



Division of Occupational Safety and Health POLICY AND PROCEDURES MANUAL

P&P C-1B1

DOCUMENTING THE EXISTENCE OF A VIOLATION

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AUTHORITY: California Labor Code Sections 6304, 6304.1, 6304.2, 6314, and 6317.

POLICY: It is the policy of the Division of Occupational Safety and Health to thoroughly and correctly document the existence of all violations found during a workplace investigation or inspection.

PROCEDURES:

A. ESTABLISH AND DOCUMENT EMPLOYEE EXPOSURE

1. Establish Employee Exposure

Compliance personnel must establish that one or more employees were exposed to a hazardous condition resulting from a violation of a Title 8 Safety Order.

NOTE: Evidence of employee exposure is not required to establish a regulatory violation.

a. Statute of Limitations

Employee exposure must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation. Where there is a continuing violation, this can include the more recent exposures.

EXCEPTION: If the employer failed to report a serious injury or illness or death as required by Title 8 section 342(a), the time limit for issuing a citation is six months after the Division learned or should have reasonably learned of the violative condition.

b. Observed Employee Exposure

Employee exposure may be established by compliance personnel directly observing or monitoring the employee exposure to a hazardous condition resulting from a violation of a Title 8 Safety Order.

c. Unobserved Employee Exposure

Employee exposure may be established through a combination of witness statements and other evidence of employee exposure to a hazardous condition resulting from a violation of a Title 8 Safety Order.

d. Zone of Danger

Compliance personnel must establish that the employee(s) came within the “zone of danger” associated with the violative condition, that is, in such proximity to the hazard that there is a reasonable basis to conclude that employee exposure occurred. An employee may come within the zone of danger while:

- (1) performing work-related duties;
- (2) pursuing personal activities during work hours; or
- (3) employing normal means of ingress and egress to their work stations.

NOTE: Employee exposure may be established through direct or circumstantial evidence.

2. Document Employee Exposure

Compliance personnel must document employee exposure with evidence sufficient to prove its occurrence by a preponderance of evidence (i.e., the evidence must show it is more likely than not that there was employee exposure). The types of evidence that can show employee exposure include, but are not necessarily limited to, the following:

- a. Direct observation by compliance personnel.

NOTE: Compliance personnel should write field notes about their observations as soon as possible.

- b. Employer admission (e.g., oral or written statement by an authorized representative of management).

NOTE: Compliance personnel should obtain a signed written statement whenever possible, or write field notes about the employer’s admission as soon as possible.

- c. Witness statement (e.g., statements by exposed employees, coworkers, union representatives, emergency personnel, family members of exposed employees).

NOTE: Compliance personnel should obtain a signed written statement or create a voice or video recording whenever possible, or write field notes as soon as possible specifying which persons made which statements.

- d. Photographs, video recordings, sketches, measurements, monitoring taken at the site showing exposure to the violative conditions, machinery, or equipment.
- e. Documents (e.g., autopsy reports, job duty descriptions for exposed employees, the employer's personnel and safety policies).

B. ESTABLISH AND DOCUMENT AN EMPLOYER-EMPLOYEE RELATIONSHIP

1. Establish that the exposed worker was not an independent contractor.

The California Supreme Court has articulated a multi-factor test for determining whether a worker is an employee. The principal test is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.

Other factors to be considered include:

- a. The right to discharge at will;
- b. Whether the worker is engaged in a distinct occupation or business;
- c. The skill required in the particular occupation;
- d. Whether the worker supplies the tools and the place of work;
- e. The length of time for which the services are to be performed;
- f. The method of payment, whether by time or by job; and
- g. Whether the parties believe they are creating an employer-employee relationship.

If the exposed worker appears to be an independent contractor, compliance personnel should contact the Legal Unit to determine jurisdiction.

2. Establish that the Exposed Worker Was Not a Volunteer.

In most cases, the Division does not have jurisdiction over the health and safety conditions of volunteers, except certain categories of volunteer firefighters. If the exposed worker appears to be a volunteer, compliance personnel should contact the Legal Unit to determine jurisdiction.

3. Document the Employer-Employee Relationship.

If the employer-employee relationship is questionable and could be a potential issue on appeal, the compliance officer should consult with the District Manager (or, if directed by the District Manager, with the Regional or District Senior Safety Engineer) on how to investigate and document the employer-employee relationship. Evidence must be collected to prove the relationship by a preponderance of evidence (i.e., the evidence must show it is more likely than not that the worker was an employee of the cited employer). The types of evidence that can show an employer-employee relationship exists include, but are not necessarily limited to, the following:

- a. Employer admission (e.g., oral or written statement by a manager).

