



**Division of Occupational Safety and Health
POLICY AND PROCEDURES MANUAL**

**P & P C- 1B2 DOCUMENTING THE CLASSIFICATION OF A
VIOLATION**

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DOCUMENTING THE CLASSIFICATION OF A VIOLATION

P&P C-1B2

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AUTHORITY: California Labor Code Sections 6302(h) and (i), 6432, and 9061, and Title 8 of the California Code of Regulations Section 334.

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

PROCEDURES:

A. DOCUMENTING THE CLASSIFICATION OF A VIOLATION AS REGULATORY

A violation should be classified as “regulatory” if it (1) pertains to a permit, posting, reporting, or recordkeeping requirement established by regulation or statute and (2) is not classified as General or Serious.

Examples: The failure of an employer to obtain a required permit, post a citation, post the required poster, keep required records, or report an industrial accident. A non-exhaustive list of Title 8 regulatory violations can be found in Attachment A, “Examples of Regulatory Violations.”

B. DOCUMENTING THE CLASSIFICATION OF A VIOLATION AS GENERAL

A violation should be classified as “general” if the violation (1) has a direct relationship to the occupational safety and health of employees, and (2) is specifically determined not to be of a serious nature. In other words, the violation could result in an injury or illness to an employee but cannot be classified as Serious.

C. DOCUMENTING THE CLASSIFICATION OF A VIOLATION AS SERIOUS¹

A violation is presumed to be “serious” if compliance personnel can show there is “*a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation*” (Labor Code section 6432(a)). An employer can rebut this presumption by showing that the employer “*did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation*” (Labor Code section 6432(c)).

1. Realistic possibility

¹ If a serious, willful, or repeat violation caused a death or a serious injury, illness, or exposure, compliance personnel must characterize the violation as accident-related, as provided in Labor Code section 6319(d).

The term “realistic possibility” means “a prediction clearly within the bounds of human reason, not pure speculation.” The Division must provide a valid evidentiary foundation for the “realistic possibility.” The Appeals Board has held that this foundation can be provided by testimony from compliance personnel based on “expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence.”

NOTE: Under Labor Code section 6432(g), compliance personnel are deemed “competent” (i.e., qualified) to testify about each element of a serious violation if their Division-mandated training is current.

The Appeals Board has held that the Division may assume a worst case scenario in evaluating whether a violation is serious. Lack of an actual accident is immaterial to this determination, but the fact of an accident is relevant and would tend to prove the realistic nature of the hazard.

2. Death

The term "death" refers to the death of an employee.

3. Serious physical harm

The term “serious physical harm” means “*any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:*” (Labor Code section 6432(e)):

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity:

- *second-degree or worse burns,*
- *crushing injuries including internal injuries even though skin surface may be intact,*
- *respiratory illnesses, or*
- *broken bones.*

Serious physical harm may be caused by a single, repetitive practice, means, method, operation, or process. (Labor Code section 6432(f))

The Appeals Board has upheld serious citations in cases where the record contained evidence that the injuries and illnesses listed below could result from the cited hazard. However, regardless of whether

one of these categories of injuries and illnesses could result from a violation being investigated, compliance personnel should still analyze the potential for serious physical harm on a case-by-case basis:

- a. Head injury, concussion, or brain injury;
 - b. Deep lacerations;
 - c. Cancer;
 - d. Human immunodeficiency virus (HIV/AIDS), hepatitis B virus (HBV), or hepatitis C virus (HCV);
 - e. Loss of dexterity, weakness and numbness;
 - f. Vision or hearing loss.
4. Actual hazard created by the violation

Compliance personnel must be able to describe and document the “actual hazard” created by the violation and explain how an employee could die or be seriously physically harmed as a result of that hazard. Just pointing to the existence of a violation is not sufficient.

EXAMPLE: A violation involving the lack of a required enclosure for energized electrical wires can create an “actual hazard” that could result in death or serious physical harm if it is possible for an employee to come into contact with the energized wires. In contrast, this violation does not create an “actual hazard” that could result in death or serious physical harm if the wires are fully insulated.

5. Special serious violations

a. Carcinogens

Generally, a violation involving the use of a carcinogen as defined in Title 8 section 330(f) must be cited as serious, unless lack of employer knowledge can be established. However, if the violation is minor and resulted in no substantial health hazard, compliance personnel should consult with the District Manager or the Regional or District Senior Safety Engineer to determine the appropriate classification of the violation.

b. Tower Cranes

For serious violations involving tower cranes, see [P&P C-41A](#).

