Chapter 10

SUBPOENAS AND LETTERS REQUESTING DOCUMENTS

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Chapter 10

SUBPOENAS AND LETTERS REQUESTING DOCUMENTS

Policy Statement: It is the policy of the Division of Occupational Safety and Health (DOSH), also known as the Division or Cal/OSHA, to issue a subpoena or subpoena duces tecum when necessary to compel the attendance of witnesses and the production of books, papers, records and physical materials, and to respond to all subpoenas and subpoenas duces tecum served on the Division.

Purpose: This policy is intended to set forth procedures for DOSH team members to conduct workplace inspections in accordance with applicable laws and regulations, ensuring that employers maintain safe and healthy work environments for employees.

Authority: DOSH will administer this policy in compliance with all applicable laws, rules, and guidance:

- California Labor Code, Sections 6304.5, 6313, 6314(c), 6317.9
- California Government Code, Sections 68096.1, 68097.1, 68097.2
- California Evidence Code, Sections 1563
- California Code of Civil Procedure, Sections 1010.6(a), 1985.3(c), 2025.250, 2025.90
- California Rules of Court, Rule 8.78

Procedures:

I. Pre-citation Subpoenas and Subpoenas Duces Tecum

A. **Definitions**

1. Subpoena

   A written order directing a person to appear at a specific place and time to give testimony.

2. Subpoena Duces Tecum
   An order to produce specific records or materials.

3. Service

   Service means to provide or deliver a copy of a document, such as a subpoena or subpoena duces tecum, to a specific recipient. In order for a subpoena or subpoena duces tecum to take effect, the party issuing the subpoena must ensure that the intended recipient receives it. In order for proper service to occur, the person delivering the subpoena or subpoena duces tecum must be:

   a. Be 18 years old or older;

   b. Serve a copy of the subpoena or subpoena duces tecum and all attachments; and

   c. Complete a proof of service.

B. When to Use Pre-citation Subpoenas

1. The Division may serve a pre-citation subpoena, pre-citation subpoena duces tecum, or both on an employer, a representative of the employer, or any other person, to obtain evidence during the course of an investigation or inspection.

2. Pre-citation subpoenas and pre-citation subpoenas duces tecum must be issued only during the investigatory phase of Division activities. They must not be issued after the issuance of citations and initiation of Occupational Safety and Health Appeals Board proceedings.

C. Timing of Pre-citation Subpoenas

1. If an employer or other entity related to an inspection does not timely produce necessary witnesses or documents, Compliance Safety and Health Officers (CSHOs) must immediately consider issuing a subpoena/subpoena duces tecum.

2. Furthermore, where an Employer refuses to comply with a request or CSHOs have reason to believe that an Employer or other entity related to an inspection is delaying compliance with a document request or intentionally withholding witnesses or documents, CSHOs must immediately issue a subpoena/subpoena duces tecum.

D. Preparation of Pre-Citation Subpoena or Subpoena Duces Tecum and related documents by Compliance Staff

1. Subpoena or Subpoena Duces Tecum

    a. CSHOs must draft a Cal/OSHA Form 24A: *Subpoena for Personal Appearance* or Cal/OSHA Form 24B: *Subpoena Duces Tecum for the Production of Documents and Things* and submit it to the District Manager (DM), Senior Industrial Hygienist – Supervisor (SIHS), and/or an authorized designee, which is herein referred to as DM/SIHS/Designee for review and approval.

    b. Prior to the DM/SIHS/Designee signing the subpoena/subpoena duces tecum, CSHOs must submit the draft subpoena/subpoena duces tecum to the Legal Unit via LEGEND as an Other Legal Request (OLR).

    c. After the DM/SIHS/Designee and the Legal Unit have reviewed and approved the draft subpoena/subpoena duces tecum, DM/SIHS/Designee will sign as the authorized designee.

2. Attachment(s) to the subpoena or subpoena duces tecum identifying requested documents and/or interview matters should be included with the draft.

3. Cal/OSHA Form 24C: Declaration of Service.

E. **Service**

1. Subpoenas/subpoenas duces tecum, related attachment(s), and Declaration of Service must be served by a contracted subpoena service, or, with the DM/SIHS/Designee approval, by CSHOs.

2. CSHOs must compile and give 1) a copy of the subpoena or subpoena duces tecum 2) related attachment(s) and 3) Declaration of Service to the contracted subpoena service to serve on the requested person.

