employers who have not been inspected by Federal OSHA nationwide or by any State Plan state within the last five years.
- To employers who have been issued citations that have become a **final order** for serious violations within the last five years that were not classified as high gravity.

NOTE: In summary, an employer who has been inspected by OSHA within the previous five years and has no serious, willful, repeat, or failure-to-abate violations will receive a 10 percent reduction for history.

d. Time Limitation and Final Order.

The five-year history of no prior citations (both federal and state) shall be calculated from the opening conference date of the current inspection. Only citations that have become a final order of the Commission or final order of the state's adjudicative body within the five years before the opening conference date shall be considered.

3. Good Faith Reduction.

a. No Allowable reduction for good faith efforts. The following considerations apply to situations in which no reductions for good faith efforts should be applied:

- No reduction shall be given for **high gravity serious violations**.
- No reduction shall be given if a **willful violation** is found. Additionally, where a willful violation has been documented, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given for **repeated violations**. If a repeated violation is found, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given if a **failure to abate (FTA) violation** is found during an inspection. No good faith reduction shall be given for any violation in the same inspection in which FTA was found.
- No reduction shall be given to employers being cited under abatement verification for any §1903.19 violations.
- No reduction shall be given if the employer has **no safety and health management system**, or if there are **major deficiencies** in the program.

- No reduction shall be given if the employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39.

b. Allowable reductions for good faith. A penalty reduction is permitted in recognition of an employer's effort to implement an effective safety and health management system in the workplace. The following apply to reductions for good faith efforts:

- Twenty-Five Percent Reduction.

A 25 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, CSHOs can recommend a full 25 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but have not documented it in writing.

To qualify for this reduction, the employer's safety and health management system must provide for:

- Appropriate management commitment and employee involvement;
- Worksite analysis for the purpose of hazard identification;
- Hazard prevention and control measures;
- Safety and health training; and
- Where **young persons** (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.
- Where **persons who speak limited or no English** are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

NOTE: An example of an effective safety and health management system is given in *Recommended Practices for Safety and Health Programs*.

- Fifteen Percent Reduction.

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

EXAMPLE 6-2: An acceptable program should include minutes of employee safety and health meetings, documented employee

safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

4. Size Reduction.

   a. A maximum penalty reduction of 70 percent is permitted for small employers. "Size" of an employer shall be calculated on the basis of the maximum number of employees for an employer at **all** workplaces nationwide, including State Plan states, at any one time during the previous 12 months.

   b. The rates of reduction to be applied are as follows.

Table 6-2: Size Reduction

Employees	Percent Reduction
1-10	70
11-25	60
26-100	30
101-250	10
251 or more	None

   c. When an employer with 1-10 and 11-25 employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity that demonstrates a lack of concern for, or indifference to, employee safety and health, the CSHO can recommend that only a partial reduction in penalty shall be permitted for size. If the Area Director approves the partial reduction, the justification is to be fully explained in the case file.

   NOTE: For violations that are not serious willful, use Table 6-2.

5. Penalty Adjustment Application.

   The penalty adjustment shall be applied serially for each factor as follows: History, Good Faith, Quick Fix and Size. The penalty adjustment factors will be applied serially to the GBP (e.g., 10 percent, then 20 percent, etc., instead of 30 percent). The OSHA Information System (OIS) will process the calculations automatically upon entering the adjustment factors.

IV. Effect on Penalties if Employer Immediately Corrects.

Appropriate penalties will be proposed for an alleged violation even though, after being informed of the violation by the CSHO, the employer immediately corrects or initiates steps to abate the hazard. In limited circumstances, this prompt abatement of a hazardous condition can be taken into account in determining the amount of the proposed penalties under the Quick-Fix penalty reduction.

A. Quick-Fix Penalty Reduction.

Quick-Fix is an abatement incentive program, that is intended to encourage employers to immediately abate hazards found during an OSHA inspection

and to do so quickly to prevent potential employee injury, illness, and death. Quick-Fix does not apply to all violations.

B. Quick-Fix Reduction Shall Apply to:

1. All general industry, construction, maritime and agriculture employers.
2. All sizes of employers in all Standard Industrial Classification (SIC) codes and North American Industry Classification System (NAICS) codes.
3. Both safety and health violations, provided that the hazards are immediately abated during the inspection (e.g., on the day that the CSHO pointed out the hazard to the employer, or within 24 hours of being discovered by the CSHO).
4. Violations classified as "other-than-serious," "low gravity serious," or "moderate gravity serious."
5. Individual violations (i.e., not to the citation or penalty as a whole).
6. Corrective actions that are permanent and substantial, not temporary or cosmetic (e.g., installing a guard on a machine rather than removing an employee from the zone of danger).

C. Quick-Fix Reductions Shall Not Apply to:

1. Violations classified as "high gravity serious," "willful," "repeated," or "failure-to-abate."
2. Violations related either to a fatal injury or illness, or to any incidents resulting in serious injuries to employees.
3. Blatant violations that can be easily corrected (e.g., turning on a ventilation system to reduce employee exposure to a hazardous atmosphere, or directing employees to put on hard hats that are readily available at the workplace).

D. Reduction Amount.

1. The adjustments to an individual violation's GBP for history, good faith, quick fix and size, will be applied, respectively. Table 6-3 below, provides an overview of the program.
2. A Quick-Fix penalty reduction of 15 percent shall be applied after the adjustments for history and good faith.

Table 6-3: Quick-Fix Penalty Reduction Factor

Reduction Factor	Restrictions	Application	Percent Reduction	Comments
Quick-Fix	No Reduction Factor for: ▪ Violations classified as: - High gravity serious - Willful - Repeated - Failure to Abate penalty ▪ Violations related to a fatal injury or illness, or a serious incident resulting in serious injuries ▪ Blatant violations can be easily corrected	▪ All general industry, construction, maritime & agriculture employers ▪ All sizes of employers in all SIC/NAICS codes ▪ Safety & health violations, provided that hazards are immediately abated during the inspection ▪ Violations classified as: - Other-than-serious - Low gravity serious - Moderate gravity serious ▪ Only to individual violations ▪ Only to a corrective action that is permanent and substantial	After the GBP has been calculated, adjustments are made for history, good faith, quick-fix, and size. **The 15% Quick-Fix reduction is applied after the adjustment for history and good faith.**	No penalty for a serious violation shall be less than the current minimum as listed in the *Annual Adjustments to OSHA Civil Penalties* Memorandum

V. Repeated Violations.

A. General.

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.
2. A Gravity-Based Penalty (GBP) shall be calculated for repeated violations based on facts noted during the current inspection.
3. Only the reduction factor for size, appropriate to the facts at the time of the re-inspection, shall be applied.

B. Penalty Increase Factors for Repeated Violations.

The amount of any increase to a proposed penalty for repeated violations shall be determined by the employer's number of employees.

1. Small Employers.

   For employers with 250 or fewer employees nationwide, the GBP shall be multiplied by a factor of **2** for the first repeated violation and multiplied by **5** for the second repeated violation. The GBP can be multiplied by **10** in cases where the Area Director determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor must be explained in the file.

2. Large Employers.

   For employers with more than 250 employees nationwide, the GBP shall be multiplied by a factor of **5** for the first repeated violation and, by **10** for the second repeated violation.

C. Other-than-Serious, No Initial Penalty.

For a repeated other-than-serious violation that otherwise would have no initial penalty, the proposed penalty will increase, based on the number of previous repeated violations. Statutory maximum and minimum penalty amounts are in the *Annual Adjustments to OSHA Civil Penalties* Memorandum.

NOTE: These penalties shall not be subject to the Penalty Increase factors as discussed in Section V.B of this chapter.

D. Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Section III.A.5 and Section X.
2. For repeated instances of regulatory violations, the initial penalty (for the current inspection) shall be multiplied by **2** for the first repeated violation and multiplied by **5** for the second repeated violation. If the Area Director determines that it is necessary to achieve the proper deterrent effect, the initial penalty can be multiplied by **10**.

E. Penalty Increase.

The 10 percent-plus penalty increase, as described in V.B.2 will be applied to the final calculated repeat proposed penalty, but not to exceed the statutory maximum.

VI. Willful Violations.

A. General.

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no reduction for an employer's good faith efforts to abate.
3. In no case shall the proposed penalty for a willful violation (serious or other-than-serious) after reductions be less than the statutory minimum for that classification.

B. Serious Willful Penalty Reductions.

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 50 or fewer employees. However, in no case shall the proposed penalty be less than the statutory minimum for these employers.

NOTE: For violations that are not serious willful, use Table 6-2.

Table 6-4: Serious Willful Penalty Reductions

Employees	Percent reduction
10 or fewer	80
11-20	60
21-30	50
31-40	40
41-50	30
51-100	20
101-250	10
251 or more	0

C. Willful Regulatory Violations.

1. For calculating the GBP for regulatory violations, see Section III.A.5 and Section X for other-than-serious violations.
2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than the statutory minimum.

VII. Penalties for Failure to Abate.

A. General.

1. Failure to Abate penalties shall be proposed when:
   a. A previous citation issued to an employer has become a final order of the Commission; and
   b. The condition, hazard, or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous).
2. The citation must have become a final order of the Review Commission. Citations become a final order of the Review Commission when the abatement date for that item passes, provided that the employer has not filed a notice of contest prior to that abatement date.
3. See Chapter 15, Legal Issues, for information on determining final order dates of uncontested citations, settlements and Review Commission decisions.

B. Calculation of Additional Penalties.

1. Unabated Violations.

   A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.

   a. EXCEPTION: When the CSHO believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective, reasonable belief that it was fully abated, the Area Director can reduce or eliminate the daily proposed penalty.

   b. For egregious cases see CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

2. No Initial Proposed Penalty.

   In instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Area Director. In no case shall the GBP be less than the minimum amount listed in the *Annual Adjustments to OSHA Civil Penalties* memorandum.

3. Size Only Permissible Reduction Factor.

   Only the reduction factor for size based upon the circumstances noted during the re-inspection shall be applied to arrive at the daily proposed penalty.

4. Daily Penalty Multiplier.

   The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

   a. The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of re-inspection, excluding the date of re-inspection.

   b. Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed **30** times the amount of the daily proposed penalty.

   c. At the discretion of the Area Director, a lesser penalty can be proposed. The reasoning for the lesser penalty shall be fully explained in the case file (e.g., achievement of an appropriate deterrent effect).

   d. If a penalty in excess of the normal maximum amount of **30** times the amount of the daily proposed penalty is deemed necessary by the Area Director to deter continued non-abatement, then the case shall be treated pursuant to the violation-by-violation (egregious) penalty procedures established in CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

C. Partial Abatement.

1. When a citation has been partially abated, the Area Director can authorize a reduction of 25 to 75 percent of the proposed penalty calculated as outlined above.
2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

   EXAMPLE 6-3: Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) can be reduced by 60 percent.

VIII. Violation-by-Violation (Egregious) Penalty Policy.

A. Penalty Procedure.

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

B. Case Handling.

Such cases shall be handled in accordance with CPL02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

C. Calculation of Penalties.

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Assistant Secretary.

IX. Significant Enforcement Actions.

A. Definition.

A significant enforcement action (a.k.a. significant case) is one that results from an investigation in which the total proposed penalty is greater than or equal to $180,000 or involves novel enforcement issues, including novel federal agency cases, regardless of penalty. (See Memorandum on *Procedures for Significant and Novel Enforcement Cases*, August 1, 2016.)

B. Multi-employer Worksites.

Several related inspections involving the same employer, or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, can also be considered a significant enforcement action if the total aggregate penalty is $180,000 or more.

C. Federal Agency Significant Cases.

For federal agencies, the action is considered significant if penalties of $180,000 or more would have been applied if the agency were a private sector employer.

1. Significant federal agency cases shall be developed, documented, and reviewed with the same rigor required for private sector cases.

2. In addition, Notices of Unsafe or Unhealthful Working Conditions in Federal Agency cases shall be issued no later than six months from the date of the opening conference, thereby paralleling the six-month statutory limit in private sector cases set by the OSH Act.

D. Assistant Secretary Concurrence.

The Assistant Secretary's concurrence is normally required prior to issuing citations related to significant enforcement cases that result in penalties greater than $350,000 and novel cases, including novel federal agency cases, of any amount. (See Memorandum on *Procedures for Significant and Novel Enforcement Cases*, dated August 1, 2016.)

X. Penalty and Citation Policy for Parts 1903 and 1904 Regulatory Requirements.

Section 17(i) of the Act specifies that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to current maximum as listed in the *Annual Adjustments to OSHA Civil Penalties* Memorandum for each violation (this includes recordkeeping violations). The following policy and procedure document must also be consulted for an in-depth review of these policies: CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*, November 27, 1995. Gravity-Based Penalties (GBPs) for regulatory violations, including posting requirements, shall be reduced for size and history (excluding willful violations; see Chapter 4, Section V, Willful Violations).

A. Posting Requirements Under Part 1903.

Penalties for violation of posting requirements shall be proposed as follows:

1. Failure to Post the OSHA Notice (Poster) – §1903.2(a).

A citation for failure to post the OSHA Notice is warranted if:

a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the OSH Act; AND

b. Interviews show that employees are unaware of their rights under the OSH Act; OR

c. The employer has been previously cited or advised by OSHA of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by OSHA as prescribed in §1903.2(a), then an other-than-serious citation shall normally be issued.

2. Failure to Post a Citation – §1903.16.

a. If an employer received a citation that was not posted as prescribed in §1903.16, then an other-than-serious citation shall normally be issued.

b. For information about the *OSHA-300A* form, see CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, December 30, 2004.

B. Advance Notice of Inspection – §1903.6.

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by §1903.6, an other-than-serious citation shall be issued.

C. Abatement Verification Regulation Violations – §1903.19.

1. General.

   a. The penalty provisions of Section 9 and Section 17 of the OSH Act apply to all citations issued under this regulation.

   b. No "Good Faith" or "History" reduction shall be given to employers when proposing penalties for any §1903.19 violations; only the reduction factor for "Size" shall apply.

   c. See Chapter 7, Post-Citation Inspection Procedures and Abatement Verification, for detailed guidance.

2. Penalty for Failing to Certify Abatement.

   a. A penalty for failing to submit abatement certification documents, §1903.19(c)(1), shall be $1,037, reduced only for size.

   b. A penalty for failure to submit abatement verification documents will not exceed the penalty for the entire original citation.

3. Penalty for Failing to Notify and Tag.

   Penalties for not notifying employees and not tagging movable equipment §1903.19 [paragraphs (g)(1), (g)(2), (g)(4), (i)(1), (i)(2), (i)(3), (i)(5) and (i)(6)] will follow the same penalty structure (GBP of $5,543) as for Failure to Post a Citation.

D. Injury and Illness Records and Reporting under Part 1904.

1. Part 1904 violations are always other-than-serious.

2. Repeated and Willful penalty policies in Sections V.D and VI.C, respectively, of this Chapter, can be applied to recordkeeping violations.

3. OSHA's egregious penalty policy can be applied to recordkeeping violations. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

4. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, December 30, 2004; specifically Chapter 2, Section II, Inspection and Citation Procedures.

NOTE: 29 CFR Part 1904 has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under Federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

XI. Failure to Provide Access to Medical and Exposure Records – §1910.1020.

A. Proposed Penalties.

If an employer is cited for failing to provide access to records as required under §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, then a penalty shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). However, the total amount cannot exceed the maximum GBP for a serious or other-than-serious violation. See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, August 22, 2007.

EXAMPLE 6-4: If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, then a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of §1910.1020.

B. Use of Violation-by-Violation Penalties.

The above policy does not in any manner preclude the use of violation-by-violation or per employee penalties where higher penalties are appropriate. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

XII. Criminal Penalties.

A. OSH Act and U.S. Code.

The Act and the U.S. Code provide for criminal penalties in the following cases:

1. Willful violation of an OSHA standard, rule, or order causing the death of an employee—Section 17(e);
2. Giving unauthorized advance notice—Section 17(f);
3. Knowingly giving false information—Section 17(g); and
4. Killing of a CSHO while engaged in the performance of investigative, inspection or law enforcement functions—Section 17(h)(2).

B. Courts.

After trials, criminal penalties are imposed by the courts and not by OSHA or by the Occupational Safety and Health Review Commission.

XIII. Handling Monies Received from Employers.

A. Responsibility of the Area Director.

Pursuant to its statutory authority, it is OSHA policy to collect all penalties owed to the government. The Area Director is responsible for:

1. Informing employers of OSHA's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Reporting penalty amounts collected and those due;

4. Calculating interest and other charges on overdue penalty amounts;
5. Referring cases with uncollected penalties to the Office of Financial Management's Debt Collection Accountability Team (DCAT);
6. Transferring selected cases to the RSOL for legal action and subsequently tracking such cases;
7. Mailing collected monies in accordance with the procedures set forth in this chapter and in other OSHA Instructions; and
8. Reviewing the DOL bankruptcy logs emailed by DCAT.

B. Receiving Payments.

The Area Director shall be guided by the following concerning penalty payments:

1. Methods of Payment.

   Employers assessed penalties shall remit the total payment to the Area Office by certified check, personal check, company check, postal money order, bank draft or bank money order, payable to the **DOL-OSHA**. Electronic payment is accepted on www.pay.gov using the OSHA Penalty Payment Form. Payment in cash shall not be accepted. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments.

2. Identifying Payment.

   The Reporting Identification Number (RID) of the Area Office, along with the Inspection Number(s), **MUST BE PLACED** in the upper left or lower left corner of the face of the payment instrument. The date of receipt **MUST BE STAMPED** on the face of the check and in the upper right corner if possible.

3. Adjustment to Payments.

   The following adjustments shall be made prior to transmitting the payment instrument to the Lockbox Depository. See Section XIII.B.6 of this chapter, Depositing Payments.

   a. If the payment instrument is not dated, then the date received shall be entered as the date of payment.
   b. If the written amount is obviously incorrect or differs from the amount referenced in the accompanying correspondence, the payment instrument shall be returned to the employer with a request for a new check. Before returning the check, void the existing check, by crossing through it. If feasible, contact the employer by email or phone prior to sending.
   c. If the payment instrument does not include the establishment name, the name shall be inserted on the face of the payment instrument.
   d. If the payment instrument includes the notation, "Payment in Full," whether or not the notation is incorrect, then the payment shall be deposited.
   e. If the payment instrument is unsigned, the payment shall be deposited.

f. If an employer mistakenly makes the payment payable to an OSHA official by name, then it shall be endorsed as follows:

- Postal Money Orders – follow instruction on reverse of the money order.
- All others – enter on reverse:

  Pay to the order of the U.S. Department of Labor – OSHA

  _____ (Signature)

  (Typewritten name of payee)

4. Incorrect, Unhonored, or Foreign Payments.

   a. Incorrectly dated payments shall be handled as follows:

   - If the payment instrument is dated 10 days or more after the date of receipt, it is to be returned to the employer.
   - If the payment instrument is dated less than 10 but more than 3 days after the date of receipt, it is to be held for deposit on the day it is dated.
   - Payment instruments dated 3 or fewer days after the date of receipt are to be mailed to the Lockbox.
   - If the payment instrument is dated more than six months prior to the current date, it is to be returned to the employer by certified mail.

   b. Payment instruments which have been returned to the Office of Financial Management (OFM) without payment due to insufficient funds shall be forwarded to the Area Office for return to the employer by certified mail.

   c. Payments drawn on non-U.S. banks **MUST BE SENT** directly to OFM (without using the "Lockbox" procedures described in Section XIII.B.6 of this chapter, Depositing Payments) at the following address:

   Office of Financial Management
   U.S. Department of Labor – OSHA
   Post Office Box 2422
   Washington, D.C. 20013

5. Endorsing Payments.

   All payment instruments shall be endorsed as follows:

   16-01-2012
   Payment FRB or BR Credit
   Treasury U.S. Payment on an
   Obligation to U.S. and must be
   paid at Par
   DO NOT WIRE NON-PAYMENT

6. Depositing Payments.

   All payments shall be kept in a safe place and, unless otherwise indicated, transmitted daily in accordance with current OIS procedures to the Lockbox Depository. For the current Lockbox address, please contact the Debt Collection Accountability Team (DCAT) in the National Office.

7. Records.

   A copy of the penalty payment instrument shall be included in the case file. Additional accounting records shall also be included in the case file in accordance with current procedures.

C. Refunds.

In cases of later penalty modifications by OSHA or by the Commission or a court, refunds to the employer shall be made by the Department of Labor through DCAT. The Area Director shall notify DCAT in accordance with current instructions.

XIV. Debt Collection Procedures.

A. Policy.

The Debt Collection Improvement Act of 1996 (DCIA) provides for the assessment of interest, administrative charges, and additional costs for nonpayment of debts arising under the OSHA program. Under the DCIA regulations implemented by the Department of Labor, penalties assessed by OSHA are considered debts. It is OSHA policy to exercise the authority provided under the DCIA to assess additional charges on delinquent debts. It is also OSHA policy to forbear collection of penalties until the employer has exhausted its right to challenge them administratively, as well as in all legal forums.

B. Time Allowed for Payment of Penalties.

The date when penalties become due and payable depends on whether or not the employer contests.

1. Uncontested Penalties.

   When citations and/or proposed penalties are uncontested, the penalties are due and payable 15 working days following the employer's receipt of the *Citation and Notification of Penalty (OSHA-2)* or, in the case of Informal Settlement Agreements, 15 working days after the date of the last signature unless a later due date for payment of penalties is agreed upon in the settlement.

2. Contested Penalties.

When citations and/or proposed penalties are contested, the date that penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, an administrative law judge decision, a Commission decision, or a court judgment. See Chapter 15, Section XIII, Citation Final Order Dates, for more information.

NOTE: The Area Director shall forward the notice of contest and the case file to the RSOL with a transmittal letter informing the Solicitor that any resulting penalty must be directed to the Area Office for payment.

3. Partially Contested Penalties.

When only part of a citation and/or a proposed penalty is contested, the due date for payment as stated in Section XIV.B.1, Uncontested Penalties, shall be used for the uncontested items and the due date stated in Section XIV.B.2, Contested Penalties, for the contested items.

NOTE: This provision notwithstanding, formal debt collection procedures will not be initiated in partially contested cases until a final order for the outstanding citation item(s) has been issued.

C. Notification Procedures.

It is OSHA policy to notify employers (the "Notice") that debts are payable and due, and to inform them of OSHA's debt collection procedures prior to assessing any applicable delinquent charges. A copy of the notice stating OSHA's debt collection policy, including assessment of interest, additional charges for nonpayment and administrative costs, shall be included with each *Citation and Notification of Penalty (OSHA-2)* and sent to employers. Interest rates and administrative costs are published annually and can be revised quarterly by the Secretary of the Treasury. DCAT shall advise Area Directors of any changes in the interest rate as they occur. A copy of the notice shall be retained in the case file.

D. Notification of Overdue Debt.

The Area Director shall send a demand letter to the employer when the debt has become delinquent and shall retain a copy of the demand letter in the case file. A debt becomes delinquent **30 calendar days after the due date**, which is the same as the **final order date** as stated in Chapter 15, Section XIII, Citation Final Order Dates.

1. Uncontested Case with Penalties.
   a. If payment of any applicable penalty is not received within 30 calendar days after the date of the expiration of the 15-working-day contest period, or after the date of the last signature (unless a later due date for payment of penalties is agreed upon in the settlement), and if an Informal Settlement Agreement has been signed, then a demand letter shall be mailed.
   b. If the employer enters into a **written** plan establishing a set payment schedule within one calendar month of the due date, but subsequently fails to make a payment within one calendar month of its scheduled

due date, a payment default letter shall be sent to the employer. The default letter meets the demand letter requirement for delinquent debts under a payment plan. If the employer fails to respond satisfactorily to that default letter within one month, then the unpaid portion of the debt shall be handled in accordance with Section XIV.F, Assessment Procedures.

2. Contested Case with Penalties.

   a. If payment of any applicable penalty is not received within 30 calendar days after the Review Commission's **Order** approving a Formal Settlement Agreement, 60 calendar days after the **Notice of Docketing**, 90 calendar days after the **Notice of Commission Decision**, or 120 calendar days after date of the judgment of a U.S. Court of Appeals, and no appeal of the case has been filed by either OSHA or the employer, the Area Director shall send a demand letter notifying the employer that the OSHA fine is past due.

   b. If the employer has partially contested the case (even if the penalty has not been contested), a demand letter shall not be sent until a a final order has been issued.

3. Exceptions to Sending the Demand Letter.

   The demand letter will not be sent if the employer is currently making payments under an approved installment plan or other satisfactory payment arrangement. Such plan or arrangement shall be set forth in writing and signed by the employer and the Area Director.

E. Assessment of Additional Charges.

Additional charges shall be assessed in accordance with the *Debt Collection Improvement Act* (31 USC 3717) and Department of Labor Regulations (29 CFR 20).

1. Interest.

   Interest on the unpaid principal amount shall be assessed on a monthly basis at the current annual rate if the debt has not been paid within one calendar month of the date on which the debt (penalty) became due and payable (i.e., the date of the final order). Interest is not assessed if an acceptable repayment schedule has been established in a written plan by the due date.

   NOTE: Interest and delinquent charges are not compounded; only the unpaid balance of the penalty amount is used to calculate these additional charges.

2. Delinquent Charges.

   Delinquent charges shall be assessed on a monthly basis if the debt has not been paid within 3 calendar months of the delinquent date (which is one calendar month after the due date). Debts paid in full within 3 calendar months of the delinquent date shall not be assessed a delinquent charge. Delinquent charges accrue at the annual rate of 6 percent (0.5 percent per month).

NOTE: Although the delinquent charge is not initially assessed until 3 calendar months after the debt became delinquent (4 calendar months after the due date), it is nevertheless calculated from the delinquent date. Thus, the first assessment of a delinquent charge will amount to a 3-month charge or 1.5 percent of the outstanding principal amount. Each month after that, the additional delinquent charge will be 0.5 percent of the unpaid principal.

3. Administrative Costs.

   Administrative costs shall be assessed for each demand letter sent in an attempt to collect the unpaid debt. Costs are not assessed for payment default letters.

F. Assessment Procedures.

If the penalty has not been paid by the delinquent date (i.e., within one calendar month of the due date), then the Area Director shall implement the following procedures:

1. Interest shall be assessed at the current interest rate on the unpaid balance of the debt. The rate of interest shall remain fixed for the duration of the debt.

   NOTE: Interest is to be calculated for one month and shall be assessed on the date on which such charges become payable. Any later additional charges will not be assessed until the first of the month following the date on which the charge becomes payable. For example, if interest becomes payable on the 20th of the month and the second demand letter is not sent out until the eighth of the following month, only one month's interest is assessed.

2. The demand letter shall be sent to the employer requesting immediate payment of the debt. The demand letter shall show the total amount of the debt, including the unpaid penalty amount, interest and administrative costs.

3. Employers can respond to the demand letter in several ways:

   a. The entire debt can be paid. In such cases no further collection action is necessary.

   b. A repayment plan can be submitted or offered; after a set payment schedule has been approved by the Area Director, no additional charges shall be levied against the debt as long as payments are timely made in accordance with the approved schedule. See note under Section XIV.D.3, of this chapter, Exceptions to Sending Demand Letter. If payments are not made on schedule, the unpaid portion of the debt shall be treated in accordance with Section XIV.F.

   c. A partial payment can be made; the unpaid portion of the debt shall be treated in accordance with Section XIV.F of this chapter.

4. If any portion of the debt remains unpaid after one calendar month from the time the demand letter was sent to the employer, the Area Director shall institute one of the following:

a. Outstanding debts less than $100 can be written off.
b. If the employer made a payment after receiving the demand letter, then the area office can:
    - Send a receipt letter or contact the employer to request the balance due on the debt.
    - Refer the case to DCAT.
c. Outstanding debts with a current debt of $100 or more shall be referred to DCAT.

5. After a case has been referred to DCAT for collection, the Area Director has no further responsibilities for penalty collection related to that case.
6. If, after a case has been referred to DCAT, the employer mistakenly sends a payment to the Area Office, the case is subsequently contested or new information regarding the debt or employer is obtained, then the Area Director shall contact DCAT immediately.
7. DCAT shall update the host database to reflect all penalty collection actions taken by the National Office. Detailed information on subsequent debt collection activity on each case is available on the OSHA Intranet website. A written communication outlining collection actions taken for each case referred to DCAT shall be sent to the Area Office upon completion of National Office and Treasury debt collection procedures for that case.
8. The responsibility for closing the case remains with the Area Director. Once final collection action has been completed, the case can be closed whenever appropriate.

G. Application of Payments.

Payments that are for less than the full amount of the debt shall be applied to satisfy the following categories in order of priority:

1. Administrative charges;
2. Delinquent charges;
3. Interest;
4. Outstanding principal.

H. Uncollectible Penalties.

There can be cases where a penalty cannot be collected, regardless of any action that has been or may be undertaken. Examples might be when a demand letter is not deliverable, a company is no longer in business and has no successor, or the employer is bankrupt. In such cases, *it is imperative* that the Area Director notify DCAT by phone or email prior to referring the case to the National Office. DCAT will then advise what further collection action is appropriate. The database shall be updated following current OIS procedures to reflect the most recent action. In bankruptcy cases, the Area Director can also seek the advice of the RSOL to determine whether to file as a creditor under the Bankruptcy Act.

I. National Office Debt Collection Procedures.

Upon receipt of a case from an Area Director, DCAT shall verify the amount of the outstanding debt and proceed to implement National Office debt collection procedures.

1. Demand Letter.

   In accordance with the Debt Collection Improvement Act of 1996 (DCIA), unless a debt meets certain exemption criteria, it must be referred to the Department of Treasury within 90 days after the debt becomes delinquent. The DCIA also specifies that the debtor must be notified that the debt can be referred to Treasury and what debt collection actions Treasury can take regarding the debt. This information is included in the demand letter that DCAT sends to the employer, notifying him/her of the overdue debt and requesting immediate payment to DCAT.

2. Exemption Criteria for Referral to Treasury.

   Debts can be exempt from the DCIA requirement if the case is in litigation by the Solicitor, in bankruptcy, in contest, or on appeal.

3. Referral to the Department of Treasury.

   In accordance with the DCIA, if the debt remains uncollected sixty days from the date the DCAT demand letter was sent, the case can be referred to the Department of Treasury. Treasury actions include: referral to private debt collection firms; reporting to commercial credit reporting agencies; referral to the Internal Revenue Service for collection by offset; referral to the Department of Treasury Offset Program where collection is done by offset from payments due the debtor by any federal agency; and/or litigation. In addition, Treasury will add its collection fees to the debt.

   a. Any penalty settlement offer received by Treasury shall be referred to the Area Director for approval.
   b. All penalty amounts collected by Treasury beyond its collection fees will be applied to the employer's penalty account.
   c. Any disputes received by Treasury will be forwarded to DCAT and can be sent to the Area Director for response.

4. Updating the Database.

   DCAT shall update the database to reflect all specific debt collection actions taken since referral to the National Office and shall indicate whether the case has been returned to the Area Office.

5. Compromise of Debts over $100,000.

   Debts of $100,000 or more, exclusive of interest, delinquent charges, and administrative costs, cannot be waived by OSHA without Justice or Treasury approval. DCAT will obtain this approval before returning the debt to the Area Office.

6. Return to the Area Office.

   Once it has been decided to return the collection action, DCAT shall return the case to the Area Office using one of the following:

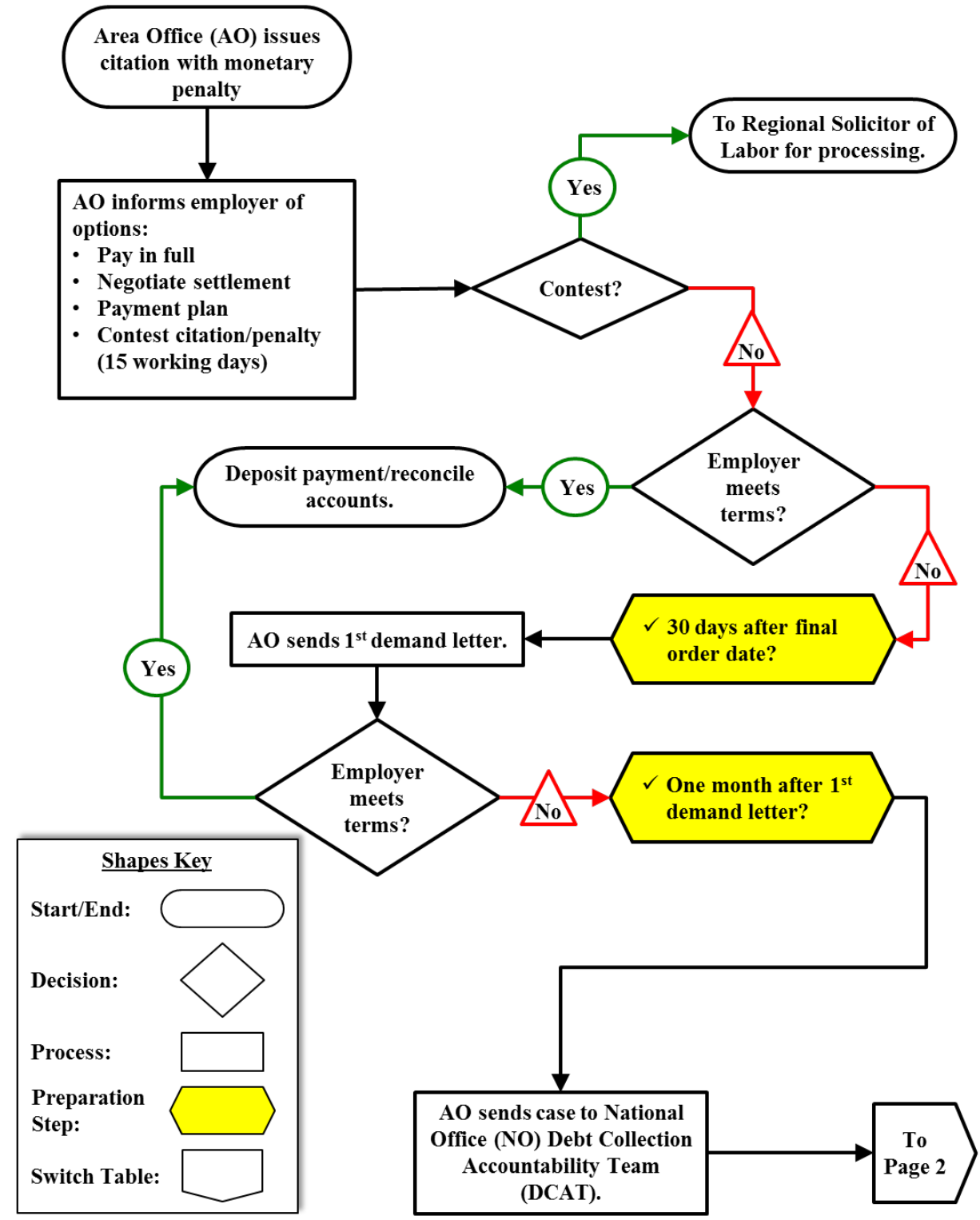
   a. Penalties paid in full: If an OSHA penalty is paid in full, then DCAT will notify the Area Director by email or by other electronic means with instructions on how OIS is to be updated. Copies of paid checks are maintained on the U.S. Treasury Electronic Check Processing System and will not be returned. The copies can be referenced for a period established by Federal Guidelines. Data related to employer payments made through the Treasury Debt Management Service are available on its internal web site for a period established by federal guidelines.

   b. Penalties Remaining Unpaid or only Partially Paid after Treasury Collection Process: Once it has been decided to return an unpaid or partially paid collection action to the Area Office, DCAT shall prepare a written transmittal memorandum to the Area Director, stating the final status of the debt and what actions should be taken. Included with the memo will be copies of the DCAT case documents other than the National Office Letter and any DCAT correspondence with the employer. Copies of employer checks will not be returned but remain available on the Treasury website.

   c. Uncollectible Penalties Returned from the Treasury without any National Office Contact: If an OSHA collection action is returned as uncollectible from the Treasury Financial Management Service without any DCAT activity, then DCAT will notify the Area Director by email or other electronic means with instructions on how OIS should be updated. Electronic files related to Treasury collection activity remain available on the Financial Management Service website, which can be accessed from DCAT.

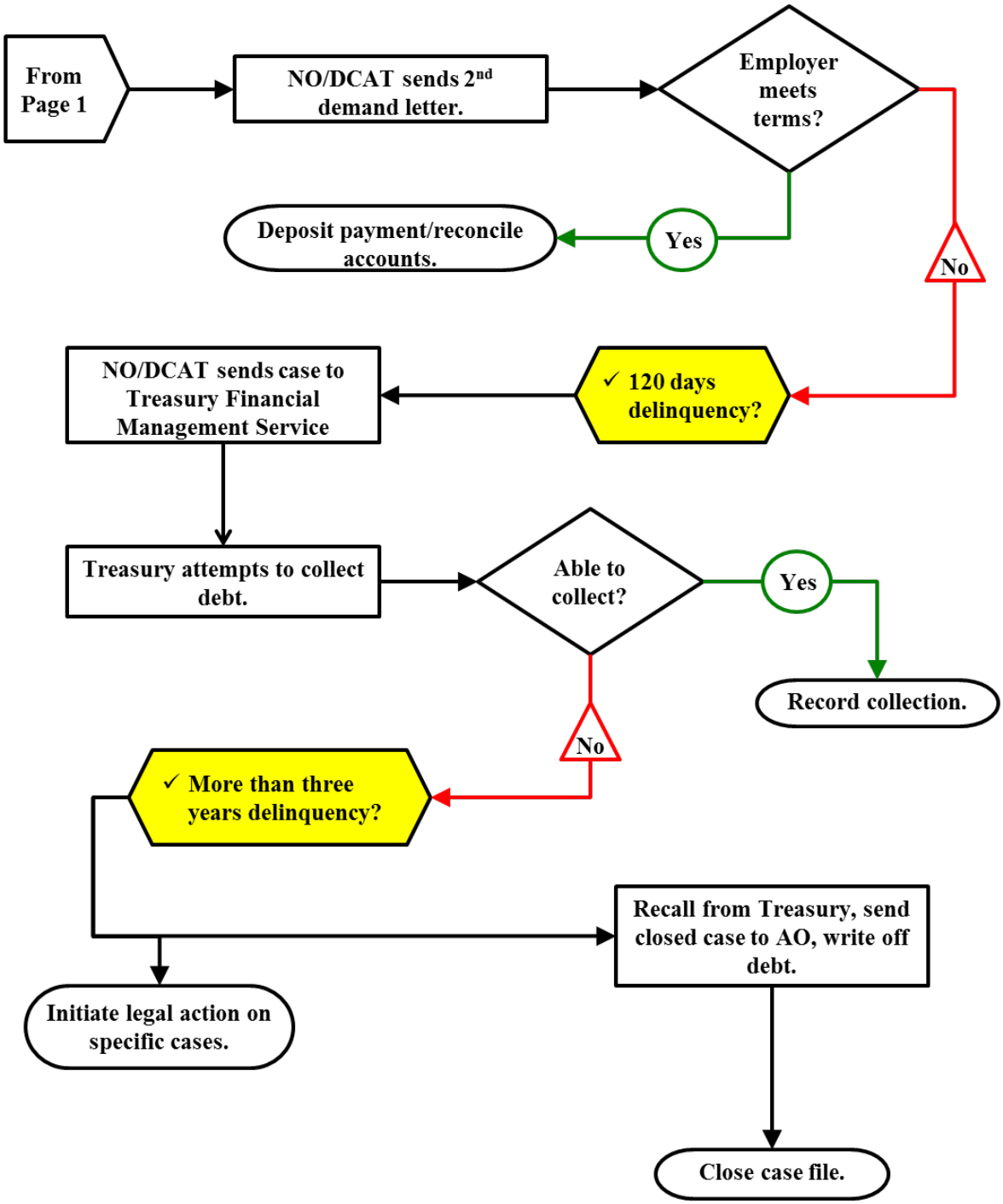
   d. Maintenance of Electronic Copies of Debt Collection Documents: Electronic copies of each National Office letter are maintained by DCAT for eight years. Overall information on each closed case is available on the OSHA Intranet website. Information about Treasury Debt Management Service activity on closed cases returned from the Treasury is also available electronically from the Treasury Debt Management Service through DCAT.

Debt Collection



Debt Collection

Page 2



Chapter 7

POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

I. Contesting Citations, Notifications of Penalty and Abatement Dates.

CSHOs shall advise the employer that the citation, the penalty and/or the abatement date can be contested in cases where the employer does not agree to the citation, penalty, or abatement date or any combination of these.

A. Notice of Contest.

CSHOs shall inform employers that if they intend to contest, the Area Director must be notified in writing and such notification must be postmarked no later than the fifteenth (15) working day after receipt of the *Citation and Notification of Penalty (OSHA-2)*, (working days are Monday through Friday, excluding federal holidays), otherwise the citation becomes a final order of the Commission (see §1903.17). OSHA has no authority to modify the contest period. Employers should also be apprised that their notice of contest can be sent electronically by email to the Area Director within the 15-working-day period and provide employers the email address(es). It shall be emphasized that oral notices of contest do not satisfy the requirement to give written notification.

NOTE: Upon receipt of all electronic notices of contest, the Assistant Area Director or Area Director **shall print copies of the email notice and include it in the documents and files to be transmitted to the Review Commission and the RSOL's office. Contest emails are not to be electronically forwarded to the Commission or RSOL.**

Area Offices are encouraged to establish procedures to establish ready access to email accounts designated to receive notices of contest to ensure the timely transmission of copies to the Commission and RSOL. OSHA's acceptance of notices of contest by email shall not be interpreted to mean that the Agency has consented to, or accepted, the electronic service of documents in litigation pursuant to Commission Rule §2200.7.