6. Employer knowledge

a. Rebutting the presumption that a violation is serious by showing lack of employer knowledge

An employer can rebut the presumption that a violation is serious and establish that a violation is not serious by showing that the employer “*did not and could not, with the exercise of reasonable*

diligence, have known of the presence of the violation.” The employer may rebut the presumption by showing both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. (Labor Code section 6432(c))

Factors relevant to determining the above include, but are not limited to, the following factors listed in subsection (b) of Labor Code section 6432:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer’s health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer’s explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut the presumption that a violation is serious.

(iv) Any other information that the employer wishes to provide to the Division.

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered. (Labor Code section 6432(c))

b. Investigating employer knowledge

Although the employer bears the burden of proving the lack of employer knowledge of a serious violation, compliance personnel should still gather evidence of employer knowledge during every inspection or investigation of a serious violation. There are two types of employer knowledge:

(1) Actual knowledge: The employer actually knew of the violative condition.

Knowledge of a violative condition by a foreman, supervisor, manager, or owner constitutes employer knowledge.

- (2) Constructive knowledge: The employer could have known of the violative condition through reasonable diligence, in other words, a degree of care or attention as might be expected from an employer of ordinary prudence and activity.

Generally, if a violative condition is discovered that had existed for a significant period of time, the compliance personnel can assume that the employer could have discovered the condition through the exercise of reasonable diligence. Even if a particular violative condition had existed for only a short time, if information acquired during the inspection reveals that the same condition was a typical, frequent, or recurrent practice, the employer can be assumed to have constructive knowledge of the violation.

In contrast, if a violative condition had recently occurred as a result of employee misconduct and been in existence for only a brief period of time, the employer may not have constructive knowledge of the violation.

If unsure about employer knowledge, compliance personnel should discuss their findings with the District Manager or the Regional or District Senior Safety Engineer and continue to investigate as much as possible to establish constructive knowledge and a serious violation.

7. Identifying and organizing the evidence supporting the serious classification

To identify and organize the evidence supporting the classification of a violation as serious, compliance personnel must use the Supplemental Violation Worksheet discussed in [P&P C-1B1](#).

8. Notice of intent to classify as serious (1BY notice)

a. Purpose

Before issuing a citation for a serious violation, compliance personnel must deliver to the employer a “Notice of Intent to Classify as Serious” (Cal/OSHA 1BY notice). The purpose of the 1BY process is to clearly communicate to the employer that the Division believes there is a serious violation and to give the employer an opportunity to show why a serious violation does not exist.

b. Content

The 1BY notice must contain the alleged violation descriptions (“AVD”) the Division intends to cite as serious and must clearly solicit the information specified in 6.a. above (Labor Code section 6432(b)). The AVD should be limited to the charging language. All Title 8 regulations that might reasonably be cited based on the AVD language should be listed below the AVD language as “possible violated regulations.” If there is more than one alleged serious violation, a separate 1BY notice should be prepared for each violation.

c. Delivery time

Compliance personnel should deliver the 1BY notice as soon as possible to allow sufficient time to consider the employer's response. At the very latest, the notice must be delivered to the employer not less than 15 calendar days prior to the citation being issued (Labor Code section 6432(b)(2)).

d. Delivery methods

Compliance personnel should identify the best way or ways to deliver the 1BY notice to ensure that the employer has at least 15 calendar days to review and respond to it. The notice can be delivered using one or a combination of the following methods:

- (1) Regular mail
- (2) Certified mail
- (3) Fax
- (4) Overnight delivery
- (5) Personal delivery
- (6) Email

Whichever method or methods are used, compliance personnel should verify that the employer received or should have received the notice. If the employer cannot be reached, compliance personnel should still deliver the notice far enough in advance to give the employer at least 15 calendar days to review and respond to it before the citation is issued.

e. Documentation

A copy of the 1BY notice must be retained in the inspection file.

9. Review of employer's response to the 1BY notice

Compliance personnel should review the employer's response to the 1BY notice as discussed below, while keeping in mind the importance of issuing citations in a timely fashion and issuing within the six-month time limit. If an employer makes a request to respond to the 1BY notice after the response date specified in the notice, compliance personnel should inform the employer that no extension can be granted.

a. Timely written response

If the employer responds in writing to the 1BY notice within the response time specified in the notice, compliance personnel must consider the information contained in the response and, if warranted, make changes to the citation based on the information provided by the employer.

b. Timely oral response

If the employer makes a request to respond orally to the 1BY notice within the response time specified in the notice, compliance personnel should accommodate the request but also inform the employer that because the investigation is still open, any information or statements the employer provides could potentially be used to support citations issued against the employer.