3. After the documents are personally served on the person, the completed Declaration of Service and a copy of the original of the subpoena or subpoena duces tecum, and any attachment(s) must be placed in the employer case file at the District Office.

F. **Fees**

1. When the Division issues a subpoena/subpoena duces tecum, the Division must pay applicable fees except when the person subpoenaed is a party to a Division proceeding or an officer or employee of the Division.

a. Government Code section 68096.1 provides the relevant fees applicable to local agency employees. As of 2023, this is $275.00 per day.

b. Government Code section 68097.2 provides the relevant fees applicable to peace officers, firefighters, state employees, trial court employees, and county employees. As of 2023, this is $275.00 per day.

c. When subpoenaing other witnesses for deposition or hearing, 8 CCR section 382 provides the relevant fees. As of 2023, this is $35.00 per day.

2. When the witness demands payment of applicable fees, CSHOs serving the subpoena must notify the Legal Unit in the form of a Request for Funds, prior to the hearing.

3. Costs for the production of records or materials are reimbursed through CalATERS.

G. **Non-Compliance with Subpoena or Subpoena Duces Tecum**

If the Recipient's response is untimely or incomplete, CSHOs should contact the Legal Unit for assistance as soon as they learn of non-compliance.

II. Post-citation Occupational Safety and Health Appeals Board Hearing Subpoenas and Subpoenas Duces Tecum

A. Administrative subpoenas and subpoenas duces tecum used in conjunction with Occupational Safety and Health Appeals Board hearings should be obtained from the Appeals Board from the Appeals Board website.

B. After CSHOs complete the appropriate form, they must submit the completed form via email to the general OSHAB inbox at OSHAB@dir.ca.gov. Forms may also be mailed to 2520 Venture Oaks Way, Suite 300 Sacramento, CA 95833 or sent by fax to (916) 274-5785. OSHAB staff will review the request and will send back the issued subpoena if it is approved. CSHOs shall then have the subpoena or subpoena duces tecum served. The service process is described above in section I, paragraph E.

III. Responding to Subpoenas and Subpoenas Duces Tecum Served on the Division

A. **Custodian of Record (Custodian)**

1. The person who has physical custody and control of the books, records, documents or physical evidence and maintains them in the ordinary course of business.

2. The DM/SIHS/Designee of each District Office is the Custodian of Records for that Office.

B. **Accepting Service of Third-Party Subpoenas/Subpoenas Duces Tecum**

1. Subpoenas that Name a Specific Individual to Testify at a Hearing or Trial

   a. Subpoenas that name a specific individual to testify at a hearing or trial may only be accepted if served in person on the individual named. Electronic or mail service of such subpoenas are not valid absent the Division's express consent.

   b. Only the specific person named in the subpoena or their immediate supervisor may accept service. If the specific person named in the subpoena accepts service personally, they must immediately notify their immediate supervisor.

      i. Where the subpoena is for testimony in relation to a Division case currently on appeal, or testimony at trial or hearing, the DM/SIHS/Designee must immediately send the subpoena to the Legal Unit so that a determination can be made regarding whether legal representation is required.

      ii. The subpoena should be sent via LEGEND as an OLR. However, if the due date is close in time, the DM/SIHS/Designee should either call or email an Assistant Chief Counsel for assistance.

   c. When served with a subpoena requiring attendance at a trial, hearing, or deposition, CSHOs I must also make a demand for payment of fees as described in section "III.B.5. Fees" of this Policy and Procedures (P&P).

2. Subpoenas Duces Tecum Directed to the Custodian of Records

   a. Subpoenas duces tecum may be served on the Division either in person or mail. Electronic service is not valid, absent the Division's express consent.

b. Subpoenas duces tecum directed to the Custodian at a particular District Office may be accepted by any employee of that District Office.

c. When accepting service of the subpoena duces tecum, Compliance personnel must make a demand for payment of fees as described in section “III.B.5. Fees” of this P&P.

d. If an employee who is **not** the Custodian accepts service of a subpoena, they **must immediately** deliver the subpoena to the Custodian of Records.