1. An employer's Notice of Intent to Contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these is being objected to. CSHOs shall ask the employer to read the OSHA-3000 pamphlet (Employer Rights and Responsibilities Following a Federal OSHA Inspection) accompanying the citation for additional details.

   a. If the employer requests only a later abatement date and there are valid grounds to consider the request, then the Area Director should be contacted. The Area Director can issue an amended citation changing an abatement date prior to the expiration of the 15-working-day period.

b. If the employer contests only the penalty or some of the citation items, then all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 15 days of notification.

2. CSHOs shall inform the employer that the Act provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

B. Contest Process.

The CSHO shall explain that when a Notice of Intent to Contest is properly filed (i.e., received in the Area Office and postmarked as described in the note to A.1 of this chapter), the Area Director is required to forward the case to an independent adjudicatory agency (OSHA Review Commission), at which time the case is considered to be in litigation.

1. OSHA will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the RSOL.
2. Upon receipt of the Notice of Intent to Contest, the Review Commission assigns the case to an administrative law judge, who will schedule a public hearing close to the workplace.

II. Informal Conferences.

A. General.

1. Pursuant to §1903.20, the employer, any affected employee, or the employee representative can request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.
2. The informal conference will be conducted within the 15-working-day contest period. The conference or any request for such a conference shall not operate as a stay of the 15 working day contest period.
3. If the employer's intent to contest is not clear, then the Area Director or designated representative will make an effort to contact the employer for clarification.
4. Informal conferences can be held by any means practical, but meeting in person is preferred.

B. Assistance of Counsel.

In the event that an employer is bringing its attorney to an informal conference, the Area Director or his or her designee can contact the RSOL's Office and ask for the assistance of counsel.

C. Opportunity to Participate.

1. If an informal conference is requested by the employer, then an affected employee or his representative shall be afforded the opportunity to participate. If the conference is requested by an employee or an employee

representative, then the employer shall be afforded an opportunity to participate.

2. If the affected employee or employee representative chooses not to participate in the informal conference, then an attempt will be made to contact that party and to solicit their input prior to the informal conference. Attempts to contact the party should be noted in the case file.

   NOTE: In the event of a settlement, it is not necessary to have the employee representative sign the informal settlement agreement.

3. If any party objects to the attendance of another party or if the Area Director believes that a joint informal conference would not be productive, then separate informal conferences can be held.
4. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests.

D. Notice of Informal Conferences.

The Area Director shall document in the case file, notification to the parties of the date, time, and location of the informal conference. In addition, the Case File Diary Sheet shall indicate the date of the informal conference.

E. Posting Requirement.

1. The Area Director will ask the employer at the beginning of the informal conference whether the form in the citation package indicating the date, time, and location of the conference has been posted as required.
2. If the employer has not posted the form, the Area Director can postpone the informal conference until such action is taken.

F. Conduct of the Informal Conference.

The informal conference will be conducted in accordance with the following guidelines:

1. Conference Subjects.
   a. Purpose of the informal conference;
   b. Rights of participants;
   c. Contest rights and time constraints;
   d. Limitations, if any;
   e. Potential for settlement of citation(s); and
   f. Other relevant information (e.g., if no employee or employee representative has responded, whether the employer has posted the notification form about the informal conference, etc.).
2. Subjects Not to be Addressed.
   a. No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.
   b. There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Department of Justice for criminal prosecution under the Act.

3. Closing Remarks.
   a. At the conclusion of the conference, all main issues and potential courses of action will be summarized and documented.
   b. A copy of the summary, together with any other relevant notes of the discussion made by the Area Director, will be placed in the case file.

III. Petition for Modification of Abatement Date (PMA).

An employer can file a petition for modification of the abatement date when it has made a good faith effort to comply with abatement requirements, but such abatement has not been completed due to circumstances beyond its control (see §1903.14a). If the employer requests additional abatement time after the 15-working-day contest period has passed, then the following procedures for PMAs are to be observed:

A. Filing.

A PMA must be filed in writing with the Area Director who issued the citation no later than the close of the next working day following the date on which abatement was originally required.

1. If a PMA is submitted orally, the employer shall be informed that OSHA cannot accept an oral PMA and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements below for late filing of the petition.
2. A late petition can be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

B. Where Filing Requirements Are Not Met.

If the employer's written PMA does not meet all the requirements of §1903.14a(b)(1)-(5), then the employer shall be contacted within 10 working days and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact.

1. If no response is received or if the information returned is still insufficient, a second attempt, by telephone or in writing, shall be made. The employer shall be informed that if it fails to respond in a timely or adequate manner, then the PMA will not be granted and the employer can be found to have not abated.
2. If the employer responds satisfactorily by telephone and the Area Director determines that the requirements for a PMA have been met, then that finding shall be documented in the case file.
3. Although OSHA policy is to handle PMAs as expeditiously as possible, there may be cases where the Area Director's decision can be delayed because of deficiencies in the PMA, the need to conduct a monitoring inspection and/or a request for Regional Office or National Office involvement. Requests for additional time (e.g., 45 days) for the Area Director to reach a decision shall be sent to the Review Commission

through the RSOL. A letter conveying this request shall be simultaneously sent to the employer and the employee representatives.

C. Approval of PMA.

After the expiration of 15 working days following the posting of a PMA, the Area Director shall agree with or object to the request within 10 working days, if additional time has not been requested from the Review Commission. In the absence of a timely objection, the PMA shall be deemed granted even if not explicitly approved. The following action shall be taken:

1. If the PMA requests an abatement date that is two years or less from the issuance date of the citation, the Area Director has the authority to approve or object to the petition.
2. Any PMA requesting an abatement date that is more than two years from the issuance date of the citation requires the approval of the Regional Administrator as well as the Area Director.
3. If the PMA is approved, the Area Director shall notify the employer and the employee representatives by letter.
4. The Area Director or Regional Administrator (as appropriate) after consultation with the RSOL, shall object to a PMA where the evidence supports non-approval (e.g., the employer has taken no meaningful abatement action at all or has otherwise exhibited a bad faith effort). In such cases, all relevant documentation shall be sent to the Review Commission in accordance with §1903.14a(d). Both the employer and the employee representatives shall be notified of this action by letter, with return receipt requested.
   a. Letters notifying the employer or employee representative of the objection shall be mailed on the same date that the Agency objection to the PMA is sent to the Review Commission.
   b. When appropriate, after consultation with the RSOL, a failure to abate notification can be issued in conjunction with the objection to the PMA.

D. Objection to PMA.

Affected employees or their representatives can file a written objection to an employer's PMA with the Area Director within 10 working days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.

1. Failure to file such a written objection with the 10-working-day period constitutes a waiver of any further right to object to the PMA.
2. If an employee or employee representative objects to the extension of the abatement date, then all relevant documentation shall be sent to the Review Commission.
   a. Confirmation of this action shall be mailed (return receipt requested) to the objecting party as soon as it is accomplished.

b. Notification of the employee objection shall be mailed (return receipt requested) to the employer on the same day that the case file is forwarded to the Commission.

IV. OSHA's Abatement Verification Regulation, §1903.19.

A. Important Terms and Concepts.

1. Abatement.

a. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection.

b. For each inspection, except follow-up inspections, OSHA shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until the Agency is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons shall be annotated in the case file and the proper code entered in the OIS.

c. Employers are required to verify in writing that they have abated cited conditions, in accordance with §1903.19.

2. Abatement Verification.

Abatement verification includes abatement certification, documents, plans, and progress reports.

3. Abatement Certification.

Employers must certify that abatement is complete for each cited violation. The written certification must include: the employer's name and address; the inspection number; the citation and item numbers; a statement that the information submitted is accurate; signature of the employer or employer's authorized representative; the date and method of abatement for each cited violation; and a statement that affected employees and their representatives have been informed of the abatement.

4. Abatement Documents.

Documentation submitted must establish that abatement has been completed, and include evidence—such as the purchase or repair of equipment, photographic or video evidence of abatement, or other written records verifying correction of the violative condition.

5. Affected Employee.

Affected employee means those employees who are exposed to the hazards(s) identified as violations(s) in a citation.

6. Final Order Dates.

a. Uncontested Citation Item.

For an uncontested citation item, the final order date is the day following the fifteenth (15) working day after the employer's receipt of the citation.

b. Contested Citation Item.

For a contested citation item, the final order date is as follows:

- The thirtieth (30) day after the date on which a decision or order of a Review Commission administrative law judge has been docketed with the Commission, unless a member of the Commission has directed review; or
- Where review has been directed, the thirtieth (30) day after the date on which the Commission issues its decision or order disposing of all or the pertinent part of a case; or
- The date on which a federal appeals court issues a decision affirming the violation in a case in which a final order of Review Commission has been stayed.

c. Informal Settlement Dates.

The final order date is when, within the 15 working days to contest a citation, the ISA is signed by **both** parties. See also Chapter 15, Section XIII, Citation Final Order Dates.

7. Abatement Dates.

a. Uncontested Citations.

For uncontested citations, the abatement date is the later of the following dates:

- The abatement date identified in the citation;
- The extended date established as a result of an employer's filing for a Petition for Modification of Abatement (see Review Commission Rule 37, §2200.37);
- The abatement date has been extended due to an amended citation; or
- The date established by an informal settlement agreement.

b. Contested Citations.

For contested citations for which the Review Commission has issued a final order, the abatement date is the later of the following dates:

- The date identified in the final order for abatement;
- Where there has been a contest of a violation or abatement date (not penalty), the date computed by adding the period allowed in the citation for abatement to the final order date; or
- The date established by a formal settlement agreement.

c. Contested Penalty Only.

Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest. The abatement period is subject to the time periods set forth above.

8. Movable Equipment.
    a. Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is moved within or between worksites.
    b. Hand-held equipment is equipment that is hand-held when operated and can generally be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, or nail gun.
9. Worksite.
    a. For the purpose of enforcing the Abatement Verification regulation, the worksite is the physical location specified within the "Alleged Violation Description" of the citation.
    b. If no location is specified, then the worksite shall be the inspection site where the cited violation occurred.

B. Written Certification.

The Abatement Verification Regulation, §1903.19, requires those employers who have received a citation(s) for violation(s) of the Act to certify in writing the cited hazardous condition has been abated and affected employess notified of the abatement actions.

C. Verification Procedures.

The verification procedures to be followed by an employer depend on the nature of the violation(s) identified and the employer's abatement actions. The abatement verification regulation establishes requirements for the following:

1. Abatement Certification
2. Abatement Documentation
3. Abatement Plans
4. Progress Reports
5. Tagging for Movable Equipment

D. Supplemental Procedures.

Where necessary, OSHA supplements these procedures with follow-up inspections and onsite monitoring inspections. For more information, see Section XII of this chapter, On-Site Visits: Procedures for Abatement Verification and Monitoring.

E. Requirements.

Except for the application of warning tags or citations on movable equipment (§1903.19(i)), the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Review Commission. For moveable hand-held equipment, the warning tag or citation must be attached immediately after the employer receives the citation. For other moveable equipment, the warning tag or citation must be attached prior to moving the equipment within or between worksites.

V. Abatement Certification.

A. Minimum Level.

Abatement certification is the minimum level of abatement verification and is required for all violations once they become Review Commission final orders. An exception exists where the CSHO observed abatement during the on-site portion of the inspection and the violation is listed on the citation as "Corrected During Inspection (CDI)" or "Quick-Fix." See Section VI.D of this chapter, CSHO Observed Abatement.

B. Certification Requirements.

The employer's written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement;
2. The employer's name and address;
3. The inspection number to which the submission relates;
4. The citation and item numbers to which the submission relates;
5. A statement that the information submitted is accurate; and
6. The signature of the employer or the employer's authorized representative.

A non-mandatory example of an abatement certification letter is available in Appendix A of the Abatement Verification Regulation (§1903.19).

C. Certification Timeframe.

1. All citation items which have become final orders, regardless of their characterizations, require written abatement certification within 10 calendar days of the abatement date.
2. A PMA received and processed in accordance with the guidance of the FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested.
   a. Thus, no citation will be issued for failure to submit the certification within 10 days of the abatement date.
   b. If the PMA is denied, the 10-day time period for submission to OSHA begins on the day the employer receives notice of the denial.

VI. Abatement Documentation.

More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to certifying abatement, the employer must submit documents demonstrating that abatement is complete.

A. Required Abatement Documentation.

Pursuant to §1903.19, documentation of abatement is required for the following:

1. Willful violations;
2. Repeat violations; and

3. Serious violations where OSHA determines that such documentation is necessary as indicated on the citation. For further information, see Section VI.C. of this chapter, Abatement Documentation for Serious Violations.

B. Adequacy of Abatement Documentation.

1. Abatement documentation must be accurate, and describe or portray the abated condition adequately. It can be submitted in electronic form, if approved by the Area Director.
2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.
3. The adequacy of the abatement documentation submitted by the employer will be assessed by OSHA using the information available in the citation and the Agency's knowledge of the employer's workplace and history.
4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:
   a. Photographic or video evidence of abatement;
   b. Evidence of the purchase or repair of equipment;
   c. Evidence of actions taken to abate;
   d. Bills from repair services;
   e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;
   f. Documentation from the manufacturer that the article that was repaired is within the manufacturer's specifications;
   g. Records of training completed by employees, if the citation is related to inadequate employee training; and
   h. A copy of program documents, if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.
5. Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with ADM 03-01-005, *OSHA Compliance Records*, August 3, 1998.

C. Abatement Documentation for Serious Violations.

1. High Gravity Serious Violations.
   a. OSHA policy generally specifies that all high gravity serious violations will require abatement documentation.
   b. Where, in the opinion of the Area Director, abatement documentation is not required for a high-gravity serious violation, the reasons for this must be set forth in the case file.
2. Moderate or Low Gravity Serious Violations.

   Moderate or low gravity serious violations should not normally require abatement documentation, except whenthe Area Director will require

evidence of abatement for moderate- and low-gravity serious violations under the following circumstances:

a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become final order in the previous three years; or

b. If the employer has any history of a violation that resulted in a fatality or an *OSHA-300 Log* entry indicating serious physical harm to an employee in the past three years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

D. CSHO Observed Abatement.

1. Employers are not required to certify abatement for violations which they promptly abate during the onsite portion of the inspection and which is observed by the CSHO.

   a. Area Directors can use their discretion in extending the "24 hour" time limit to document abated conditions during the inspection.

   b. Observed abatement will be documented on the *Abatement* section of the *Violation Worksheet* for each violation and must include the date and method of abatement.

2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, then the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO can use photographs or video evidence. For further information about adequacy of abatement documentation, see Section VI.B, of this chapter, Adequacy of Abatement Documentation.

3. When the abatement has been witnessed and documented by the CSHO, a notation reading "Corrected During Inspection" shall be made on the citation. Immediate abatement of some violations can qualify for penalty reductions under OSHA's "Quick-Fix" incentive program. These incentives are discussed with the employer during the opening conference. See Chapter 6, Section IV.A, Quick-Fix Penalty Adjustment.

4. Notations stating "Corrected during inspection" or "Employer has abated all hazards" shall not be made on the citation in cases where there is evidence of a continuing violative practice by an employer who can be subject to a summary enforcement order under Section 11(b) of the Act (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications that suggest widespread violations of the same or similar standards at other establishments or construction worksites).

VII. Monitoring Information for Abatement Periods Greater than 90 Days.

A. Abatement Periods Greater than 90 Days.

For abatement periods greater than 90 calendar days, the regulation allows the Area Director flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated to the citation item to which they relate.
2. Progress reports cannot be required unless abatement plans are specifically required.
3. Note that Paragraphs (e) and (f) of §1903.19 have limits: the Area Director is not allowed to require an abatement plan for abatement periods less than 91 days or for citations classified as other-than-serious.
4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. See §1903.19, Non-Mandatory Appendix B, for a sample of an Abatement Plan and Progress Report.

B. Abatement Plans.

1. The Area Director can require an employer to submit an abatement plan for each qualifying cited violation.
   a. The requirement for an abatement plan must be indicated in the citation.
   b. The citation can also call for the abatement plan to include interim measures.
2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting employees from exposure to the hazardous conditions in the interim until the abatement is complete (§1903.19(e)(2)).
3. In cases where the employer cannot prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

C. Progress Reports.

1. An employer that is required to submit an abatement plan can also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:
   a. That periodic progress reports are required and the citation items for which they are required;

b. The date on which an initial progress report must be submitted, which can be no sooner than 30 calendar days after the due date of an abatement plan;

c. Whether additional progress reports are required; and

d. The date(s) on which additional progress reports must be submitted.

2. For each violation the progress report must identify, in a single sentence if possible, the action taken to achieve abatement and the date that the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

D. Special Requirements for Long-Term Abatement.

1. Long-term abatement is abatement that will be completed more than one year from the citation issuance date.

2. The Area Director must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.

3. Progress reports are mandatory and must be filed, at a minimum, every six months. More frequent reporting can be required at the discretion of the area director.

VIII. Employer Failure to Submit Required Abatement Certification.

A. Actions Preceding Citation for Failure to Certify Abatement.

1. If abatement certification, or any required documentation, is not received within 13 calendar days after the abatement date (the regulation requires filing within 10 calendar days after the abatement date; and another 3 calendar days is added for mailing), then the following procedures should be followed:

a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within 7 calendar days after the telephone call.

b. During the conversation with the employer, determine why the employer has not complied and document all communication efforts in the case file. Discuss OSHA's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer's statement of *exceptional circumstances* explaining the delay.

c. Issue a follow-up letter to the employer the same day as the telephone call.

d. The employer can be allowed to respond by fax or email where appropriate.

2. If the certification and/or documentation are not received within the next 7 calendar days, then a single other-than-serious citation will be issued.

3. Normally citations for failure to submit abatement certification for violations of §1903.19(c) shall not be issued until the above procedures

have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans or progress reports are not received within 13 days of the due date.

B. Citation for Failure to Certify.

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) can be issued without formal follow-up activities by following the procedures below.
2. A single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.
   a. This "other" citation will be issued under the same inspection number that contained the original violations cited.
   b. The abatement date for this citation shall be set 30 days from the date of issuance.

   NOTE: Each violation of §1903.19(c), (d), (e), or (f) with respect to each original citation item is a separate item.
3. For those situations where the abatement date falls within the 15 day informal conference time period, and when an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's classification or abatement period is to be modified.
4. For those rare instances where the reminder letter is returned to the Area Office by the Post Office as undeliverable and telephone contact efforts fail, the Area Director has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.

C. Certification Omissions.

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement that the information being submitted is accurate) should be considered a *de minimis* condition of the regulation.
2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to verify that the documents received were the ones that they intended to submit. If so, then the date stamp of the Area Office can serve as the date on the document.
3. A certification with an omitted signature should be returned to the employer to be signed.

D. Penalty Assessment for Failure to Certify.

The penalty provisions of Sections 9 and 17 of the OSH Act apply to all citations issued under this regulation. See Chapter 6, Penalties and Debt Collection, for additional information.

IX. Tagging for Movable Equipment.

A. Tag-Related Citations.

Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag the cited movable equipment.

1. See §1903.19, Non-mandatory Appendix C, for a sample warning tag. OSHA must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation).
2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation can be issued for failure to maintain the tag or copy of the citation using §1903.19(i)(6).

B. Equipment Which is Moved.

Tags are intended to provide an interim form of protection to employees through notification for those who may not be aware of the citation or the hazardous condition.

1. For non-hand-held equipment, CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement (§1903.19(i)) because the tagging provision is triggered upon *movement of* the equipment.
2. For hand-held equipment, employers must attach a warning tag or copy of the citation *immediately* after the employer's receipt of the citation. The attachment of the tag is not dependent on any *subsequent* movement of the equipment.

X. Failure to Notify Employees by Posting.

A. Evidence.

Like tag-related citations, CSHOs shall investigate an employer's failure to notify employees by posting.

B. Location of Posting.

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (§1903.19(g)(2)) the employer can post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

C. Other Communication.

The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used as an alternative.

XI. Abatement Verification for Special Enforcement Situations.

A. Construction Activity Considerations.

1. Construction activities pose situations requiring special consideration.

   a. Construction site closure or hazard removal due to completing of the structure or project, will only be accepted as abatement without certification where the area office CSHO verifies the site closure/completion and where closure/completion effectively abates the condition cited.

   b. In all other circumstances, the employer must certify to OSHA that the hazards have been abated by submitting an abatement certification. In rare cases the verification may have to cease and the abatement action closed through cessation of work or verification with the general contractor of the site to verify abatement.

2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons) violations *will always* require employer certification of abatement regardless of construction site closure.

3. Where the violation specified in a citation is the employer's general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.

4. For situations where the main office of the employer being cited is physically located in another Regional jurisdiction, the Area Director who has jurisdiction over the worksite will proceed as if the employer's main office were in the Area Director's jurisdiction, and notify the affected Regional Office of the communication with the employer.

5. Where a follow-up inspection to verify abatement is deemed necessary, the affected Regions and Area Offices will determine the most efficient and mutually beneficial approach to conducting the inspection.

B. Field Sanitation and Temporary Labor Camps.

Under Secretary's Order 3-2000, the authority to conduct inspections and issue citations for field sanitation and most temporary labor camps in agricultural employment has been delegated to the Employment and TrainingAdministration (ETA).

1. An employer's obligation under the abatement verification regulation still applies. However, OSHA's delegation of authority to ETA does not extend to other OSHA regulations or standards, including §1903.19.

2. In situations where ETA determines that employers are in violation of §1903.19, the following procedures are to be followed:

   a. Wage and Hour District Directors, after following the procedures outlined in Section VIII, of this chapter (Employer Failure to Submit Required Abatement Certification), will send a copy of the inspection

case file or a summary memorandum to the OSHA Regional Administrator's Office for referral following established practice.

b. The OSHA Regional Office shall forward appropriate case files to the Area Office that has jurisdiction to open a NEW inspection (coded as a Referral) and process citation(s) for failure to comply with §1903.19. Upon receipt of the abatement verification documents related to the ETA inspection, OSHA will fax them to ETA.

NOTE: All field sanitation and temporary labor camp cases will automatically comply with the Appropriations Act rider because the field sanitation standard does not apply to employers with 10 or fewer employees and the rider does not apply to temporary labor camps.

c. Penalties will be collected and processed following normal procedures. Upon receipt of penalties for the OSHA-issued §1903.19 citations, OSHA's case file will be closed.

d. In situations where an employer does not respond to OSHA's issuance of violations of §1903.19 and dunning efforts fail, ETA shall be informed through memorandum and the OSHA case file shall be closed with the penalties referred for debt collection.

NOTE: See also Chapter 10, Industry Sectors, and Chapter 12, Specialized Inspection Procedures, for more information.

C. Follow-Up Policy for Employer Failure to Verify Abatement under §1903.19.

Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*, June 18, 2018.

NOTE: For further information on extended abatement periods, see Section VII, Monitoring Information for Abatement Periods Greater than 90 Days, and Section XIII, Monitoring Inspections, both of this chapter.

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Area Director has discretion to conduct a follow-up inspection.
2. Submission of inadequate documents can also be the basis for a follow-up inspection.
3. This inspection should not generally occur before the end of the original 15-day contest period, except in unusual circumstances.

XII. On-Site Visits: Procedures for Abatement Verification and Monitoring.

A. Follow-Up Inspections.

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected or to verify the accuracy of information provided during a phone/fax investigation or Rapid Response Investigation (RRI).

B. Severe Violator Enforcement Program (SVEP) Follow-Up.

1. For any inspection issued on or after June 18, 2010, that results in an SVEP case, an enhanced follow-up inspection will normally be conducted even if abatement of the cited violations has been verified. The primary purpose of follow-up inspections is to assess both whether the cited violation(s) were abated and whether the employer is committing similar violations.
2. If there is a compelling reason not to conduct a follow-up inspection, the reason must be documented in the file. The Region shall also report these cases to the Director of Enforcement Programs, along with the reason why a follow-up was not initiated.
3. Grouped and combined violations from the original inspection will be counted as one violation for SVEP purposes.
4. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see OSHA Instruction CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*, June 18, 2010.

   NOTE: See Memorandum, "*Inclusion of Upstream Oil and Gas Hazards to the High-Emphasis Hazards in the Severe Violator Enforcement Program (SVEP)*", February 11, 2015, for policy relating to the addition of upstream oil and gas hazards to the list of High-Emphasis Hazards in the Severe Violator Enforcement Program (SVEP).

C. Severe Injury Reporting Monitoring.

OSHA may conduct monitoring inspections of closed Rapid Response Investigations (RRIs) based on a randomized selection of closed investigations. The monitoring inspection is to ensure accuracy in the reporting and will be limited to an inspection of the previously reported condition. See Memorandum on Revised Interim Procedures for Reporting Requirements under 29 CFR 1904.39, March 4, 2016.

D. Initial Follow-Up.

1. The initial follow-up is the first follow-up inspection after issuance of the citation.
2. If a violation is found not to have been abated, then the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed additional daily penalties while such failure or violation continues.
3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and when other technology was available that would have brought the process into compliance, a Notification of Failure to Abate Alleged Violation normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances can be considered.

5. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.

E. Second Follow-Up.

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.
   a. After the Notification of Failure to Abate Alleged Violation has been issued, the Area Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.
   b. If the employer contests the proposed additional daily penalties, then a follow-up inspection shall still be scheduled to ensure correction of the original violation.
2. If a second follow-up inspection reveals that the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Area Director, after consultation with the Regional Administrator and RSOL, concludes that this action is appropriate.
3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer's flagrant disregard of a citation or an item on a citation, then the Area Director shall immediately contact the Regional Administrator. This communication, in writing, should detail the circumstances so that the matter can be referred to the RSOL for appropriate action, as appropriate, in the U.S. Court of Appeals in accordance with Section 11(b) of the Act.

F. OSH Act Section 11(b).

There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation or other factors, it will be apparent that traditional enforcement actions would be inappropriate or ineffective. In such cases, a summary enforcement action shall be initiated under Section 11(b) of the Act in the U.S. Court of Appeals. The Area Director shall notify the Regional Administrator, in writing, of all the particular circumstances of the case for referral to the RSOL.

G. Follow-Up Inspections.

1. Follow-up inspections shall be coded as such in OIS and associated with the inspection case file from which the citations being evaluated were issued. The applicable identification and description sections of the *Violation Worksheet*, citation, or file narrative shall be used for documenting correction of violations and failure to abate items during follow-up inspections. Failure to Abate violations are issued in the

original inspection. Repeat violations are issued in the follow-up inspection.

2. If Serious, Willful, or Repeat violation items were appropriately grouped in the *Violation Worksheets* in the original case file, they can be grouped on the follow-up *Violation Worksheet*; otherwise, individual *Violation Worksheets* shall be used for each item. The correction of other-than-serious violations can be documented in the narrative portion of the case file.
3. Documentation of Hazard Abatement by Employer.
   a. The hazard abatement observed by the CSHO shall be specifically described in the *Violation Worksheet*, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.
   b. Brief terms such as "corrected" or "in compliance" will not be accepted as proper documentation for violations having been corrected.
   c. When appropriate, this written description shall be supplemented by a photograph and/or a video recording to illustrate correction circumstances.
   d. Only the item description and identification blocks need to be completed on the follow-up *Violation Worksheet* with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.
4. Sampling.
   a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short-term sampling, or full-shift sampling).
   b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, then full-shift sampling is required to verify exposure limits based on an 8-hour time-weighted average.
5. Narrative.

   The CSHO must include in the narrative the findings of the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all pertinent factors available in an organized manner.
6. Failure to Abate.

   In the event that any item has not been abated, complete documentation shall be included on an *Violation Worksheet*.

XIII. Monitoring Inspections.

A. General.

Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections can be scheduled for the following reasons, among others:

- Abatement dates in excess of one year.
- A petition for modification of abatement date (PMA).
- A Corporate-Wide Settlement Agreement. See CPL 02-00-152, *Guidelines for Administration of Corporate-Wide Settlement Agreements*, June 22, 2011.
- To ensure that terms of a permanent variance are being carried out.
- At the request of an employer requesting technical assistance granted by the Area director.

B. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).

Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- Determine the progress that an employer is making toward final correction.
- Ensure that the target dates of a multi-step abatement plan are being met.
- Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- Ensure that the employees are being properly protected until final controls are implemented.
- Ensure that the terms of a permanent variance are being implemented.
- Provide abatement assistance for items under citation.

C. Abatement Dates in Excess of One Year.

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.
2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.
   a. If the case has been contested, then the final order date (instead of the citation date) shall be used as a starting point.
   b. A settlement agreement can specify an alternative monitoring schedule.

3. If the employer is submitting satisfactory quarterly progress reports and the Area Director agrees after careful review that these reports reflect adequate progress on implementation of control measures and that they provide adequate interim protection for employees, then a monitoring inspection can be conducted every twelve months.
4. Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

D. Monitoring Abatement Efforts.

1. The Area Director shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
2. Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
3. Where no engineering controls have been cited but more time is needed for other reasons that do not require assistance from OSHA (such as delays in receiving equipment), a monitoring visit need not normally be scheduled.
4. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA.
5. CSHOs shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent (i.e., spot sampling, short-term sampling, or full-shift sampling).
6. CSHOs shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all relevant factors available in an organized manner. The factors to be considered can include, but are not limited to, the following:
   a. Progress reports or other indications of the employer's good faith efforts, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.
   b. The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants, and/or the employer's insurance agency.
   c. Other documentation collected by Area Office personnel, including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.
   d. Employer and employee interviews.
   e. Specific reasons for requesting additional time, including specific plans for controlling exposures and specific calendar dates.

f. Personal protective equipment.

g. Medical programs.

h. Emergency action plans.

E. Monitoring Corporate-Wide Settlement Agreements.

Corporate-wide Settlement Agreements (CSA) extend abatement requirements to all covered locations of the company. These agreements can require baseline, periodic, and follow-up monitoring. More information about abatement related to CSA is in CPL 02-00-152, *Guidelines for Administrating of Corporate-Wide Settlement Agreements*, dated June 22, 2011.

XIV. Notification of Failure to Abate.

A. Violation.

A *Notification of Failure to Abate Alleged Violation (OSHA-2B)* shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

B. Penalties.

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation that is a final order of the Commission.

C. Calculation of Additional Penalties.

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.
2. Detailed information on calculating failure to abate (FTA) penalties is included in Chapter 6, Penalties and Debt Collection.

XV. Case File Management.

A. Closing of Case File Without Abatement Certification.

The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Area Director or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.

B. Review of Employer-Submitted Abatement.

Area Offices are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

C. Whether to Keep Abatement Documentation.

Abatement documentation (photos, employer programs) shall be retained in accordance with OSHA Instruction ADM 03-01-005, *OSHA Compliance Records*, dated August 3, 1998.

XVI. Abatement Services Available to Employers.

Employers requesting abatement assistance shall be informed that OSHA is willing to work with them even after citations have been issued, and that OSHA can provide incentives for immediate onsite abatement of certain types of violations. For further information see Chapter 6, Section IV, Effect on Penalties if Employer Immediately Corrects.

Chapter 8

SETTLEMENTS

I. Settlement of Cases by Area Directors.
Area Directors are granted settlement authority and shall follow these instructions when negotiating settlement agreements:

A. General.

1. Except for egregious cases, or cases that affect other jurisdictions, Area Directors can enter into Informal Settlement Agreements with employers prior to the employer filing a written notice of contest.
   NOTE: After the employer has filed a written notice of contest, the Area Director can proceed toward a Formal Settlement Agreement with the concurrence and participation of the RSOL.
2. Area Directors can amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), and modify or withdraw a penalty, a citation, or a citation item where evidence is established during the informal conference to show that the changes are justified.
3. Area Directors can negotiate the amount of proposed penalties, depending on the circumstances of the case and the particular improvements in employee safety and health that can be obtained.
4. Employers shall be informed that they are required by §1903.16 to post copies of all amendments or changes to citations resulting from informal conferences. Employee representatives must also be provided with copies of any agreements.
5. Cases or issues relating to potential Section 17 settlements shall be handled in accordance with established Agency procedures, including approval by the National Office.

B. Pre-Contest Settlement (Informal Settlement Agreement).
Pre-contest settlement discussions will generally occur during or immediately following the information conference and prior to the expiration of the 15 working day contest period.

1. In the event that an employer is bringing an attorney to an informal conference, Area Directors or their designees are encouraged to contact the RSOL and ask for the assistance of counsel.
2. If a settlement is reached during the informal conference, then an Informal Settlement Agreement (ISA) shall be prepared and the employer will be asked to sign it. It will be effective upon signature of both the employer and the Area Director (**who shall sign last**), provided that the contest period has not expired. Both parties will date the documents on the day of actual signature.
3. If the employer is not present to sign the ISA, then the Area Director shall send the agreement to the employer for signature. After signing, the employer must return the agreement to the Area Director by hand delivery or facsimile within the 15-working-day contest period.

a. In every case, Area Directors shall give employers notice in writing that the citation will become final and unreviewable at the end of the contest period, unless the employer signs the proposed agreement or files a written notice of contest.
b. If an employer wishes to make any changes to the text of the agreement, then the Area Director must agree to and authorize the proposed changes prior to the expiration of the contest period.
    - If the changes proposed by the employer are acceptable to the Area Director, then the exact language written into the agreement shall be mutually agreed upon. Employers shall be instructed to incorporate the agreed-upon language into the agreement, sign it, and return the agreementto the Area Office by hand delivery or facsimile.
    - Annotations incorporating the exact language of any changes authorized shall be made to the retained copy of the agreement and signed and dated by the Area Director.
c. Upon receipt of the ISA signed by the employer, the Area Director will ensure, prior to his/her signature, that any modifications to the agreement are consistent with the notations made in the case file.
    - In these cases, the citation record will then be updated in OIS in accordance with current procedures.
    - If an employer's changes substantially alter the original terms, then the agreement signed by the employer will be treated as a notice of contest and handled accordingly. The employer will be informed of this as soon as possible.
d. A reasonable time will be allowed for return of the agreement from the employer.
    - If an agreement is not received within the 15-working-day contest period, then the Area Director will presume that the employer did not sign the agreement, and the citation will be treated as a final order.
    - The employer will be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.

4. If settlement efforts are unsuccessful and the employer contests the citation, then the Area Director will state the terms of the final settlement offer in the case file.
5. See Informal Conference Guidance Memorandum, dated September 18, 2013, for more information. The following paragraphs are from the Informal Conference Guidance Memo:
    a. Provide the attendee information regarding the purpose of an informal conference. This will include the following:
        - Why the inspection was conducted. Explicitly, the difference between a programmed and un-programmed inspection. For example, "OSHA conducted an un-programmed inspection of

your facility because a formal complaint was filed alleging blocked exit routes."

- The rights of the employer(s). Specifically, the AD will inform the employer(s) of their contest rights. The AD will provide the employer(s) an overview of OSHA's contest procedures. Furthermore, the AD should indicate that if the employer(s) decide to contest the citation(s), any past settlement offer made during the informal conference will no longer be available to the employer(s) at the area office level. Once a case is contested, the AD should explain that the case is transferred to the Regional Solicitor's office.
- The AD should inform the employer that (for settlement purposes) he/she has the authority to change the citation's classification and adjust the total proposed penalty. However, the AD should clarify that this can only be accomplished if the employer demonstrates development of or will continue to improve on a safety and health program and have, or are in the process of, abating all cited violations. Examples of proactive initiatives should include, but are not limited to, hiring a safety and health consultant or using OSHA's consultation services. A reduction in classification or penalty can only be given if proof of correct abatement has been received or if the employer has committed to correct the violations by the abatement due dates.
- Potential for settlement of citation(s). The AD should inform the employer that if an agreement is reached, the Informal Settlement Agreement (ISA) must be signed by both parties. Additionally, the AD will inform the employer(s) that by signing the ISA, the employer(s) forfeit their right to contest the citation(s).

b. Once the employers understand why the inspection was conducted and the procedures of the informal conference are explained, the AD should start a discussion regarding the citations.
c. As the citation(s) are discussed, the AD must thoroughly document what was stated by all parties (employers, employee representatives, and AD). Furthermore, if the alleged violation was not corrected during the inspection, the AD should ask for both the signed abatement certification and abatement documentation (if required). For example, the employer(s) should provide abatement verification that clearly proves the facilities' exit routes are unobstructed. Abatement verification can include photographs (time/date stamped) of the corrected violative condition. This process should be followed for any additional items and/or citations arising from the inspection.
d. Once the discussion of the citation(s) is concluded, the AD should determine what are the expectations of the employer(s), (if any).

Usually, the employer(s) will ask for penalty reductions, citation reclassification, both penalty reduction and reclassification, or possibly vacating the citation(s). Depending upon the extent of safety and health efforts by the employer(s), and any other pertinent information established during the course of the settlement proceedings, the AD should use his/her professional judgment in evaluating a settlement offer.

e. The AD will abide by OSHA policy and procedures and can grant a penalty reduction and/or citation reclassification to settle the case.

f. There will be occasions where employers will ask for a payment plan. The AD shall follow the guidelines in the FOM, Chapter 6, pertaining to collecting payments.

g. Employers can ask for a petition to modify abatement (PMA). The AD will follow procedures outlined in the FOM to ensure PMAs do not adversely affect the safety and health of employees. The AD can amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), or modify or withdraw a penalty, a citation, or a citation item, where the evidence establishes that the changes are justified.

h. Enforceability of ISA. If settlement negotiations change or in any way amend the original citation(s), the agreement shall include language that states: "the parties agree that the underlying citations are amended to include as abatement the full terms of this agreement."

i. The AD will advise the employer of OSHA's Whistleblower protections programs, which ensures that workers are free to participate in safety and health activities. Section 11(c) of the OSH Act prohibits any person from discharging or in any manner retaliating or discriminating against any worker for exercising rights under the Act.

C. Procedures for Preparing the Informal Settlement Agreement.
The ISA shall be prepared and processed in accordance with current OSHA policies and practices. For guidance in determining final dates of settlement agreements and Review Commission orders, see Chapter 15, Section XIII, Citation Final Order Dates.

D. Post-Contest Settlement (Formal Settlement Agreement).
Post-contest settlements will normally occur before the complaint is filed with the Review Commission.

1. Following the filing of a notice of contest, the Area Director shall (unless other procedures have been agreed upon) notify the RSOL when it appears that negotiations with the employer could produce a settlement. This notification shall occur at the time the notice of contest transmittal memorandum is sent to the RSOL.

2. If a settlement is later requested by the employer, the Area Director will communicate the proposed terms to the RSOL, who will then draft and execute the agreement.

E. Corporate-Wide Settlement Agreement.
Corporate-Wide Settlement Agreements (CSAs) can be entered into under special circumstances to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control. See CPL 02-00-152, *Guidelines for Administering Corporate-Wide Settlement Agreements*, June 22, 2011, for additional information.

Chapter 9

COMPLAINT AND REFERRAL PROCESSING

I. Safety and Health Complaints and Referrals.

A. Definitions.

1. Complaint.

Notice of an alleged safety or health hazard (over which OSHA has jurisdiction), or a violation of the Act. There are two types; formal and non-formal.

a. Formal Complaint.

Complaint made by a current employee or a representative of employees that meets all the following requirements:

- Asserts that an imminent danger, a violation of the Act, or a violation of an OSHA standard exposes employees to a potential physical or health harm in the workplace;
- Is reduced to writing or submitted on a *Complaint (OSHA-7)*; and
- Is signed by at least one current employee or employee representative.

b. Non-formal Complaint.

Any complaint alleging a safety or health violation(s) that does not meet all the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

2. Inspection.

An on-site examination of an employer's worksite conducted by an OSHA compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in Section C, Criteria Warranting an Inspection, below.

3. Inquiry.

A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria as listed in Section C. It does not involve an on-site inspection of the workplace but, rather, the employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter, if necessary. The employer is then requested to provide a response, and OSHA will notify the complainant of that response through appropriate means.

4. Electronic Complaint.

A complaint submitted through OSHA's public website. All complaints submitted via OSHA's public website are initially considered non-formal.

See Chapter 9 Section I.E.5, to determine when electronic complaints are to be considered formal.

5. Permanently Disabling Injury or Illness.

   An injury or illness that has resulted in permanent disability, work-related injury, or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to: amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

6. Referral.

   An allegation of a potential workplace hazard or violation received from one of the sources listed below:

   a. CSHO referral – information based on the direct observation of a CSHO.
   b. Safety and health agency referral – from sources including, but not limited to: NIOSH, state programs, consultation, and state or local health departments, as well as safety and/or health professionals in other federal agencies.
   c. Discrimination or Whistleblower complaint referral – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, engaging in other activities related to occupational safety or health or for raising concerns under any of the federal anti-retaliation statues that OSHA enforces. See the Whistleblower Statutes Desk Aid for more information.
   d. Other government agency referral – made by other federal, state, or local government agencies or their employees, including local police and fire departments.
   e. Media report – either news items reported in the media or information reported directly to OSHA by a media source.
   f. Employer/Employer Representative report – of accidents other than fatalities and catastrophes.

7. Representative of Employees.

   Any of the following:

   a. An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization.
   b. An attorney acting for an employee.
   c. Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

NOTE: The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.

B. Classifying as a Complaint or a Referral.

Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if **at least one** of the conditions in Section C, Criteria Warranting an Inspection, is met.