Regardless of whether the employer responds orally, the employer retains the right to respond in writing within the response time specified in the notice.

c. No response

If the employer does not respond, compliance personnel can and should issue the citation after the response time specified in the notice has expired.

D. DOCUMENTING THE CLASSIFICATION OF A VIOLATION AS REPEAT ^{2, 3}

1. Definition of “Repeat Violation” (8 CCR section 334(d))

a. For violations occurring on or after January 1, 2017:

(d) Repeat Violation - is a violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

b. For violations occurring on or before December 31, 2016:

(d) Repeat Violation

(1) General - is a violation where the employer has corrected, or indicated correction of an earlier violation, for which a citation was issued, and upon a later inspection is found to have committed the same violation again within a period of three years immediately preceding the latter violation. For the purpose of considering whether a violation is repeated, a repeat citation issued to employers having fixed establishments (e.g., factories, terminals, stores . . .) will be limited to the cited establishment; for employers engaged in businesses having no fixed establishments (e.g., construction, painting, excavation . . .) a repeat violation will be based on prior violations cited within the same Region of the Division.

(2) Field Sanitation Violations - is a violation of the State Field Sanitation Standard, currently set forth in 8 CCR 3457, or of the Federal Field Sanitation Standard, currently set forth in 29 CFR 1928.110, where the employer has corrected, or indicated correction of an earlier violation, for

² See footnote 1.

³ For instructions on characterizing a violation as “failure-to-abate” (instead of “repeat”), as provided in Labor Code section 6320, see P&P C-15.

which a citation was issued, and upon a later inspection is found to have committed the same violation within a period of five years immediately preceding the latter violation.

2. Determining Whether a Violation Is a Repeat Violation

a. For violations occurring on or after January 1, 2017:

(1) Compliance personnel must check the employer's prior citation history. The previous violation must have occurred in California.

(2) The new violation must occur within five years immediately following the latest of: “(1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law.”

(a) If the previous citation was appealed, compliance personnel must determine the date of the final order affirming the existence of the previous violation. The date of a final order affirming the existence of a violation means:

- i. The 35th day after the date on which an administrative law judge issued a decision or order affirming the existence of the violation, unless a Petition for Reconsideration or Order of Reconsideration was filed with or by OSHAB; or
- ii. If a Petition for Reconsideration or Order of Reconsideration was filed, the 35th day after the date on which OSHAB issued its decision or order affirming the existence of the violation, unless a petition for writ of mandate was filed in superior court and the superior court stayed the final order of OSHAB; or
- iii. If a petition for writ of mandate was filed in superior court and the superior court stayed the final order of OSHAB, the date on which the superior court issued a decision affirming the existence of the violation. (If the decision of the superior court was appealed, please contact the Legal Unit.)

(b) If the previous citation was not appealed, compliance personnel must determine the date on which the underlying citation became final by operation of law, which means the 15th working day after the employer received the citation issued by the Division.

(3) The employer must have abated or indicated abatement of the previous violation.

NOTE: If the employer has not abated the previous violation, compliance personnel should consider whether to classify the violation as a failure-to-abate violation.

(4) The new violation must involve the violation of a substantially similar regulatory requirement, which means the citation for the first violation placed the employer on notice of the need to take steps to prevent the second violation. Compliance personnel should therefore consider the substance of the regulatory requirement, not just the section number or subsection.

(5) Violations classified and documented as repeat must be further classified and documented as repeat regulatory, repeat general, or repeat serious.

NOTE: The classification of a repeat general or repeat serious violation may differ from the classification of the previous violation, depending on the circumstances of the two cases.

- (6) If the violation is to be classified as repeat general or repeat serious, the new violation must involve essentially similar conditions or hazards as the previous violation.⁴
- (7) A copy of the previous citation and a copy of the signed Cal/OSHA form 160, 161, or 161A must be retained in the inspection file. If the previous citation was issued out-of-District, compliance personnel should obtain a copy of the citation and a copy of the signed Cal/OSHA form 160, 161, or 161A from the issuing District Office.

b. For violations occurring on or before December 31, 2016:

- (1) Compliance personnel must check the employer's prior citation history.
 - (a) For fixed establishments, the previous violation must have occurred within the same establishment.
 - (b) For other than fixed establishments, the previous violation must have occurred within the same Region of the Division.
- (2) The new violation must occur within three years after the date of the previous violation.
- (3) The employer must have abated or indicated abatement of the previous violation.