NOTE: Compliance personnel should obtain a signed written statement ([see Cal/OSHA 1AW](#)) or create a voice or video recording whenever possible.

- b. Witness statements regarding how work was directed and controlled (e.g., statements by employees or union representative).

NOTE: Compliance personnel should obtain a signed written statement or create a voice or video recording whenever possible.

c. Documents (e.g., employment contract, employment manual, pay statements).

4. Consider Whether More Than One Employer May be Cited

At multi-employer worksites and in dual-employer situations, more than one employer may be cited for violation of a Title 8 Safety Order resulting in employee exposure. For guidance on establishing an employer-employee relationship in those settings, consult the following:

a. Multi-Employer Worksite Inspections – [See P&P C-1C](#).

b. Dual Employer Inspections – [See P&P C-1D](#).

C. IDENTIFY THE REGULATION THAT WAS VIOLATED

1. Title 8 Subchapter

Compliance personnel must specify which subchapter of Title 8 regulations applies to the type of workplace inspected. If more than subchapter could be applicable, the compliance officer should consult with the District Manager (or, if directed by the District Manager, the Regional or District Senior Safety Engineer) to determine which subchapter should be cited.

2. Title 8 Section Number

Compliance personnel must ensure that the violation to be cited correctly corresponds to the Title 8 section and subsection number that applies to the violation.

3. Exceptions in the Regulation

Compliance personnel must ensure that any exceptions in the regulation to be cited do not apply, and if necessary, must document evidence to rebut application of the exception.

D. RULE OUT THE “INDEPENDENT EMPLOYEE ACT” AFFIRMATIVE DEFENSE

An employer may assert one or more affirmative defenses that the employer should not be held responsible for a violation for which the Division cited the employer. If each element of the affirmative defense is established by the employer during an administrative hearing, the citation will be vacated. One of the most common affirmative defenses is the Independent Employee Act Defense.

1. Elements of the Independent Employee Act Defense

a. The employee was experienced in the job being performed;

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- b. The employer had a well-devised safety program that included training employees in matters of safety respective to their particular job assignments;
 - c. The employer effectively enforced the safety program;
 - d. The employer enforced a policy sanctioning employees who violated the safety program; and
 - e. The employee caused a safety infraction that he or she knew violated the employer's safety requirement.
2. Establish and Document the Lack of an Independent Employee Act
 - a. Compliance personnel should document all facts related to the five elements of the independent employee act defense when it becomes evident, either from a statement by the employer or another person during the inspection or from the circumstances surrounding the alleged violations, that the independent employee act defense may become an issue in the case. The compliance officer must make the District Manager aware of all facts potentially supporting an independent employee act defense.
 - b. Even though establishing the five elements of the independent employee act defense is the employer's responsibility, compliance personnel should be prepared to respond when the employer raises the defense at an informal conference, pre-hearing conference, or administrative hearing.
 - c. If the District Manager believes that a citation should not be issued because the employer to be cited can establish all five elements of independent employee act defense, the District Manager must consult with, and receive concurrence from, the Regional Manager and the Legal Unit before making a final determination not to issue, or to withdraw, the citation.

E. VERIFY OR RULE OUT THE APPLICATION OF A VARIANCE

1. Compliance personnel must not cite an employer for a condition that is in compliance with a temporary variance granted by the Division or with a permanent variance granted by the Occupational Safety and Health Standards Board.
2. If the employer states that the conditions being investigated comply with a temporary or permanent variance, the District Manager should contact Headquarters to verify this statement. If a variance has not been granted or does not apply, the compliance officer may proceed with the citation.

F. IDENTIFY AND ORGANIZE THE EVIDENCE SHOWING THE REGULATION WAS VIOLATED

During the course of an inspection, while undertaking the steps discussed above, compliance personnel must determine whether the regulation to be cited applies and whether each required element of the regulation was violated. If the citation is later appealed, the Division will be required to prove the violation by a preponderance of evidence; in other words, the evidence must show it is more likely than not that the regulation was violated.

To identify and organize the evidence showing the regulation was violated, compliance personnel must complete the supplement violation worksheet. Please follow instructions from DOSH headquarters on how to fill out the grid.