C. Criteria Warranting an Inspection.

An inspection is normally warranted if **at least one** of the conditions below is met (but see also Section I.D, of this chapter, Scheduling an Inspection of an Employer in an Exempt Industry):

1. A valid formal complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on a *Complaint (OSHA-7 or OSHA Online Complaint Form)*, be signed by a current employee or representative of employees, and state the reason for the inspection request with reasonable particularity. Additionally, there must be reasonable grounds to believe either that a violation of the Act or OSHA standard that exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists, as provided in Section 8(f)(1) of the Act.
2. The information received in a signed, written complaint from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a potentially serious safety or health violation.
3. The information alleges that an imminent danger situation, a violation of the Act or of an OSHA standard exists, that exposes employees to a potential serious physical or health hazard in the workplace.
4. The information concerns an establishment and an alleged hazard covered by a local, regional, or national emphasis program (such as the Site-Specific Targeting Plan).
5. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s). The evidence must be descriptive of current or recurring hazardous conditions.
6. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within the Area Office's jurisdiction during the past five years, or is an establishment or related establishment in the Severe Violator Enforcement Program. However, if the employer has previously submitted adequate documentation for these violations, demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, then the Area Director will normally determine that an inspection is not necessary.

7. The Whistleblower Protection Program requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
8. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled through inquiry is received, then this complaint or referral can, at the Area Director's discretion, be incorporated into the scheduled or ongoing inspection. If such a complaint is formal, then the complainant must receive a written response that addresses the complaint items.
9. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, then an on-site inspection will be initiated if the information relates to construction, manufacturing, maritime, agriculture, or other industries as determined by the Area Director. Limitations placed on OSHA's activities in agriculture by Appropriations Act provisions will be observed. See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998. A referral to Wage and Hour should also be initiated.

   NOTE: The information does not need to allege that a child labor law has been violated.

D. Scheduling an Inspection of an Employer in an Exempt Industry.

In order to schedule an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions (See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998), one of the following conditions must be met:

1. The information must come directly from a current employee; OR
2. It must be determined and documented in the case file that the information came from a representative of the employee (see Section I.A.7 of this chapter, Representative of Employees), with the employee's knowledge of the representative's intended action.

E. Electronic Complaints Received through the OSHA Public Website.

1. Electronic complaints submitted through the OSHA public website are automatically forwarded by email to a designated Area Office in the appropriate state. That office then forwards the electronic complaints to the appropriate Area Office in the state.
2. Each Area Office manages a "Complaints" mailbox and processes electronic complaints according to internal complaint processing procedures. The complaints mailbox is monitored daily and every incoming complaint is reviewed for jurisdiction.
   a. If the complaint falls within the jurisdiction of the Area Office, then the complaint is entered into OIS and processed as usual.

b. If the complaint falls within the jurisdiction of another Area Office, the complaint is forwarded appropriately.

3. Area Offices will coordinate with State Plan states to establish procedures to process electronic complaints. The state establishes its own internal procedures for responding to such complaints. These procedures can be the state's usual procedures for handling unsigned complaints or they can include some further coordination with the complainant prior to action. In State Plan states, the Federal Monitoring Office will screen the complaints unless there is another arrangement. If the complaint falls within the individual State Plan's jurisdiction, then the Screening Office will follow the procedures developed with the State Plan for processing the complaint.
4. Complete a *Complaint (OSHA-7)* for all complaint information received. In order to facilitate the tracking of electronic complaints, please enter the electronic complaint number in the Receipt/Activity Info tab when applicable.
5. Electronic complaints where a current employee has provided their name **and** checked the "*This constitutes my electronic signature"* box shall be considered as a formal complaint and processed accordingly.
6. All complaint-related material received electronically should be printed and date-stamped with the date indicating when the material was submitted and received. When these dates are not the same, the Area Director will determine the appropriate date for the incoming material.

F. Information Received by Telephone.

1. While speaking with the caller, OSHA personnel will attempt to obtain the following information:
   a. Whether the caller is a current employee or an employee representative.
   b. The exact nature of the alleged hazard(s) and the basis of the caller's knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of OSHA standards or the OSH Act.
   c. The employer's name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.
   d. The name, address, telephone number, and email address of any union and/or employee representative at the worksite.
2. As appropriate, OSHA will provide the caller with the following information:
   a. Describe the complaint process, and if appropriate, the concepts of "inquiry" and "inspection," as well as the relative advantages of each.
   b. If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint. These rights and protections include:

- The right to request an on-site inspection.
- Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists.
- The right to obtain review of a decision not to inspect by submitting a request for review in writing.

3. Information received by telephone from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can mail, email, or fax a signed copy of the information, request that a *Complaint (OSHA-7)* be sent, or sign the information in person at the Area Office. Normally a complainant has five working days to formalize an electronic complaint.
4. If appropriate, inform the complainant of rights to confidentiality in accordance with Section 8(f)(1) of the Act for private sector employees, and Executive Order 12196 for federal employees, and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant is protected regardless of the formality of the complaint.
5. Explain Section 11(c) rights to private sector employees and employees of the U.S. Postal Service, or reprisal and discrimination protection provided by Executive Order 12196, §1960.46 and the Whistleblowers Protection Act of 1989 to federal employees. See Chapter 13, Section III.E for reports of reprisal or discrimination from federal employees.

G. Procedures for Handling Complaints Filed in Multiple Area Offices or Regions.

1. When a Regional Office determines that multiple offices within the Region have received the same complaint or, if the Regional Office suspects that the same complaint has been filed in multiple Regions, the Regional Office should contact the Director or Deputy Director of the Directorate of Enforcement Programs (DEP).
2. DEP will query all 10 Regions and coordinate with the Directorate of Cooperative and State Programs to query the State Plan states to determine whether similar complaints were filed in multiple offices.
   a. If multiple Regions have received the same complaint, then the National Office will address the complaint with the employer.
   b. Area Offices should indicate in OIS that these complaints have been transferred to the National Office.

H. Procedures for an Inspection.

1. Upon receipt of a complaint or referral, the Area Director or designee will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.
   a. If necessary, reasonable attempts will be made to contact the individual who provided the information in order to obtain additional

details or to clarify issues raised in the complaint or referral. See the Complaint Questionnaire beginning on page 9-13.

b. The Area Director can determine not to inspect a facility if he/she has a substantial reason to believe that the condition in the complaint is being or has been abated.

2. Despite the existence of a complaint, if the Area Director determines that there are no reasonable grounds to believe that a violation or hazard exists, then no inspection or inquiry will be conducted.

   a. Where a formal complaint has been submitted, the complainant will be notified in writing of OSHA's intent not to conduct an inspection, the reasoning behind the determination, and the right to have the determination reviewed under §1903.12. The justification for not inspecting will be noted in the case file.

   b. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of OSHA's intent not to conduct an inquiry or inspection. The justification for not inspecting or conducting an inquiry will be noted in the case file.

3. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in Section I.C of this chapter, Criteria Warranting an Inspection, and there are reasonable grounds to believe that a violation or hazard exists, the Area Office is authorized to conduct an inspection.

   a. If appropriate, then the Area Office will inform the individual who has provided the information that an inspection will be scheduled and that he or she will be advised of the results.

   b. After the inspection, the Area Office will send the complainant a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.

4. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within five working days of formalizing.

5. As a general rule, the scope of a complaint/referral inspection must bear an appropriate relationship to the alleged violative conditions. The CSHO must have probable cause to expand the inspection beyond the violations alleged in the complaint/referral. See Chapter 3, Section III, Inspection Scope, and Chapter 15, Section III, Obtaining Warrants, for more information.

I. Procedures for an Inquiry.

1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, then an inquiry will be conducted. OSHA will promptly notify the employer about the complaint or referral and its allegation(s), and fax or email a confirming letter.

2. If a non-formal complaint is submitted by a current employee or a representative of employees that does not meet any of the inspection criteria, then the complainant can be given five working days to make the complaint formal.
   a. The complainant can come into the Area Office and sign the complaint, or mail, email, or fax a signed complaint letter to OSHA. A *Complaint (OSHA-7)* can also be mailed or faxed to the complainant, if appropriate.
   b. If the complaint is not made formal after five working days, after making a reasonable attempt to inform the complainant of the decision, OSHA will proceed with the inquiry process.
3. The employer will be advised of what information is needed to answer the inquiry and encouraged to respond by fax or email. See Chapter 13, Federal Agency Field Activities, for differing federal agency procedures. Employers are encouraged to do the following:
   a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.
   b. Advise the Area Director either in writing by email or fax within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Area Director and depending on the circumstances, the response time can be longer or shorter than five working days. Also, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during the above timeframe, the employer should be encouraged to do so.
   c. Provide the Area Director with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the employer believes would be helpful, as well as a description of any corrective action that the employer has taken or is in the process of taking.
   d. Post a copy of the letter from OSHA where it is readily accessible for review by all employees.
   e. Return a copy of the signed Certificate of Posting to the Area Office.
   f. If there is a recognized employee union or safety and health committee in the facility, provide them with a copy of OSHA's letter and the employer's response.
4. As soon as possible after contacting the employer, a notification letter will be faxed to the employer, or mailed where no fax is available. Sample letters to complainants and employers are provided in OIS. Note that some of these letters are for private sector use and some are for federal agency use. If email is an acceptable means of responding, then this should be indicated in the notification letter and the proper email address should be provided.

5. If no employer response or an inadequate employer response is received after the allotted five working days, additional contact with the employer can be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if OSHA determines from other information that the condition has not been or is not being corrected, then an inspection will be scheduled.
6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response and, if the alleged hazard persists, of the right to request an inspection. When OSHA receives an adequate response from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.
7. If the complainant is a current employee or a representative of employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.
   a. If the employee disagreement takes the form of a written and signed formal complaint, then see Section I.H of this chapter, Procedures for an Inspection.
   b. If the employee disagreement does not take the form of a written and signed formal complaint, then some discretion is allowed in situations where the information does not justify an on-site inspection. In such situations, the complainant will be notified of OSHA's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.
8. If a signed complaint is received after the complaint inquiry process has begun, then the Area Director will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the inquiry has begun and that the complainant retains the right to request an on-site inspection if he/she disputes the results and believes that the hazard still exists.
9. The complaint must not be closed until OSHA verifies that the hazard has been abated.
10. The justification for not conducting an inquiry will be noted in the case file.

J. Complainant Protection.

1. Identity of the Complainant.
   a. Upon request of the complainant, his or her identity will be withheld from the employer in accordance with Section 8(f)(1) of the Act. No information will be given to the employer that would allow the employer to identify the complainant.
   b. Generally, names and other personally identifiable information of employees will not be included in the warrant application. Where employees' names or other personally identifiable information appear in affidavits and other supporting documents attached to the warrant

application, such information must be redacted. Where inclusion of the employee's name is necessary, Area Offices should consult with RSOL about filing the warrant application under seal.

2. Whistleblower Protection.

   a. Section 11(c) of the Act provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that he or she has been discharged or otherwise retaliated against by any person as a result of engaging in such activities can file a whistleblower complaint. The complaint must be filed within thirty (30) days of the discharge or other retaliation.

   b. Complainants should always be advised of their Section 11(c) rights and protections upon initial contact with OSHA and whenever appropriate in subsequent communications.

K. Recording in OIS.

Information about complaint and referral inspections or inquiries must be recorded in OIS following the current instructions outlined in the FOM. Referrals reported by the employer will be recorded in OIS following the guidance provided in the Memorandum entitled, *Revised Interim Enforcement Procedures for Reporting Requirements under 29 C.F.R. 1904.39*, dated March 4, 2016, or unless superseded by future Agency-approved correspondence.

II. Whistleblower Complaints.

A. OSHA enforces the whistleblower or anti-retaliation provisions of the OSH Act and 21 other other federal statutes. These anti-retaliation statutes protect employees who report violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws. The statutes generally prohibit employers from discharging or otherwise retaliating against their employees for exercising their rights under these statutes. In particular, under Section 11(c) of the OSH Act, these rights include filing an OSHA complaint, participating in an inspection or talking to an inspector, seeking access to employer exposure and injury records, reporting an injury, and raising a safety or health complaint with the employer. A desk reference summarizing these statutes can be found at www.whistleblowers.gov.

B. When a whistleblower complaint is made under any of the federal whistleblower statutes enforced by OSHA other than the OSH Act, the complainant should be referred promptly to the Assistant Regional Administrator for Whistleblower Protection Programs because the requirements for filing complaints under those statutes can vary from those of

the OSH Act. They should also be advised that there are statutory deadlines for filing these complaints.

C. In the context of an OSHA enforcement action or a consultation activity, the complainant will be advised of the protection against retaliation afforded by Section 11(c) of the Act. A Section 11(c) complaint can be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that he or she has suffered an adverse action because of activity protected under Section 11(c), CSHOs will record that person's identifying information and the date and time of this initial contact on an OSHA-87 form and forward it to the Assistant Regional Administrator for Whistleblower Protection Programs for processing.

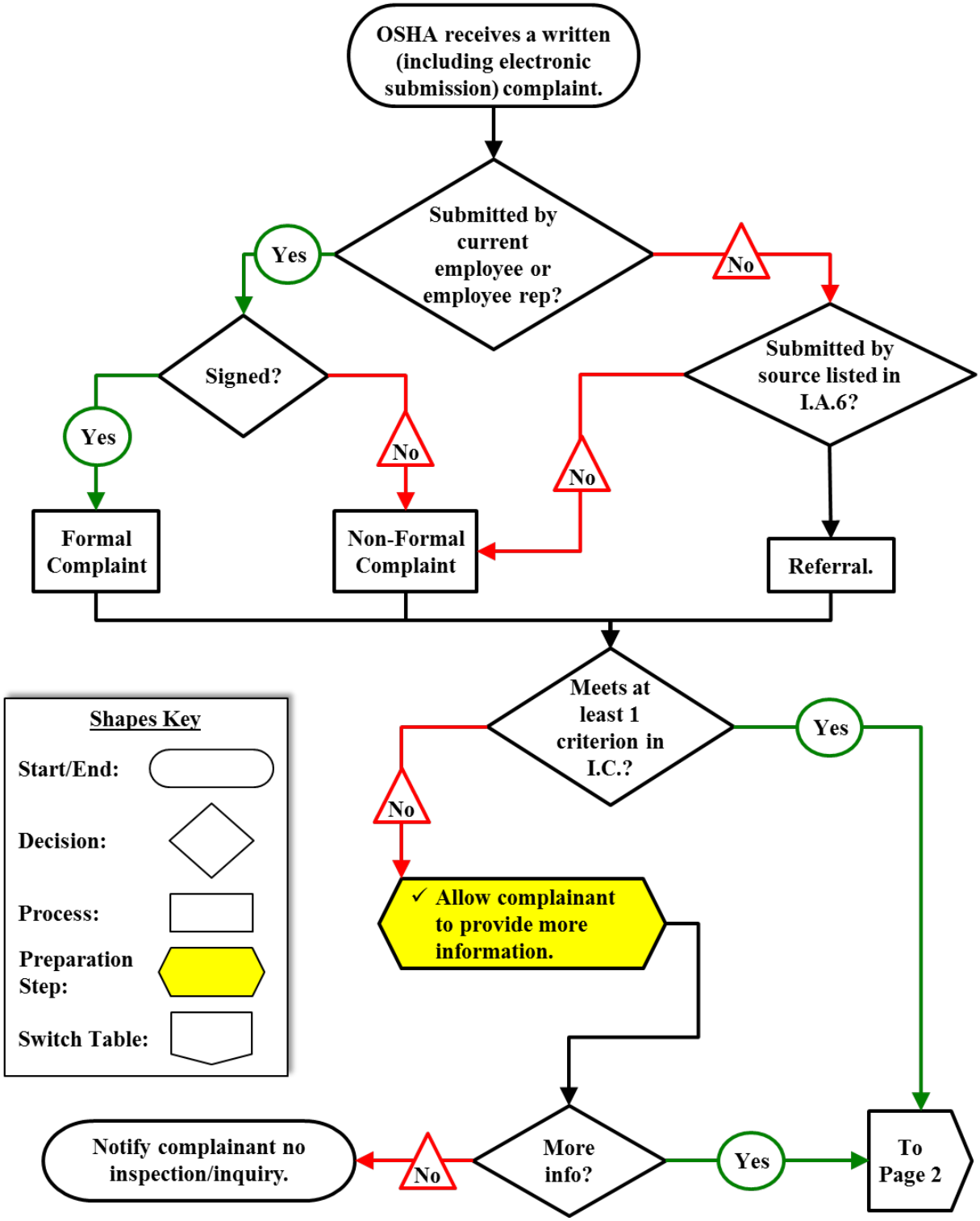
D. In State Plan states, employees can file occupational safety and health retaliation complaints with Federal OSHA, the state, or both. Federal OSHA normally refers such complaints to the State Plan states for investigation. OSHA's Whistleblower Manual outlines the Agency's referral/deferral policies for such complaints.

III. Decision Trees.

A. See tree on page 9-12 for OSHA enforcement action or consultation activity when information is obtained in writing.

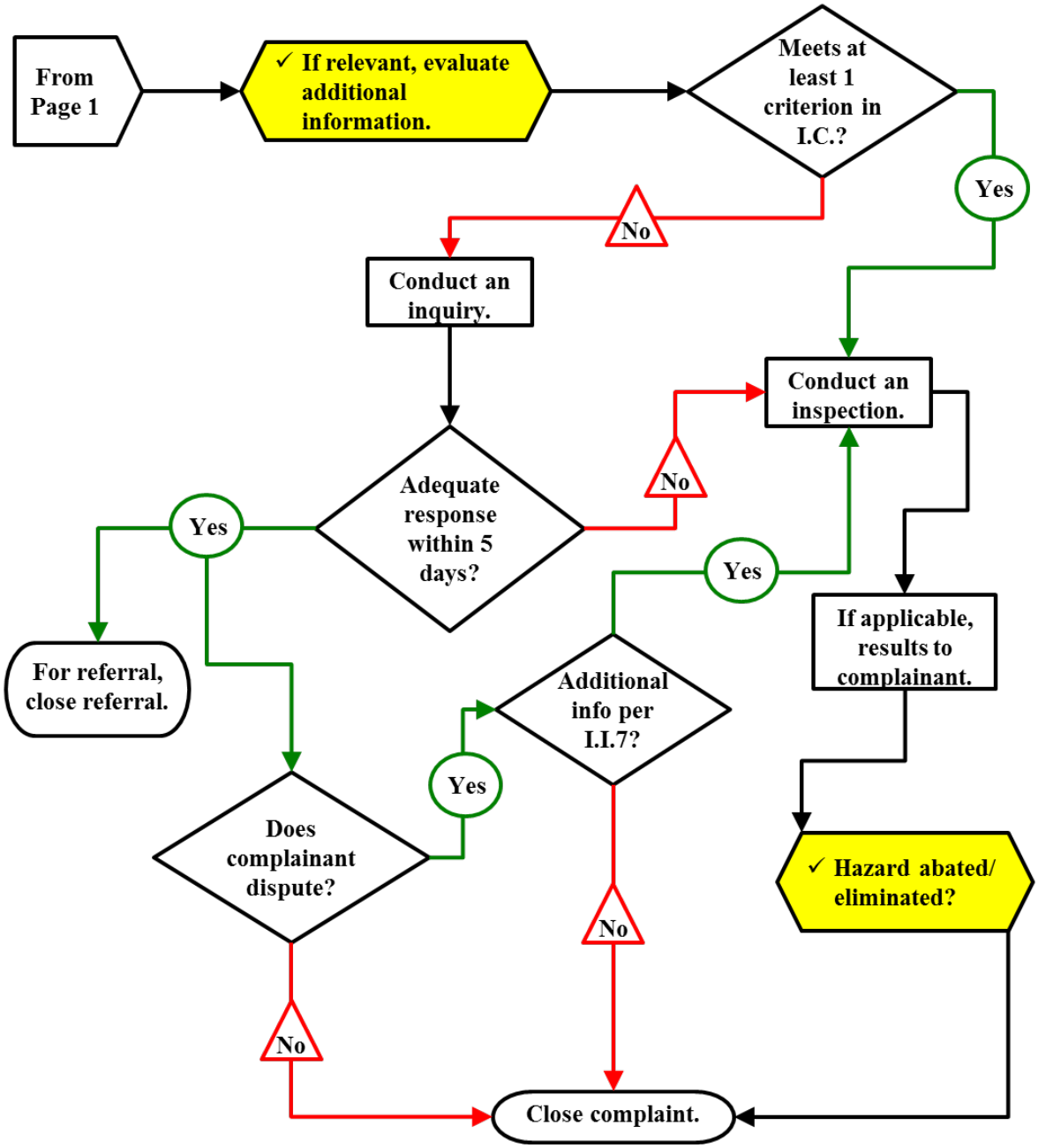
B. See tree on page 9-14 for OSHA enforcement action or consultation activity when information is obtained orally.

Written Complaint Processing

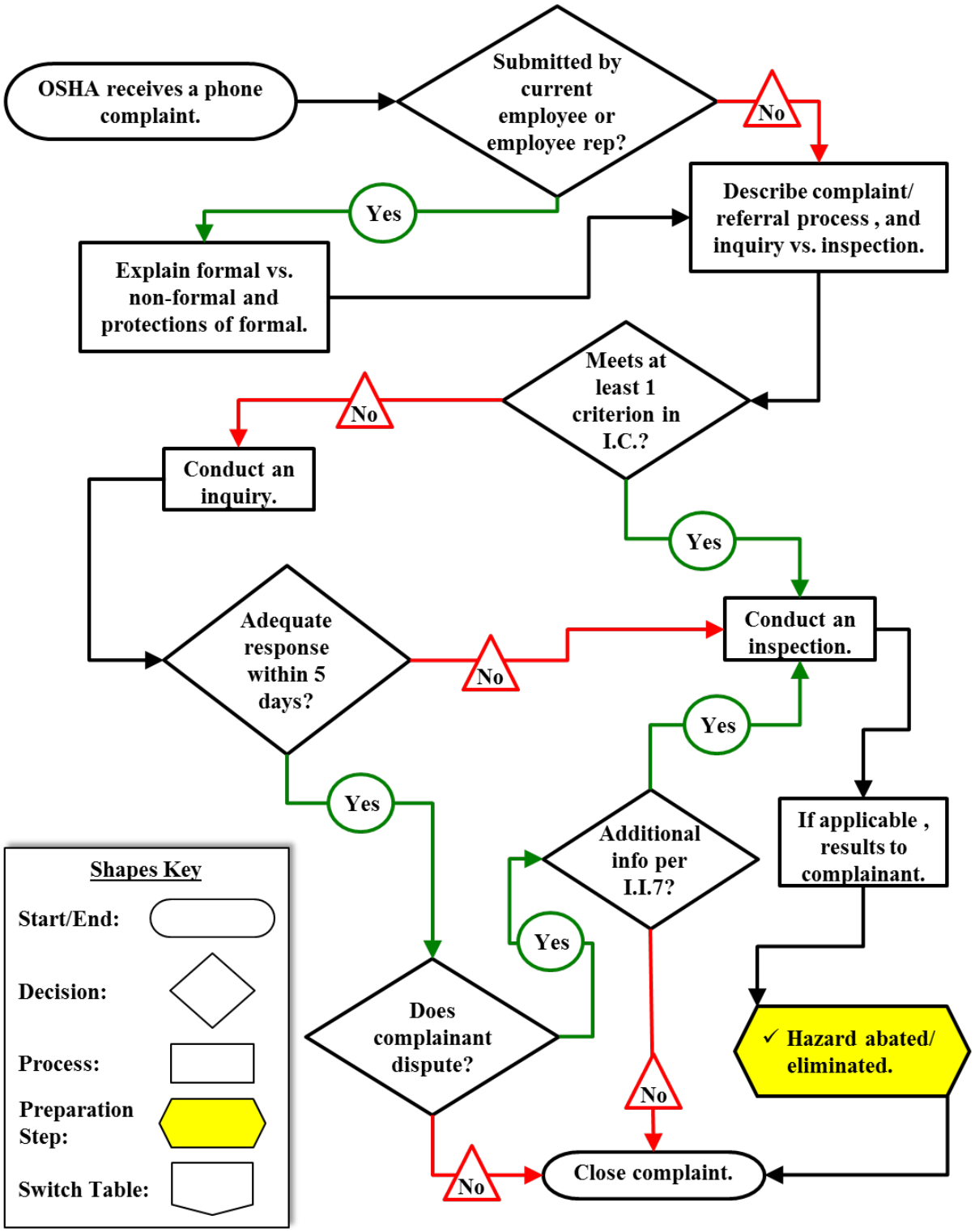


Written Complaint Processing

Page 2



Telephone Complaint Processing



Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

For All Complaints:

1. What is the specific safety or health hazard?

_____

_____

_____

2. Has the hazardous condition been brought to the employer's attention? If so, when? How?

_____

_____

_____

3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.

_____

_____

_____

4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or incidents?

_____

_____

_____

5. With what frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?

_____

_____

_____

6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?

_____

_____

_____

7. What personal protective equipment (e.g., hearing protection, gloves, or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.

_____

_____

_____

8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?

_____

_____

_____

9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

_____

_____

_____

<u>For Health Hazards</u>:

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

_____

_____

_____

11. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which can reduce exposure to the hazard?

_____

_____

_____

12. What administrative or work practice controls has the employer put in place?

_____

_____

_____

13. Do any employees have any symptoms that could have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work-related disease or condition? What was it?

_____

_____

_____

14. Have there been any "near-miss" incidents?

_____

_____

_____

15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?

_____

_____

_____

16. If the complaint is related to noise, what, if any, hearing protection is provided and worn by the employees?

_____

_____

_____

17. Do employees receive audiograms on a regular basis?

_____

_____

_____

For Safety Hazards:

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and "other" probability factors.

_____

_____

_____

19. Have any employees been injured as a result of this hazardous condition? Have there been any "near-miss" incidents?

_____

_____

_____

Chapter 10

INDUSTRY SECTORS

I. Agriculture.

A. Introduction.

Special situations arising in the agriculture industry, which is regulated under 29 CFR Part 1928 and the General Duty Clause, are discussed in this section. Part 1928 covers "agricultural operations," which include, but are not limited to, egg farms, poultry farms, livestock grain and feed lot operations, dairy farms, horse farms, hog farms, fish farms, and fur-bearing animal farms. OSHA has very few standards that are applicable to this industry. Part 1928 sets forth a few standards in full and lists particular Part 1910 standards that apply to agricultural operations. Part 1910 standards not listed do not apply. The General Duty Clause can be used to address hazards not covered by these standards.

B. Definitions.

1. Agricultural Operations.

This term is not defined in 29 CFR Part 1928. Generally, agricultural operations would include any activities involved in the growing and harvesting of crops, plants, vines, fruit trees, nut trees, ornamental plants, egg production, the raising of livestock (including poultry and fish), as well as livestock products. The Occupational Safety and Health Review Commission has ruled that activities integrally related to these core "agricultural operations" are also included within that term. *Darragh Company*, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980) (delivery of feed to chicken farmer by integrator of poultry products is agricultural operation); *Marion Stevens dba Chapman & Stephens Company*, 5 BNA OSHC 1395 (No.13535, 1977) (removal of pipe to maintain irrigation system in citrus grove is agricultural operation). Post-harvest activities not on a farm, such as receiving, cleaning, sorting, sizing, weighing, inspecting, stacking, packaging and shipping produce, are not "agricultural operations." *J. C. Watson Company*, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008) (employer's onion packing shed was not an agricultural operation); *J.C. Watson Company v. Solis*, DC Cir. 08-1230 (April 17, 2009).

2. Agricultural Employee.

OSHA regulation §1975.4(b)(2) states that members of the immediate family of the farm employer **are not** regarded as employees.

3. Farming Operation.

This term is used in OSHA's Appropriations Act, and has been defined in CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, to mean any operation involved

in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on-sites such as farms, ranches, orchards, dairy farms or similar farming operations.

These are employers engaged in businesses that have a two-digit Standard Industrial Classification (SIC) of 01 and three-digit North American Industry Classification System (NAICS) of 111 (Agricultural Production–Crops); SIC 02 and NAICS 112 (Agricultural Production–Livestock and Animal Specialties); four-digit SIC 0711 and six-digit NAICS 115112 (Soil Preparation Services); SIC 0721 and NAICS 115112 (Crop Planting, Cultivating, and Protecting); SIC 0722 and NAICS 115113 (Crop Harvesting, Primarily by Machine); SIC 0761 and NAICS 115115 (Farm Labor Contractors and Crew Leaders); and SIC 0762 and NAICS 115116 (Farm Management Services). CSHOs should verify the accuracy of NAICS codes reported by employers.

4. Post-Harvesting Processing.

   This is a term that is used in CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998, in discussing enforcement guidance for small farming operations. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider,or sauces) or a higher degree of packaging versus field sorting in a shed for size.

C. Appropriations Act Exemptions for Farming Operations.

1. Exempt Farming Operations.

   OSHA is limited by provisions in its Appropriations Act that refer to which employers it can inspect. Some of the Appropriations Act exemptions and limitations apply to small farming operations; specifically, OSHA shall not inspect farming operations that have 10 or fewer employees **and** have had no temporary labor camp (TLC) activity within the prior 12 months.

2. Non-Exempt Farming Operations.

   A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months **is not** exempt from inspection.

3. State Plans States.

   States with OSHA-approved State Plans can enforce on small farms and provide consultation or training, provided that 100 percent state funds are used and the state has an accounting system in place to ensure that no federal or matching state funds are expended on these activities.

4. Enforcement Guidance for Small Farming Operations.

   OSHA's Appropriations Act exempts qualifying small farming operations from enforcement or administration of **all** rules, regulations, standards, or orders under the Occupational Safety and Health Act, including rules affecting consultation and technical assistance or education and training services.

Table 10-1, below, provides an at-a-glance reference to OSHA activities under the funding legislation.

Table 10-1: OSHA's Appropriation Act Exemptions for Farming Operations

OSHA Activity	Farming operations with 10 or fewer employees (EEs) and no TLC activity within 12 months.	Farming operations with more than 10 EEs or a farming operation with an active TLC within 12 months.
Programmed Safety Inspections	Not Permitted	Permitted
Programmed Health Inspections	Not Permitted	Permitted
Employee Complaint	Not Permitted	Permitted
Fatality and/or two or more Hospitalizations (Reporting Note)	Not Permitted	Permitted
Imminent Danger	Not Permitted	Permitted
11(c) (whistleblower investigation)	Not Permitted	Permitted
Consultation & Technical Assistance	Not Permitted	Permitted
Education & Training	Not Permitted	Permitted
Conduct Surveys & Studies	Not Permitted	Permitted

NOTE: See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, May 28, 1998, for more information.

D. Standards Applicable to Agriculture.

OSHA has very few standards that apply to employers engaged in agricultural operations. Activities that take place after harvesting are considered general industry operations and are covered by OSHA's general industry standards.

1. Agricultural Standards (Part 1928).

a. Roll-over Protective Structures (ROPS) for Tractors (§1928.51, 1928.52, and 1928.53).

b. Guarding of Moving Machinery Parts of Farm Field Equipment, Farmstead Equipment, and Cotton Gins (§1928.57).

c. Field Sanitation (§1928.110). See Section I.F of this chapter, *Wage & Hour/OSHA Shared Authority under Secretary's Order*, regarding Wage & Hour authority. OSHA has no authority to issue any citations under this standard.

2. General Industry Standards (Part 1910).

a. Temporary Labor Camps (§1910.142). See Chapter 12, Section II, *Temporary Labor Camps*.

b. Storage and Handling of Anhydrous Ammonia (§1910.111(a) and (b)).

c. Logging Operations (§1910.266).

d. Specifications for Accident Prevention Signs and Tags – Slow-Moving Vehicle Emblem (§1910.145(d)(10)).

e. Hazard Communication (§1910.1200).

f. Cadmium (§1910.1027).

g. Retention of Department of Transportation Markings, Placards and Labels (§1910.1201).

Except to the extent specified above, the standards contained in subparts B through T and subpart Z of Part 1910 of Title 29 do not apply to agricultural operations.

3. General Duty Clause.

As in any situation where no standard is applicable, Section 5(a)(1) of the OSH Act can be used; all the elements for a Section 5(a)(1) citation must be met. See Chapter 4, Section III, *General Duty Clause.*

E. Pesticides.

1. Coverage.

a. Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Environmental Protection Agency (EPA) has jurisdiction over employee protection relating to pesticides (which also includes herbicides, fungicides, and rodenticides). The EPA Worker Protection Standard (WPS) protects employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides. The WPS includes provisions for personal protective equipment, labeling, employee notification, safety training, safety posters, decontamination supplies, emergency assistance, and restricted field entry. See 40 CFR Part 170, Worker Protection Standard.

b. The regulation covers two types of employees:

- Pesticide Handlers. Those who mix, load, or apply agricultural pesticides; clean or repair pesticide application equipment; or assist with the application of pesticides in any way.
- Agricultural Workers. Those who perform tasks related to the cultivation and harvesting of plants on farms or in greenhouses, nurseries, or forests – such as carrying nursery stock, repotting

plants, or watering – related to the production of agricultural plants on an agricultural establishment.

c. For all pesticide use, including uses not covered by 40 CFR Part 170, it is a violation of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. Thus, OSHA has no authority to issue any citations related to pesticide exposures, pursuant to Section 4(b)(1) of the OSH Act. In the event a CSHO should encounter any cases of pesticide exposure or the lack of an appropriate pesticide label on containers, a referral shall be made to the local EPA office or to state agencies that administer pesticide laws.

d. EPA also has jurisdiction in non-agriculture situations where pesticides are being applied by pest control companies. This would include, but not be limited to, applications in and around factories, warehouses, office buildings, and personal residences. OSHA cannot cite the Hazard Communication standard in such situations.

2. OSHA's Hazard Communication Standard.

Although OSHA will not cite employers covered under EPA's WPS with regard to hazard communication requirements for pesticides, agricultural employers who are otherwise covered by OSHA are still responsible for having a hazard communication program for all hazardous chemicals that are not considered pesticides.

F. Wage & Hour/OSHA Shared Authority under Secretary's Order.

Since 1997, the Wage & Hour Division (WHD) has had shared authority with OSHA over two standards: the Field Sanitation standard (1928.110), and the Temporary Labor Camp standard (1910.142). See Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration (*Federal Register*, January 2, 1997 (62 FR 107)) and Secretary's Order 5-2002: Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, *Federal Register*, October 22, 2002 (67 FR 65007).

1. Field Sanitation Standard.

a. The WHD has sole federal enforcement authority for this standard, including the issuing of citations.

b. OSHA, therefore, shall not issue citations under this standard.

c. The provisions of the Field Sanitation standard are also applicable to reforestation activities involving "hand-labor operations" as defined by the standard. This position regarding reforestation activities was developed through extensive intra-agency discussions and was intended to provide, in the absence of a clear and unambiguous exemption of this activity from the provisions of the standard, the broadest possible coverage for these employees.

2. Temporary Labor Camp (TLC) Standard.

   Under the Secretary's Order, enforcement authority for the TLC standard is split between the WHD and OSHA. See Chapter 12, Section II, *Temporary Labor Camps*, for a detailed discussion on Temporary Labor Camps.

3. Compliance Interpretation Authority.

   WHD has sole interpretation authority for both the Field Sanitation and the Temporary Labor Camp standards, even over those temporary labor camp areas for which OSHA has enforcement authority.

4. Standard Revision and Variance Authority.

   OSHA retains all authority for revisions of the Field Sanitation and the Temporary Labor Camp standards, as well as the evaluation and granting of temporary and permanent variances.

5. State Plan States.

   a. Eight of the twenty-two jurisdictions (21 states and Puerto Rico) that have OSHA-approved State Plans covering private sector employment elected not to enforce the Field Sanitation standard in agriculture and the Temporary Labor Camp standard, except with respect to egg, poultry, red meat production, and post-harvesting processing of agricultural and horticultural commodities. Thus, WHD enforces these standards, except as noted above, in the following states: Alaska, Indiana, Iowa, Kentucky, Minnesota, South Carolina, Utah, and Wyoming.

   b. The 14 other jurisdictions with OSHA-approved State Plans covering private sector employment have retained enforcement authority for the Field Sanitation and Temporary Labor Camp standards in agriculture. They are Arizona, California, Hawaii, Maryland, Michigan, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, Tennessee, Vermont, Virginia, and Washington.

II. Construction [Reserved].

III. Maritime.

The maritime industry includes shipyard employment (shipbuilding, ship repair, shipbreaking, and related employments), marine cargo handling (longshoring and marine terminals), and other marine activities.

A. Maritime Industry Primary Resources 10-8
1. DIRECTIVES 10-8
2. STANDARDS 10-8
3. Guidance Products 10-8
4. OSHA AGREEMENTS WITH OTHER AGENCIES AND ORGANIZATIONS 10-11
5. ETOOLS, EXPERT ADVISORS, EMATRIX 10-11
6. PUBLIC MARITIME WEBPAGE 10-12
7. CSHO MARITIME WEBPAGE 10-13

B. SHIPYARD EMPLOYMENT (PART 1915) 10-13
1. Coverage 10-13
2. SHIPYARD AUTHORITY 10-14
3. Shipyard Inspections 10-15
4. Applicable Standards 10-20
5. Shipyard References 10- 20

C. Marine Cargo Handling Industry (Parts 1917 & 1918) 10-22
1. Coverage 10-22
2. Marine Cargo Handling Authority 10-22
3. Marine Cargo Handling Inspections 10-23
4. Applicable Standards 10-27
5. Marine Cargo Handling References 10-29

D. Other Marine Activities 10-30
1. Commercial Diving – 29 CFR Part 1910, Subpart T 10-30
2. Commercial Fishing – 29 CFR Part 1910 10-31
3. Marine Construction – 29 CFR Part 1926 10-31
4. Towboats/Tugboats – 29 CFR Part 1910 10-31
5. Training Marine Oil Spill Response Workers 10-31
6. Other Regulatory Agencies 10-32

E. Security Procedures 10-32
1. Transportation Worker Identification Card (TWIC) 10-32
2. Photography and Security at U.S. Navy Worksites 10-32

A. Maritime Industry Primary Resources.

1. Directives.
   - CPL 02-00-162, Shipyard Employment "Tool Bag" Directive, May 22, 2019.
   - CPL 02-01-055, Maritime Cargo Gear Standards and 29 CFR 1919 Certification, September 30, 2013.
   - CPL 02-00-154, Longshoring and Marine Terminals "Tool Shed" Directive, July 31, 2012.
   - CPL 02-00-151, 29 CFR Part 1910, Subpart T – Commercial Diving Operations, June 13, 2011.
   - CPL 02-01-061, 29 CFR Part 1915, Subpart B, Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment, May 22, 2019.
   - CPL 03-00-012, OSHA's National Emphasis Program (NEP) on Shipbreaking, November 4, 2010.
   - CPL 02-01-060, 29 CFR Part 1915, Subpart I, Enforcement Guidance for Personal Protective Equipment (PPE) in Shipyard Employment, May 22, 2019.
   - CPL 02-01-047, OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), February 22, 2010.
2. Standards.
   a. 29 CFR Part 1915 – Shipyard Employment. Including the Shipyard Industry Standards "Brown Book," OSHA Publication 2268-03R (2009).
   b. 29 CFR Part 1917 – Marine Terminals. Including the Longshoring Industry "Green Book," OSHA Publication 2232 (2001).
   c. 29 CFR Part 1918 – Longshoring. Including the Longshoring Industry "Green Book," OSHA Publication 2232 (2001).
   d. 29 CFR Part 1919 – Gear Certification. (See also 1915.115(a), 1917.50, 1918.11, and 1918.66(a)(1)).
3. Guidance Products.
   a. Shipyard Employment Industry.
      - Guidance Documents.
        - Safe Work Practices for Marine Hanging Staging. OSHA Guidance Document (April 2005); also available as a PDF.
        - Safe Work Practices for Shipbreaking. OSHA Publication 3375 (March 2010).
        - Abrasive Blasting Hazards in Shipyard Employment. OSHA Guidance Document (December 2006).
        - Ventilation in Shipyard Employment. OSHA Publication 3639-04 (2013).

- Safety and Health Injury Prevention Sheets (SHIPS).
  - Control of Hazardous Energy Lockout/Tags-Plus. (April 2014)
  - Shipboard Electrical. (December 2013).
  - Rigging. (April 2011).
  - Shipfitting. (August 2008).
- Hot Work – Welding, Cutting and Brazing. OSHA Safety and Health Injury Prevention Sheets.
- Fact Sheets.
  - Safe Lighting Practices in the Shipyard Industry. OSHA Publication FS 3677 (November 2013).
  - Shipbreaking. OSHA Fact Sheet (2001). English PDF. Spanish PDF.
  - Guidelines for Safely Entering and Cleaning Vessel Sewage Tanks. OSHA Publication FS 3587 (March 2013).
  - Safely Performing Hot Work on Hollow or Enclosed Structures in Shipyards. OSHA Publication FS 3586 (March 2013).
  - General Working Conditions in Shipyard Employment: Motor-Vehicle Safety Equipment, Operation and Maintenance.
  - General Working Conditions in Shipyard Employment: Sanitation.
  - General Working Conditions in Shipyard Employment: Lockout/Tags-plus Coordination.
  - Spud Barge Safety. OSHA Publication FS 3358 (January 2009).
  - Eye Protection against Radiant Energy during Welding and Cutting in Shipyard Employment. OSHA Publication FS 3499 (January 2012). English PDF. Spanish PDF.
  - Safety While Working Alone in Shipyards. OSHA Publication FS 3591 (March 2013).
- Quick Cards.
  - Fire Watch Safety during Hot Work in Shipyards. OSHA Publication 3494.
  - Hot Work Safety on Hollow or Enclosed Structures in Shipyards. OSHA Publication 3585 (March 2013).
  - Aerial Lift Fall Protection Over Water. OSHA Publication 3452 (September 2011). English PDF. Spanish PDF.