NOTE: If the employer has not abated the previous violation, compliance personnel should consider whether to classify the violation as a failure-to-abate violation.

- (4) The new violation must involve essentially similar conditions or hazards as the previous violation.
- (5) A copy of the previous citation and a copy of the signed Cal/OSHA form 160, 161, or 161A must be retained in the inspection file. If the previous citation was issued out-of-District, compliance personnel should obtain a copy of the citation and a copy of the signed Cal/OSHA form 160, 161, or 161A from the issuing District Office.

E. DOCUMENTING THE CLASSIFICATION OF A VIOLATION AS WILLFUL⁵

A violation should be classified as “willful” if evidence shows one of the following (see 8 CCR section 334(e)): (1) the employer knew the provisions of the cited regulation and intentionally violated them, or

⁴ For example, the Appeals Board has found a repeat classification to be proper in the following circumstances:

- Collisions between cranes and visible obstructions, even though they involved different cranes and different obstructions;
- Exposure to an unshored trench and exposure to a trench that was shored inadequately;
- Section 4075 guarding violations for a sewing machine and for a curtain coating machine used a different manufacturing process;
- Fall protection violations for exposure to falls from a building perimeter and from an I-beam.

⁵ See footnote 1.

(2) the employer had actual knowledge of an unsafe or hazardous condition and made no reasonable effort to correct it.

1. Analyzing and determining whether a violation is willful

a. Willful classification analysis

During the course of an inspection, the compliance officer must analyze and determine whether the employer's violation was willful and must document that classification. To conduct this analysis, the compliance officer must prepare a willful classification analysis for the Legal Unit and the District and Regional Managers. Please follow instructions provided by the Legal Unit on how to prepare the analysis. After completing the analysis, confidentially email it to the Assistant Chief Counsel.

b. Confidentiality

The willful classification analysis should be maintained in the confidential section of the case file and should not be distributed to employers, employees, or third parties. The instructions provided by the Legal Unit and all draft and completed versions of the analysis are confidential communications intended for use by the Legal Unit and the District Manager in advising compliance personnel on the appropriate classification of a violation, in anticipation of litigation, to prepare for hearing, and/or to make settlement offers that are fair and equitable to both the employer and the Division.

c. Further classification

If the violation was willful, the compliance officer must document that classification and must further classify and document the violation as willful regulatory, willful general, or willful serious.

2. Pre-issuance evidentiary review

a. District Manager review

Prior to issuing any willful regulatory, willful general or willful serious citation, the District Manager must:

- (1) Review the documentation generated by the compliance officer to support the issuance of a willful citation and determine if the documentation in the case file provides evidence establishing each element of a willful violation; and
- (2) Ensure that all of the relevant materials are sent to the Regional Manager and the Legal Unit within required time frames (see below).

b. Legal Unit review

- (1) Scope of Legal Unit review. A Legal Unit attorney must review the willful classification analysis and district case file documentation to determine the sufficiency of the evidence

supporting each element of the willful violation based on general legal principles and applicable case law.

- (2) Meetings. If requested by any party, the District Manager, compliance officer, and Legal Unit attorney should meet to review the evidence supporting the willful violation.

c. Documentation

If necessary, the Legal Unit attorney should request additional documentation from the District Manager to support one or more elements of the willful violation. The District Manager should provide the requested documentation as soon as possible to allow the attorney to complete the legal review.

d. Written legal opinion

Upon completion of legal review, the Legal Unit attorney must prepare a written opinion regarding the sufficiency of the evidence supporting the willful violation and send a summary of that opinion to the Regional Manager as a confidential communication.

NOTE: If possible, the Legal Unit attorney assigned to conduct pre-issuance evidentiary review of the willful violation should be assigned to represent the Division if the employer appeals the citation.

e. Time frames

- (1) The District Manager should initiate Legal Unit review at least three months prior to the date of planned citation issuance.
- (2) The Legal Unit attorney must complete review of the evidentiary foundation for a willful violation at least one month prior to the date of planned citation issuance.

NOTE: Time frames may be modified, but only under exigent circumstances.

Attachment:

A - Examples of Regulatory Violations [under development]