3. Subpoenas Directed to Person Most Knowledgeable (PMK)

   a. Any employee of the District Office may accept subpoenas directed to the PMK.

   b. When accepting service of the subpoena, CSHOs must make a demand for payment of fees as described in section “III.B.5. Fees” of this P&P.

   c. Upon accepting service of the subpoena, CSHOs must immediately notify their DM/SIHS/Designee and deliver the subpoena to them.

   d. The DM/SIHS/Designee must review the subpoena and determine which Division employee would be the PMK. If unable to determine which Division employee is the PMK, the DM/SIHS/Designee should contact the Legal Unit for assistance.

4. Deposition Subpoenas

   a. Only the specific person named in the subpoena or their immediate supervisor may accept service.

   b. When accepting service of the subpoena, CSHOs must make a demand for payment of fees as described in section “III.B.5. Fees” of this P&P.

   c. If the specific person named in the subpoena accepts service personally, they must immediately notify their immediate supervisor.

      Additionally, if there is an open Appeal related to the underlying case or the Legal Unit represents the Division on the case, CSHOs must immediately notify the Legal Unit and include a copy of the deposition subpoena. The Legal Unit will defend all depositions involving open Appeals.

5. Fees

    a. Third Party Subpoena Fees

        i. Excluding criminal cases, when the Division is served with a subpoena requesting a Division employee's attendance at a deposition, hearing or a trial, the Division is entitled to the amount provided for under Government Code section 68097.2(b) for each day attendance is required. Fees are to be paid at the same time the subpoena is served. As of 2023, the current amount is $275.00 per day.

        ii. In criminal cases, when the Division is served with a subpoena requesting a Division employee's attendance at a deposition, hearing, or a trial, the Division is entitled to the amount provided for under California Penal Code section 1329.

        iii. All checks must be endorsed to the State of California General Fund and forwarded with a copy of the subpoena to the DIR Accounting Unit.

    b. Third Party Subpoena Duces Tecum Fees

        i. If Attendance of the Custodian of Records is Required

            1) The Division is entitled to the amount provided for under Government Code section 68097.2(b) for each day attendance is required. Fees are to be paid at the same time the subpoena is served.

            2) Where records or materials are requested, the Division is entitled to reasonable costs as specified in California Evidence Code section 1563 from the requesting party.

                a) $0.10 per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less.

                b) $0.20 per page for copying of documents from microfilm.

                c) Actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to a subpoena.

                d) Reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of twenty-four dollars ($24) per hour per person, computed on

the basis of six dollars ($6) per quarter hour or fraction thereof.

e) Actual postage charges; and the actual cost, if any, charged to the witness by a third person for the retrieval and return of records held offsite by that third person.

f) For each photograph provided, the Division is entitled to $1.50 per photograph or digital print. [If multiple digital prints are requested, the requestor has the option to obtain such digital photographs on a CD for a charge of $20.00 per CD].

g) A copy of an audio tape may be obtained for $8.00 per tape.

ii. Attendance of the Custodian of Records is Not Required

If attendance of the Custodian is not required, the Division is only entitled to the duplicating fees provided above.

iii. All checks must be endorsed to the State of California General Fund and forwarded with a copy of the subpoena to the DIR Accounting Unit.

iv. No Responsive Records or Materials Located

Where there are no records or materials responsive to the subpoena duces tecum, any payments made to the Division should be returned to the subpoenaing entity or else destroyed with that entity's express permission.

C. **Complying with Subpoenas/Subpoenas Duces Tecum**

1. If the Division is the Defendant in a civil case

If CSHOs are served with a subpoena, where the Division is the defendant in a civil case, CSHOs must immediately contact the Legal Unit.

2. If Division Records Are Required

Upon receiving a subpoena duces tecum, the Custodian of Records must adhere to the following provisions:

a. Locating and Duplicating Records

i. The Custodian must locate the requested records and make a copy of them.

If the requested records cannot be located, the Custodian must complete and sign the Cal/OSHA Form 24E: *Declaration of No Records* and mail it to the party who issued the subpoena, any payments made to the Division should be returned to the subpoenaing entity or else destroyed with that entity's express permission.

ii. The Custodian or person producing the records must redact or withhold all records as described in section 2.c. below.

iii. Questions regarding the production of records should be directed to the Legal Unit.

b. Mailing Records

If the subpoena duces tecum indicates that mailing the records is acceptable, the Custodian must mail copies of disclosable requested records with a completed and signed the Cal/OSHA Form 24D: *Declaration of the Custodian of Records*.