- Additional Guidance.
  - Deck Barge Safety. OSHA Publication 3358 (January 2009).
  - Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Shipyards. OSHA Publication 3341 (March 2008).
  - Shipyard Fire Protection Frequently Asked Questions (FAQs). OSHA (March 2006); also available as a PDF.
  - Hanging Staging (Marine). OSHA eTool.
  - Fire Protection in Shipyard Employment. OSHA Slide Presentation (March 2005).

b. Marine Cargo Handling Industry.

- Fact Sheets.
  - Working Safely While Repairing Intermodal Containers in Marine Terminals. OSHA Publication FS 3626 (April 2013).
  - Freeing Inoperable Semi-Automatic Twist Locks (SATLs) in Longshoring. OSHA Publication FS 3583 (December 2012).
  - Traffic Lanes and Personnel Safety Zones. OSHA Publication FS 3540 (May 2012).
  - Radio Communication Can Assist Container Gantry Crane Operators in Marine Terminals. OSHA Publication FS 3267 (June 2007); also available as a PDF.
  - Marine Terminal Fall Protection for Personnel Platforms. OSHA Fact Sheet (June 2006); also available as a PDF.
- Quick Cards.
  - First Aid in Marine Cargo Handling, OSHA Publication 3368 (December 2009). English and Spanish PDF.
  - Lifesaving Facilities in Marine Cargo Handling, OSHA Publication 3367 (December 2009). English and Spanish PDF.
  - Safe Plugging and Unplugging Reefer Units in Longshoring and Marine Terminals. OSHA Publication 3652 (June 2013).
  - Top/Side Handler Safety in Marine Terminals. OSHA Publication 3621 (April 2013).
  - Servicing Multi-Piece and Single-Piece Rim Wheels. OSHA Publication 3584 (March 2013).
  - Safe Operation of Semi-tractors in Marine Terminals. OSHA Publication 3653 (May 2013).

- Safely Operating and Working Around Cargo Handling Equipment in Marine Terminals. OSHA Publication 3640 (May 2013).
- Mechanics Working in "the Yard" on Powered Equipment during Marine Terminal Operations. OSHA Publication 3562 (July 2012).
- Working Safely on the Apron or Highline during Marine Terminal Operations. OSHA Publication 3539 (May 2012).
- Gangway Safety in Marine Cargo Handling, OSHA Publication 3369 (December 2009). English and Spanish PDF.

➢ Additional Guidance.

- Roll-On Roll-Off (RO-RO) Ship and Dock Safety. OSHA Publication 3396 (June 2010).
- Traffic Safety in Marine Terminals. OSHA Publication 3337 (July 2007).
- OSHA Guidance Update on Protecting Employees from Avian Flu (Avian Influenza) Viruses. OSHA Publication 3323 (October 2006); also available as a PDF.

4. OSHA Agreements with other Agencies and Organizations.
   a. Settlement Agreement concerning Powered Industrial Truck Operator Training Standard between the National Maritime Safety Association (NMSA) and the Occupational Safety and Health Administration, U.S. Department of Labor, July 14, 2000.
   b. Memorandum of Understanding *on Coordination and Information Sharing of Domestic Ship Recycling Operations between DOD/DOT/EPA/DOL-OSHA,* July 30, 2015.
   c. *Memoranda of Understanding between the U.S. Coast Guard and OSHA* located in CPL 02-01-047 – *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010, concerning:
      - The Health and Safety of Seamen on Inspected Vessels (see Appendix D of the Instruction); and
      - Occupational Safety and Health on the Outer Continental Shelf (OCS) (see Appendix E of the Instruction).
5. eTools, Expert Advisors, eMatrix.
   a. eTools are "stand-alone," interactive, web-based training tools that provide highly illustrated information and guidance on occupational safety and health topics. Some also use expert system modules, which enable users to answer questions and receive reliable advice on how OSHA standards apply to their worksite(s).

b. Shipyard Employment eTools were developed by OSHA in conjunction with the shipyard employment industry for ship repair, shipbuilding, shipbreaking, and barge-cleaning activities. The eTools provide comprehensive information, in an electronic format with photos and illustrations, about the applicability of safety and health standards. They are excellent overall training tools and good for safety briefs of specific standards.

6. Public Maritime Webpage.

OSHA's public maritime webpage (Maritime Internet) provides access to maritime directives, standards, guidance documents and eTools, as well as:

a. Shipyard employment fatality videos – presents 16 computer-generated animated scenarios based on actual shipyard fatalities. Each scenario demonstrates how to prevent accidents;

b. Longshoring and Marine Terminals: Fatal Facts – presents 42 written scenarios based on actual marine cargo handling fatalities;

c. Maritime Outreach Training Programs – includes OSHA's Maritime "Train-the-Trainer" (course #5400), and OSHA's 10-hour and 30-hour Maritime Industry courses;

d. MACOSH (Maritime Advisory Committee for OSH) – includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH *Federal Register* notices;

e. Federal Registers pertaining to the maritime industry;

f. SHIPS – Safety and Health Injury Prevention Sheets developed by OSHA in conjunction with the shipyard industry to provide specific guidance a "Do and Don't" list with accompanying photographs for various shipyard processes;

g. Maritime crane accreditation and certification program information, including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program;

h. Shipyard Employment Industry "Flyer." OSHA Products, Information and Guidance (November 2007); also available as a PDF;

i. Longshoring and Marine Terminal Industries "Flyer." OSHA Products, Information and Guidance (November 2007); also available as a PDF; and

j. Office of Maritime Enforcement (OME). One of five offices within the Directorate of Enforcement Programs (DEP). OME provides support for maritime employment through the development of standards interpretations, management, and administration of the 29 CFR Part 1919 maritime gear certification program (including the web-based *Maritime Crane* database for OSHA-71 and -72 forms) and coordination of the activities of the Agency's Maritime Steering Committee. CSHOs who need standards interpretations, have

questions or require access to the 1919 *Maritime Crane* database (requires training and a password) should contact OME at 202-693-2399.

7. CSHO Maritime Webpage.

   OSHA's maritime (Intranet) webpage provides CSHOs with the following information:

   a. Shipyard Listing – a list of all shipyards by OSHA Region and State (Excel format);
   b. Boatyard Listing – a list of all boatyards by OSHA Region and State (Excel format);
   c. Sea Bag – Provides an all-inclusive list of enforcement resources and tools for Compliance Officers to effectively use when conducting safety and health inspections within the Maritime Industry; and
   d. SAVEs (Standard Alleged Violation Elements) for the maritime industry standards. SAVEs and associated AVEs (Alleged Violation Elements) are available on the Intranet for all enforceable Part 1915, Part 1917 and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVEs.

B. Shipyard Employment (Part 1915).

1. Coverage.

   a. Shipyard employment includes the building, repairing, and breaking (scrapping, disposal, recycling) of vessels, or a section of a vessel, without regard to geographical location, and is covered by 29 CFR Part 1915 for Shipyard Employment (see 29 CFR 1910.11(b)). Examples of vessels include, but are not limited to: ships, barges, fishing boats, work boats, cruise liners, and floating oil drilling rigs (i.e., mobile offshore drilling units). The Area Office should consult with the Regional Solicitor's Office about citing violations involving shipyard employment not on U.S. navigable waters in the Third, Fifth, Ninth, and Eleventh Circuits. However, the Area Office need not do so for violations of Subpart B (confined spaces), Subpart F (General Working Conditions), Subpart I (PPE), and Subpart P (fire protection) since these subparts have provisions expressly applying these subparts regardless of geographical location.
   b. Shipyard employment involves work activities aboard floating vessels as well as vessel-related work activities on the land, docks, or piers, of a shipyard. Although 29 CFR Part 1915 covers many hazards in shipyard employment, it does not cover all such hazards. Therefore, some of the 29 CFR Part 1910 General Industry Standards are also applicable in shipyard employment. (See Appendix A of CPL 02-00-162, *Shipyard Employment "Tool Bag" Directive*, May 22, 2019).

      NOTE: Not all activities within a shipyard are considered shipyard employment covered by 29 CFR Part 1915. For example, erection of a new building, roadway construction, demolition activities (including

the dismantling of cranes), and the installation of water pipes are covered by Construction Standards, 29 CFR Part 1926.

2. Shipyard Authority.

   a. U.S. Coast Guard.

      - OSHA and the U.S. Coast Guard each have authority over shipyard employment activities. The U.S. Coast Guard regulates working conditions for seamen (crew members) on inspected vessels through 46 CFR 90.05-1. OSHA has authority to cite shipyard employment activities on inspected vessels if the work is performed by shipyard employees (non-crew members).

        NOTE: An inspected vessel is any ship, boat, or barge, that has or is required to have a Certificate of Inspection (COI) issued by the U.S. Coast Guard.

      - On uninspected vessels, OSHA has authority to cite shipyard employers for all working conditions. OSHA also can cite the owners or operators of uninspected vessels for violations involving shipbuilding, shipbreaking, and ship repair operations regardless of whether the work is performed by seamen (crew members) or by non-crew members unless the hazards are covered by U.S. Coast Guard regulations. (See Section XIV.B.1. in CPL 02-01-047 – *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

      - CHSOs should contact the vessel owner, master, or captain to obtain the vessel identification or official number (VIN or ON) and contact the nearest U.S. Coast Guard Sector (http://homeport.uscg.mil or USCG 2013 Phonebook) to determine whether the vessel is inspected or uninspected.

   b. U.S. Navy.

      Under the OSH Act, OSHA has authority over shipyard employment aboard U.S. Navy vessels and within a U.S. Navy shipyard when the work is performed by a contractor. U.S. Navy civilian personnel are covered under Presidential Executive Order 12196, implemented by 29 CFR Part 1960. There are no U.S. state or territory limitations of OSHA's coverage for Executive Branch federal civilian employees who are not performing uniquely military operations as defined in 29 CFR 1960.2(i). Therefore, OSHA's authority extends to all federal civil service mariners (CIVMARs) in the U.S. Navy's Military Sealift Command (MSC).

      However, OSHA does not have coverage over any Armed Forces personnel (uniformed military) such as: U.S. Navy (including MSC military department (MILDEPT)), U.S. Army, U.S. Air Force, U.S. Marine Corps, and U.S. Coast Guard, both active duty and reserve.

c. State Plans.

- Private Sector Employees.

  States that operate their own OSHA-approved State Plans can elect to exercise authority over private sector maritime employees. States that have authority to exercise safety and health standards over private sector, land-side shipyard employment activities are: California, Minnesota, Vermont, and Washington. (See the State Plan standards in 29 CFR Part 1952 of these states for specific areas of authority.) However, OSHA retains authority in these four States on U.S. navigable waters. In the remaining states, OSHA has authority over all shipyard employees whether working land-side or on U.S. navigable waters.

  NOTE: U.S. navigable waters include graving-docks, dry-docks, lifting-docks, and marine railways (i.e., federal jurisdiction).

- Public Sector Employees.

  State Plan states have authority over employees of state and local governments (e.g., port authorities, cities, counties), on both the land-side areas and aboard vessels. OSHA has no authority over "…any State or political subdivisions of a State." Section 3(5) of the OSH Act, 29 U.S.C. 625(5).

3. Shipyard Inspections.

a. Inspection Scheduling.

The shipyard employment industry is made up of several industrial activities. Due to the unique differences among these activities, and differing yard locations, sizes, and number of employers, several scheduling methods are necessary. Consequently, shipyard employment inspections can be scheduled under National Emphasis Programs (NEPs), Regional Emphasis Programs (REPs), Special Emphasis Programs (SEPs), Local Emphasis Programs (LEPs), the Severe Violator Enforcement Program (SVEP), or from lists developed in accordance with CPL 02-00-025, *Scheduling System for Programmed Inspections*, January 4, 1995. However, this Instruction will take precedence over CPL 02-00-025 when there is a divergence between the two instructions.

- National Emphasis Programs (NEPs).

  Guidance for conducting NEP inspections in the shipyard employment industry includes:

  - CPL 03-00-012, *OSHA's National Emphasis Program (NEP) on Shipbreaking*, November 4, 2010, describes policies and procedures to reduce or eliminate workplace hazards associated with shipbreaking operations;
  - CPL 03-00-009, *National Emphasis Program–Lead*, August 14, 2008; and

- CPL 03-00-007, *National Emphasis Program: Crystalline Silica*, January 24, 2008. (See also Safety and Health Topics: Silica, Crystalline.)

NOTE: All other scheduled shipyard employment inspections can be conducted under LEPs that support DOL's Strategic Plan and OSHA's Strategic Management Plan Goals.

- Local Emphasis Programs (LEPs).

LEPs are a type of Special Emphasis Program in which one or more area offices in a region participate. LEPs can be originated at the area or regional office level and should follow CPL 04-00-002, *Procedures for Approval of Local Emphasis Programs (LEPs)*, November 13, 2018.

LEPs are generally based on knowledge and experience of local industry hazards, injuries, and illnesses. LEPs can include targeting of employers with 10 or fewer employees, as long as they do not conflict with restrictions under congressional appropriations act riders described in OSHA Instruction CPL 02-00-051 or successor guidance.

The most recent list of OSHA Local Emphasis Programs (LEPs) in effect is available at the Directorate of Enforcement Program's (DEP's) Intranet webpage.

- Severe Violator Enforcement Program (SVEP).

This program is intended as a means to focus on employers who have demonstrated indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations. Cases identified by the SVEP are those in which at least one of the following criteria is met as defined in the *Severe Violator Enforcement Program (SVEP)* directive, CPL 02-00-149, June 18, 2010:

- Fatality/Catastrophe Criterion;
- Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards;
- Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management); or
- Egregious Criterion.

Enforcement actions for severe violator cases include mandatory follow-up inspections, increased company/corporate awareness of OSHA enforcement, corporate-wide agreements, enhanced settlement provisions, and federal court enforcement under Section 11(b) of the OSH Act.

If an unprogrammed inspection arises for an establishment that is to receive a follow-up inspection or additional targeted inspection as a result of the SVEP, the two inspections can be conducted either concurrently or separately. The SVEP does not affect in any way the conduct of unprogrammed inspections.

Some establishments can be selected for inspection under the SVEP and also under other OSHA initiatives such as National Emphasis Programs (NEPs), Regional Emphasis Programs (REPs), or Local Emphasis Programs (LEPs). These other programs run concurrently with the SVEP.

- Inspection Lists.

  All fixed maritime (shipyard) establishments shall be scheduled and inspected by either using an industry rank report or establishment lists as detailed in CPL 02-00-025.

  The Area Director shall compile a complete list of active establishments (worksites) considering all establishments within the coverage of the office and using the best available information (internet and local listings, local knowledge, shipyard and boatyard lists provided by OME, etc.). Inspection lists can be compiled in various ways. Two ways that have been used successfully in scheduling shipyard inspections are:

  - List by Port Area; or

    A list of shipyard sites by port areas can be prepared at the beginning of the fiscal year by the Area Office, using LEP inspection lists, local knowledge, and experience.

  - List by Employer.

    A list of all shipyard industry employers within the Area Office's jurisdiction can be prepared, using LEP inspection lists, local knowledge, and experience.

b. CSHO Training.

Supervisors or team leaders are responsible for ensuring that CSHOs are qualified to inspect/intervene in shipyard employment establishments. CSHOs should have completed the OTI Course #2090, Shipyard Employment, or have received equivalent training and/or experience prior to conducting shipyard inspections.

c. CSHO Preparation.

In addition to normal inspection preparation procedures, CSHOs must be properly equipped and attired. All necessary personal protective equipment (PPE) must be available for use and in proper operating condition. CSHOs must be trained in the uses and limitations of PPE before beginning the inspection. At the opening conference, the CSHO will request a copy of the employer's certification of hazard

assessment prepared in accordance with 29 CFR 1915.152(b) in order to be aware of the necessary PPE. The suggested minimum PPE for a CSHO is: a hard hat, safety shoes, gloves, eye protection, hearing protection, a personal flotation device (PFD), and a high-visibility/retro-reflective vest. Additional PPE can be required, such as a respirator, if conditions warrant. All testing and monitoring equipment must be calibrated (if necessary) and in good condition. It may be advisable for a CSHO to carry a multi-gas meter when conducting a vessel inspection to test for O_2, H_2S, CO, and/or LEL.

d. Safety and Health Rules at Shipyards.

Under 29 CFR 1903.7(c) CSHOs must comply with all site safety and health rules and practices at a shipyard or on a vessel, and to wear or use the safety clothing or protective equipment required by OSHA standards or by the employer for the protection of employees.

e. Inspection Data.

Inspection data is accessible through OSHA's webpage. This "Statistics & Data" page will allow the user to conduct searches by establishment, Standard Identification Classification (SIC) code, North American Industry Classification System (NAICS) code, OSHA inspection number, accidents, and frequently cited standards. The page also contains links to the Bureau of Labor Statistics (BLS) for injury and illness statistics. The NAICS codes that correspond to shipyard employment include, but are not limited to:

- 336611 Ship Building and Repairing: This U.S. industry comprises establishments primarily engaged in operating a shipyard. Shipyards are fixed facilities with drydocks and fabrication equipment capable of building a ship, defined as watercraft typically suitable or intended for other than personal or recreational use. Activities of shipyards include the construction of ships; their repair, conversion and alteration; the production of prefabricated ship and barge sections; and specialized services, such as ship scaling (Shipbreaking and dismantling at shipyards);
- 336612 Boat Building: This U.S. industry comprises establishments primarily engaged in building boats. Boats are defined as watercraft not built in shipyards and typically of the type suitable or intended for personal use. Included in this industry are establishments that manufacture heavy-duty inflatable rubber or inflatable plastic boats (RIBs);

  NOTE: Boats are defined by NAICS code 336612 as watercraft **not built in shipyards** and typically of the type suitable or intended for recreational or personal use (such as dinghy manufacturing, motorboat building, rowboat manufacturing, and sailboat/yacht building that is **not done in shipyards**). Boat building, repair, and breaking, including

recreational boat building and manufacturing facilities, that are **not** located on or adjacent to U.S. navigable waters of the United States are covered by 29 CFR Part 1910 General Industry Standards.

- 423930 Shipbreaking and Dismantling Merchant Wholesalers (except at floating drydocks and shipyards);
- 488390 Other Support Activities for Water Transportation: This industry comprises establishments primarily engaged in providing services to water transportation (includes ship dismantling, maintenance, and routine repairs for ships at floating drydocks);
- 713930 Marinas: This industry comprises establishments, commonly known as marinas, engaged in operating docking and/or storage facilities for pleasure craft owners, with or without one or more related activities, such as retailing fuel and marine supplies; and repairing, maintaining, or renting pleasure boats; and
- 811490 Other Personal and Household Goods Repair and Maintenance. This industry comprises establishments primarily engaged in repairing motorboats, canoes, sailboats, and other recreational boats (includes inboard and outboard repair and maintenance services).

NOTE: Operating marinas and facilities providing a range of other services, including boat cleaning and repair are classified in Industry 713930, Marinas;

NOTE: The repair of recreational boats is covered by the 29 CFR Part 1915 Shipyard Employment Standards if performed on or adjacent to U.S. navigable waters;

NOTE: A complete list of NAICS codes is available on the U.S. Census Bureau website.

f. Leased Employees and Employer Responsibilities.

Many shipyards use contract or temporary leased employees. The company on whose payroll the employee is listed, as well as the company that supervises and controls the employee's activities, can be regarded as the employer. However, only the company that supervises the employee's daily work activities is responsible for injury and illness recordkeeping for that employee. (See LOI, 04-30-1996.)

g. Multi-Employer Worksites.

More than one employer can be liable for a hazardous condition that violates an OSHA standard. The process that must be followed in determining whether more than one employer is liable for employee safety and health conditions can be found in OSHA Instruction CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999. See also the multi-employer worksite provisions in 29 CFR 1915.12(f) and

29 CFR 1915.501. The Regional Solicitor's Office is available to address issues concerning the application of the multi-employer worksite doctrine after approval from the respective Regional Administrator.

4. Applicable Standards.

   a. 29 CFR Part 1915 – Shipyard Employment Standards.

      Apply to all ship repairing, shipbuilding, shipbreaking, and related employments.

   b. 29 CFR Part 1910 – General Industry Standards.

      For a list of general industry standards that do or do not apply in shipyard employment, refer to Appendix A: Application of 29 CFR Part 1910 Standards to 29 CFR Part 1915 Shipyard Employment, in the Shipyard "Tool Bag" Directive.

   c. 29 CFR Part 1926 – Construction Standards.

      Apply when:

      - Construction activities occur on shipyards; or
      - Construction materials, equipment and supplies in support of a construction project are unloaded, moved, or handled into, in, on, or out of any vessel, from shore to vessel, from vessel to shore, or from vessel to vessel. (See STD 03-13-002, *29 CFR 1926.605(a)(1) as Applied to Maritime Construction*; July 15, 1982.)

        NOTE: Incidental maintenance or normal upkeep performed on floating equipment during actual construction operations is not covered by 29 CFR 1915.115(a), but major overhauls of floating equipment when equipment is taken out of service and is not being used for construction operations are covered by 29 CFR 1915.115(a). (See STD 03-13-002, 29 CFR 1926.605(a)(1) as Applied to Maritime Construction; July 15, 1982.)

   d. 29 CFR Part 1919 – Gear Certification.

      - Provides guidance for the approval of OSHA-accredited agencies and criteria for Part 1919 agencies to evaluate and issue a certificate (OSHA Form-71 and -72) for certain cranes in shipyards. The 29 CFR Part 1919 standards cannot be cited; rather, CSHOs shall use the appropriate 29 CFR Part 1915 standards to cite hazards. (See 1915.115(a) and CPL 02-01-055, Maritime Cargo Gear Standards and 29 CFR 1919 Certification, September 30, 2013.)

5. Shipyard References.

   There are a number of resources available to assist CSHOs in conducting shipyard employment inspections; however, there are three principal references.

a. Shipyard Employment "Tool Bag" Directive.

The Shipyard "Tool Bag" Directive is the primary source of information for all aspects of shipyard employment inspections. All maritime industry primary resources that have relevance in the shipyard employment industry can be accessed through the "Tool Bag" directive with e-Links. The "Tool Bag" directive "One Stop Shopping" concept is designed to provide comprehensive information about inspection scheduling, conduct of shipyard inspections, shipyard alliances, training sources, etc. Appendix A of the directive is very useful because it contains guidance about which of the General Industry Standards (29 CFR Part 1910) can be used in shipyard employment, and equally important, which general industry standards are applicable aboard a vessel. The Tool Bag directive also consolidates all OSHA interpretations related to shipyard employment into a question-and-answer appendix.

b. Public Maritime Webpage.

OSHA's public maritime webpage (Maritime Internet) provides access to shipyard employment directives, standards, guidance documents and eTools, as well as:

- Shipyard employment fatality videos – presents 16 computer-generated animated scenarios based on actual shipyard fatalities. Each scenario includes a review of the factors that contributed to the accident and how to avoid them;
- Maritime Outreach Training Programs – includes OSHA's Maritime "Train-the-trainer" (course #5400), and OSHA's 10-hour and 30-hour Maritime Industry courses;
- MACOSH (Maritime Advisory Committee for OSH) – includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH *Federal Register* notices;
- *Federal Register* notices pertaining to the maritime industry;
- SHIPS – Safety and Health Injury Prevention Sheets developed by OSHA in conjunction with the shipyard industry to provide specific guidance and "do and don't" advice with accompanying photographs for various shipyard processes;
- Maritime crane accreditation and certification program information including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program; and
- Shipyard Employment Industry Bulletin. OSHA Products, Information and Guidance (November 2007); also available as a PDF.

c. CSHO Maritime Webpage.

OSHA's maritime (Intranet) webpage provides CSHOs with the following relevant information:

- Shipyard Listing – a list of all shipyards by OSHA Region and State (Excel format);
- Boatyard Listing – a list of all boatyards by OSHA Region and State (Excel format);
- Sea Bag – Provides an all-inclusive list of enforcement resources and tools for Compliance Officers to effectively use when conducting safety and health inspections within the Maritime Industry; and
- SAVEs (Standard Alleged Violation Elements) for the maritime industry standards. SAVEs and associated AVDs (Alleged Violation Descriptions) are available on the Intranet for all enforceable Part 1915, Part 1917, and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVEs.

C. Marine Cargo Handling Industry (Parts 1917 & 1918).

1. Coverage.

The marine cargo handling industry includes:

a. Longshoring and related employment aboard a vessel. Longshoring is the loading, unloading, moving, or handling of cargo, ship's stores, gear, or any other materials into, in, on, or out of any vessel. Related employment is any employment performed incidental to or in conjunction with longshoring, including securing cargo, rigging, and employment as a porter, clerk, checker, or security officer (see 29 CFR 1918.2); and

b. Marine terminal (on shore) employment, as defined in 29 CFR 1917.1, includes the loading, unloading, movement or other handling of cargo, ship's stores, or gear within the terminal or into or out of any land carrier, holding or consolidation area, and any other activity within and associated with the overall operations and functions of the terminal, except as noted in the standards. It includes all cargo transfers using shore-based material handling devices. (See CPL 02-00-154, *Longshoring and Marine Terminals "Tool Shed" Directive*, July 31, 2012.)

2. Marine Cargo Handling Authority.

a. U.S. Coast Guard.

OSHA has authority to cite employers engaged in longshoring and marine terminal operations; U.S. Coast Guard regulations do not preempt OSHA from citing such employers. On inspected vessels, OSHA has no authority to cite the owner or operator of the vessel with respect to any working conditions of seamen (crew members) regardless of the work they are performing. On uninspected vessels

OSHA can cite the owner or operator of the vessel for any violation of working conditions affecting seamen or non-seamen, unless the hazards are covered by U.S. Coast Guard regulations. (See CPL 02-01-047, *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

b. U.S. Navy.

OSHA has authority under the OSH Act over longshoring operations aboard U.S. Navy vessels and within a marine terminal at a U.S. Navy facility when the work is performed by a contractor. U.S. Navy civilian personnel are covered under Presidential Executive Order 12196, implemented by 29 CFR Part 1960. There are no geographic limitations of OSHA's coverage for Executive Branch federal civilian employees who are not performing uniquely military operations as defined in 29 CFR 1960.2(i). Therefore, OSHA's authority extends to all federal civil service mariners (CIVMARs) in the U.S. Navy's Military Sealift Command (MSC).

However, OSHA does not have coverage over any Armed Forces personnel (uniformed military) such as: U.S. Navy (including MSC military department (MILDEPT)), U.S. Army, U.S. Air Force, U.S. Marine Corps, and U.S. Coast Guard, both active duty and reserve.

c. State Plans.

- Private Sector Employees.

  States that operate their own OSHA-approved State Plans can elect to exercise authority over private sector maritime employees. States that have authority to exercise safety and health standards over private sector, land-side marine terminal employment activities are: California, Minnesota, Vermont, and Washington. (See the State Plan standards in 29 CFR Part 1952, of these states for specific areas of authority.) However, OSHA retains authority in these four states on U.S. navigable waters (i.e., longshoring employment). In the remaining states, OSHA has authority over all marine cargo handling employees whether working land-side or on U.S. navigable waters.

- Public Sector Employees.

  State Plan states have authority over employees of state and local governments (e.g., port authorities, cities, counties), on both the land-side areas and aboard vessels. OSHA has no authority over "…any State or political subdivisions of a State." Section 3(5) of the OSH Act, 29 U.S.C. 625(5).

3. Marine Cargo Handling Inspections.

a. Inspection Scheduling.

The marine cargo handling industry is made up of longshoring activities (i.e., cargo handing aboard vessels) and activities within

marine terminals (i.e., cargo handling ashore). Due to the unique differences among these activities and differing port locations, sizes, and number of employers (i.e., stevedores), several scheduling methods are necessary. Consequently, marine cargo handling industry inspections can be scheduled as National Emphasis Programs (NEPs), Special Emphasis Programs (SEPs), Regional Emphasis Programs (REPs), Local Emphasis Programs (LEPs), the Severe Violator Enforcement Program (SVEP), or from lists developed in accordance with CPL 02-00-025, *Scheduling System for Programmed Inspections*, January 4, 1995. However, this Instruction will take precedence over CPL 02-00-025 when there is a divergence between the two instructions.

- National Emphasis Programs (NEPs).

  Guidance for conducting NEP inspections in the marine cargo handling industry includes:

  - CPL 03-00-009, *National Emphasis Program–Lead*, August 14, 2008; and

  NOTE: All other scheduled marine cargo handling inspections can be conducted under LEPs that support DOL's Strategic Plan and OSHA's Strategic Management Plan Goals.

- Local Emphasis Programs (LEPs).

  LEPs are a type of Special Emphasis Program in which one or more area offices in a region participate. LEPs can be originated at the area or regional office level and should follow CPL 04-00-002, *Procedures for Approval of Local Emphasis Programs (LEPs)*, November 13, 2018.

  LEPs are generally based on knowledge and experience of local industry hazards, injuries, and illnesses. LEPs can include targeting of employers with 10 or fewer employees, as long as they do not conflict with restrictions under congressional appropriations act riders described in OSHA Instruction CPL 02-00-051 or successor guidance.

  The most recent list of OSHA Local Emphasis Programs (LEPs) in effect is available at the Directorate of Enforcement Program's Intranet page.

- Severe Violator Enforcement Program (SVEP).

  This program is intended as a means to focus on employers who have demonstrated indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations. Cases identified by the SVEP are those in which at least one of the following criteria is met as defined in the *Severe Violator Enforcement Program (SVEP)* directive, CPL 02-00-149, June 18, 2010:

- Fatality/Catastrophe Criterion;
- Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards;
- Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management); or
- Egregious Criterion.

Enforcement actions for severe violator cases include mandatory follow-up inspections, increased company/corporate awareness of OSHA enforcement, corporate-wide agreements, enhanced settlement provisions, and federal court enforcement under Section 11(b) of the OSH Act.

If an unprogrammed inspection arises for an establishment that is to receive a follow-up inspection or additional targeted inspection as a result of the SVEP, then the two inspections can be conducted either concurrently or separately. The SVEP does not affect in any way the conduct of unprogrammed inspections.

Some establishments can be selected for inspection under the SVEP and also under other OSHA initiatives such as National Emphasis Programs (NEPs), Regional Emphasis Programs (REPs), or Local Emphasis Programs (LEPs). These other programs can be run concurrently with the SVEP.

- Inspection Lists.

Water transportation services inspection lists can be developed either by port area or by employer.

- List by Port Area.

  A list of port areas can be prepared at the beginning of the fiscal year by the Area Director, using OSHA inspection history, local knowledge and experience, company schedules, and information from other sources. For example, the Port of Savannah might be subdivided into three port areas; the Port of Houston might be subdivided into eight or more port areas. Other large ports can be subdivided in the same manner.

- List by Employer.

  A list of all water transportation services employers within the Area Office's jurisdiction can be prepared, based on OSHA inspection history, local knowledge and experience, company schedules, and other sources.

NOTE: Due to differing locations, loading/unloading equipment, products, site conditions, or any other reasons determined by the CSHO, he/she can inspect multiple

worksites (i.e., vessels) being worked by the same employer. Each vessel shall be considered a separate inspection for recording purposes.

b. CSHO Training.

Supervisors or team leaders are responsible for ensuring that CSHOs are qualified to inspect/intervene in marine cargo handling establishments. CSHOs should have completed the OTI Course #2060, Longshoring and Marine Terminal Processes and Standards, or have received equivalent training and/or experience prior to conducting marine cargo handling industry inspections.

c. CSHO Preparation.

In addition to normal inspection preparation procedures, CSHOs must be properly equipped and attired. All necessary personal protective equipment (PPE) must be available for use and in proper operating condition. CSHOs must be trained in the uses and limitations of PPE before beginning the inspection. The suggested minimum PPE for a CSHO is: a hard hat, safety shoes, gloves, eye protection, hearing protection, a personal flotation device (PFD), and a high-visibility/retro-reflective vest. Additional PPE can be required, such as a respirator, if conditions warrant. All testing and monitoring equipment must be calibrated (if necessary) and in good condition. It may be advisable for a CSHO to carry a multi-gas meter when conducting a vessel inspection to test for O_2, H_2S, CO, and/or LEL.

d. Safety and Health Rules at a Marine Cargo Handling Facility.

29 CFR 1903.7(c) requires CSHOs to comply with all site safety and health rules and practices at marine cargo handling facility or vessel, and to wear or use the safety clothing or protective equipment required by OSHA standards or by the employer for the protection of employees.

e. Inspection Procedures.

- A CSHO shall gain access to a marine terminal by following local security measures (see also Section III.E of this chapter, *Security Procedures*, for more information). When a longshoring operation inspection involves only a stevedoring company (i.e., a company that hires longshoring employees) and does not involve the marine terminal operator, the CSHO shall go directly to the vessel to initiate the inspection. The employer's representative (such as a superintendent, crew leader, supervisor, or hatch boss) and a union representative (if applicable) will be contacted, and the opening conference held. The inspection will usually be limited to the vessel being worked by the stevedore. When the stevedore and the terminal operator are the same, an inspection of both the terminal and vessel will typically be conducted when Federal OSHA has authority.

- A CSHO shall always notify the master of the vessel (i.e., captain) or have the stevedore's representative notify the master prior to performing the walk-around portion of the inspection on a vessel.

f. Inspection Data.

Inspection data is accessible through OSHA's webpage. This "Statistics & Data" page will allow the user to conduct searches by establishment, Standard Identification Classification (SIC) code, North American Industry Classification System (NAICS) code, OSHA inspection number, accidents, and frequently cited standards. The page also contains links to the Bureau of Labor Statistics (BLS) for injury and illness statistics. The NAICS codes that correspond to the marine cargo handling industry include, but are not limited to:

- 488310 Port and Harbor Operations: This industry comprises establishments primarily engaged in operating ports, harbors (including docking and pier facilities), or canals;
- 488320 Marine Cargo Handling: This industry comprises establishments primarily engaged in providing stevedoring and other marine cargo handling services (except warehousing);
- 483211 Inland Water Freight Transportation: This U.S. industry comprises establishments primarily engaged in providing inland water transportation of cargo on lakes, rivers, or intracoastal waterways (except on the Great Lakes System);
- 483111 Deep Sea Freight Transportation: This U.S. industry comprises establishments primarily engaged in providing deep sea transportation of cargo to or from foreign ports; and
- 483113 Coastal and Great Lakes Freight Transportation: Establishments primarily engaged in providing coastal and/or Great Lakes barge transportation services are included in this industry.

NOTE: A complete list of NAICS codes is available on the U.S. Census Bureau website.

g. Multi-employer Worksites.

More than one employer can be liable for a hazardous condition that violates an OSHA standard. The process which must be followed in determining whether more than one employer is liable for employee safety and health conditions can be found in OSHA Instruction CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999. The Regional Solicitor's Office is available to address issues concerning the application of the multi-employer worksite doctrine after approval from the respective Regional Administrator.

4. Applicable Standards.

a. There are separate standards for the two components of marine cargo handling.

- Marine Terminal Standards.

Material handling activities that occur on piers, docks, wharves, and other shore-side locations are covered by 29 CFR Part 1917, Marine Terminals Standards. (See also the Longshoring Industry "Green Book," OSHA Publication 2232 (2001)).

- Longshoring Standards.

  Material handling activities occurring on a vessel are covered by 29 CFR Part 1918, Longshoring Standards. (See also the Longshoring Industry "Green Book," OSHA Publication 2232 (2001)).

b. General Criteria for Standard Application.

There are often uncertainties about which part applies. The following are some basic "rule-of-thumb" criteria for determining standard applicability.

- Lifting Devices.
  - Use 29 CFR Part 1917 for cranes, derricks, hoists, spouts, etc., located on the marine terminal.
  - Use 29 CFR Part 1918 for cranes, derricks, hoists, etc., located on the vessel.

  NOTE: See CPL 02-01-055, *Maritime Cargo Gear Standards and 29 CFR Part 1919 Certification*, September 30, 2013.

  NOTE: See the third bullet under III.C.4.c, below, if cranes, derricks, or hoists are involved in construction activities.
- Work Location.
  - 29 CFR Part 1917 applies if the work occurs within a marine terminal (i.e., on the land-side), including all piers, docks and wharves.
  - 29 CFR Part 1918 applies if the work occurs on a vessel (i.e., on the water), including the gangway.

  NOTE: If cranes, derricks, or hoists are involved in construction activities, see in this chapter, Section III.C.4.c. under the third bullet below.

c. Other Applicable Standards.

- Gear Certification – 29 CFR Part 1919.

  Provides guidance for the approval of OSHA-accredited agencies and criteria for Part 1919 agencies to evaluate and issue a certificate (OSHA Form-71 and -72) for cargo handling gear onboard vessels and at marine terminals. The 29 CFR Part 1919 standards cannot be cited by CSHOs. They shall use the appropriate 29 CFR Part 1917 or 1918 standards to cite hazards. (See 1917.50, 1918.11, and 1918.66.) (Also see, CPL 02-01-055, Maritime Cargo Gear Standards and 29 CFR 1919 Certification, September 30, 2013.)

- General Industry Standards – 29 CFR Part 1910.

  The only 29 CFR Part 1910 General Industry Standards that are applicable to marine terminals and longshoring operations are identified in the *Scope and Applicability* sections of each part. (See 1917.1(a)(2) and 1918.1(b)).

- Construction Standards – 29 CFR Part 1926.

  Apply when:

  - Construction activities occur on marine terminals; or
  - Construction materials, equipment and supplies in support of a construction project are unloaded, moved, or handled into, in, on, or out of any vessel, from shore to vessel, from vessel to shore, or from vessel to vessel. (See STD 03-13-002, *29 CFR 1926.605(a)(1) as Applied to Maritime Construction*; July 15, 1982.)

- Shipyard Employment Standards – 29 CFR Part 1915.

  When vessels located at marine terminals are repaired, 29 CFR Part 1915 Shipyard Employment Standards apply.

5. Marine Cargo Handling References.

   There are a number of resources available to assist CSHOs in conducting marine cargo handling industry inspections; however, there are three principal references.

   a. Longshoring and Marine Terminal "Tool Shed" Directive.

      The Longshoring and Marine Terminal "Tool Shed" Directive is the primary source of information for all aspects of marine cargo handling industry inspections. All maritime industry primary resources that have relevance in the marine cargo handling industry can be accessed through the Tool Shed directive with e-Links. The Tool Shed Directive's one stop shopping concept is designed to provide comprehensive information about inspection scheduling, conduct of marine cargo handling inspections, alliances, training sources, etc. Appendices are provided which cross-reference similar 29 CFR Part 1917 and Part 1918 standards and include a question-and-answer section about the longshoring and marine terminal standards.

   b. Public Maritime Webpage.

      OSHA's public maritime webpage (Maritime Internet) provides access to marine cargo handling directives, standards, guidance documents and eTools, as well as:

      - *Federal Register* notices pertaining to the maritime industry;
      - Maritime crane accreditation and certification program information including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program;

- Maritime Outreach Training Programs – includes OSHA's Maritime "Train-the-trainer" (course #5400), and OSHA's 10-hour and 30-hour Maritime Industry courses;
- Longshoring and Marine Terminals: Fatal Facts – presents 42 written scenarios based on actual marine cargo handling fatalities;
- MACOSH (Maritime Advisory Committee for OSH) –includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH *Federal Register* notices; and
- Longshoring and Marine Terminal Industries bulletin. OSHA Products, Information and Guidance (November 2007); also available as a PDF.

c. CSHO Maritime Webpage.

OSHA's maritime (Intranet) webpage provides CSHOs with the following relevant information:

- Marine Cargo Handling Listing – a list of all marine terminals by OSHA Region and state (Excel format);
- Marina Listing – a list of all marinas by OSHA Region and State (Excel format);
- Sea Bag – Provides an all-inclusive list of enforcement resources and tools for Compliance Officers to effectively use when conducting safety and health inspections within the Maritime Industry; and
- SAVEs (Standard Alleged Violation Elements) for the maritime industry standards. SAVEs and associated AVDs (Alleged Violation Descriptions) are available on the Intranet for all enforceable Part 1915, Part 1917, and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVEs.

D. Other Marine Activities.

A number of other activities that occur on, above, or in water, but no separate 29 CFR parts specifically address them. Rather, the activities are covered by either general industry or construction standards.

1. Commercial Diving – 29 CFR Part 1910, Subpart T. (See CPL 02-00-151, *29 CFR Part 1910, Subpart T – Commercial Diving Operations*, June 13, 2011.)

   Diving activities related to shipyard employment are covered by 29 CFR 1915.6; diving activities related to construction activities are covered by 29 CFR Part 1926, Subpart Y. Both standards reference 29 CFR Part 1910, Subpart T.

   NOTE: Diving is classified as NAICS code 561990.

2. Commercial Fishing – 29 CFR Part 1910. (See CPL 02-01-047, *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

   Shipyard employment activities for fishing vessels are covered by 29 CFR Part 1915; marine cargo handling activities for fishing vessels are covered by 29 CFR Parts 1917 and 1918.

   - Commercial fishing is classified as NAICS codes:
     - 114111 Finfish Fishing;
     - 114112 Shellfish Fishing; and
     - 114119 Other Marine Fishing (Except finfish and shellfish).

3. Marine Construction – 29 CFR Part 1926. (See in particular 29 CFR 1926.605 and 29 CFR 1926.106.)

   Construction activities (e.g., bridge and pier construction, bulkhead construction, installation of sewage outfalls) occurring from a vessel are considered marine construction and are covered under the 29 CFR Part 1926 Construction Standards.

4. Towboats/Tugboats – 29 CFR Part 1910. (See CPL 02-01-047, *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

   Unless a ship repair or cargo transfer activity is involved with work in the above industries, the Shipyard Standards (29 CFR Part 1915), Marine Terminals standards (29 CFR Part 1917), and Longshoring standards (29 CFR Part 1918) do not apply. Normal towboat and tugboat operations are covered by the 29 CFR Part 1910 General Industry standards.

   On August 9, 2004, Congress gave the U.S. Coast Guard authority to regulate all towing vessels as *inspected* vessels under 46 U.S.C. 3301; as a general rule, such vessels were previously classified as *uninspected* vessels. The U.S. Coast Guard has not yet exercised this authority; thus, towing vessels remain uninspected vessels. Therefore, OSHA will continue to provide safety and health coverage of employees on uninspected towing vessels until the U.S. Coast Guard issues inspected vessel regulations for these vessels.

   NOTE: The U.S. Coast Guard is required by 46 CFR 4.07-1 to conduct an investigation of all marine casualties or accidents, as defined in 46 CFR 4.03-1, to ascertain the cause of the casualty or accident. The mere fact that the U.S. Coast Guard is authorized to investigate a marine casualty or incident, or investigates one, does not mean that OSHA is preempted from exercising its authority pertaining to occupational safety and health.

5. Training Marine Oil Spill Response Workers Under OSHA's Hazardous Waste Operations and Emergency Response Standard, OSHA Publication 3172 (2010).

   Training needed for marine oil spill response employees is covered under 29 CFR 1910.120 – Hazardous waste operations and emergency response (HAZWOPER) and explained in OSHA Publication 3172.

OSHA's webpage, *Keeping Workers Safe During Oil Spill Response and Cleanup Operations*, compiles safety and health information for workers conducting such operations including: multi-lingual fact sheets and guidance documents, oil spill training materials, national response system information, and many other resources relating to oil spills and cleanup operations.

6. Other Regulatory Agencies.

   During a maritime inspection, CSHOs may encounter other regulatory agencies such as, but not limited to, the Department of Homeland Security (DHS), including the U.S. Coast Guard (USCG) and the Transportation Security Administration (TSA); U.S. Army Corps of Engineers (USACE); Department of Transportation (DOT); Environmental Protection Agency (EPA); Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE); Nuclear Regulatory Commission (NRC); and Federal Grain Inspection Service (FGIS). CSHOs should contact the Office of Maritime Enforcement for any questions about coordination and/or jurisdiction with other agencies.

E. Security Procedures.

1. Transportation Worker Identification Card (TWIC).

   The TWIC program is a Transportation Security Administration (TSA) and U.S. Coast Guard initiative. The TWIC program provides a tamper-resistant biometric credential to maritime workers requiring unescorted access to secure areas of port facilities, outer continental shelf facilities, and vessels regulated under the *Maritime Transportation Security Act* (MTSA); and all U.S. Coast Guard credentialed merchant mariners. An estimated 750,000 individuals require TWICs.

   NOTE: A CSHO's credentials and government identification card are equivalent to a TWIC for the purposes of access to and escorting non-TWIC holders on maritime facilities (see Redefining Secure Areas and Acceptable Access Control, January 7, 2008, and TWIC & Law Enforcement Officials & Other Regulatory Agencies, November 21, 2007). Should problems arise, the CSHO should contact the local U.S. Coast Guard office (http://homeport.uscg.mil or USCG 2013 Phonebook) to obtain resolution and access. Difficulties in obtaining access to maritime facilities using CSHO credentials and a government identification card should be reported by the Regional Administrator to the Directorate of Enforcement Programs, Office of Maritime Enforcement at 202-693-2399.

2. Photography and Security at U.S. Navy Worksites.

   Area Directors should establish a photography and security policy agreement with an installation prior to conducting inspections.

   The U.S. Navy has advised its shore and afloat (ship) activities that permission is granted for Federal OSHA compliance officials to conduct safety and health inspections and investigations of U.S. Navy civilian and contractor workplaces. CSHOs will be required to present appropriate

identifying credentials and a government identification card; also, for entry into nuclear, explosive, and other security-sensitive areas, a security clearance may be required. CSHOs shall be required to possess appropriate security clearances for entry into areas where the workplace is situated.

The current U.S. Navy policy prohibits OSHA compliance officials from taking photographs. CSHOs can request that photographs of safety and health conditions to be taken by U.S. Navy personnel. Any photographs taken by the U.S. Navy will initially be classified CONFIDENTIAL, and shall not be delivered to OSHA compliance officials until all film, negatives, and photographs have been fully screened and censored, as appropriate, in the interest of national security. Also, any design or system performance data (e.g., recordings of noise sound level profiles and light level readings) shall be screened by the U.S. Navy prior to release to OSHA. This process is normally completed within a period of 15 working days from the receipt of material by the Naval Sea Systems Command (NAVSEASYSCOM). If photos and/or data are not received by the Area Office within 30 working days of submission, then the Area Office should contact the Office of Maritime Enforcement through their Regional Administrator.

Representatives of the U.S. Navy will normally accompany CSHOs at all times during the physical inspection of U.S. Navy civilian or contractor workplaces. A representative of the contractor(s) and a representative of the employee(s) also can accompany the CSHO during the inspection. If there is no authorized employee representative, CSHOs can consult with a reasonable number of employees (contractors or U.S. Navy civilians) concerning matters of safety and health in the pertinent workplace. CSHOs can privately question the contractor(s), contractor employee(s), U.S. Navy civilian employee(s), or their authorized representative(s). (See chapter 11 in OPNAVINST 5100.23G – *Navy Safety and Occupational Health (SOH) Program Manual*, July 21, 2011.)

Chapter 11

IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE

I. Imminent Danger Situations.

A. General.

1. Definition of Imminent Danger.

   Section 13(a) of the OSH Act defines imminent danger as "…any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

2. Conditions of Imminent Danger.

   The following conditions must be present for a hazard to be considered an imminent danger:

   a. Death or serious harm must be threatened; AND

   b. It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

   NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life or be immediately dangerous to life and health (IDLH) or cause substantial reduction in physical or mental efficiency or health, though the resulting harm may not manifest itself immediately.

B. Pre-Inspection Procedures.

1. Imminent Danger Report Received by the Field.

   a. After the Area Director or designee receives a report of imminent danger, he or she will evaluate the inspection requirements and assign a CSHO to conduct the inspection.

   b. Every effort will be made to conduct the imminent danger inspection on the same day that the report is received. In any case, the inspection will be conducted no later than the day after the report is received.

   c. When an immediate inspection cannot be made, the Area Director or designee will contact the employer and obtain as many pertinent details as possible about the situation, and attempt to have any employee(s) affected by the imminent danger voluntarily removed.

      - A record of what steps, if any, that the employer intends to take to eliminate the danger will be included in the case file.

- This notification is considered an advance notice of inspection to be handled in accordance with the advance notice procedures described below.

2. Advance Notice.
   a. Section 1903.6 authorizes advance notice of an inspection of potential imminent danger situations in order to encourage employers to eliminate dangerous conditions as quickly as possible.
   b. Where an immediate inspection cannot be made after the Area Office is alerted to an imminent danger condition and advance notice will speed the elimination of the hazard, the Team Leader or CSHO, at the direction of the Area Director, will give notice of an impending inspection to the employer.
   c. Where advance notice of an inspection is given to an employer, it shall also be given to the authorized employee representative, if present. If the inspection is in response to a formal Section 8(f)(1) complaint, the complainant will be informed of the inspection unless this will cause a delay in speeding the elimination of the hazard.

C. Imminent Danger Inspection Procedures.

All alleged imminent danger situations brought to the attention of or discovered by CSHOs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

1. Scope of Inspection.

   CSHOs can seek to expand the scope of an imminent danger inspection based on any additional hazards discovered or brought to their attention during the inspection. See Chapter 15, for more information.

2. Procedures for Inspection.
   a. Every imminent danger inspection will be conducted as expeditiously as possible.
   b. CSHOs will offer the employer and employee representatives the opportunity to participate in the worksite inspection, **unless** the immediacy of the hazard makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.
   c. As soon as reasonably practicable after discovery of existing conditions or practices constituting an imminent danger, the employer shall be informed of such hazards. The employer shall be asked to notify affected employees and to remove them from exposure to the imminent danger hazard. The employer should be encouraged to voluntarily take appropriate abatement measures to promptly eliminate the danger.

D. Elimination of the Imminent Danger.

1. Voluntary Elimination of the Imminent Danger.

a. How to Voluntarily Eliminate a Hazard.

- Voluntary elimination of the hazard has been accomplished when the employer:
  - Immediately removes affected employees from the dangerous area;
  - Immediately removes or abates the hazardous condition; and
  - Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.
- Satisfactory assurance can be evidenced by:
  - After the affected employees are removed, immediate corrective action is initiated to bring the dangerous condition, practice, means, or method of operation, or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or
  - A good faith effort by the employer that shows permanent corrective action will be taken as soon as possible, **and** that affected employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or
  - A good faith effort by the employer that shows permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

NOTE: Through on-site observations, CSHOs shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.

b. Where a Hazard is Voluntarily Eliminated.

If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

- No imminent danger legal proceeding shall be instituted;
- The *Notice of an Alleged Imminent Danger* does not need to be completed;
- An appropriate citation(s) and notice(s) of penalty will be proposed for issuance with an appropriate notation on the *Violation Worksheet* to document corrective actions; and
- CSHOs will inform the affected employees or their authorized representative(s) that, although an imminent danger had

existed, the danger has been eliminated. They will also be informed of any steps taken by the employer to eliminate the hazardous condition.

2. Refusal to Eliminate an Imminent Danger.
   a. If the employer does not or cannot voluntarily eliminate the hazard or remove affected employees from the exposure and the danger is immediate, then CSHOs will immediately consult with the Area Director or designee and obtain permission to post a *Notice of an Alleged Imminent Danger*.
   b. Area Directors or designees will then contact the Regional Administrator and determine whether to consult with the RSOL to obtain a Temporary Restraining Order (TRO).
   c. The employer will be advised that Section 13 of the OSH Act gives United States district courts the authority to restrain any condition or practice that poses an imminent danger to employees.

      NOTE: The Agency has no authority to order the closing of a worksite or to order affected employees to leave the area of the imminent danger or the workplace.
   d. CSHOs will notify affected employees and the employee representative that a *Notice of an Alleged Imminent Danger* has been posted and will advise them of the Section 11(c) discrimination protections under the OSH Act. Employees will be advised that they have the right to refuse to perform work in the area where the imminent danger exists.
   e. The Area Director or designee and the Regional Administrator, in consultation with the RSOL, will assess the situation and, if warranted, make arrangements for the expedited initiation of court action, or instruct the CSHO to remove the *Notice of an Alleged Imminent Danger*.
3. When Harm Will Occur Before Abatement is Required.
   a. If CSHOs have clear evidence that harm will occur before abatement is required (i.e., before a final order of the Commission in a contested case or before a TRO can be obtained), then they will confer with the Area Director or designee to determine a course of action.

      NOTE: In some cases, the evidence may not support the finding of an imminent danger at the time of the physical inspection, but rather after further evaluation of the case file or presence of additional evidence.
   b. As appropriate, an imminent danger notice can be posted at the time citations are delivered or even after the notice of contest is filed.

II. Fatality and Catastrophe Investigations.

A. Definitions.

1. Fatality.

Fatality is an employee death resulting from a work-related incident or exposure; in general, from an injury or an illness caused by or related to a workplace hazard.

2. Catastrophe.

Catastrophe is the hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an injury or an illness caused by a workplace hazard.

NOTE: OSHA Area Offices will determine the inspection priority of a catastrophe using the Memorandum, *Revised Interim Enforcement Procedures for Reporting Requirements under 29 C.F.R. 1904.39*, March 04, 2016, or unless superseded by future Agency-approved correspondence.

3. Hospitalization.

In-patient hospitalization is the formal admission to the inpatient service of a hospital or clinic for care or treatment. It excludes admission for diagnostic testing or observation only.

4. Incident Requiring a Coordinated Federal Response.

An incident involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or one that presents potential employee injury and generates widespread media interest.

NOTE: 29 CFR Part 1904 requires reporting work-related fatalities, hospitalizations, amputations or losses of an eye and has a list of employers partially exempt from OSHA record-keeping requirements, which went into effect on January 1, 2015, for workplaces under Federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

B. Initial Report, Recording and Tracking for Fatality/Castrophe Investigations.

1. The *Fatality/Catastrophe Report in* OIS *(FAT/CAT)* is an unprogrammed activity (UPA) intake form that must be completed for all fatalities or catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. The purpose of the *FAT/CAT* is to provide OSHA with enough information to determine whether or not to investigate the event. It is also used as a research tool by OSHA and other agencies. Processing of the *FAT/CAT* shall be as follows:

a. The Area Office will complete and enter into OIS a *FAT/CAT* for all fatalities and catastrophes as soon as possible after learning of the event. As much information as is known at the time of the initial report should be provided; however, all items on the *FAT/CAT* need not be completed at the time of this initial

report. Wherever possible, the age of the victim(s) should be provided, because this information is used for research by OSHA and other agencies.

b. If additional information relating to the event becomes available that affects the decision to investigate, the *FAT/CAT* should be updated. If the additional information does not affect the decision to investigate, or the investigation has been initiated or completed, the *FAT/CAT* need not be updated.

c. In addition, the Regional Administrator will contact the Deputy Director of Enforcement Programs (or Construction, as appropriate) to promptly notify the National Office of major events, such as those likely to generate significant public or congressional interest.

C. Investigation Procedures.

1. All fatalities and catastrophes will be thoroughly investigated in an attempt to determine the cause of the event (whether a violation of OSHA safety and health standards, regulations, or the general duty clause occurred), and any effect the violation had on the incident. Each Regional Administrator will establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

2. The investigation should be initiated as soon as possible after receiving an initial report of the incident, ideally within one working day, by an appropriately trained and experienced compliance officer assigned by the Area Director or designee. The Area Director or designee shall determine the appropriate scope of the fatality/catastrophe investigation based on factors such as a prior history of willful, serious, or repeat violations, reports of near misses/close calls, an evaluation of violations in plain view, or the existence of an NEP or LEP. To the extent circumstances allow, all investigations must be completed in an expeditious manner.

3. Inspections following fatalities or catastrophes should include video recording as a method of documentation and gathering evidence when appropriate. The use of photography is also encouraged in documenting and gathering evidence.

4. As in all inspections, under no circumstances should OSHA personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. OSHA personnel must use appropriate personal protective equipment and take all necessary precautions to avoid and/or prevent occupational exposure to potential hazards that may be encountered.

D. Interview Procedures.

1. Identify and Interview Persons.

a. As early as possible in the investigation, identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management. The

sooner a witness is interviewed, the more accurate and candid the witness statement will be.

b. If an employee representative is involved in the inspection, he or she can serve as a valuable resource by helping to identify employees who might have information relevant to the investigation.

c. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to OSHA.

d. When interviewing:

- Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.
- When appropriate, reduce interviews to writing and have the witness sign the document. Transcribe video and audio recorded interviews and have the witness sign the transcription.
- Read the statement to the witness and attempt to obtain agreement. Note any witnesses' refusal to sign or initial his/her statement.
- Ask the interviewee to initial any changes or corrections made to his/her statement.
- Advise interviewee of OSHA whistleblower protections.

e. See Chapter 3, *Inspection Procedures*, for more information on conducting interviews.

2. Informer's Privilege.

a. The informer's privilege allows the government to withhold the **identity** of individuals who provide information about the violation of laws, including OSHA rules and regulations. The identity of witnesses will remain confidential to the extent possible. However, inform each witness that disclosure of his/her identity may be necessary in connection with enforcement or court actions.

b. The informer's privilege also protects the contents of statements to the extent that disclosure would reveal the witness' identity. When the contents of a statement will not disclose the identity of the informant (i.e., statements that do not reveal the witness' job title, work area, job duties, or other information that would likely reveal the individual's identity), the privilege does not apply and such statements can be released.

c. Inform each witness that his/her interview statements can be released if he or she authorizes such a release or if he or she voluntarily discloses the statement to others, resulting in a waiver of the privilege.

d. Inform witnesses in a tactful and nonthreatening manner that making a false statement to a CSHO during the course of an investigation could

be a criminal offense. Making a false statement, upon conviction, is punishable by a fine of up to $10,000 or six months in jail, or both.

E. Investigation Documentation.

Document all fatality and catastrophe investigations thoroughly.

1. Personal Data – Victim.

   Potential items to be documented include: Name; Address; Email Address; Telephone; Age; Sex; Nationality; Job Title; Date of Employment; Time in Position; Job being done at the time of the incident; Training for job being performed at the time of the incident; Employee deceased/injured; Nature of injury – fracture, amputation; and Prognosis of injured employee.

2. Incident Data.

   Potential items to be documented include: How and why the incident occured; the physical layout of the worksite; sketches/ drawings; measurements; video/audio/photos to identify sources; and whether the accident was work-related.

3. Equipment or Process Involved.

   Potential items to be documented include: Equipment type; Manufacturer; Model; Manufacturer's instructions; Kind of process; Condition; Misuse; Maintenance program; Equipment inspection (logs, reports); Warning devices (detectors); Tasks performed; How often equipment is used; Energy sources and disconnecting means identified; and Supervision or instruction provided to employees involved in the incident.

4. Witness Statements.

   Potential witnesses include: the Public; Fellow employees; Management; Emergency responders (e.g., police department, fire department); and Medical personnel (e.g., medical examiner).

5. Safety and Health Program.

   Potential questions include:

   - Does the employer have a safety and/or health program?
   - Does the program address the type of hazard that resulted in the fatality/catastrophe?
   - How are the elements of the program specifically implemented at the worksite?

6. Multi-Employer Worksite.

   Describe the contractual and in practice relationships of the employer with the other employers involved with the work being performed at the worksite.

7. Records Request.

   Potential records include: Injury and Illness Records (OSHA 300, 300A, and 301 data); Disciplinary Records; Training Records; and Next of Kin information.

NOTE: Next of kin information should be gathered as soon as possible to ensure that condolence letters can be sent in a timely manner.

F. Potential Criminal Penalties in Fatality and Catastrophe Cases.

1. Criminal Penalties.

   a. Section 17(e) of the OSH Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA standard, rule or order when the violation results in the death of an employee. However, Section 17(e) does not apply to violations of the general duty clause. When there are violations of an OSHA standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice could also be relevant.

   b. The circumstances surrounding all occupationally-related fatalities will be evaluated to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. The evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.

   c. Early in the investigation, the Area Director or designee, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation. The decision will be based on consideration of the following:

      - A fatality has occurred.
      - There is evidence that an OSHA standard has been violated and that the violation contributed to the employee death.
      - There is reason to believe that the employer was aware of the requirements of the standard and knew it was in violation of the standard, or that the employer was plainly indifferent to employee safety.
      - If the Regional Administrator agrees with the Area Director or designee's assessment of the case, then the Regional Administrator will notify the RSOL at the discretion of the Regional Administrator and the Area Director or designee, and dependent upon Regional procedures in place, a Regional team or trained criminal investigator can assist in or perform portions of an investigation.
      - When there is a potential criminal referral in a case, it is essential that the Regional Administrator and/or the Area Director involve the RSOL's Office in the early stages of the investigation—particularly during the evidence-gathering process.

2. Additional Prosecution.

   In addition to criminal prosecution under Section 17(e) of the OSH Act, employers can face prosecution under a number of other sections of the United States Code, including, but not limited to:

a. Crimes and Criminal Procedures, for actions such as conspiracy, making false statements, fraud, obstruction of justice, and destruction, alteration or falsification of records during a federal investigation.

b. The Clean Water Act.

c. The Clean Air Act.

d. The Resource Conservation Recovery Act (RCRA).

e. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

3. Procedures for Criminal Referral.

When a case is forwarded from the Regional Office to the RSOL for criminal review, advise the Director of Enforcement Programs (or, when appropriate, the Director of the Directorate of Construction). Provide follow-up reports to indicate any subsequent actions.

G. Families of Victims.

1. Contacting Family Members.

Family members of employees involved in fatal or catastrophic occupational injuries or illnesses shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the injury or illness. OSHA staff contacting family members must exercise tact and good judgment in their discussions.

See CPL 02-00-153, Communicating OSHA Fatality Inspection Procedures to a Victim's Family, dated April 17, 2012, for more information.

2. Information Letter.

The standard information letter will normally be sent to the individual(s) listed as the emergency contact on the victim's employment records (if available) and/or the otherwise determined next of kin within 5 working days of determining the victim's identity and verifying the proper address where communications should be sent.

NOTE: In some circumstances, it may not be appropriate to follow these exact procedures (i.e., in the case of a small business, the owner or supervisor may be a relative of the victim). Modify the form letter to take into account any special circumstances or do not send the letter, as appropriate.

3. Letter to Victim's Emergency Contact.

In addition to the standard information letter sent by the Area Director or designee, the Assistant Secretary also sends a letter to the victim's emergency contact or otherwise verifiable next of kin.

All Area Offices must send a brief two-to-three sentence description of the incident that resulted in the fatality. This description should be sent by email and accompany the Assistant Secretary's next-of-kin letter when it is transmitted to the National Office.

In cases presenting language concerns, the Area Office should inquire about the primary language of the next of kin. If it has been verified that the primary language of the next of kin is Spanish and not English, the Area Office will advise the National Office concerning this and specify that a Spanish language letter should also be sent.

Also, in situations where it is not immediately possible to determine the primary language of the next of kin recipient of the fatality letter, or in instances where it has been determined that a primary language other than English or Spanish is spoken by the next of kin, this information should also be communicated to the National Office. Unofficial translation of the fatality letter into other languages may be available and permitted.

The National Office will send a Spanish language letter along with the English letter for Spanish-speaking next of kin recipients. All foregoing information related to language concerns should be sent by email and accompany the Assistant Secretary's next-of-kin letter when it is transmitted to the National Office.

4. Interviewing the Family.
   a. When taking a statement from families of the victim(s), explain that the interview will be handled following the same procedures as those in effect for witness interviews. Sensitivity and professionalism are required during these interviews. Carefully evaluate the information received and attempt to corroborate it during the investigation.
   b. Maintain follow-up contact with key family members or other contact persons so that these parties can be kept up to date on the status of the investigation. Provide family members or their legal representatives with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued, or as soon thereafter as possible. However, such information will be provided to family members only after it has been provided to the employer.
   c. The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the case file will not be made available until after the litigation is completed. Also, if a criminal referral is under consideration or has been made, then the case file cannot be released to the family. Notify the family of these policies and inform them that this is necessary so that any potential litigation is not compromised.
5. Post-Inspection Communications [With Next of Kin].

   After the inspection, OSHA will make every effort to contact the next of kin by telephone to explain findings, address any questions, and give the family an opportunity to provide input. Depending on the case, OSHA may issue a press release. If a press release is planned, OSHA will make every attempt to notify the family by telephone before the information is released to the public. OSHA will also provide a copy of the press release to the family.

H. Public Information Policy.

OSHA's public information policy regarding response to fatalities and catastrophes is to explain the federal presence to the news media; not to issue periodic updates on the progress of the investigation. The Area Director and his or her designee normally will handle response to media inquiries.

I. Recording and Tracking for Fatality/Catastrophe Investigations.

1. Investigation.

a. The *Investigation Tab* in OIS is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, hospitalizations of two or more days, have generated significant publicity, and/or have resulted in significant property damage. An Unprogrammed Activity (UPA) must be entered in OIS and saved saved as final as soon as the Agency becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of *the FAT/CAT Info* Tab data fields are left blank. The *Inspection* must be associated with the UPA for the initial report information in the *FAT/CAT Info Tab* to populate in the *Investigation.* The information on this form enables the Agency to track fatalities and summarizes circumstances surrounding the event.

NOTE: The two-day hospitalization criterion is a cutoff to preclude completing an *Investigation* for events that may not be serious. There is no relationship between this criterion and the definition of hospitalization in Section II.A, of this chapter, Definitions.

b. For fatality/catastrophe investigations, the *Investigation form* will be:

- Entered in OIS at the beginning of the inspection and saved as *final*, even if most of the data fields are left blank, so that the Agency can track fatality/catastrophe investigations in a close to "real time" fashion.
- Modified as needed during the investigation to account for updated information.
- Updated with all data fields completely and accurately completed at the conclusion of the investigation, including a thorough narrative description of the incident.

c. The *Investigation* narrative should not be a copy of the summary provided on the *FAT/CAT* pre-inspection form. The narrative must comprehensively describe the characteristics of the worksite; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.

d. In addition, a single fatality or catastrophe event shall normally result in only one fatality [catastrophe] inspection of the employer of the

deceased employee(s) [injured employees], but one event at a multi-employer work site may possibly lead to one or more unprogrammed-related inspection(s) of other involved employers. The exception to this would occur if an event involves multiple fatalities of workers of two or more employers, resulting in more than one fatality inspection.

EXAMPLE 11-1: A fatality occurs in employer's facility in August. Both a safety and health inspection are initiated. One *Investigation* should be filed to summarize the results of the inspections that resulted from the August fatality. One *Investigation* will be included in the *Inspection* that is coded as a fatality in OIS (safety or health), with all of the related activities appropriately associated in OIS. However, in September, while the employer's facility is still undergoing the inspections, a second fatality occurs. In this case, a second *Investigation* should be submitted for the second fatality and an additional inspection should be opened.

EXAMPLE 11-2: An employer reports a severe injury and the injury subsequently results in a fatality. If an *Inspection* was scheduled or opened based on Employer Reported Referral UPA then enter a new FAT/CAT UPA and link both UPAs to the *Inspection*. Change the Initiating Type of the existing *Inspection* to Fatality/Catastrophe. If an *Inspection* was scheduled but not opened, verify the Comp/Ref Actions Tab on the Employer Reported Referral UPA has a Do Inspection = Y entry.

2. Immigrant Language Questionnaire (IMMLANG).
   a. The IMMLANG Questionnaire is designed to allow the Agency to track fatalities among Spanish-speaking and other immigrant employees and to assess the impact of potential language barriers and training deficiencies on fatal incidents. Information for this questionnaire should be collected as early in the investigation as possible, as the availability of immigrant workers for questioning later in the process is often uncertain.
   b. The IMMLANG Questionnaire shall be completed before the conclusion of a fatality investigation according to the procedures outlined in the Memorandum *Change to the Interim Procedure for Fatality Investigations (IMMLANG)*, for Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, December 16, 2003. It should be completed only if the CSHO marks IMMLANG as "Yes" in the Victim Information of the Investigation. The Questionnaire is not to be completed if IMMLANG is marked as "No" on the Victim Information of the Investigation.
   c. The IMMLANG Questionnaire shall be submitted by OIS. A copy of the completed questionnaire should be printed and placed in the case file.
3. Related Event Code (REC).

   The *Violation Worksheet* provides specific supplemental information documenting hazards and violations. If any item cited is directly related to

the occurrence of the fatality or catastrophe, then select FAT/CAT/Accident. If multiple related event codes apply, then the only code that has priority over relation to a fatality/catastrophe is imminent danger.

J. Pre-Citation Review.

1. Because cases involving a fatality can result in civil or criminal enforcement actions, the Area Director is responsible for reviewing all fatality and catastrophe investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here.
2. The Area Director is responsible for ensuring that an *Investigation* is reported to OIS for each incident (see Section II.I.1 of this chapter, *Investigation*).
3. Review all proposed violation-by-violation penalties in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, October 21, 1990.
4. Review citations covered by Regional OSHA/SOL workload agreements in accordance with those agreements.
5. Each Regional Administrator should establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

K. Post-Citation Procedures/Abatement Verification.

The regulation governing abatement verification is found at §1903.19, and OSHA's enforcement policies and procedures for this regulation are outlined in Chapter 7, Post-Citation Procedures and Abatement Verification.

1. Due to the transient nature of many of the worksites where fatalities occur and because the worksite could be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. In such cases, the Area Director should obtain abatement verification from the employer, along with an assurance that appropriate safety and health programs have been implemented to prevent the hazard(s) from recurring.
2. While site closure due to the completion of the cited project is an acceptable method of abatement, it can be accepted as abatement without certification only where a CSHO directly verifies that closure; otherwise, certification by the employer is required. Follow-up inspections need not be conducted if the CSHO has verified abatement during the inspection or if the employer has provided other proof of abatement.
3. Where the worksite continues to exist, OSHA will normally conduct a follow-up inspection if serious citations have been issued.
4. Include abatement language and safety and health system implementation language in any subsequent settlement agreement.
5. If there is a violation that requires abatement verification, then the *Violation Worksheet* must be completed with the date of abatement verified.

6. If the case is a Severe Violator Enforcement Program (SVEP) case, follow-up inspections will be conducted in accordance with OSHA Instruction CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*, June 18, 2010. Follow-up inspections will normally be conducted even if abatement of cited violations has been verified through abatement verification.

L. Audit Procedures.

The following procedures will be implemented to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures:

1. Regional Offices will incorporate the review and analysis of fatality/catastrophe files into their audit functions and include their findings in the regular audit reports to the National Office. The review and analysis will use random case files to address the following:

   a. Inspection Findings.

      Ensure that hazards have been appropriately addressed and violations have been properly classified. Also ensure that criminal referrals are made when appropriate.

   b. Documentation.

      Ensure that the *Investigation* narrative and data fields and the *Violation Worksheet* narrative have been completed accurately and detailed enough to allow for analysis at the national level of the circumstances of fatal incidents. Ensure that the IMMLANG Questionnaire is completed, if relevant.

   c. Construction Fatalities.

      Ensure that the case file has been copied and forwarded to the University of Tennessee in accordance with the Memoranda *Construction Fatality Case Study, Reasons and Methodology*, for Regional Administrators from H. Berrien Zettler, Deputy Director, D.O.C. (by email), regarding transmittal of information on construction fatalities to the University of Tennessee, dated September 12 and 13, 2000, and the Memorandum *Construction Fatality Investigation Case Files*, for Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, regarding transmittal of information on construction fatalities to the University of Tennessee, dated May 14, 2003, and February 18, 2004.

   d. Settlement Terms.

      Ensure that settlement terms are appropriate, including violation reclassification, penalty reductions, and additional abatement language.

   e. Abatement Verification.

      Ensure that abatement verification has been obtained.

f. OIS Reports.

Review OIS reports to identify any trends or cases that could indicate that a further review of those cases might be necessary.

M. Relationship of Fatality and Catastrophe Investigations to Other Programs and Activities.

1. Homeland Security.

OSHA's *National Emergency Management Plan (NEMP)*, as contained in HSO 01-00-001, December 18, 2003, clarifies the procedures and policies for OSHA's National Office and Regional Offices during responses to incidents of national significance. Generally, OSHA will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health. When the President of the United States makes an emergency declaration under the Stafford Act, the National Response Framework (NRF) is activated. The NEMP can then be activated by the Assistant Secretary, the Deputy Assistant Secretary, or by request from a Regional Administrator. Whether OSHA will conduct a formal fatality or catastrophe investigation in such a situation will be determined on a case-by-case basis.

2. Severe Violator Enforcement Program.

a. Inspections that result in citations being issued for at least one of the following are considered Severe Violator Enforcement Program (SVEP) cases:

- A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations;
- An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to a High-Emphasis Hazard as defined in Section XII of OSHA Instruction CPL 02-00-149, Severe Violator Enforcement Program (SVEP), June 18, 2010;
- An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of a highly hazardous chemical, as defined in the PSM standard; or
- All egregious (e.g., per-instance citations) enforcement actions.

b. In such cases, the instructions outlined in OSHA Instruction CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*, June 18, 2010,

shall be followed to ensure that the proper measures are taken regarding classification, coding and treatment of the case.

NOTE: See the Memorandum *Inclusion of Upstream Oil and Gas Hazards to the High-Emphasis Hazards in the Severe Violator Enforcement Program (SVEP)*, February 11, 2015, for policy relating to the addition of upstream oil and gas hazards to the list of High-Emphasis Hazards in the Severe Violator Enforcement Program (SVEP).

3. Significant Enforcement Cases.

   Significant enforcement cases are defined as inspection cases with initial proposed penalties over $100,000 or which involve novel enforcement issues, including federal agency cases, regardless of penalty. An inspection resulting from an employee fatality or a workplace catastrophe may well be a significant enforcement case and, therefore, particularly thorough documentation is necessary to sustain legal sufficiency. (See the Memorandum on "Procedures for Significant and Novel Enforcement Cases," August 1, 2016).

4. Special Emphasis Programs.

   If a fatality or catastrophe investigation arises at an establishment that is also in the current inspection cycle to receive a programmed inspection under any Site-Specific Targeting program, the investigation and the inspection can be conducted either concurrently or separately.

5. Cooperative Programs.

   If a fatality or catastrophe occurs at a worksite operating under OSHA's Voluntary Protection Program (VPP), the OSHA Strategic Partnership Program (OSPP) site, or OSHA's Safety and Health Achievement Recognition Program (SHARP), or Pre-SHARP, then the Regional VPP Manager, OSPP Coordinator, or Assistant Regional Administrator (ARA) for On-Site Consultation Program and the Consultation Program Manager, as well as the Director of the Directorate of Cooperative and State Programs, should be notified. When enforcement activity has concluded, the Regional VPP Manager, OSPP Coordinator, or ARA for On-Site Consultation Program and Consultation Program Manager should be informed so that the site can be reviewed for program issues.

N. Special Issues Related to Workplace Fatalities.

1. Death by Natural Causes.

   Workplace fatalities that are attributed to natural causes, including work-related heart attacks, must be reported by the employer. The Area Director will then decide whether to investigate the incident.

2. Workplace Violence.

   As with heart attacks, fatalities caused by incidents of workplace violence must be reported to OSHA by the employer. The Area Director or designee will determine whether or not the incident will be investigated.

3. Motor Vehicle Incidents.

   a. OSHA does not require reporting injuries including motor vehicles that occur on public roads or highways, unless the incident occurs in a construction work zone.

   b. Although employers who are required to keep records must record such vehicle incidents in their *OSHA-300 Log* of Work-Related Injuries and Illnesses, OSHA does not investigate such events. (See §1904.39(b)(3).)

      NOTE: 29 CFR Part 1904 has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under Federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

III. Rescue Operations and Emergency Response.

A. OSHA's Authority to Direct Rescue Operations.

1. Direction of Rescue Operations.

   OSHA has no authority to direct rescue operations. These are the responsibility of the employer and/or local political subdivisions or state agencies.

2. Monitoring and Inspecting Working Conditions of Rescue Operations.

   OSHA can monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

B. Voluntary Rescue Operations Performed by Employees.

OSHA recognizes that an employee can choose to place himself/herself at risk to save the life of another person. The following provides guidance on OSHA citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

1. Imminent Danger.

   §1903.14(f) specifies that no citation can be issued to an employer because of a rescue activity undertaken by an employee of that employer when an individual is in imminent danger (i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated) unless:

   a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations,

AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;

or

b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties,

AND

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;

or

c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening events is foreseeable, such as operations where employees are in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water;

AND

such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual;

AND

the employer has failed to instruct employees (1) not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, (2) not to attempt rescue, and (3) of the hazards of attempting rescue without adequate training or equipment.

2. Citation for Voluntary Actions.

If an employer has trained his or her employees in accordance with §1903.14, then no citation will be issued for an employee's voluntary rescue actions, regardless of whether they are successful.

C. Emergency Response.

1. Role in Emergency Operations.

While it is OSHA's policy to respond as quickly as possible to significant events that could affect the health or safety of employees, the Agency does not have authority to direct emergency operations.

2. Response to Catastrophic Events.

OSHA responds to catastrophic events promptly and acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

3. OSHA's Role.
   a. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where OSHA is acting under the National Emergency Management Plan (NEMP), Regional Administrators will determine the overall role that OSHA will play. See CPL 02-02-073, *Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases*, August 27, 2007.
   b. During an event that is covered by the NEMP, OSHA has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the federal on-scene coordinator. If such an event occurs in a State Plan state, OSHA will coordinate with the State Plan agency to ensure the agency's involvement in the response.
   c. For details on OSHA's response to occupationally related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential worker injury that generates widespread media interest. See CPL 02-00-094, *OSHA Response to Significant Events of Potentially Catastrophic Consequences*, July 22, 1991.
4. Incidents of National Significance.

   For detailed instructions on how to proceed during incidents of national significance when OSHA has been designated as the primary federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, and the Assistant Secretary has activated the National Emergency Response Plan, see HSO 01-00-001 *National Emergency Management Plan*, December 18, 2003, and the National Response Framework (Worker Safety and Health Support Annex).

   NOTE: These documents apply when activated.

Chapter 12

SPECIALIZED INSPECTION PROCEDURES

I. Multi-Employer Workplace/Worksite [Reserved].

See CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999.

II. Temporary Labor Camps.

A. Introduction.

29 CFR 1910.142, the Temporary Labor Camp standard, is applicable to both agricultural and non-agricultural workplaces.

B. Definitions.

NOTE: §1910.142 does not contain a definition section. The following definitions reflect OSHA's interpretation of the standard.

1. Temporary.

The term *temporary* in §1910.142 refers to employees who enter into an employment relationship for a discrete or defined time period. As a result, the term *temporary* refers to the length of employment, and not to the physical structures housing employees.

2. Temporary Labor Camp Housing.

Temporary labor camp housing is required employer-provided housing that, due to company policy or practice, necessarily renders such housing a term or condition of employment. See *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325 (11th Cir. 1983).

3. New Construction.

All agriculture housing construction started on or after April 3, 1980, including totally new structures and additions to existing structures, will be considered new construction. Cosmetic remodeling work on pre-1980 structures will not be considered new construction and should be treated as existing housing.

C. Wage & Hour/OSHA Shared Authority Under Secretary's Order.

Pursuant to a Secretary's Order, the Wage & Hour Division (WHD) has shared authority with OSHA over the Temporary Labor Camp standard (§1910.142). See Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration (*Federal Register*, January 2, 1997 (62 FR 107)) and Secretary's Order 5-2002: Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, *Federal Register*, October 22, 2002 (67 FR 65007).

1. Enforcement Authority.
   a. WHD Responsibility.

      WHD has enforcement authority over any agricultural establishment where employees are engaged in "agricultural employment" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(3), regardless of the number of employees, including employees engaged in hand packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed. See Appendix A, Section 4.a.2 of ADM 01-00-003, *Redelegation of Authority and Responsibility of the Assistant Secretary for Occupational Safety and Health,* March 6, 2003.

   b. OSHA Responsibility.

      OSHA retains enforcement authority over temporary labor camps for egg, poultry, red meat production, post-harvesting processing of agricultural and horticultural commodities, and any non-agricultural TLCs. See Appendix A, Section 4.a.2.b of ADM 01-00-003, *Redelegation of Authority and Responsibility of the Assistant Secretary for Occupational Safety and Health,* March 6, 2003.

2. Compliance Interpretation Authority.

   WHD has sole interpretation authority for the Temporary Labor Camp standard, even over those temporary labor camp areas for which OSHA has enforcement authority.

3. Standard Revision and Variance Authority.

   OSHA retains all authority for revisions of the Temporary Labor Camp standard, as well as the evaluation and granting of temporary and permanent variances.

4. State Plan States.
   a. Eight of the twenty-two jurisdictions (21 states and Puerto Rico) that have OSHA-approved State Plans covering private sector employment elected not to enforce the Temporary Labor Camp standards, except with respect to egg, poultry, red meat production, post-harvesting processing of agricultural and horticultural commodities, and any non-agricultural TLCs. Thus, WHD enforces these standards, except as noted above, in the following states: Alaska, Indiana, Iowa, Kentucky, Minnesota, South Carolina, Utah, and Wyoming.
   b. The 14 other jurisdictions with OSHA-approved State Plans covering private sector employment have retained enforcement authority for the Temporary Labor Camp standards in agriculture. They are Arizona, California, Hawaii, Maryland, Michigan, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, Tennessee, Vermont, Virginia, and Washington.

D. Enforcement of Temporary Labor Camp Standards for Agriculture.

1. Choice of Standards on Construction Prior to April 3, 1980.

   Prior to walkaround inspections of temporary labor camps built before April 3, 1980, employers providing the housing will be asked to specify their preference of applicable departmental standards. Choices shall be limited to Subpart E of 29 CFR Part 654, or §1910.142 , or provisions contained in variances from these standards. An employer who has been issued a variance shall produce copies upon request. See Housing for Agricultural Employees, 29 CFR 500.132.

   a. In instances where Subpart E of Part 654 is specified as the governing standard for existing housing, hazardous conditions violating both the Employment and Training Administration (ETA) and OSHA requirements shall be cited under the OSHA standard. Hazardous conditions found in violation of ETA standards, but in compliance with §1910.142 shall not be cited.

   b. In instances where conditions are deemed in violation of the ETA standard and not covered by the OSHA standard, either Section 5(a)(1) shall be cited (only serious violations) or such deficiencies shall be brought to the employer's attention and correction shall be encouraged.

   c. In instances where §1910.142 is selected by the employer as the governing standard for the existing facility or is applicable in the case of "new construction," all requirements of that standard shall apply and shall be cited when violations are found.

   d. Under no circumstances shall Subpart E of Part 654 be cited by CSHOs, since no authority exists within the Act to cite standards not adopted under the Act.

2. Informing Employers.

   Prior to the inspection of an agriculture housing facility, employers shall be made aware of the foregoing policy and procedures during the opening conference. This policy applies to all employment-related agriculture housing covered by OSHA, regardless of whether or not employees housed in the facility are recruited through the U.S. Employment Service's inter-intrastate clearance system.

3. Agriculture Worksites Under OSHA Responsibility.

   For agriculture worksites that OSHA has responsibility to cover, §1928.21 lists which Part 1910 standards apply.

E. OSHA Enforcement for Non-Agriculture Worksites.

1. For non-agriculture worksites, other Part 1910 standards can be cited for hazards that are not covered under §1910.142. For non-agriculture worksites, the TLC standard has no provisions that specifically apply to fire protection, so those standards are not explicitly pre-empted by the TLC standard. The same is true for §1910.36 and §1910.37 (exit routes). However, §1910.38 (emergency action plans) applies only where an

emergency action plan is required by a particular OSHA standard, so it cannot be used with TLCs.

2. Examples of temporary labor camp housing for non-agriculture worksites would be for the construction industry, oil and gas industry, and garment industry in the Pacific territories. Such housing for these industries can also be found in large cities and rural areas in various parts of the United States.
3. The choice of standards issue, discussed in Section D.1, of *Choice of Standards on Construction Prior to April 3, 1980*, does not apply to non-agriculture temporary housing.

F. Employee Occupied Housing.

Generally, inspections shall be conducted when housing facilities are occupied and as soon as feasible so that any hazards identified can be corrected early in the work season.

1. Since employees may not speak English, or may speak English only as a second language, every effort shall be made to send a bilingual CSHO on the inspection or have a translator accompany the CSHO to converse with employees.
2. CSHOs shall conduct inspections in a way that minimizes disruptions to those living in the housing facilities. If an occupant of a dwelling unit refuses entry for inspection purposes, CSHOs shall not insist on entry and shall continue the rest of the inspection unless the lack of access to the dwelling unit involved would substantially reduce the effectiveness of the inspection. In that case, valid consent should be obtained from the owner of the unit. If the owner also refuses entry, the procedures for refusal of entry shall be followed. See Chapter 15, *Legal Issues*. The same shall apply in cases where employers refuse entry to the housing facility and/or to the entire worksite.
3. During inspections, CSHOs shall encourage employers to correct hazards as quickly as possible. Particular attention shall be paid to identifying instances of failure to abate and repeated violations from season to season or past occupancy. These violations shall be cited in accordance with normal procedures.

G. Primary Concerns.

When conducting a housing inspection, CSHOs shall be primarily concerned with those facilities or conditions that most directly relate to employee safety and health. Accordingly, all housing inspections shall address at least the following:

1. Site.
   a. Review the location of the site for adequate drainage in relation to periodic flooding, swamps, pools, sinkholes, and other surfaces where water could collect and remain for extended periods.
   b. Determine whether the site is adequate in size to prevent overcrowding and whether it is located near (within 500 feet of) livestock.

c. Evaluate the site for cleanliness and sanitation (i.e., free from rubbish, debris, wastepaper, garbage, and other refuse).

2. Shelter.

   a. Determine whether the shelter provides protection against the elements; has the proper floor elevation and floor space; whether rooms are used for combined purposes of sleeping, cooking, and eating; and whether all rooms have proper ventilation and screening.

   b. Determine which rooms are used for sleeping purposes, the number of occupants, size of the rooms, and whether beds, cots, or bunks and lockers are provided.

   c. Determine what kind of cooking arrangements or facilities are provided, and whether all heating, cooking, and water heating equipment are installed in accordance with state and local codes.

3. Water Supply.

   Determine whether the water supply for drinking, cooking, bathing, and laundry is adequate and convenient, and has been approved by the appropriate local health authority.

4. Toilet Facilities.

   Determine the type, number, location, lighting, and sanitary conditions of toilet facilities.

5. Sewage Disposal.

   Determine, in camps where public sewers are available, whether all sewer lines and floor drains are connected.

6. Laundry, Handwashing, and Bathing Facilities.

   a. Determine the number, kind, locations, and conditions of these facilities, and whether there is an adequate supply of hot and cold running water.

   b. Determine also whether such facilities have appropriate floors, walls, partitions, and drains.

7. Lighting.

   a. Determine whether electric service is available, and, if so, whether appropriate light levels, number of ceiling-type light fixtures, and separate floor- or wall-type convenience outlets are provided.

   b. Determine also whether the light fixtures, and floor and wall outlets are properly grounded and covered.

8. Refuse Disposal and Insect and Rodent Control.

   Determine the type, number, locations, and conditions of refuse disposal containers, and whether there are any infestations of animal or insect vectors or pests.

9. First-Aid Facilities.

   Determine whether adequate first-aid facilities are available and maintained for emergency treatment.

H. Dimensions.

The relevant dimensions and ratios specified in §1910.142 are mandatory; however, CSHOs can exercise discretion and not cite minor variations from specific dimensions and ratios when such violations do not have an immediate or direct effect on safety and health. In those cases in which the standard itself does not make reference to specific dimensions or ratios but instead uses adequacy as the test for the cited conditions and facilities, the Area Director shall make the determine on a case-by-case basis, while considering all relevant factors, whether a violation exists.

I. Documentation for Housing Inspections.

The following facts shall be carefully documented:

1. The age of the dwelling unit, including any additions. For recently built housing, the date that the construction began.
2. Number of dwelling units, number of occupants in each unit.
3. Approximate size of area in which the housing is located and the distance between dwelling units and water supply, toilets, livestock, and service building.

J. Condition of Employment.

The Act covers only housing that is a term and condition of employment. Factors in determining whether housing is a term and condition of employment include situations where:

1. Employers require employees to live in the specified housing.
2. The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.
3. Additional factors to consider in determining whether the housing is a term and condition of employment include, but are not limited to:
   a. Cost of the housing to the employee – is it provided free or at a low rent?
   b. Ownership or control of the housing: Is the housing owned or controlled or provided by the employer?
   c. Distance to the worksite from the camp, distance to the worksite from other non-camp residences: Is alternative housing reasonably accessible (distance, travel, cost) to the worksite?
   d. Benefit to the employer: Does the employer make the camp available in order to ensure that the business is provided with an adequate supply of labor?
   e. Relationship of the camp occupants to the employer: Are those living in the camp required to work for the employer upon demand?

Chapter 13

FEDERAL AGENCY FIELD ACTIVITIES

I. Introduction.

A. Scope.

The purpose of this chapter is to highlight policies that are unique to federal agency occupational safety and health programs. Policies and procedures for federal agencies are generally the same as those followed in the private sector, except as specified in this chapter.

The United States Postal Service (USPS) is considered a private sector employer for purposes of OSHA's enforcement oversight,[1] although Federal OSHA retains full jurisdiction over all USPS facilities and employees and contract employees engaged in USPS mail operations. See FOM 2-7 for more information on the USPS.

B. Overview.

The Occupational Safety and Health Act (the Act), Executive Order 12196, and 29 CFR Part 1960 all shape OSHA's responsibilities for federal agencies. This chapter, with eight sections, outlines OSHA's safety and health program requirements for federal agencies and highlights certain differences between OSHA's program for the private and federal sectors. Below is a summary of each of the sections.

1. Section I: Introduction.

   This section provides a broad review of OSHA's safety and health requirements for federal agencies. It also identifies definition differences between the private and federal sectors, and the offices within OSHA where inspectors can seek more detailed information.

2. Section II: OSHA's Jurisdiction over Federal Agencies.

   This section provides an overview of how OSHA's jurisdiction varies for federal agencies. For example, while OSHA's authority to establish requirements and oversee safety and health program implementation applies only to executive branch federal agencies, it can offer compliance assistance to all branches of the federal government in the form of Agency Technical Assistance Requests (ATARs). See Section VII.

3. Section III: Federal Agency Inspection Procedures.

   This section reviews how OSHA requirements applied during federal agency inspections differ from those for the private sector. For example, while the standards promulgated by Section 6 of the Act generally apply to the federal sector, only specific regulations in Section 8 of the Act apply to

[1] On September 28, 1998, Congress amended the Occupational Safety and Health Act (the Act) to make it applicable to the U.S. Postal Service in the same manner as any other employer subject to the Act.

federal agencies. Also, for executive branch federal agencies §1960.8(a), not Section 5(a)(1) of the Act, is the "general duty clause."

4. Section IV: Federal Agency Recordkeeping and Reporting Requirements.

   This section addresses the similarities and differences between private sector and federal agency recordkeeping requirements.

5. Section V: Access to Federal Employee Records.

   This section explains OSHA's access to federal agencies' employee injury and illness records, as well as exposure and medical records.

6. Section VI: Evaluations of Federal Agency Programs.

   This section explains OSHA's authority and procedures for evaluating federal agencies.

7. Section VII: Agency Technical Assistance Requests.

   This Section discusses Agency Technical Assistance Requests (ATARs), a compliance assistance alternative available only to federal agencies, since they are not eligible for OSHA On-Site Consultation services.

8. Section VIII: Notices of Unsafe or Unhealthful Working Conditions.

   This section discusses how Notices, rather than citations, are issued to federal agencies and explains that financial penalties cannot be applied for OSHA violations.

C. Important Definitions.

1. Establishment.

   When OSHA adopted the applicable §1904 recordkeeping requirements for federal agencies, it maintained the definition of "establishment" under §1960.2(h), as this definition better describes the application of the term in the federal sector. Unlike in the private sector, it is common for federal agencies to have an organizational structure that consists of agencies, bureaus, or other components that come under the line authority of an Assistant Secretary, Under Secretary, or another official at a comparable level.

   Specifically, a federal establishment is a single physical location where business is conducted or services or operations are performed. Where distinctly separate activities are performed at a single physical location, each activity will be treated as a separate "establishment." Typically, an "establishment" refers to a field activity, Regional Office, Area Office, installation, or facility. Examples are as follows:

   - Major organizational units with distinct lines of authority are considered as separate establishments.
   - Agencies or bureaus in an agency are considered separate establishments even if they occupy the same building.
   - Each component of the Department of Defense (Army, Navy) and each major command located at an installation is a separate establishments.

- Lower organizational units (such as offices or divisions within a bureau, or shops within a command) are not considered separate establishments.

2. Employee, Including Volunteers and Working Federal Inmates.

   Section 1960.2(g) defines federal employees as "any person, other than members of the Armed Forces, employed or otherwise suffered, permitted, or required to work by an agency."

   a. Volunteers (uncompensated staff working under the supervision of an agency) in the federal sector are considered employees and covered by §1960, including the injury and illness recordkeeping requirements under Subpart I. This differs from the private sector where volunteers are not covered by the §1904 recordkeeping regulation.

   b. Federal inmates are protected under §1960 when they are "suffered, permitted, or required to work" at tasks similar to those found in the private sector, and the sites at which they work must comply with applicable OSHA regulations, including the applicable recordkeeping provisions of §1904. Given that federal inmates are prisoners and wards of the Bureau of Prisons, they are not afforded all the rights that accrue to other federal employees, including volunteers. However, only complaints related to workplace safety and health issues (not domiciliary issues) received in writing should be treated as formal complaints and investigated, as appropriate.

      Federal inmates who are employed in a "work-release" status are generally considered to be employees of the entity for which they work, with all the rights and responsibilities that apply to that entity's other workers. However, their specific status is based upon specific factual circumstances. Questions concerning federal work-release inmates should be referred to the Office of Federal Agency Programs (OFAP).

D. Laws and Regulations Affecting Federal Agencies.

1. Federal Agencies and the Occupational Safety and Health Act.

   a. Section 19 is the section of the OSH Act that applies specifically to federal agencies; some other sections apply to both the private and federal sectors. Section 19(a) requires each federal agency to "establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under Section 6."

   b. In contrast, OSHA regulations promulgated under Section 8 of the Act generally do not apply to federal agencies unless 29 CFR Part 1960 – Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters, includes them by reference.

   c. Two regulations specifically applicable to federal agencies are:

      - Section 1904 – Recordkeeping and reporting occupational injuries and illnesses (see Section IV in this chapter).

NOTE: 29 CFR Part 1904 has new requirements for reporting work-related fatalities, hospitalizations, amputations, or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under Federal OSHA jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

- §1910.1020 – Access to employee exposure and medical records (see Section V in this chapter).

d. OSHA's oversight authority to prescribe requirements and provide safety and health oversight is limited to Executive Branch agencies (see Section II.A of this chapter for limitations). The U.S. Postal Service is covered under OSHA's private sector procedures.

e. Despite lack of formal oversight authority, OSHA cooperates and consults with the heads of agencies in the federal, legislative, and judicial branches to help them implement safety and health programs upon request.

2. Executive Order 12196 – Occupational Safety and Health Programs for Federal Employees.

Issued February 26, 1980, Executive Order 12196 prescribes additional responsibilities for the heads of federal executive branch agencies, the Secretary of Labor, and the General Services Administration.

- Executive branch agencies must operate workplace safety and health programs in accordance with requirements of the executive order and the basic elements promulgated by the Secretary.
- OSHA responsibilities include issuing basic program elements that the heads of agencies must use as a basis for their safety and health programs. These basic program elements are set forth in 29 CFR Part 1960.
- GSA responsibilities include prompt attention to reports from agencies of unsafe or unhealthy conditions at GSA-owned or -operated facilities.

3. 29 CFR Part 1960 – Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters.

a. §1960.16 requires federal agencies to comply with all occupational safety and health standards issued under section 6 of the Act.

b. §1960 applies exclusively to executive branch agencies (with limitations discussed in Section II of this chapter), and requires them to implement and manage their own internal safety and health programs.

c. The §1960 regulations have a broad range of requirements. Some of the highlights include requirements for agencies to:

- Conduct self-inspections;

- Issue Notices of Unsafe and Unhealthy Working Conditions as a result of those inspections; and
- Abate the violations within set time frames.

d. Agency staff must have the requisite training to conduct these self-inspections. Covered federal agencies must also investigate employee safety and health complaints and provide responses to complainants. Accidents and fatalities require self-inspections.

e. Citable Program Elements in 29 CFR Part 1960.

OSHA's Compliance Safety and Health Officers (CSHOs) should evaluate compliance with the §1960 regulations during enforcement activities at covered worksites. Although agencies must comply with all §1960 regulations, only some sections are designated as citable (to be cited in any issued Notices). Refer to Table 13-1 at the end of this chapter for a listing of citable paragraphs

E. OSHA Contacts for Information Regarding Federal Agencies.

1. Regional Federal Agency Program Officers (FAPOs).

Each OSHA region has at least one person who is designated as a Federal Agency Program Officer (FAPO) and is responsible for responding to questions from the field regarding federal agencies. Contact the National Office of Federal Agency Programs for a current list of FAPOs ((202) 693-2122 or ofap@dol.gov).

2. National Office of Federal Agency Programs (OFAP).

OFAP, located in OSHA's Directorate of Enforcement Programs, has a range of responsibilities, including:

a. Tracking federal agencies' occupational safety and health statistics;

b. Reviewing federal agencies' requests for alternate and supplementary standards;

c. Providing directives and guidance related to federal agencies; and

d. Reporting to the President of the United States on the status of federal agencies' occupational safety and health programs.

II. Coverage of Federal Agencies under 29 CFR Part 1960.

A. Enforcement.

1. The Occupational Safety and Health Administration's enforcement jurisdiction over federal entities (departments, agencies, museums, corporations) is limited to the executive branch. OSHA can, upon request, provide assistance or consultation to the legislative and judicial branches of government, but has no oversight authority over those branches.

2. OSHA's coverage under §1960 of Executive Branch federal civilian employees who are not performing strictly military operations has no geographic limitation and includes federal civilian employees working in private sector establishments. Given that many private sector employees are working overseas, alongside federal employees, any complaints,

referrals, and reports of fatalities or catastrophic events occurring at federal worksites should be forwarded to OFAP for review.

3. Table 13-2 lists some of the federal entities that are excluded from OSHA coverage. For further clarification regarding the status of a particular federal organization, contact the Office of Federal Agency Programs.

B. Military Personnel, Equipment, and Operations.

Within the Executive Branch, uniformed military personnel and uniquely military equipment, systems, and operations are excluded from OSHA's coverage under §1960.

1. "Uniquely military equipment" includes equipment and systems designed by the Department of Defense that are unique to the national defense mission.
2. Examples of excluded military equipment, systems, and operations:
   a. Military aircraft, ships, and submarines;
   b. Artillery, tanks, and tactical vehicles;
   c. Naval operations, military flight operations, and associated research test and development activities;
   d. Missiles and missile sites;
   e. Military space systems; and
   f. Field maneuvers.
3. OSHA retains jurisdiction over workplaces and operations comparable to those of private sector industries, such as:
   a. Vessel, aircraft, and vehicle repair, overhaul, or modification (except for equipment trials);
   b. Construction;
   c. Medical services;
   d. Civil engineering or public works;
   e. Supply services; and
   f. Office work.

C. Federal Agencies Exempt from Unannounced Inspections.

OSHA is authorized to conduct unannounced inspections in executive branch federal agency establishments unless:

1. The inspection site is a federal prison.

   OSHA can conduct announced inspections at federal prisons following guidelines found in FAP 01-00-002, *Federal Agency Safety and Health Programs with the Bureau of Prisons, U.S. Department of Justice*, April 10, 1995.

   CSHOs should review the definition of a federal employee (Section I.C of this chapter) prior to conducting inspections at federal prisons.
2. The Agency has a Certified Safety and Health Committee (CSHC) as defined by 29 CFR Part 1960, Subpart F.

Certified Safety and Health Committees are organized and maintained to monitor and assist an agency's safety and health program. In 29 CFR Part 1960, Subpart F provides a list of items necessary for the certification of the Committee, including the requirement of the Assistant Secretary of OSHA to certify to the Secretary of Labor that all the requirements of Subpart F are met. The Secretary of Labor can evaluate the operations of the committee and require any deficiencies to be remedied within 90 days.

a. OSHA can conduct announced inspections at agencies with CSHCs.

b. For more information on CSHCs, see Section III.D in this chapter, Complaint Handling.

c. See Table 13-3 for a current list of agencies with a CSHC.

D. Federal Agencies with Private Sector Employees On-Site.

1. Employees of private contractors performing work under federal government contracts are covered by standards, regulations, and other OSH Act requirements applicable to private sector employees.

a. State Program Jurisdiction on Federal Property.

State Plans do not have jurisdiction over federal employees. However, the state programs can choose to exercise jurisdiction over private sector contractors working at federal facilities and on federal enclaves with the exception of Government Owned Contractor Operated (GOCO) facilities and land ceded by a state to the federal government ("federal enclaves"). Such coverage is set out in various documents including operational status agreements and final approval decisions which are codified at 29 CFR Part 1952. The Regional Administrator must refer to the appropriate state subject to 29 CFR Part 1952 and supporting documents to determine jurisdiction.

b. Government-Owned Contractor-Operated Facilities (GOCOs).

OSHA compliance policies concerning GOCO operations are described in separate Memoranda of Understanding (MOUs) applicable to specific agencies. CSHOs should follow private sector procedures for GOCOs with no corresponding MOUs.

c. Department of Energy (DOE) Sites.

OSHA has jurisdiction over some DOE sites not covered by the Atomic Energy Act (AEA). These sites are primarily involved in fossil fuel energy research and power marketing administration. See Occupational Safety and Health of Contractor Employees at Certain Energy Department Sites; Jurisdiction and Enforcement Responsibilities; Clarification Regarding State Plans (*Federal Register*, June 29, 2006 (71 FR 36988)) for further clarification as to the jurisdiction and enforcement responsibilities of OSHA and 14 of its approved State Plans at various Department of Energy (DOE) sites that are not subject to the AEA. OSHA's regulations in §1952 have been amended to reflect this jurisdiction, as appropriate.

2. Private Sector Employees and Other Agencies' Jurisdictions.

If there are private sector employees for which another federal agency has occupational safety and health standards under Section 4(b)(1) of the Act, then OSHA does not have jurisdiction over the working conditions addressed by the requirements of the other federal agency. The working conditions of federal employees at the worksite would still be subject to OSHA jurisdiction as specified in §1960.19. Where OSHA requirements and those of another federal agency apply to working conditions, the agency must comply with both requirements. If a standard from one agency conflicts with an OSHA standard, then agencies should comply with the more protective of the conflicting standards until the conflict is resolved.

E. United States Postal Service.

Inspections at USPS facilities will be conducted by Federal OSHA using private sector procedures.

III. Federal Agency Inspection Scheduling.

A. Targeted Inspections.

Targeted inspections at federal agencies are equivalent to targeted inspections at private sector worksites. Area Directors are to schedule all targeted federal agency inspections within the timeframe outlined in the applicable inspection directive. Federal targeted inspections may result in Notices for violations of OSHA standards as well as applicable citable program elements under §1960.

B. Special Emphasis Inspections.

Special Emphasis programs can be developed at the National, Regional, or Area Office level to address hazardous working conditions causing significant injuries and illnesses in the workplace. Federal agency worksites can be included in Special Emphasis programs developed primarily for the private sector, or can be covered under special programs developed specifically for federal agencies. Federal inspection programs can be based on OSHA-300-series data when available, workers' compensation claim injury and illness data, or other suitable data.

1. National Emphasis Inspections.

When the inspection programs are developed at the National Office level, the Office of Federal Agency Programs will provide the information used to initiate the inspection activity.

2. Local Emphasis Inspections.

Area Directors, in conjunction with the Regional Administrators, can develop federal agency local emphasis programs following CPL 04-00-002, *Procedures for the Approval of Local Emphasis Programs (LEPs)*, November 13, 2018. The Office of Federal Agency Programs must obtain concurrence from the OFAP Director before implementing any local emphasis inspection programs.

C. Incident Inspections.

When an Area Office is informed by a federal agency about a fatality or catastrophic incident (defined as an event resulting in hospitalization of three or more employees), the Area Director will determine if an inspection will be conducted. When an inspection is conducted, the Area Office must ensure the following:

1. Agency Investigative Report.

   CSHOs must obtain a copy of the agency's investigative report, required by §1960.29. If the agency has not completed the report, then the agency must send a copy to the Area Office when it is finished.

2. Agency Incident Summary Report.

   CSHOs must request that the federal agency submit a summary report of any fatal or catastrophic events accidents to OFAP, as required by §1960.70.

3. Excluded Agencies.

   If an incident report is received concerning a federal agency not under OSHA's jurisdiction (see Table 13-2), then the person reporting the incident should be referred to an OFAP staff member, who will provide him/her with the agency's safety and health staff contact information.

D. Complaint Handling.

1. OSHA can decide to investigate complaints of unsafe or unhealthful working conditions at federal workplaces (both in the United States and overseas) if the agency is covered by §1960 (see Table 13-2). Section 1960.28(e) specifies procedures for referring employee complaints to the subject agency for investigation. The UPA module of the OIS, or successor system, provides complaint form letters for transmitting the complaint to the agency. See Table 13-4 for a list of relevant form letters in OIS.
2. If a complaint is received from a private contractor working overseas at a federal worksite, forward it to OFAP for review.
3. OSHA investigations of complaints from federal employees will follow the same procedures as for private sector complaints except for the following:

   a. Agencies' reports of complaints.

      CSHOs should ensure that agencies are tracking complaints as required by §1960.28(d).

   b. Federal Agencies with Certified Safety and Health Committees (CSHCs).

      - If OSHA receives a complaint about an agency with a CSHC, and OSHA decides not to conduct an announced inspection, OSHA will forward the complaint to the employing agency's Designated Agency Safety and Health Official (DASHO) in accordance with §1960.28(e)(2). Once the agency receives the

complaint, it must follow the procedures outlined in §1960.28(d). A copy of the employing agency's response to the originator is to be sent to the Secretary of Labor.

- If half the members of record of an agency's CSHC are dissatisfied with the agency's response to a complaint, then the members can ask OSHA to evaluate or inspect the condition. If OSHA determines that an inspection is necessary, it will notify the establishment official at least one day in advance of the scheduled inspection. OSHA will provide inspection results to the establishment official and ask that the official share the results with the CSHC. OSHA will also forward a copy of the inspection results to the agency DASHO.

c. Reports of Safety and Health Program Violations.

When complaints allege violations of program elements of §1960, the Area Director can either schedule an inspection or respond by letter. Any program deficiencies trends identified in a federal agency must be reported to the OFAP and forwarded to OFAP for review. OFAP will determine if an evaluation of the agency's program is necessary.

d. Federal Bureau of Prisons.

OSHA can investigate allegations of unsafe and unhealthful working conditions of federal inmates at Federal Bureau of Prisons facilities if the work the inmates perform is similar to work performed at private sector industries, such as manufacturing. See Section I.C.2 in this chapter for a more complete definition of federal inmates.

NOTE: For further guidance, refer to the Federal Prisons inspection guidelines found in FAP 01-00-002, *Federal Agency Safety and Health Programs with the Bureau of Prisons, U.S. Department of Justice*, April 10, 1995.

e. Federal Agencies Excluded from OSHA Enforcement.

If a complainant's agency or program is excluded from coverage under §1960 (see Table 13-2), the complainant should be referred to OFAP, which will provide him/her with the agency's safety and health staff contact information.

E. Reports of Reprisal or Discrimination.

Section 11(c) of the Act does not apply to federal employees, except for employees of the U.S. Postal Service. However, Executive Order 12196, §1960.68, and the Whistleblower Protection Act (WPA) of 1989 require agency heads to make sure that no employee is subject to restraint, interference, coercion, discrimination or reprisal for exercising any right under these laws. Specific segments of the federal workforce also can be covered by the "whistleblower" provisions of other legislation (see Section III.E.4 of this chapter).

Federal employees can report allegations of fraud, waste and abuse to their agencies' Office of the Inspector General without fear of reprisal. Offices of

the Inspector General have responsibilities to the American public to detect and prevent fraud, waste, abuse and violations of law, and to promote economy, efficiency and effectiveness in the operations of the federal government.

1. Covered Employees.

   The Office of Special Counsel (OSC) enforces the Whistleblower Protection Act of 1989. Whenever a covered federal employee believes that actions have been taken against him/her in reprisal for reporting a violation of a law, rule or regulation, or for gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, OSHA will refer these employees or former employees directly to the:

   Office of Special Counsel
   Complaints Examining Unit (Suite 201)
   1730 M St., NW
   Washington, DC 20036-4505
   (800) 872-9855

   There is no time limitation for filing a reprisal complaint with the Office of Special Counsel.

   The OSC will not usually consider anonymous complaints. If a complaint is filed by an anonymous source, then the complaint will be referred to the Office of Inspector General in the appropriate agency. OSC will take no further action on the complaint.

2. Non-Covered Employees.

   Reports of reprisal or discrimination from federal employees who are not covered by the WPA should be referred to the agency DASHO. Contact OFAP for further assistance, if needed. Non-covered employees include employees of the:

   a. Postal Rate Commission;
   b. Federal Bureau of Investigation;
   c. Central Intelligence Agency;
   d. Defense Intelligence Agency;
   e. National Geospatial-Intelligence Agency;
   f. National Security Agency;
   g. Other executive branch intelligence agencies excluded by the President; and
   h. Government Accountability Office.

3. Federal Prisoners.

   Inmates at federal prisons have their own reprisal program through the Bureau of Prisons and are not covered by the Whistleblower Protection Act or 1960.68. (See FAP 01-00-002, *Federal Agency Safety and Health*

Programs with the Bureau of Prisons, U.S. Department of Justice, April 10, 1995).

4. Other Whistleblower Protections.

   Although OSHA does not have authority to enforce Section 11(c) of the Act for federal employees outside the U.S. Postal Service, federal agencies are required by §1960.68 to set up procedures to protect employees from discrimination or reprisals for reporting unsafe or unhealthful working conditions. CSHOs can issue notifications to agencies for failing to have such procedures. OSHA also investigates whistleblower complaints filed by federal employees under the whistleblower provisions of a number of other statutes.

   The time limits for filing complaints and the specific filing methods vary by statute, and can be as short as 30 days from the date of retaliation. For more information, about these statutes, including the time limits for filing complaints and information about how to file a complaint, please visit www.whistleblowers.gov.

F. Alternate and Supplementary Standards.

1. The head of each agency must comply with all occupational safety and health standards issued under Section 6 of the Act (such as 29 CFR 1910, 1915, 1917, 1918, 1926, and 1911, etc.), or with alternate standards approved for that agency by the Secretary of Labor.
   a. An alternate standard is the federal agency equivalent of a private sector variance from OSHA standards.
   b. An agency can apply for an alternate and/or supplementary standard using application procedures found at §1960.17, Alternate Standards and §1960.18 Supplementary Standards.
   c. Federal agencies must follow FAP 00-00-001, Procedures for Handling "Alternate" and "Supplementary" Standards Submitted by Federal Agencies, July 1, 1981, when applying for approval of alternate standards.
   d. A list of federal agency alternate standards can be found on the Federal Agency Programs page of the OSHA website at: http://intranet.osha.gov/compliance/dep_fap.html.
2. If an agency has been approved for an alternate standard, the CSHO will determine if the agency is in compliance with the alternate standard. If the CSHO observes that the agency is not in compliance with the terms and conditions of the alternate standard, OSHA will issue a Notice in accordance with Section VIII of this Chapter, "Notice of Unsafe and Unhealthful Working Conditions."
3. A supplementary standard as defined by §1960.18 should be implemented by an agency if there is no OSHA standard that applies to a given workplace condition. The agency can implement an emergency temporary supplementary standard first and then work with OSHA to implement a permanent standard.

G. Refusal of Entry.

1. If a federal agency scheduled for an inspection refuses entry, then the Area Director, in consultation with the Regional Administrator, will attempt to resolve the issue with the establishment official. If they cannot agree on a resolution, the Area Director will contact the FAPO who will contact an official at the subject agency who is at the FAPO's equivalent agency organizational level, with responsibility and authority for the establishment's working conditions to discuss the refusal. Issues unresolved at the Area or Regional Office level will be transferred to the OFAP Director for resolution with the DASHO.

   NOTE: OSHA will not use administrative subpoenas or warrants for federal agencies. As stated above, unresolved issues shall be elevated to the next level until resolved.

2. A written record of all action taken to resolve the issue must be kept in the case file.

IV. Federal Agency Recordkeeping and Reporting Requirements.

A. General Background.

Section 19(a)(3) of the Act requires the head of each federal agency to "…keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action." Executive Order 12196 further requires federal agency heads to "operate an occupational safety and health management information system, which shall include the maintenance of such records as the Secretary may require." These requirements are set forth in §1960, Subpart I.

B. Recording and Reporting Injuries and Illnesses at Federal Agencies.

Since January 1, 2005, federal agencies have been required to keep their injury and illness records in essentially the same manner as private sector employers under §1904, Subparts C, D, E, and portions of Subpart G. The revised recordkeeping requirements for federal agencies are separate and apart from responsibilities for completing workers' compensation documentation, and do not diminish or modify in any way a federal agency's responsibility to report or record injuries and illnesses in accordance with the Federal Employees' Compensation Act (FECA).

NOTE: On September 28, 1998, Congress amended the Occupational Safety and Health Act to make the U.S. Postal Service subject to private sector injury and illness recordkeeping under §1904.

1. Exemptions from §1904, Subparts A and B.

   NOTE: §1904, Subparts A and B do NOT apply to federal agencies.

   a. Purpose of Recordkeeping for Federal Establishments.

      §1904, Subpart A, specifies the "Purpose" of the recordkeeping regulation for private sector employers. The "Purpose" statement for federal agencies is outlined in §1960.66.

b. All Federal Establishments Must Keep Injury and Illness Records.

§1904, Subpart B, is the exemption for private sector employers with ten or fewer employees and those in certain industries. There is no equivalent provision in the federal sector. All federal executive branch agencies regardless of size or industry classification, must keep injury and illness records; the USPS falls under OSHA's private sector procedures for maintaining injury and illness records.

2. Sources of Additional Information.

a. Basic Program Elements.

For further background information, see Basic Program Elements for Federal Employee Occupational Safety and Health Programs and Related Matters; Subpart I for Recordkeeping and Reporting Requirements (*Federal Register*, November 26, 2004 (69 FR 68793) and August 5, 2013 (78 FR 47180).

b. Frequently Asked Questions.

OSHA has also developed a document that answers common questions concerning federal agencies' recordkeeping. (See Frequently Asked Questions for OSHA's Injury and Illness Recordkeeping Rule for Federal Agencies).

C. Summary of Major Federal Recordkeeping Requirements Differences Compared to Private Sector.

1. Different Definitions.

CSHOs should review the different definitions for "establishment" and "employees" that are provided in Section I.C of this chapter to ensure that they review federal agencies' records correctly.

2. Certifying the Records.

Under §1904 for the private sector, a company executive must certify that he or she has examined the OSHA Form 300 log, and reasonably believes that the OSHA Form 300A summary is correct and complete. For federal establishments, the person who certifies the records must be the senior establishment management official, the head of the agency for whom the senior establishment management official works, or any management official in the direct chain of command between the senior establishment management official and the agency head.

D. Reports and Investigations of Fatalities/Catastrophes.

1. As with the private sector, agencies must report fatalities, in-patient hospitalizations, amputations, and losses of an eye as a result of work related incidents to OSHA in accordance with §1904.39. Notification can be made by telephone or in person at the OSHA area office nearest to the site of the incident, or by contacting the OSHA toll-free telephone number at 1-800-321-OSHA (6742). Also, notification can be made by electronic submission using the reporting application at www.osha.gov.

2. In addition, as required by §1960.70, federal agencies must provide OFAP with a summary report of each fatal and catastrophic incident investigation.

E. Federal Agency Recordkeeping Forms.

1. OSHA Forms.

   Federal establishments are required to maintain the same injury and illness recordkeeping forms as the private sector, either by using the OSHA forms or equivalent forms.

2. Use of Equivalent Forms.

   a. As in the private sector, federal agencies are permitted to use an equivalent form, provided that the replacement form contains all the OSHA-required information. The substitute form must be readable and understandable, and completed using the same instructions as the OSHA form it replaces.

   b. Some federal agencies can elect to use the Office of Workers' Compensation (OWCP) claim forms in lieu of the *OSHA-301 Incident Report*. While this is permissible, in their standard format the OWCP claim forms do not contain all the OSHA-required information, and must be supplemented to include the questions contained on the right-hand side of the OSHA Form 301. Also, the OWCP claim forms usually contain information that is protected under the Privacy Act of 1974.

V. Access to Federal Employee Occupational Safety and Health-Related Records.

A. Access to Federal Employee Injury and Illness Records.

1. Access to the §1904 records by employees, former employees, personal representatives, or authorized employee representatives is the same in the federal sector as in the private sector as specified under §1904.35.

2. If a federal establishment chooses to use an OWCP claim form as a substitute for the *OSHA-301 Incident Report*, then any personal identifiers or other privacy-protected information must be redacted before providing the forms to employees or former employees other than the injured parties or their personal representatives.

3. Access to these records by authorized employee representatives is limited to only that information detailing specific information about the case, which is equivalent to information contained on the right-hand side of the *OSHA-301 Incident Report*, "Tell us about the case."

B. Federal Employee Access to Exposure and Medical Records.

1. Employees or their designated representatives must have access to their personal exposure and medical records kept under §1910.1020. [See Basic Program Elements for Federal Employee Occupational Safety and Health Programs, *Federal Register*, July 5, 1995 (60 FR 34851)].

2. Section 19 of the OSH Act, Executive Order 12196, and 29 CFR Part 1960 require agency heads to implement occupational safety and health programs consistent with standards promulgated under Section 6 of the OSH Act. Because §1910.1020, which regulates employee access to exposure and medical records, was promulgated pursuant to Section 8 of the OSH Act, under existing regulations it would not be a required element of an agency program. Therefore, in 2013, OSHA amended §1960.66 by adding a new paragraph (f) to make §1910.1020 a required element of federal agency safety and health programs.

VI. Evaluations of Federal Agency Programs.

A. Purpose.

Executive Order 12196 section 1-401(h) directs the Secretary of Labor to evaluate the occupational safety and health programs of agencies and promptly submit reports to the agency heads. The Act requires federal agency heads to operate effective occupational safety and health programs; OSHA is required to evaluate the effectiveness of those programs and does so by conducting on-site field reviews and special studies at agency establishments.

1. Determining Effectiveness of Federal Agency OSH Programs.

OSHA determines the effectiveness of an agency's OSH program established by §1960.

2. Scope of Evaluations.

Evaluations can be classified by scope as follows:

a. Full-Scale Evaluations.

Full-scale evaluations include headquarters, intermediate organizational levels and worksite reviews of the entire occupational safety and health program.

b. Special Study Evaluations.

Special Study evaluations include headquarters, intermediate organizational levels, and worksite reviews but focus only on specific issues.

c. Headquarters-Only Evaluations.

Headquarters-only evaluations do not include worksite reviews.

d. Agency Self-Evaluations.

Agency self-evaluations can be substituted for an OSHA evaluation when recommended by the OFAP Director and approved by the Secretary.

B. Time Frames.

While some special studies and scheduled inspections may be completed relatively quickly, comprehensive reviews are likely to involve a substantial time investment and require careful coordination and full cooperation from the evaluation team. According to §1960.80 (e), (f) and (g), an agency evaluation should be completed within 90 calendar days of the date of the opening

conference, the evaluation report should be submitted to the agency head within 90 calendar days from the date of the closing conference, and the agency head then has 60 calendar days to respond to the report.

C. Office Responsibilities.

1. OFAP, in coordination with the FAPO(s), is responsible for organizing and managing evaluations. Evaluations will be conducted by a team comprised of OFAP staff, FAPOs, and compliance officers.
2. The scope of the evaluation will determine the size and composition of the team, as well as the participation level of each team member.
3. FAPOs will work with Area Directors to determine the availability of compliance officers to participate in the field evaluation/inspection element of the agency evaluation. A compliance officer's role in and time commitment to evaluations will depend on the type of evaluation.
4. Please contact OFAP for further information.

VII. Agency Technical Assistance Request (ATAR).

A. Definition.

An ATAR is a request by a federal agency for on-site assistance. An ATAR may include hazard abatement advice, training, an assistance inspection, or program assistance. An ATAR is conducted at the request of an agency and is not an enforcement inspection.

All forms of assistance provided on site must be recorded as an intervention on an OSHA Form 55.

B. Agency Procedures for Requesting an ATAR.

1. While many ATAR requests for hazard abatement advice or for an assistance visit will be received by telephone, the requesting agency normally must reduce the ATAR to writing before OSHA will schedule an on-site visit.
2. If special circumstances arise that make it impractical to wait for a written request, then the ATAR visit can be initiated in response to the oral request, with documentation in the file including the time, form of communication, individual making the request, and the reason the ATAR was not requested in writing.
3. Agencies requesting assistance will be informed in advance that they will be expected to correct any violations of citable program elements under §1960 or OSHA standards observed by CSHOs.

C. OSHA Response to ATARs.

OSHA will usually respond to agency requests for assistance whenever resources permit. However, an Area Director has discretion to deny the request for reasons such as:

1. Lack of site commitment to safety and health as evidenced by the agency's failure to correct serious job safety and health hazards;

2. Reluctance of the requesting agency to assign necessary staff and resources to implement safety and health programs;
3. Overdue abatement of previous violations and hazards; or
4. Unwillingness by the requesting agency to pay CSHO travel and per diem during the ATAR.

D. Visit Procedures.

Assistance visit procedures will vary according to the scope of the visit, as prescribed by the Area Director.

1. Opening Conference.
   a. Discuss and agree upon the scope of the ATAR.
   b. Explain that the agency will be required to correct any hazards within reasonable and agreed-upon time frames.
   c. Explain that if an imminent danger situation is found during the ATAR, the ATAR will be ended and the agency will be required to correct the hazard immediately or OSHA will conduct an enforcement inspection.
   d. Explain that if any trends of serious hazards are observed and/or the site has no effective OSH management program in place, then the ATAR will be terminated immediately and the case will be referred for enforcement action.
2. Closing Conference.
   a. Review findings from the ATAR.
   b. If hazards were identified, then set a date for when the hazard must be abated and an abatement report provided to the OSHA area office.
   c. If no violations are observed, or if all hazards are eliminated prior to the completion of the closing conference, then the ATAR will be closed at that time.

E. Abatement.

If, after 30 calendar days, the Area Director has not received an abatement plan and has not been notified that violations have been abated, then the Area Director will check on abatement status by telephone and determine whether an abatement verification inspection is required.

If any violations are unabated, OSHA can terminate the ATAR and refer the case for enforcement action.

NOTE: Where on-site assistance is provided for those agencies excluded from OSHA's enforcement jurisdiction, OSHA will send a recommendation letter.

VIII. Notice(s) of Unsafe or Unhealthful Working Conditions.

The federal agency equivalent of a "citation" is OSHA's *Notice of Unsafe or Unhealthful Working Conditions (OSHA-2H)*. (The *Citation and Notification of Penalty (OSHA-2)* is for private sector employers; federal agencies receive

OSHA-2H forms.) The "Notice" is a report of a violation of OSHA standards, agency alternate standards, or citable program elements required by §1960.

A. Issuance of an OSHA Notice.

1. When violations are observed during an inspection or evaluation of a federal agency establishment, the private sector procedures will be followed, except as otherwise indicated in this section. The OSHA Notice will be used to inform establishment officials of violations of OSHA standards, alternate or supplemental standards, and §1960 citable program elements.
   a. For violation of a citable program element, cite the paragraph. See Table 13-1 for citable program elements.
   b. For recordkeeping violations, cite the applicable sections of §1904 (unless superseded by future agency-approved correspondence). Also see §1960 Citable Program Elements in Table 13-1 (at the end of this chapter).
   c. For violations of a specific OSHA standard, cite the applicable OSHA standard/paragraph.
   d. Where violations of the Alternate Standard are identified, follow the guidance for variance violations for private sector employers, with the following federal agency adjustments:
      - For violations of an Alternate Standard where requirements are also addressed in the OSHA standards, cite the OSHA standard and then add the following language to the SAVE standard language section: "As required by §1960.8(b)." Then reference in the AVD the Alternate Standard provision that was not met.
      - For violations of a provision of the Alternate Standard that is not a requirement in §1910, cite §1960.8(a), referencing the paragraph of the Alternate Standard.
      - For violations of a requirement in §1910 that is not addressed in the Alternate Standard, cite the OSHA standard and then add the following language to the SAVE standard language section: "As required by §1960.8(b)."
   e. If there is no OSHA standard that addresses a serious hazard, cite §1960.8(a) (the federal equivalent of the General Duty Clause). If there is no OSHA standard that addresses an other-than-serious hazard, then notify the establishment using the inspection form letter ("Agency No Standard Applies Supplementary") in OIS.
   f. If there is an agency supplemental standard(s) that addresses a serious hazard, then cite §1960.8(a) (the federal equivalent of the General Duty Clause) and the supplemental standard that was in violation.
2. The Area Office will send the OSHA Notice in accordance with private sector procedures. When violations are classified as willful or repeat, a

copy must also be sent to the DASHO. Contact information is available from OFAP, through the Regional FAPOs.

NOTE: For the U.S. Army only, send copies of willful and repeat Notices to:

(Name to be supplied by OFAP)
Department of the Army
Assistant Secretary of the Army Installations and Environment
110 Army Pentagon
Washington, DC 20310-0110

B. Cover Letter for Federal Agencies.

1. The OSHA Notice for federal agencies includes general information for the agency advising it of the contents of the Notice, its rights, and procedures to follow. It will remind the establishment official to post a copy of the OSHA Notice at or near each place that a violation exists or existed, and will inform the establishment official that he or she can request an informal conference, either in writing or by telephone with a confirming letter, within 15 working days of receipt of the OSHA Notice.
2. Enclose the OSHA Publication, "Employer Rights & Responsibilities Following a Federal OSHA Inspection." (English PDF) (Spanish PDF)

C. Violations of Citable Program Elements of 29 CFR Part 1960.

1. Violations of citable program elements of §1960 will normally be classified as "other-than-serious" unless they are considered a contributing factor to a serious safety or health standard violation (e.g., where lack of supervisory training contributed to an unshored trench, both the trenching standard and §1960.55, Training of Supervisors, would be cited as "serious").
2. If violations of §1960 citable program elements cannot be corrected within 30 days, then Area Directors can assign abatement dates of up to 6 months in 90-day increments. Justification for abatement in excess of 30 days must be documented in the case file.

D. Repeat OSHA Notice for Federal Agencies.

1. A repeat OSHA Notice can be issued to a federal agency establishment for repeat violations if the agency had been cited previously for the same or a substantially similar condition and one or more of the following conditions are present.
   a. A repeat notice for serious violations can be issued if OSHA agency-wide inspection history lists a previous OSHA Notice issued within the past five years to an agency establishment within the same NAICS code. For example, if an inspection is conducted at the U.S. Department of Transportation (DOT), Federal Aviation Administration (FAA) worksite, then a CSHO would search for violations at the FAA and not DOT-wide.

b. A repeat notice for other-than-serious violations can be issued if the establishment being inspected received a previous OSHA Notice issued within the past three years.

c. There is documentary evidence that the previous OSHA Notice had been abated.

2. For a repeat Notice, cite the appropriate OSHA standard (§1910, 1926, etc.) Prepare the Notices as follows:

"Notice ___ #, Item ___ #, 29 CFR ___ STANDARD NUMBER as required by 29 CFR 1960.8(b): The employer failed to (a brief description of the violation – SAVE). The employer was cited for a violation of the (SAME/SIMILAR standard and/or SAME/SIMILAR hazard) on MONTH/DAY/YEAR, Inspection ___ #, date MONTH/DAY/YEAR of final order/settlement, and means of abatement".

E. Multi-Employer Worksite Policy for Federal Agencies.

Many workplaces in the federal sector involve a mixed workforce of civil service and private contractor employees. OSHA requires federal agencies to comply with all occupational safety and health standards and to assume responsibility for worker protection in a manner comparable to private employers, including multi-employer worksite responsibility in appropriate circumstances. Federal agencies on multi-employer worksites have safety responsibilities comparable to those of private employers in comparable circumstances, whether the workforce is comprised of employees from multiple federal agencies or a mixture of federal and private-sector employees. The multiemployer worksite policy described in CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999, applies to both construction and non-construction, and to both private and federal employers.

F. Informal Conference Procedures for Federal Agencies.

1. Separation.

a. In an effort to resolve issues quickly, federal agencies should be aware of, and use, the informal conference at the Area Office level. Agencies should contact the Area Director to schedule an informal conference prior to beginning the appeals process. However, agencies must also understand that the informal conference is independent of, and proceeds separately from, the appeals process.

b. An agency that intends to appeal an OSHA Notice must file the appeal with the Regional Administrator within the given time frame, regardless of whether the informal conference has occurred.

2. Affirmative Defenses.

Although agencies will have the burden of proving any affirmative defenses during the appeals process, the Area Director must anticipate the potential for affirmative defenses, particularly if the agency makes such an assertion during the informal conference. When providing the case file to

the Regional and/or National Office, the Area Director should be sure to include all documentation related to possible affirmative defenses.

G. Federal Agency Appeals Procedure.

The private sector contest procedures before the Occupational Safety and Health Review Commission do not apply to federal agencies, **except the United States Postal Service**. However, federal agencies can obtain higher-level OSHA review of Notices issued to them, as described in this section.

1. Regional Review.

   If the Area Director and relevant federal agency cannot resolve an issue through an informal conference, then the federal agency has 15 working days following receipt of the OSHA Notice to file a written request that OSHA's Regional Administrator review the case. The request must originate from the appealing agency's National Occupational Safety and Health (OSH) Manager[2] or the equivalent.

   a. The written appeal request should state the:

      - grounds for the appeal based on 29 CFR Part 1960,
      - reason(s) for the appeal, and
      - issues the agency intends to raise.

      NOTE: If the federal agency fails to notify OSHA of its intent to request a Regional review within 15 working days following the receipt of a Notice, then the Notice becomes final.

   b. After receiving the written appeal request, the Area Director has five working days to provide the OSHA Regional office with a written summary of the informal conference discussion.

   c. After receiving the written summary from the Area Director, the Regional Administrator has 20 working days to review the summary, case file and other relevant information, including any documentation provided by the appealing agency, and, if necessary, schedule and hold a (tele)conference with all parties (which may include the Area Director, Regional Solicitor, and other OSHA personnel as necessary) to discuss the issues raised in the written appeal request. The Regional Administrator will provide a bulletin (see Appendix A and Appeals Process Flowchart), by certified mail, with the date, time, and location of the conference, which the appealing agency must post. The appealing agency must return the Certificate of Posting (see Appendix B and Appeals Process Flowchart) within three working days of receiving the bulletin.

   d. If the Regional Administrator and the appealing agency reach a settlement, then the Area Director will ensure that the appealing agency receives a written Informal Settlement Agreement (ISA) (see

[2] The National Occupational Safety and Health Manager is the headquarters-level career official tasked with responsibility for overseeing, implementing, and evaluating the agency's OSH program. In smaller agencies, this person may also be the DASHO.

Appendix C and Appeals Process Flowchart). The Area Director must ensure that the ISA is sent, by certified mail, within 10 working days.

- The appealing agency has 15 working days after receiving the ISA to sign it (see *Federal Employer Rights and Rsponsibilities Following an OSHA Inspection*). The ISA must be signed by the appealing agency's National OSH Manager or the equivalent.
- Once the agency has signed the agreement and returned it to the OSHA Area Office by certified mail, it is considered final and the case will be closed.
- The Area Office will notify the Regional Administrator upon receipt of the signed ISA from the appealing agency. If the appealing agency has failed to sign the agreement, then the Area Office must note this on the agreement with details of the time line for signatures.
- If the appealing agency does not sign the agreement within the given time frame, then the original Notice will stand, unless the federal agency requests a review by OSHA's National Office within the required time frame.

e. If the Regional Administrator and the appealing agency cannot reach a settlement within the specified 20-day time frame, then the appealing agency must either accept the original Notice or follow procedures for requesting OSHA National Office review.

NOTE: If the Regional Administrator and appealing agency do not reach a settlement within 20 working days, and the appealing agency does not ask for a National Office review, then the Notice becomes a final order and is not subject to review.

2. National Office Review.

If an appealing agency has signed an ISA with the Regional Office, then it cannot request a review by OSHA's National Office.

a. Following the Regional Administrator's decision, an appealing agency has 10 working days to request, in writing, a review by OSHA's National Office. The appealing agency must send its request to:

[Name], Director
Office of Federal Agency Programs
U.S. Department of Labor
Occupational Safety and Health Administration
200 Constitution Avenue, NW
Room N3622
Washington, DC 20210

b. The written request for National Office review must originate from the appealing agency's Designated Agency Safety and Health Official

(DASHO)[3]. The agency must base the written appeal on its compliance with the program elements described in §1960 and, according to §2200.34(b)(1-3), the appeal documentation must include:

- A short and plain statement denying the allegations in the Notice that the appealing agency intends to contest.

  NOTE: If an agency does not deny an allegation in the initial written appeal, the allegation becomes a final order.

- All affirmative defenses that the agency is asserting, such as "infeasibility," "unpreventable employee misconduct," and "greater hazard."

  NOTE: The National Office will not consider appeals based solely on issues of fact surrounding a Notice; the agency must resolve issues of factual dispute with the relevant OSHA Area or Regional Office.

c. Once the National Office receives the review request, it must request a copy of the case file from the Regional Administrator and provide a copy of the review request to the Area Office. The Regional Office must provide a copy of the case file to the National Office within two working days.

d. If the National Office finds it necessary to discuss the appeal with the appealing agency, then the National Office, after receiving the copy of the case file from the Region, will schedule and hold a (tele)conference with the federal agency and affected employee(s) or employee representatives to discuss the issues raised.

   The National Office will provide a bulletin (see Appendix A), sent by certified mail, with the date, time, and location of the conference, which the appealing agency must post. The appealing agency must return the Certificate of Posting (see Appendix B) within three days of receiving the bulletin.

e. The OFAP Director may convene a panel of experts (Appeals Panel) to assist with reviewing the appeal. At the Director's request, the panel members can participate in the conference with the appealing agency.

   The panel will provide input to assist the OFAP Director in making recommendations on the resolution of the appeal.

f. The OSHA Assistant Secretary, or designee, makes the final OSHA National Office's decision on federal agency appeals. The Assistant

[3] Consistent with 29 CFR 1960.2(f), the term Designated Agency Safety and Health Official means the individual who is responsible for the management of the safety and health program within an agency, and is so designated or appointed by the head of the agency pursuant to §1960.6 and the provisions of Executive Order 12196. 29 CFR 1960.6(a) notes that the DASHO should be of the rank of Assistant Secretary, or of equivalent rank, or equivalent degree of responsibility.

Secretary or designee will provide a final written decision to all parties.

g. The National Office will address the decision to the highest level DASHO for the Department or Agency.

h. The National Office must provide the originating Area Office with a signed copy of the summary of the conference and decision.

3. While the National Office's decision is considered the Secretary's final decision, OSHA encourages discussion between agencies in an effort to promote occupational safety and health for federal employees. In the unlikely event that agency heads are unable to reach agreement, Executive Order 12196, paragraph 1-401(k) states that unresolved disagreements between the Secretary of Labor and another agency head will be submitted to the President, with recommendations.

H. Verification of Abatement.

Follow private sector guidelines to verify abatement. Notify the Certified Committee, if appropriate, of the abatement plan.

I. Petition for Modification of Abatement Dates (PMA).

When Area Offices receive federal agency requests for additional abatement time, they will follow §1903.14(a) and §2200.37, which prescribe PMA procedures for the private sector. If the Area Director does not agree to extend the abatement date, then the agency can bring unresolved issues to the Regional Administrator/FAPO for resolution with his counterpart in the agency. Issues not resolved at the regional level will be forwarded to the OFAP Director for resolution with agency headquarters staff in consultation with the Regional Administrator, the FAPO, and the Area Director.

J. Failure to Abate.

Area Directors will work with local federal agency managers in developing an acceptable abatement plan. When development of such a plan is unsuccessful, and abatement is not achieved within 30 calendar days of the abatement date, the following steps will apply:

1. The Area Director will send a *Notification of Failure-to-Abate Alleged Violation (OSHA-2C)*, (FTA Notice) with inspection form letter "h" ("Notification of Failure to Abate Alleged Violation") to the establishment official. This letter can also contain a general summary of what penalty amounts would have been proposed had the agency been a private sector employer.

2. The Area Director will send a copy of the FTA Notice and inspection form letter to the DASHO and representative of employees (a transmittal letter is not required).

   NOTE: If the inspection was initiated because of a complaint, then the Area Director will send a copy of the FTA Notice to the complainant with the complaint form letter ("Complainant_FTA Issued to Agency") in the OIS.

3. If the Area Director cannot resolve the issue at the local level, then he/she will forward a copy of pertinent portions of the complete case file to the FAPO. The FAPO will immediately contact the federal agency official at the equivalent organizational level with responsibility and authority for the establishment's working conditions, and ask the manager to abate the violation(s) or to develop an acceptable abatement plan. If no solution is reached within 60 calendar days, then the Regional Administrator will forward the Area Office case file and written documentation showing the dates, contacts, and results of discussions undertaken at the Regional level to the Director of OFAP.

   The OFAP Director will, within 30 calendar days, determine which Directorate within OSHA is the most appropriate to review the case file. The Director, Directorate of Enforcement Programs (DEP), will then forward the case file to the appropriate Directorate. The reviewing Directorate will have 30 calendar days in which to review the case file and return it to DEP with appropriate recommendations.
4. If DEP upholds the citation, then the DEP Director will, within 30 calendar days, schedule a meeting with the DASHO in the cited federal agency to discuss OSHA's findings and request an abatement schedule.
5. If a satisfactory abatement schedule is not received within 60 calendar days, then the case will be referred to the Assistant Secretary.
6. DEP will provide the Regional Office with a status report every 60 calendar days until the case is resolved.

Table 13-1: 29 CFR Part 1960 Citable Program Elements

Program Element	Explanation
§1960.8(a)	The "general duty clause" element that will replace the Executive Order 201(a) for enforcing serious hazards that are not covered by a standard.
§1960.8(b)	Requires all agencies to comply with applicable OSHA standards.
§1960.8(c)	Requires all agencies to develop, implement, and evaluate an occupational safety and health program.
§1960.8(d)	Requires all agencies to acquire, maintain, and mandate employee use of approved personal protective equipment (PPE) and other safety equipment.
§1960.11	Establishes accountability of managers and supervisors and can apply equally to all agencies.
§1960.12(c)	Requires all agencies to post an agency occupational safety and health poster informing employees of the agency safety and health program.
§1960.25(a)	The last sentence, stipulating that necessary equipment to conduct inspections must be provided, can be enforced in all agencies; the first part of the paragraph may not apply.
§1960.25(c)	The first sentence requires each agency to inspect each workplace annually. The remaining part of the element may not apply to all agencies.
§1960.26(b)(5)	The first sentence provides the CSHO with specific imminent danger instructions that can apply uniformly. The rest of the paragraph may not apply at all locations.
§1960.26(c)(1-4)	Specifies how agencies should handle agency inspection reports and notices of unsafe or unhealthful conditions.
§1960.27(a)	The first sentence specifies that the safety and health inspector is in charge of an agency inspection. The rest of the paragraph is general instruction that would be difficult to enforce.
§1960.28(d)(3)	Specifies time frames for an agency to inspect employee reports of hazards.
§1960.29(b)	Requires all agencies to investigate incidents resulting in a fatality or hospitalization of three or more employees.
§1960.29(d)	Requires agencies to include specific information on all investigative reports of incidents and specifies that the report be made available to the Secretary or an authorized representative of the Secretary of Labor.
§1960.30(a-e)	Specifies abatement directions that apply to all agencies.
§1960.34(a-d)	Provides specific directions to General Services Administration (GSA) and other agencies that affect the safety and health programs of agencies in federally owned or leased buildings.

Program Element	Explanation
§1960.37(b)	Requires equal representation of management and non-management employees for those agencies that choose to have a Certified Safety and Health Committee.
§1960.37(d)	Requires the chair position of the safety and health committee to alternate between management and non-management; this element applies as well to those agencies that choose to have a Certified Safety and Health Committee.
§1960.37(e)	Requires safety and health committees to meet on a regular schedule and applies to all agencies that choose to have a Certified Safety and Health Committee.
§1960.55(a)	Requires agencies to train all supervisory employees on the Act, E.O. 12196, the agency safety and health program, etc.
§1960.56(a)	Provides specific directions for training agency safety and health specialists.
§1960.57	Requires agencies to train safety and health inspectors.
§1960.58	Requires agencies to train collateral duty safety and health personnel and committee members.
§1960.59(a-b)	Requires agencies to train employees and employee representatives in safety and health appropriate to the work performed.
§1960.67 (Cite the appropriate §1904 regulation then cite this program element in the alternative)	Requires all agencies to have the record or log of occupational injuries and illnesses certified by: (a) the senior establishment management official, (b) the head of the agency for which the senior establishment management office works, or (c) any management official who is in the direct chain of command between the senior establishment management official and the head of the agency.
§1960.68	Requires all agencies to have established procedures for protecting employees against reprisal or discrimination for identifying unsafe or unhealthful working conditions.
§1960.70	Provides directions to all agencies about providing a summary report of each fatal and catastrophic incident to OSHA's Office of Federal Agency Programs. NOTE: 29 CFR Part 1904 has requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye.
§1960.71(a)(1)	Requires the agency head to submit to the Secretary an annual report on his/her agency's occupational safety and health program by January 1 of each year.

Table 13-2: The Main Federal Agencies Outside OSHA's Oversight

Branch of the Federal Government	Agency
Legislative	➢ Congress (Senate and House of Representatives) ➢ Architect of the Capitol including the Botanical Garden ➢ Congressional Budget Office ➢ Government Accountability Office ➢ Government Publishing Office ➢ Library of Congress
Judicial	➢ U.S. Supreme Court ➢ Federal Courts of Appeals ➢ U.S. District Courts ➢ U.S. Bankruptcy Courts ➢ U.S. Tax Courts ➢ U.S. Court of Appeals for Veterans' Claims

Table 13-3: Departments and Agencies with Certified Safety and Health Committees

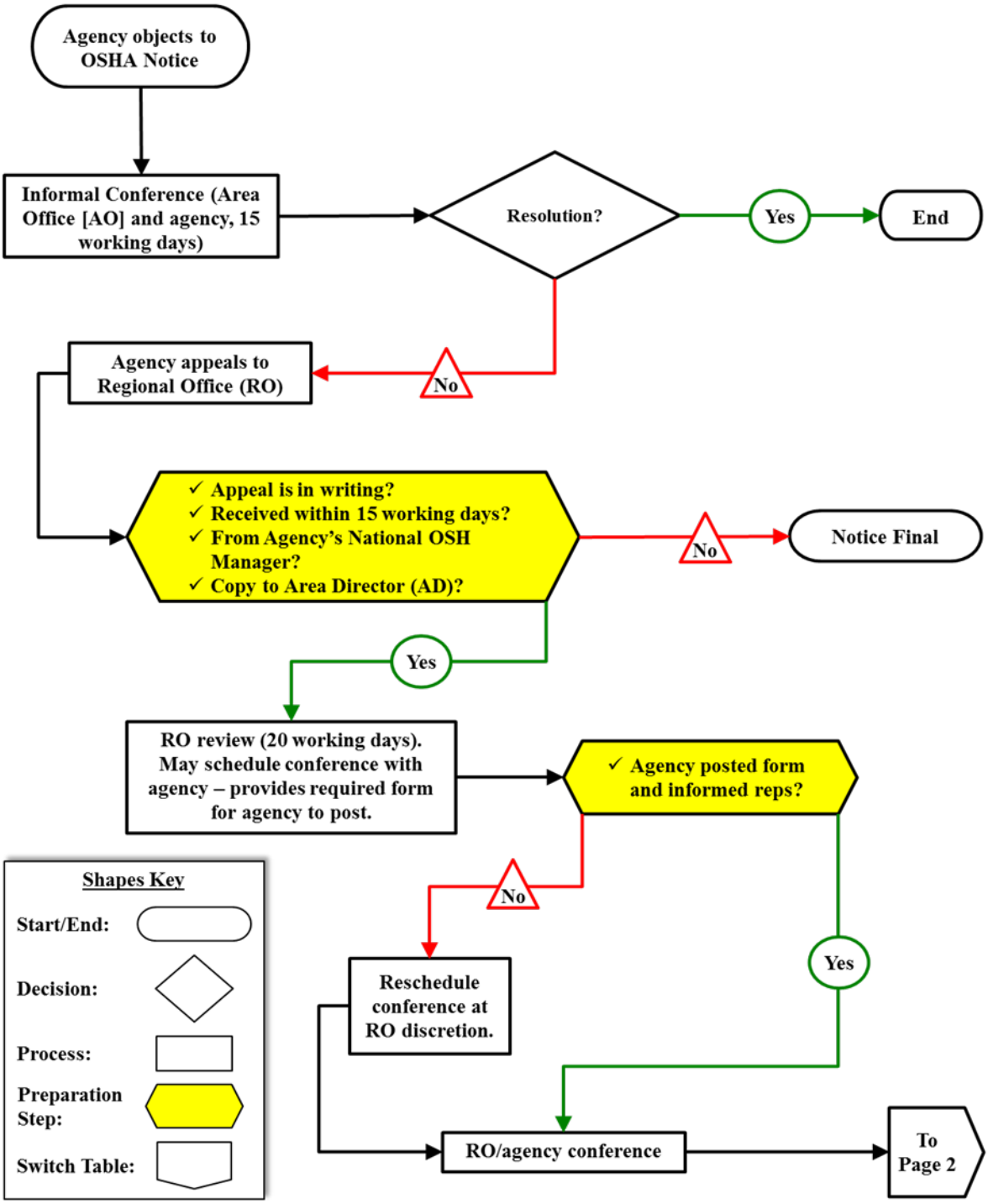
➢ Central Intelligence Agency
➢ U.S. Department of Labor
➢ General Services Administration
➢ Tennessee Valley Authority
➢ U.S. International Trade Commission

Table 13-4: Federal Agency Form Letters

Standard Form Letter Screen on NCR	
Federal Agency Form Letters	
H	Complaint Letters
I	Inspection Letters
J	PMA Letters
K	Reprisal Letters
Complaint Letters (H)	
A	No inspection – invalid complaint
B	Reserved
C	Complaint (OSHA-7) For Signature
D	Notification to Employer

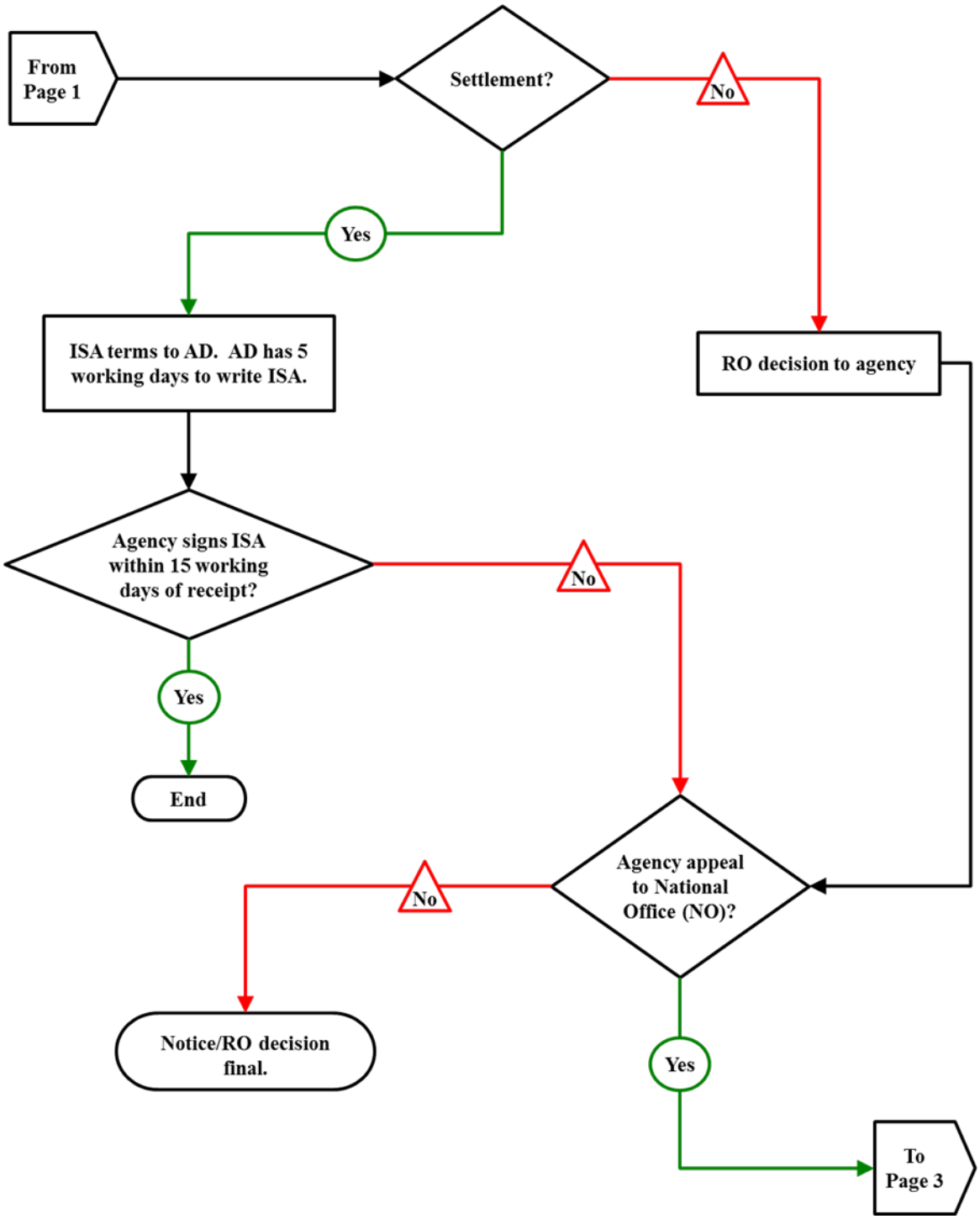
E	Complaint Notification with Letter D
F	Acknowledgement Complainant
G	Notification Complainant with Employer Response
H	Notification Complainant with Inspection Results
I	Dunning Letter – Non Insp Complaint
J	Correcting – Additional Information Needed
K	Notification Complainant – Invalid Allegations
L	Notification Complainant – Unsatisfactory Employer
Other (H)	
M	Notification Reprisal Complaint
N	Reports Program Deficiencies – Agency
O	Notification Complainant – FTA Issued
P	Complaint Letter Insp Employer
Federal Sector Inspection Letters (I)	
A	Notification Official (Inspection Results)
B	Reserved
C	Notification Official (Evaluation Results)
D	Notification Official (ATAR-Schedule)
E	Notification Official (ATAR-Results)
F	Agency Technical Assistance Request (ATAR)
G	Hazard Not Covered by General Standard
H	Notification of FTA Alleged Violation
I	Informal Conference Scheduled
Federal Sector PMA Form Letters (J)	
A	Notification Modification of Abatement Date
B	Notification Amended Abatement Date
C	Notification Employer (Uncontested)
D	Petition Modification of Abatement Date
E	Notification Employer (Review Request)
F	Uncontested Petition
G	Notification Employer (Object Petition)
H	Process Petition – Modify Abatement
I	Notification Employer (Objection by Union)
J	Notification Employer (Objection by OSHA)
Federal Sector Reprisal Letters (K)	
A	Reprisal Letter – Special Counsel
B	Reprisal Letter – Covered Federal Employee

Federal Agency Appeal Process



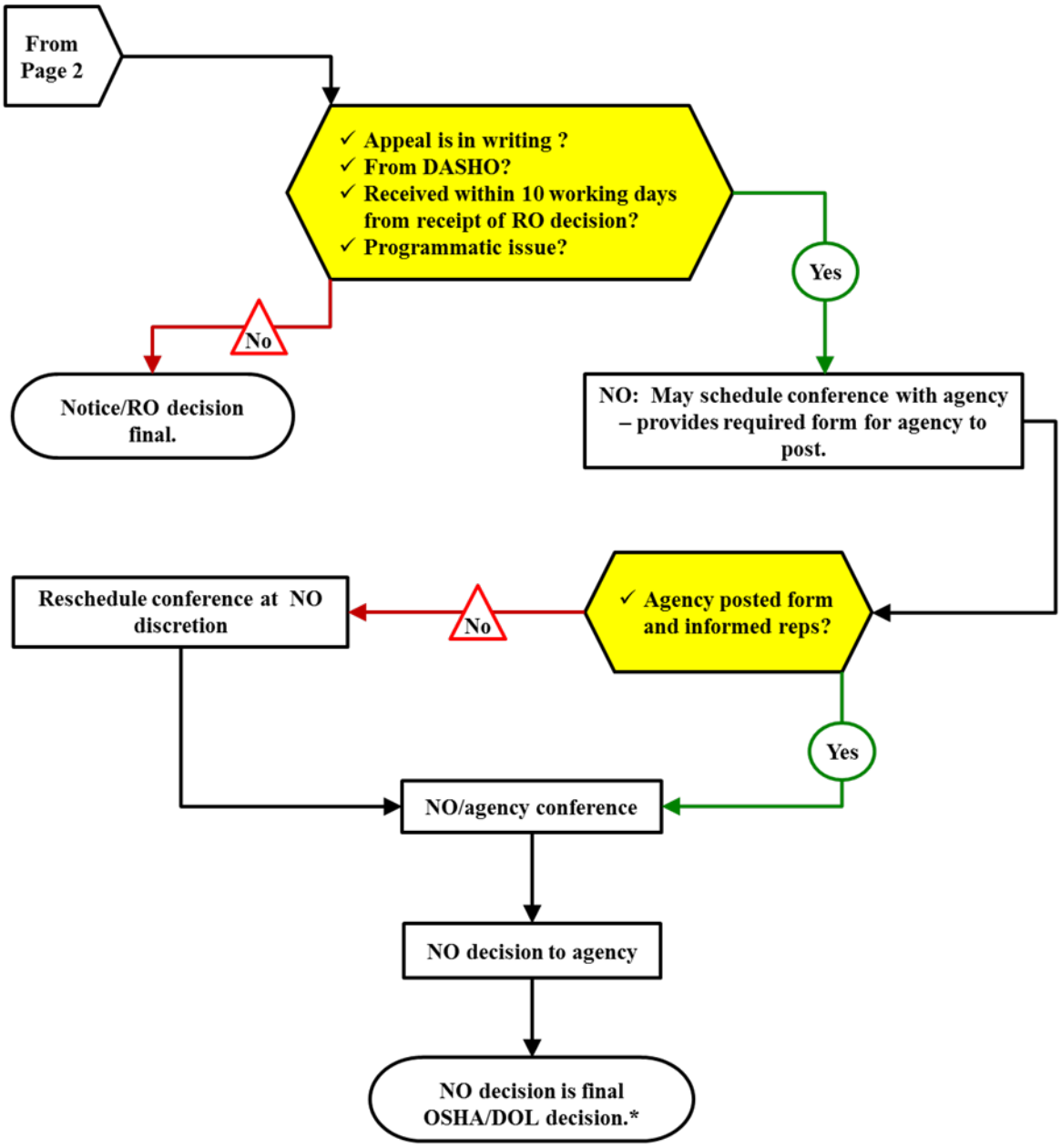
Federal Agency Appeal Process

Page 2



Federal Agency Appeal Process

Page 3



*While the Assistant Secretary's decision is considered the Secretary of Labor's final decision, OSHA encourages discussion between agencies in an effort to promote and benefit occupational safety and health for federal employees. In addition, in the unlikely event that agency heads are unable to reach agreement, Executive Order 12196, paragraph 1-401(k) provides that unresolved disagreements between the Secretary of Labor and another agency head will be submitted to the Office of Management and Budget.

Appendix A

(Print on letterhead)

(*Regional or National*) Office Notice of Appeal

This bulletin serves to notify all employees that (*federal agency*) is appealing OSHA inspection (*inspection number and date of inspection*) and the resulting Notice(s) of Unsafe or Unhealthful Working Conditions. The agency and OSHA will discuss the appeal at:

(*Regional or National Office Address*)

(*Time*)

(*Date*)

_____

[Name], Regional Administrator or Director, Office of Federal Agency Programs (choose one)

[sample – would be printed on letterhead]

Region III Notice of Appeal

This bulletin serves to notify all employees that the U.S. Army Corps of Engineers (USACE) is appealing OSHA inspection #123456, January 3, 2012, and the resulting Notice(s) of Unsafe or Unhealthful Working Conditions. The USACE and OSHA will discuss the appeal at:

U.S. Department of Labor - OSHA
The Curtis Center, Suite 740 West
170 South Independence Mall West
Philadelphia, PA 19106-3309

9:00 AM

June 5, 2012

_____

Phoebe Clark, Regional Administrator

Appendix B

[print on letterhead]

Certificate of Posting

Notice of Appeal

Inspection Number: _____

Date of Posting Notice of Appeal:_____

Date Copy Given to Relevant Employee Representative(s): _____

On behalf of (*federal agency*), I certify that a copy of the Occupational Safety and Health Administration's Notice of Appeal, has been posted in a conspicuous place, where all affected employees will have notice. The agency has also provided a copy of the Notice to each authorized representative of affected employees, if any. This bulletin will be posted for a minimum of 10 days or until any proceedings conclude.

_____
National Occupational Safety and Health Manager

_____
Title

_____
Federal Agency Name

[sample – would be printed on letterhead]

Certificate of Posting

Notice of Appeal

Inspection Number: __123456_____

Date of Posting Notice of Appeal: ____May 16, 2019_____

Date Copy Given to Relevant Employee Representative(s): __May 16, 2019_____

On behalf of the U.S. Army Corps of Engineers, I certify that a copy of the Occupational Safety and Health Administration's Notice of Appeal, has been posted in a conspicuous place, where all affected employees will have notice. The USACE has also provided a copy of the Notice to each authorized representative of affected employees, if any. This bulletin will be posted for a minimum of 10 days or until any proceedings conclude.

_____
National Occupational Safety and Health Manager

_____
Title

_____
U.S. Army Corps of Engineers

Appendix C

(Print on letterhead)

In the Matter of:
OSHA No.(s):

INFORMAL SETTLEMENT AGREEMENT

The undersigned Agency and the undersigned Occupational Safety and Health Administration (OSHA), in settlement of the above Notice(s) of Unsafe or Unhealthful Working Conditions (Notice) which was issued on (Issue Date) hereby agree as follows:

1) The Agency agrees to correct the hazards as cited in the above Notice(s) or as amended below.

2) The Agency and OSHA agree that the following Notice(s) are not being amended:

   Notice 01 Item 001
   Notice 02 Item 001
   Notice 02 Item 002
   Notice 02 Item 003

3) OSHA agrees that the following Notice(s) are being amended as shown below:

   Notice 01 Item 002 – Withdraw item
   Notice 01 Item 003 – Reclassify from Serious to Other than Serious
   Notice 01 Item 004 – Withdraw item
   Notice 01 Item 005 – Group with Item 6
   Notice 01 Item 006 – Group with Item 5

4) The Agency, by signing this Informal Settlement Agreement, hereby waives its rights to appeal the above Notice(s), as amended in Paragraph 3 of this agreement.

5) The Agency agrees to immediately post a copy of this Agreement in a prominent place at or near the location of the hazard(s) referred to in Paragraph 3 above. This Agreement must remain posted until the agency has corrected the hazards cited, or for three working days (excluding weekends and federal holidays), whichever is longer.

6) The Agency agrees to continue to comply with the applicable provisions of the Occupational Safety and Health Act of 1970 (the Act), Executive Order 12196, 29

CFR Part 1960, and the applicable safety and health standards promulgated pursuant to the Act.

7) By entering into this agreement, the Agency does not admit that it violated the cited standards.

8) The Agency also agrees to the following conditions:

- It has abated all violations.
- It will correct all similar conditions in the workplace.
- It will send a letter of corrective action to the Area Director by <date>.

For the Occupational Safety and Health Administration
<name of representative>

_____
Date

For the Agency

_____
Date

If your Agency received this Informal Settlement Agreement via postal mail or facsimile for signature, your agency must return the document with the "ORIGINAL" signature to this office or the agreement will not be valid.

NOTE: If you are faxing the signed ISA as an interim measure, you must fax the entire agreement, **not just the signature page.**

Chapter 14

HEALTH INSPECTION ENFORCEMENT PROGRAMS

I. Health Enforcement Programs [Reserved]

Chapter 15

LEGAL ISSUES

I. Administrative Subpoenas.

A. When to Issue.

An Administrative Subpoena can be issued whenever there is a need for records, documents, testimony, or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within OSHA's authority.

1. Regional Administrators have authority to issue subpoenas, and are also authorized and encouraged to delegate to Area Directors the authority to issue routine administrative subpoenas.
2. The issuance of an administrative subpoena requires the Area Director's or Regional Administrator's signature.

B. Two Types of Subpoenas.

There are two types of subpoenas used to obtain evidence during an OSHA investigation:

1. A *Subpoena Duces Tecum* is used to obtain documents. It orders a person or organization to appear at a specified time and place and produce certain documents, and to testify to their authenticity. Employers are not required to create a new record in order to respond to these types of subpoenas.
2. A *Subpoena Ad Testificandum* commands a named individual or corporation to appear at a specified time and place, such as the Area Office, to provide testimony under oath. A verbatim transcript is made of this testimony.

C. Area Director Delegated Authority to Issue Administrative Subpoenas.

Although authority to issue some types of subpoenas is reserved to the Regional Administrator, Area Directors can be authorized to issue routine administrative subpoenas.

1. Area Directors can be delegated authority to issue administrative subpoenas for any record or document relevant to an inspection or investigation under the Act, including:
   a. Injury and illness records such as the *OSHA-301* and the *OSHA-300* (See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, August 22, 2007, and 29 CFR 1913.10(b)(6));
   b. Hazard communication program;
   c. Lockout/tagout program; and
   d. Safety and health program.

2. Information shall be requested from the employer or holder of records, documents, or other information-containing materials.
   a. If this person/entity refuses to provide requested information or evidence, then the OSHA representative serving the subpoena shall explain the reason for the request.
   b. If there is still a refusal to produce the information or evidence requested, then the OSHA representative shall inform the person/entity that the Agency may take further legal action.
3. The official issuing the subpoena is responsible for evaluating the circumstances and deciding whether to issue a subpoena. In cases with potential national implications or involving extraordinary circumstances, the Regional Administrator shall be contacted for concurrence or to determine whether the subpoena should be issued by the Regional Administrator.

D. Regional Administrator Authority to Issue Administrative Subpoenas.
1. Regional Administrators have independent authority to issue subpoenas for any appropriate purpose. Unless delegated to an Area Director, the following authority shall be reserved to Regional Administrators:
   a. Issuance of a *Subpoena Ad Testificandum* to require the testimony of any company official, employee, or other witness;
   b. Issuance of a subpoena for the production of personally identifiable medical records for which a medical access order has been obtained. See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, and §1913.10(b)(6); and
   c. Issuance of a subpoena for the production of physical evidence, such as samples of materials.
2. Although this authority may not routinely be delegated to Area Directors, in a few cases such delegation may be appropriate.

E. Administrative Subpoena Content and Service.
1. Model administrative subpoenas for use by the Area Offices are provided at the end of this chapter. If the Area Director believes that there is reason for any departure from the models due to circumstances of the case, the RSOL shall be consulted.
2. The subpoena shall be prepared for the appropriate party and will normally be served by personal service (delivery to the party named in person). Leaving a copy at a place of business or residence is not personal service.
   a. In exceptional circumstances, service may be by certified mail with return receipt requested.
   b. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

3. Examples of language for a routine *Subpoena Duces Tecum* are provided in this section. This language should be expanded when requesting additional or more detailed information for accident, catastrophe, referral, or fatality investigations.
   a. "Copies of any and all documents, including information stored electronically, which reflect training procedures for the lockout/tagout procedures and hazard communication program in effect at the [*insert site name*] in [*insert city, state*], during the period [*insert month/day/year*], to present."
   b. "Copies of the *OSHA-300* and the *OSHA-301* forms, for the entire site, during calendar years [*insert year*] and [*insert year*]."
   c. "Copies of any and all documents, including information stored electronically, such as safety and health program handbooks, minutes of safety and health meetings, training certification records, audits and reprimands for violations of safety and health rules by employees of the [*insert site name*] in [*insert city, state*], that show [*insert employer's name*] had and enforced safety rules relating to the use of trench boxes during the period [*insert month/day/year*], to present."

      NOTE: Where particular information is being sought, a subpoena's description should be narrow and specific in order to increase the likelihood of prompt compliance with the request.
4. Regional Administrators will ensure that Area Directors track all administrative subpoenas (including return of service) and maintain a copy in the casefile.

F. Compliance with the Subpoena.

The person/entity served can comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.

1. With respect to any record required to be made or kept pursuant to any statute or regulation, the subpoena shall normally allow **three days** from the date of service for production of the required information, although a shorter period may be appropriate.
2. With respect to other types of records or information, such as safety programs or incident reports, the subpoena shall normally allow **five working days** from the date of service for production of the required information.
3. Separate subpoenas for items 1 and 2 above may be necessary.
4. Any witness fees or mileage costs potentially associated with administrative subpoenas should be discussed with the RSOL prior to the issuance.

G. Refusal to Honor Subpoena.

1. If the person/entity served refuses to comply with (or only partially honors) the subpoena, the compliance officer shall document all relevant facts and advise the Area Director before taking further action.

2. To enforce a subpoena, the Area Director shall follow the procedures outlined for obtaining warrants, and shall refer the matter, through the Regional Administrator, to the RSOL for appropriate action.

II. Service of Subpoena on OSHA Personnel.

A. Proceedings to which the Secretary of Labor is a Party.

If any OSHA personnel are served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Secretary of Labor is a party, then they shall immediately contact the RSOL for instructions regarding the manner in which to respond. If a CSHO is served with a subpoena, then they shall notify the Area Director immediately who shall then refer the matter to the RSOL.

NOTE: Review Commission rules provide that any person served with a subpoena, whether to testify in any Commission hearing or to produce records and testify in such hearing shall, within **five days** after date of service, move to revoke the subpoena if the person does not intend to comply with its terms. See §2200.57(c). Therefore, expeditious handling of any subpoena served on OSHA employees is essential. When any such subpoena is served, the RSOL must immediately be notified by telephone or email.

B. Proceedings to which the Secretary of Labor is Not a Party.

1. If any OSHA personnel are served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Secretary of Labor is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), then they shall immediately contact the RSOL.
2. U.S. Department of Labor regulations prohibit Department employees from participating in, or from providing information for, proceedings in which the Secretary of Labor is not a party without explicit permission from the designated Deputy Solicitor of Labor. (See 29 CFR 2.21 and 29 CFR 2.22). These regulations apply to demands to disclose or provide:
   a. Any material contained in the files of the Department;
   b. Any information relating to material contained in the files of the Department; or
   c. Any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his/her official duties or because of his/her official status.
3. The Office of the Solicitor is responsible for responding to such requests and will take appropriate steps to have the subpoena quashed or provide the necessary permission, as appropriate, to allow an employee to comply with an issued order.

III. Obtaining Warrants.

A. Warrant Applications.

1. Upon refusal of entry, or if there is reason to believe an employer will refuse entry, the Area Director shall proceed according to guidelines and procedures established in the region for warrant applications. The Area Director may initiate the compulsory process with RSOL approval.
   a. Warrant applications for establishments where consent has been denied for a limited scope inspection (i.e., complaint, referral, accident investigation) shall normally be limited to the specific working conditions or practices forming the basis of the inspection.
   b. A broader inspection warrant may be sought **only** when there is reasonable belief, based on specific evidence (e.g., injuries or illnesses recorded in both OSHA forms 300 and 301, employee statements, or plain view observations), that violative conditions could be found in other areas of the workplace. For example, a broader inspection warrant may be sought when, in addition to a complaint or referral, there is specific evidence that the alleged violative condition permeates the entire workplace (e.g., ventilation defects in a foundry, pervasive electrical hazards, or exposure to hazardous chemicals), or where the establishment has a past pattern of violations and a review of the OSHA 300 and 301 data suggests that those violations may still be present. Additionally, a broader inspection warrant may be sought if the establishment is on a current list of establishments targeted for a comprehensive inspection, unless the establishment was the subject of a comprehensive safety inspection within the past fiscal year and there have been no significant changes to the work environment since that inspection.
      NOTE: Ordinarily, injury and illness data from the OSHA 300 logs ***alone*** will not be sufficient to support a broader inspection. However, OSHA 300 data in conjunction with other specific evidence—including incident report information from OSHA 301 forms, employee statements, or plain view observations—can be used to support an expanded inspection when the particular injuries or illnesses found in the OSHA 300 logs can be tied to a specific violative condition in the workplace.
   c. If the Area Director determines that a broader inspection is needed, he/she should consult the RSOL to determine the appropriate scope of that inspection.

B. General Information to Obtain a Warrant.

If the warrant is to be obtained by the RSOL, then the Area Director shall inform the RSOL in writing within **48 hours** after the determination is made and provide all essential information to obtain a warrant, including:

1. Area/District Office, telephone number, and name of Area Director or designee involved;

2. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items, or both;
3. Legal name(s) of establishment and address, including city, state, and county. Include worksite location if different from mailing address;
4. Estimated number of employees at inspection site;
5. Estimated number of employees in each work area;
6. Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) Code and high hazard ranking for that specific industry within the state, as obtained from statistics provided by the National Office;
7. Days Away, Restricted, or Transferred (DART) rate for the particular establishment and for the specific industry;
8. Summary of all facts leading to the refusal of entry or limitation of inspection, including:
    a. Date and time of entry/attempted entry;
    b. Date and time of denial;
    c. Stage of denial (entry, opening conference, walkaround);
9. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:
    a. Full name and title of the person(s) to whom CSHO presented credentials;
    b. Full name and title of person(s) who refused entry;
    c. Reasons stated for the denial by person(s) refusing entry;
    d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.
10. Any information related to past inspections, including copies of previous citations;
11. Any previous requests for warrants. Attach details, if applicable;
12. All completed information related to the current inspection report, including copies of employee statements (if any), documentation of any observations of violations in plain view discovered prior to denial, and copies of the OSHA 300 logs, 300A summaries, and 301 incident reports;
13. If a construction site involving work under contract from any agency of the federal government, the name of the agency, the date of the contract, and the type of work involved;
14. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry; and
15. Investigative procedures that may be required during the proposed inspection (e.g., interviewing of employees/witnesses, personal sampling,

photographs, audio/video recordings, examination of records, access to medical records).

C. Specific Warrant Information Based on Inspection Type.

Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

1. Imminent Danger.
   a. Description of alleged imminent danger situation;
   b. Date information received and source of information;
   c. Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and
   d. Whether all current imminent danger investigative procedures have been followed.
   e. Generally, names and other personally idenitifiable information of employees must not be included in the warrant application. Where employees' names or other personally identifiable information appear in affidavits and other supporting documents attached to the warrant application, such information must be redacted. Where inclusion of the employee's name is necessary, Area Offices should first consult with RSOL about filing the warrant application under seal.
2. Fatality/Catastrophe.

   The Fatality/Catastrophe Report in OIS should be completed with as much detail as possible.
3. Complaint or Referral.
   a. Original complaint or referral, and copy of typed complaint or referral;
   b. Reasons OSHA believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;
   c. Whether all current complaint or referral processing procedures have been followed; and
   d. Any additional information pertaining to the evaluation of the complaint or referral, including issues pertaining to the proposed scope of the inspection. See section Section III.A.1.b of this chapter.
4. Programmed.
   a. Targeted safety – general industry, maritime, construction;
   b. Targeted health; and/or
   c. Special emphasis program (e.g., Special Programs, Local Emphasis Program, Migrant Housing Inspection).
5. Follow-up.
   a. Date of initial inspection;
   b. Details and reasons follow-up was conducted;

c. Copies of previous citations which served as the basis for initiating the follow-up;
d. Copies of settlement agreements and final orders, if applicable; and/or
e. Previous history of failure to correct, if any.

6. Monitoring.
   a. Date of original inspection;
   b. Details and reasons monitoring inspection is to be conducted;
   c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or
   d. Petition for Modification of Abatement Date (PMA) request, if applicable.

D. Warrant Procedures.

Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the Area Director and the RSOL.

1. Action Taken Upon Receipt of Warrant (Compulsory Process).
   a. The inspection will normally begin within 24 hours of receipt of a warrant or from the date authorized by the warrant for initiating the inspection.
   b. Upon completion of the inspection, if the warrant includes a return of service space for entering inspection dates, then CSHOs shall complete the return of service on the original warrant, sign it, and forward it to the Area Director or designee for appropriate action.
2. Serving a Subpoena for Production of Records.

   Where appropriate, even where the scope of an inspection is limited by a warrant or an employer's consent to specific conditions or practices, any subpoena for production of records shall be served in accordance with the section on administrative subpoenas in this chapter.

E. Second Warrant.

Under certain circumstances, a second warrant can be sought to expand an inspection based on a records review (i.e., OSHA 300 logs, 300A summaries, and 301 incident report data), employee statements, or "plain view" observations of other violative conditions discovered during a limited scope walkaround.

F. Refused Entry or Interference.

1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.
2. If the employer refuses to comply or if consent is not clearly given, then CSHOs shall not attempt to conduct the inspection at that time, and shall

leave the premises and contact the Area Director or designee regarding further action.

a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).

b. Area Directors shall then contact the RSOL and the Regional Administrator, who shall jointly decide the action to be taken.

G. Federal Marshal Assistance.

In unusual circumstances, a U.S. Marshal can be asked to accompany a CSHO when a warrant is presented. A Regional Administrator and RSOL must be consulted prior to a request for a U.S. Marshal's assistance. The request can be made only when there is a potential for violence, harassment and/or interference with the inspection, or reason to believe that the presence of a U.S. Marshal will assist with compliance with the warrant.

IV. Equal Access to Justice Act (EAJA).

A. Prevailing Party May be Awarded Fees.

The Equal Access to Justice Act (EAJA) provides that a party prevailing against the United States in litigation may be awarded fees payable by an agency of the United States if the agency's position in litigation was not "substantially justified" or if the agency proposed a penalty that was reduced as a result of litigation and subsequently determined to be "unreasonable." EAJA awards are statutorily limited to certain small entity parties, generally those with a designated net worth and/or number of employees (see 28 U.S.C. § 2412(d)(2)(B)).

B. OSHA's Position Must be Substantially Justified.

Pursuant to EAJA, the Commission or a federal court can award an employer fees if OSHA proceeds in litigation on a position that is not substantially justified or proposes a penalty that subsequently is found to be unreasonable in light of the statutory penalty assessment provisions and the circumstances relevant to the particular case. If an EAJA award is assessed by the Commission or a court following an OSHA proceeding and the award becomes a final order, OSHA is responsible for paying the award.

C. EAJA Should Not Affect How the Agency Operates.

EAJA should not affect the manner in which the agency operates, as citations are issued only after OSHA determines that there is adequate evidence that a violation exists, and proposed penalty amounts are determined based on established statutory and administrative criteria, and facts derived during the inspection/investigation. However, the potential for the agency incurring EAJA costs underscores the importance of thoroughly documenting each element of a violation with evidence supporting the violative condition and characterization. In addition, because the Secretary generally bears the burden of proof in litigation, it is important that CSHOs promptly discuss with the RSOL during the early stages of an investigation any factors affecting the

Secretary's ability to support an alleged violation or penalty proposal (e.g., the likely unavailability of a critical witness or the need for an expert).

V. Notice of Contest.

OSHRC is an independent federal agency created to decide contests of citations or penalties resulting from OSHA inspections. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence, and rendering decisions by Administrative Law Judges (ALJs). The Act states that the Review Commission operates as an independent agency (i.e., not part of another federal department) to ensure that parties to agency cases receive impartial hearings.

A. Time Limit for Filing a Notice of Contest.

1. The Act provides employers 15 working days following its receipt of a notice of a citation to notify OSHA of the employer's desire to contest a citation and/or proposed assessment of penalty.
2. Where a notice of contest was not mailed (i.e., postmarked, within the 15-working-day period allowed for contest), the Area Director shall follow the instructions for Late Notices of Contest. A copy of any untimely notice of contest shall be retained in the case file.

B. Contest of Abatement Period Only.

If the notice of contest is submitted to the Area Director after the 15-working-day period, but contests only the reasonableness of the abatement period, then it shall be treated as a Petition for Modification of Abatement and handled in accordance with PMA procedures.

C. Communication Where the Intent to Contest is Unclear.

1. If a written communication is received from an employer containing an objection, criticism or other adverse comment as to a citation or proposed penalty, but which does not clearly appear to contest the citations, then the Area Director shall contact the employer to clarify the intent of the communication.
   a. After receipt of the communication, any clarification should be obtained within the 15-working-day contest period, so that if a determination is made that it is a notice of contest, the file can be timely forwarded to the Review Commission.
   b. In cases where the Area Office receives a written communication from an employer requesting **an informal conference that also states an intent to contest**, the employer must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer still wants to pursue an informal conference, it must first present or send a letter expressing that intent and rescinding the contest. All documents pertaining to such communications shall be retained in the case file.
2. If an Area Director determines that the employer intends the document to be a notice of contest, then it shall be transmitted to the OSHRC. If

contact with the employer reveals a desire for an informal conference, then the employer shall be informed that the conference does not stay the running of the 15 working day contest period.

NOTE: Settlement is permitted at any stage of Commission proceedings (see §2200.100(a)).

VI. Late Notice of Contest.

A. Failure to Notify OSHA of Intent to Contest.

If the employer fails to notify OSHA of its intent to contest a citation or penalty within 15 working days following the receipt of a citation, then the citation and proposed penalties become final orders of the Review Commission.

B. Notice Received after the Contest Period.

1. In every case where OSHA receives notice of an employer's intent to contest a citation and/or proposed assessment of penalty beyond the 15-working-day period, Area Directors shall inform employers in writing that OSHA will not accept the untimely notice of contest, but employers can contact the Commission if they want to pursue the matter. The letter from the Area Director will also indicate the following:

   a. Inspection number;

   b. Citation number(s);

   c. Corresponding proposed penalties;

   d. Date on which OSHA believes that the employer received the notice of a violation (and proposed penalty, if applicable);

   e. Date on which OSHA received the employer's notice of contest, as well as any additional information that the Area Director believes to be pertinent.

   NOTE: The postmarked envelope containing the late filed notice of contest date is to be retained. A copy of the letter and envelope shall be sent to RSOL.

C. Retention of Documents.

1. Area Offices shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the employer's notice of contest was received, as well as any additional information pertinent to demonstrating failure to file a timely notice of contest.

2. Written or oral statements from the employer or its representative explaining the employer's reason for missing the filing deadline shall also be maintained (notes shall be taken to document oral communications).

VII. Contested Case Processing Procedures.

The notice of contest and related documents must be sent to the OSHRC within 15 working days of receipt of the employer's notification (see §2200.33). The RSOL shall be consulted in any questionable cases.

A. Transmittal of Notice of Contest to OSHRC.

1. Electronic Filing with Executive Secretary.

   The OSHRC e-filing submission to the Executive Secretary will contain the following three documents:

   a. Employer's letter contesting OSHA's action;
   b. One copy of the *Citation and Notification of Penalty (OSHA-2)* or of the *Notice of Failure to Abate Alleged Violation (OSHA-2B)*; and
   c. Certification form.

2. Notices of Contest.

   The notice of contest shall be electronically transmitted to the Review Commission and a copy retained in the case file. The case file diary shall include the electronic filing date with the Review Commission.

3. Contested Citations and Notice of Proposed Penalty or Notice of Failure to Abate.

   A signed copy of each of these documents shall be electronically submitted to the Review Commission and a copy retained in the case file.

4. Certification Form.

   a. The certification form shall be used for all contested cases and a copy retained in the case file. It is essential that the certification form, properly executed, be electronically transmitted to the Commission.
   b. When listing the Region number in the heading, do not use Roman numerals. Use 1, 2, 3, 4, 5, 6, 7, 8, 9, or 10.
   c. Item 3 of the form shall be filled by inserting only the word "employer" or "employee" in the space provided. This shall be done even where the notice of contest is filed by an attorney for the party contesting the action. An item "4" shall be added where other documents, such as additional notices of contest, are sent to the Commission.
   d. Insert the correct date for each item in the document list in the column headed "Date."
   e. Insert the name and address of the RSOL attorney who will handle the case, in the box containing the printed words "FOR THE SECRETARY OF LABOR." The Commission notifies this person of the hearing date and other official actions on the case.
   f. The documents are to be transmitted within the 15-working-day time limit via the OSHRC E-File system.

B. Transmittal of File to Regional Solicitor.

1. Under the Commission's Rules of Procedure, the Secretary of Labor is required to file a complaint with the Commission within **20 calendar days** after the Secretary's receipt of a notice of contest.
2. Immediately after receiving a notice of contest, the Area Director shall send to the RSOL by U.S. mail (or other mutually agreeable manner) the notice of contest, which the Area Director or designee will later transmit to the Commission, along with the complete investigative file (including photos and video).

VIII. Communications while Proceedings are Pending before the Commission.

A. Consultation with Regional Solicitor.

1. After a notice of contest is filed and the case is within the jurisdiction of the Commission, there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations, without prior clearance from the RSOL.
2. Once a notice of contest has been filed, all inquiries relating to the *Citation and Notification of Penalty (OSHA-2)* shall be referred promptly to the RSOL. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other government agencies, attorneys, and any other party.

B. Communications with Commission Representatives while Proceedings are Pending before the Commission.

CSHOs, Area Directors, Regional Administrators, or other field personnel shall not have any direct or indirect communication relevant to the merits of any open case with Administrative Law Judges, employees of the Commission, or any of the parties or interveners. All inquiries and communications shall be handled through the RSOL.

IX. Commission Procedures.

A. Two Levels of Adjudication.

OSHRC's Rules of Procedure provide for two levels of adjudication. The first level is before an Administrative Law Judge. If one of the Commissioners directs review, the second level of review are ALJ decisions by the agency's Commissioners.

B. Rules of Procedure.

1. The OSHRC Rules of Procedure are found in Part 2200 of Title 29 of the Code of Federal Regulations. These rules govern two types of ALJ proceedings.
   a. The more conventional proceeding involves the use of pleadings, discovery, a hearing, and post-hearing briefs.

b. Simplified Proceedings are less formal hearings that employ fewer legal procedures and are used in less complex cases (few citation items, no willful or repeat violation or fatality) and can be requested by either party or by the ALJ. In Simplified Proceedings, pleadings are generally not required and early discussion among the parties to narrow the disputed issues is required.

2. Receipt of Case.

   Upon receipt of a case by the assigned ALJ, a hearing date is set and a site selected as close as possible to where the alleged violation(s) occurred. The hearing is an administrative trial conducted in accordance with the Commission's Rules of Procedure.

3. Hearing Evidence.

   a. Review includes a new examination of all the evidence, as well as briefs submitted by the parties.
   b. Upon hearing all the evidence, the judge will issue a written decision, including both findings of fact and conclusions of law.
   c. The OSHRC then issues a decision affirming, modifying, or vacating the citations and penalties proposed by OSHA.
   d. The decision becomes final in **30 days** unless, within that period, one of the Commissioners directs that the case be reviewed.

4. Review of ALJ's Decision.

   If one of the parties requests review of the ALJ's decision, but review is not directed by the Commission, then the petitioning party can request review by the appropriate U.S. Circuit Court of Appeals. Review by a U.S. Court of Appeals must be sought within **60 days** after the Commission's decision becomes final.

5. Availability of Commission Decisions.

   Commission decisions, including Administrative Law Judge decisions, are available from the Review Commission website, www.oshrc.gov.

X. Discovery Methods.

Once a legal proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Traditionally, discovery methods include:

- Request for Admissions,
- Interrogatories,
- Requests for Production of Documents, and
- Depositions.

An attorney from the Solicitor's Office will represent the Agency in responding to discovery requests. It is essential that all OSHA personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

A. Interrogatories.

CSHOs shall draft and sign answers to interrogatories, with RSOL assistance. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The RSOL attorney shall sign any objections to the interrogatories. CSHOs should be aware that they can be deposed and/or examined at hearing on the interrogatory answers provided.

B. Production of Documents.

1. If a request for production of documents is served on RSOL and that request is forwarded to the Area Office CSHOs, or staff member, they should immediately make all documents relevant to that discovery demand available to the RSOL attorney.
2. While portions of those materials can be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), CSHOs must not withhold any information from the RSOL attorney.
3. It is RSOL's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

C. Depositions.

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other OSHA personnel can be required to testify during a deposition. In such cases, an RSOL attorney will be present with the witness.

XI. Testifying in Hearings.

While instructions provided by RSOL attorneys take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

A. Review Documents and Evidence.

In consultation with RSOL, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding, so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

B. Attire.

Wear appropriate clothing that reflects OSHA's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a magistrate to seek an administrative warrant.

C. Responses to Questions.

Answer all questions directly and honestly. If you do not understand a question, indicate this and ask that the question be repeated or clarified.

D. Judge's Instruction(s).

Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by RSOL counsel, follow the judge's instruction.

XII. Commission Simplified Proceedings.

Simplified Proceedings (formerly known as "E-Z Trials") are the Commission's attempt to simplify the resolution of some contested citations.

A. Proposed Penalty Threshold.

Because the Commission has raised the proposed penalty threshold for cases that are eligible for simplified proceedings, a greater number of cases will be eligible for this type of proceeding. These include most cases with aggregate proposed penalties of less than $20,000 and, at the discretion of the Chief ALJ, some cases with aggregate proposed penalties of up to $30,000.

B. Prompt Disclosure of Inspection Documents.

Simplified proceedings contemplate the prompt disclosure of inspection documents. Pursuant to the Commission's rules [29 CFR 2200.206], the Secretary must provide the employer, within prescribed time periods, the following documents:

1. Within **12 working days** after the case is designated for simplified proceedings, copies of the *Narrative* and *Violation Worksheets* (or their equivalents);
2. Within **30 calendar days** after the case is designated for simplified proceedings, copies of photographs or video recordings expected to be used at the hearing; and
3. Within **30 calendar days** after the case is designated for simplified proceedings, any evidence in OSHA's possession that may support the employer's defense to the citation.

NOTE: Simplified proceedings provide fewer opportunities for the Secretary's counsel to obtain information concerning the employer's positions and defenses prior to a hearing. Therefore, it is particularly important for CSHOs to promptly provide SOL counsel with all information about potential affirmative defenses that an employer may raise and/or arguments the employer may use to refute a violation(s) or the propriety of a proposed penalty.

XIII. Citation Final Order Dates.

A. Citation/Notice of Penalty Not Contested.

The Citation/Notice of Penalty and abatement date becomes a final order of the Commission **on the date the 15-working-day contest period expires**. For purposes of computing the 15-working-day period, the day that the employer receives the citation is not counted.

Example 15-1: An employer receives the Citation/Notice of Penalty on Monday, August 4. The day the employer receives the Citation/Notice of

Penalty is not counted. Therefore, the final order date would be Monday, August 25.

B. Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA).

Because there is no contest of the citation, an ISA becomes final, with penalties due and payable, **on the date of the last signature of the parties**. See also Chapter 8, Section I.B.2. (An ISA is effective upon signature by both the Area Director and the employer representative as long as the contest period has not expired).

NOTE: A later due date for payment of penalties can be set by the terms of the ISA.

C. Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA).

The Citation/Notice of Penalty **becomes final 30 days after docketing of the Administrative Law Judge's (ALJ's) Order approving the parties' stipulation and settlement agreement**, assuming that there is no direction for review. The Commission's Notice of Docketing specifies the date upon which the decision becomes a final order. If the FSA is approved by an order of the full Commission, **it will become final after 60 days**.

D. Cases Resolved by an ALJ Decision.

The ALJ's decision **becomes a final order of the Commission 30 days after docketing, unless the Commission directs review of the case**. The Commission's Notice of Docketing specifies the date upon which the decision becomes a final order.

E. ALJ Decision Reviewed by Commission.

Pursuant to Section 11 of the Act, **the Commission's decision becomes final 60 days after the Notice of Commission Decision**. The Notice of Commission Decision specifies the date that the Commission decision was issued. As a matter of policy, OSHA does not attempt to collect civil penalties while a case is being appealed. However, unless the employer requests a stay of the Commission's decision, U.S. Court of Appeals review does not delay the abatement obligation.

F. Commission Decision Review by the U.S. Court of Appeals.

The U.S. Court of Appeals' decision becomes final when the court issues a decision.

XIV. Federal Court Enforcement under Section 11(b) of the OSH Act.

An employer's obligation to abate a cited violation arises when there is a final order of the Review Commission upholding the citation.

A. Section 11(b) Summary Enforcement Orders.

Section 11(b) of the OSH Act authorizes OSHA to obtain a summary enforcement order from the appropriate U.S. Circuit Court of Appeals enforcing final Review Commission orders. An employer who violates such a court order can be found in contempt of court. Potential sanctions for contempt include daily penalties and other fines, recovery of the Secretary's

costs of bringing the action, incarceration of an individual company officer who flouts the Court's order, and any other sanction which the court deems necessary to secure compliance. Employers who ignore ordinary enforcement actions may be induced to comply by the severity of these potential contempt sanctions.

Section 11(b) orders can be an effective and speedier alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowed time. They can be requested from the Court whether the final order results from a Review Commission or ALJ decision, a settlement agreement, or an uncontested citation.

B. Selection of Cases for Section 11(b) Action.

All final orders issued in enhanced enforcement cases must be considered for Section 11(b) enforcement. In addition, a petition for 11(b) enforcement is to be considered in cases where final orders do not meet the enhanced enforcement case criteria but where the following factors suggest that an 11(b) petition should be filed:

1. Employer's citation history and/or other indications suggest serious compliance problems, such as widespread violations of the same or similar standards at multiple establishments or construction worksites. The OIS database and public establishment search webpage should be searched for the employer's history of violations;
2. Employer statements or actions indicating reluctance or refusal to abate significant hazards, or behavior that demonstrates indifference to employee safety;
3. Repeated violations of the Act, particularly of the same standard, which continue undeterred by the traditional remedies of civil monetary penalties and Review Commission orders to abate;
4. Repeated refusal to pay penalties;
5. Filing false or inadequate abatement verification reports;
6. Disregard of a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

C. Drafting of Citations and Settlements to Facilitate Section 11(b) Enforcement.

Proper drafting of citations and settlement agreements can facilitate obtaining a Section 11(b) order and maximize its deterrent effect.

Notations stating "Corrected during inspection" or "Employer has abated all hazards" shall not be made on the citation in cases where there is evidence of a continuing violative practice by an employer that may be subject to a summary enforcement order under Section 11(b) of the Act (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting widespread violations of the same or similar standards at other establishments or construction worksites).

Where possible, OSHA should attempt to identify cases that may warrant Section 11(b) enforcement at least a month before issuing the citation. When OSHA identifies such a case, it will contact the RSOL to discuss citation

language that is in accordance with Section 11(b) enforcement. If a case identified for potential Section 11(b) action is being resolved through a settlement agreement, whether formal or informal, language should be sought in the agreement that commits the employer to specific ongoing abatement duties.

Language in a settlement agreement that imposes a specific duty on the employer, such as a requirement that the employer hire a consultant to develop a safety program or provide OSHA with a list of other worksites, can be enforced under Section 11(b).

D. Follow-up Inspections.

The OSH Division in the National Office of the Solicitor's Office will notify the RSOL and the Directorate of Enforcement Programs (and, where the order pertains to a construction employer, the Directorate of Construction), when a court has entered a Section 11(b) order. OSHA will then promptly schedule an inspection or investigation to determine whether the employer is complying with the court order. The Regional Administrator, in consultation with the RSOL, will determine the nature and extent of the inspection or investigation. The RSOL will advise on the kind of "clear and convincing" evidence that would be needed to support a contempt petition in the event of the employer's noncompliance with the order of the court.

E. Conduct of Verification Inspections.

Whenever an enforcement order is issued by a U.S. Court of Appeals, an inspection shall be scheduled within six months to determine whether the company is complying with the court order. If serious violations of the standard(s) subject to the enforcement order are found, the RSOL shall be contacted immediately for guidance on what evidence will be needed for submission to the court.

Appendix A

United States of America

DEPARTMENT OF LABOR
Occupational Safety and Health Administration

Subpoena Duces Tecum

TO :

_____

Pursuant to Section 8(b) of the Occupational Safety and Health Act (29 U.S.C. §657(b)) you are hereby required to appear before

_____

of the OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, at_____, in the city of _____, on the _____ day of _____, 20____, at _____ o'clock am/pm of that day, to testify regarding the working conditions maintained by _____

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents, including information stored electronically:

_____

FAIL NOT AT YOUR PERIL

IN TESTIMONY WHEREOF *I have hereunto affixed my signature and the seal of the* UNITED STATES DEPARTMENT OF LABOR at *(Insert Location) this* _____ *day of* _____ *(insert month and year).*

_____

(Insert name of Regional Administrator), Occupational Safety and Health Administration, United States Department of Labor

RETURN OF SERVICE

I hereby certify that a duplicate original of the attached subpoena was duly served as follows:

in person_____

by certified mail_____:

_____

(Indicate by check method used.)

_____

_____

_____

on the person named herein on

_____
(Month, day, year)

_____
(Name of person making service)

_____
(Official title)

I certify that a person named herein was in attendance as a witness at

_____

on_____
(Month, day, year)

_____
(Name of person certifying)

_____
(Official title)

Appendix B

United States of America

DEPARTMENT OF LABOR
Occupational Safety and Health Administration

Subpoena Ad Testificandum

TO:
_____
_

Pursuant to Section 8(b) of the Occupational Safety and Health Act (29 U.S.C. §657(b))

you are hereby required to appear before

_____
_____

of the OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES

DEPARTMENT OF LABOR, at_____, in the city of

_____, on the _____ day of _____, 20____, at

_____ o'clock am/pm of that day, to testify regarding the working conditions

maintained by
_____

_____
_____

_____
_____

FAIL NOT AT YOUR PERIL

IN TESTIMONY WHEREOF *I have hereunto affixed my*

signature and the seal of the UNITED STATES

DEPARTMENT OF LABOR at *(Insert Location) this*

_____ *day of* _____ *(insert month and year).*

_____

(Insert name of Regional Administrator), Occupational Safety and Health Administration, United States Department of Labor

RETURN OF SERVICE

I hereby certify that a duplicate original of the attached subpoena was duly served as follows:

in person_____

by certified mail_____:

_____

(Indicate by check method used.)

_____

_____

_____

on the person named herein on

_____
(Month, day, year)

_____
(Name of person making service)

_____
(Official title)

I certify that a person named herein was in attendance as a witness at

_____

on_____
(Month, day, year)

_____
(Name of person certifying)

_____
(Official title)

Chapter 16

DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT (FOIA)

I. Disclosure [Reserved]

Chapter 17

Preemption by Other Agencies

I. Introduction.

When promulgating the Occupational Safety and Health Act of 1970 (OSH Act), Congress recognized that other federal agencies possess authority over safety and health matters in certain industries. To avoid a duplication of federal effort and to prevent conflict between different sets of regulations covering the same working condition, Congress specified, in Section 4(b)(1) of the Act, "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under Section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. 653(b)(1).

The process of making a Section 4(b)(1) determination is fact-specific. The determination process involves a review of the other federal agencies' regulations, policy statements, memoranda of understanding, and court and Occupational Safety and Health Review Commission (Commission) cases. All agencies continually create and amend their regulations. Policy statements can be amended or rescinded. Agencies may enter into new Memoranda of Understanding or issue interpretations and directives. Links to some of these resources are included in this document. A working condition that OSHA covered one day may end up being covered by another federal agency the next day. Because the federal regulatory universe is in a constant state of flux, this document does not comprehensively address the coverage of the OSH Act within each industry. Although it is useful to contact the field offices of the other agency, the guidance received from that field office is not necessarily determinative. The determination should be made after consultation with the Regional Solicitor's Office.

II. Testing Exemptions.

Generally speaking, there is a two-pronged test to determine whether or not working conditions are exempt from coverage by Section 4(b)(1) of the OSH Act: (1) Does the other federal agency possess the statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health, and (2) has the other federal agency "exercised" its statutory authority over the particular working condition? A "working condition" is generally a particular occupational hazard. Another agency's requirement dealing with an occupational hazard preempts OSHA even if the requirement also protects public safety or health, unless the other agency's requirement only incidentally affects occupational safety or health. It is important to note that the Commission and the courts have stated that OSHA cannot question the efficacy of another federal agency's requirements. The mere fact that the other federal agency has

exercised its statutory authority over the working condition is enough to preempt OSHA.

In some cases, the other agency has formally decided that its regulations comprehensively address an entire area. In such cases, OSHA is preempted within the entire identified area. In other cases, an agency has formally decided that a particular hazard will not be regulated. In such a case, OSHA is preempted from citing for that hazard.

III. Statutory Exercise.

The vast majority of the time, an "exercise" of statutory authority takes the form of a regulation in the Code of Federal Regulations. However, the Commission and the courts have recognized other agency actions as forms of this exercise of authority. For instance, safety and health requirements contained in a maintenance manual that has been reviewed and approved by the Federal Aviation Administration (FAA) have been deemed to be an exercise of statutory authority, thereby exempting working conditions covered by manual provisions from applicable OSHA requirements. Another example is a requirement on an EPA-approved label on a pesticide container.

Section 4(b)(1) is not a "jurisdictional" issue. It is an affirmative defense to a citation. This means that an employer must prove that OSHA is preempted pursuant to Section 4(b)(1) in order to defeat the citation on those grounds. The employer must show that the other agency's requirements are enforceable against that employer, not others who may be involved in the work. However, OSHA Area Offices must not issue a citation for a working condition preempted by another agency pursuant to Section 4(b)(1). Where there may be Section 4(b)(1) preemption, the Area Office must make an initial determination before a citation is issued.

NOTE: Section 4(b)(1) does not preempt citations for violations of the Part 1904 recordkeeping regulations. Thus, citations can be issued for violations of Part 1904 without regard to Section 4(b)(1).

State agencies do not preempt OSHA pursuant to Section 4(b)(1), with a few exceptions. Section 4(b)(1) expressly provides for preemption by state nuclear regulatory agencies with respect to materials regulated by the Nuclear Regulatory Commission. Also, when state agencies enforce federal regulations pursuant to a plan approved by another federal agency, those regulations trigger Section 4(b)(1) preemption; but state regulations merely compatible with federal regulations do not preempt OSHA. Examples of state agencies which enforce federal regulations are agencies that regulate natural gas pipelines and commercial motor vehicles.

At times, OSHA State Plan officials may have questions about preemption by other federal agencies. Section 4(b)(1) does not apply to State Plan agencies. However, some state OSHA statutes have provisions the same as or similar to Section 4(b)(1). In those cases, Area Offices should consult with their Regional Solicitors. Also, the federal statutes establishing the other federal agencies may preempt the states directly. Thus, when State Plan officials ask questions about

preemption by other federal agencies, they should be advised to consult with their attorneys and with the relevant federal agency.

IV. Other Agencies that can Preempt OSHA.

The following information is meant to help OSHA personnel determine jurisdiction. Should an instance arise where one or more federal agencies are at the scene of an inspection or investigation and authority is at issue, the Directorate of Enforcement Programs (DEP) should be contacted for additional guidance. DEP staff will work with National Office staff from other federal agencies to make the Section 4(b)(1) determination. The agencies that prompt the most Section 4(b)(1) questions arise are listed below along with their websites. This is not an exhaustive list of all agencies whose requirements may preempt OSHA. OSHA's Memoranda of Understanding and Memoranda of Agreement with other agencies are at: http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=MOU&p_toc_level=0&p_keyvalue

A. Department of Transportation.

The Department of Transportation (DOT) protects the safety and health of employees and the public under various federal transportation laws.

1. Federal Aviation Administration.

The Federal Aviation Administration (FAA) has the authority to develop regulations and minimum standards in the interest of safety in air commerce.

The Commission has held that FAA-mandated maintenance manual provisions concerning safety instructions for aircraft maintenance personnel trigger Section 4(b)(1), preemption of OSHA requirements. The FAA has issued a policy statement stating that the FAA comprehensively regulates the working conditions of flight crew, except that OSHA can enforce its noise, hazard communication, and bloodborne pathogens standard to protect all cabin crewmembers other than flight deck crew. OSHA began this enforcement on March 26, 2014. http://www.faa.gov/

2. Federal Motor Carrier Safety Administration.

DOT's Federal Motor Carrier Safety Administration (FMCSA) regulates commercial motor vehicles. The types of vehicles covered are listed in 49 U.S.C. 31132. FMCSA has issued extensive regulations related to commercial motor vehicle safety, including regulations to prevent the unintended movement of parked vehicles, regardless of their location. http://www.fmcsa.dot.gov/

3. Pipeline and Hazardous Materials Safety Administration.

The Pipeline and Hazardous Materials Safety Administration (PHMSA) prescribes safety requirements for natural gas and oil pipelines, liquefied natural gas facilities, and breakout tanks. These statutes reach only the owners and operators of pipelines and the other facilities mentioned above. Therefore, the employees of a contractor who is not the owner or

operator of such a facility are covered by OSHA. States are authorized, by statute, to enforce PHMSA natural gas pipeline safety regulations. Such regulations, although enforced by a state agency, preempt OSHA.

PHMSA also regulates the transportation of hazardous materials by vehicles. Because of a special provision in the hazardous materials transportation law, Section 4(b)(1) does not apply to this transportation. However, as matter of policy, OSHA does not issue citations regarding the design of, or materials used for, containers of hazardous materials. http://www.phmsa.dot.gov/. OSHA, however, does enforce the whistleblower provision of the Pipeline Safety Improvement Act (PSIA).

4. Federal Railroad Administration.

The Federal Railroad Administration (FRA) enforces a number of statutes covering railroad safety. FRA regulations comprehensively regulate the movement of equipment over the rails. The FRA generally does not regulate working conditions in railroad repair shops. FRA Policy Statement, 43 FR 10583 (March 14, 1978). The FRA also has fall protection regulations for railroad bridge workers. http://www.fra.dot.gov/.

B. Department of Labor, Mine Safety and Health Administration.

The Mine Safety and Health Administration (MSHA) comprehensively regulates the safety and health of employees engaged in mining and mineral milling. To clarify where milling ends and OSHA authority begins, OSHA and MSHA entered into an extensive Memorandum of Understanding (MOU) that delineates respective agency authorities. http://www.msha.gov/.

C. Environmental Protection Agency.

The Environmental Protection Agency (EPA) administers the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Under that law, EPA requires pesticides to have labels containing instructions for the safe use of pesticides. Some of those labels incorporate EPA regulations for the protection of farmworkers. These label instructions related to occupational pesticide hazards preempt OSHA. http://www.epa.gov/pesticides/.

D. Nuclear Regulatory Commission.

The Nuclear Regulatory Commission (NRC) is responsible for licensing and regulating nuclear facilities and materials. In 2013, OSHA and NRC entered into a revised MOU that identifies three kinds of hazards associated with NRC-licensed nuclear facilities, and designates which agency will be responsible for each kind of hazard. Generally, the NRC is responsible for the following hazards at NRC-licensed facilities: 1) radiation hazards produced by radioactive materials; 2) chemical hazards produced by radioactive materials; and 3) facility conditions that affect the safety of radioactive materials, such as fire and explosion hazards. At these facilities, OSHA has authority over facility conditions that do not involve the use of radioactive materials, such as toxic nonradioactive material, electrical, fall, confined space, and equipment energization hazards. http://www.nrc.gov/.

E. Department of Energy.

The Department of Energy (DOE) is responsible for the production of nuclear weapons, as well as the dismantling and cleanup of nuclear sites under the Atomic Energy Act. DOE has established and enforces a comprehensive set of occupational safety and health standards for the working conditions of contractor employees at its Government-Owned, Contractor-Operated (GOCO) facilities engaged in the Atomic Energy Act activities described above. Therefore, OSHA does not inspect the working conditions of these contactor employees. DOE's statutory authority extends to construction, including new construction, on GOCO facilities. http://energy.gov/.

F. Department of Homeland Security, United States Coast Guard.

The United States Coast Guard (USCG) promulgates and enforces safety and health regulations for U.S. flag vessels on the high seas and navigable waters of the United States. USCG has exercised its statutory authority over "inspected vessels" by issuing a comprehensive set of regulations. An inspected vessel is one for which the Coast Guard has issued a Certificate of Inspection (COI). The types of "inspected vessels' are listed in 46 U.S.C. 3301 and exemptions in 46 U.S.C. 3302. OSHA and the USCG entered into a MOU acknowledging that, due to USCG's extensive regulations, OSHA will not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels. However, this prohibition does not apply to recordkeeping.

Conversely, USCG has issued only a limited number of regulations applicable to "uninspected" vessels. To the extent USCG has not regulated a particular working condition on an uninspected vessel, OSHA can conduct enforcement activity.

Under the Outer Continental Shelf Lands Act, the Coast Guard, along with the Bureau of Safety and Environmental Enforcement of the Interior Department (see below), has issued many safety and health regulations for offshore platforms—in particular, provisions designed to prevent fires and explosions.

Enforcement Directive CPL 02-01-047, *OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, Feb. 22, 2010, addresses the issues in this paragraph. http://www.uscg.mil/

G. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives.

A law enforcement agency in the United States Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) promulgates and enforces regulations relating to the illegal use and storage of explosives.

OSHA directive CPL 02-01-053, *Compliance Policy for Manufacture, Storage, Sale, Handling, Use and Display of Pyrotechnics,* October 27, 2011, clarifies the interplay between OSHA's Process Safety Management Standard, 29 CFR 1910.119, OSHA's Explosives and Blasting Agents standard, 1910.109; and the BATFE regulations. http://www.atf.gov/.

H. Department of Interior, Bureau of Safety and Environmental Enforcement.

The Department of the Interior's Bureau of Safety and Environmental Enforcement (BSEE), along with the Coast Guard (see above), promulgates and enforces safety regulations for offshore platforms on the Outer Continental Shelf—in particular, provisions designed to prevent fires and explosions. http://www.bsee.gov/.