i. The signed Declaration and copy of the records must be placed in an inner, sealed envelope.

ii. A copy of the subpoena duces tecum must be attached to the outside of this envelope.

iii. The inner envelope must be placed in an outer envelope, sealed, and mailed to the person indicated on the subpoena duces tecum.

iv. A copy of the Custodian's Declaration must be mailed to the party issuing the subpoena duces tecum.

v. A copy of the Custodian's Declaration must be placed in the District Office file.

c. Withholding Records

The Custodian will inform the party requesting the records in writing for the legal basis for withholding any requested documents. Examples of materials to be excluded include, but are not limited to the following:

i. Emails to and from Division attorneys on the basis of Attorney-Client privilege;

ii. Legal Unit Willful Analysis protected from disclosure under the Attorney-Client privilege and Attorney Work product doctrine;

iii. Information that would reveal the identity of confidential complainants protected under Labor Code section 6309 and Evidence Code section 1040 and 1041;

iv. Photographs and confidential business information that protected from disclosure under Labor Code sections 6314(a) and 6322;

v. Confidential medical records protected from disclosure pursuant to Cal. Const. Art. 1, § 1, Right to Privacy; Cal. Info. Practices Act, Cal. Civ. Code, § 1798 et seq.

vi. Materials subject to a protective order or otherwise sealed by law.

d. Duplication Fees

i. The fees for duplicating the subpoenaed records must be collected prior to the production of the records. The record may be withheld until applicable fees are paid. All fees must be in the form of checks payable to the State of California as previously provided in section “III.B.5. Fees” of this P&P.

ii. If the records are duplicated by the requesting party at the District Office, no duplicating fees must be charged by the Division.

3. Division Employee Attendance Required

a. Subpoenaed Division Employee Did Not Participate in Inspection

i. Custodian of Records

1) If the subpoena requires that the Custodian appear in court, the subpoena must be referred to the Legal Unit.

2) When making an appearance at a deposition or at a trial, the Custodian of Records must appear and bring a copy of requested records to produce during the deposition or trial.

If any records considered confidential are brought to the deposition or trial, the Custodian must contain the records in a sealed envelope marked "Confidential" which must not be released. The Custodian must inform the party requesting the records or the court that the Division is asserting its privilege not to disclose confidential records based the ground provided above in section “III.C.2.c. – *Withholding Documents*” of this chapter.

ii. Compliance Safety and Health Officers

If CSHOs receive a subpoena to appear at a deposition, hearing, or trial, in a case where they did not participate in the underlying inspection, CSHOs must immediately notify their DM/SIHS/Designee and refer the subpoena to the Legal Unit.

b. Subpoenaed CSHOs Participated in the Inspection

i. Appeals Board Hearings Subpoenas

1) If CSHOs receive a subpoena to provide testimony at an Appeals Board hearing in a case where CSHOs participated in the underlying inspection, they must notify the DM/SIHS/Designee.

2) If the Legal Unit represents the Division in the case, CSHOs must immediately refer the subpoena to the Legal Unit and include a copy of the subpoena.

ii. Deposition Subpoena

1) CSHOs must comply with the conditions of the deposition subpoena which requires travel within seventy-five (75) miles.

a) CSHOs will not comply with a deposition subpoena which requires travel in excess of seventy-five (75) miles from the person's office or residence.

b) CSHOs must notify the subpoenaing party that they will not comply with the subpoena because of this distance pursuant California Code of Civil Procedures section 2025.250.

2) A deposition of a witness is limited to 7 hours of total testimony, pursuant to California Code of Civil Procedures section 2025.290, except:

a) Where the witness has been designated as the person most qualified/knowledgeable.

b) Where a new party appeared in a case, after the deposition has already concluded.

3) In active Division inspections/investigation and appeals, CSHOs must contact the Legal Unit.

4) In closed Division inspections/investigations and appeals, CSHOs do not normally require legal representation at deposition.

   a) However, upon request, the Legal Unit will assist with objecting to the subpoena, reviewing the documents or items to be produced, or preparing CSHOs for the deposition.

   b) On high profile cases or where the circumstances are appropriate, CSHOs may contact the Legal Unit to request additional assistance beyond what was described above.

   c) At the deposition, CSHOs should request a copy of their deposition transcript for the sole purpose of reviewing it for errors. Do not request a certified copy.

   d) Upon receipt of the deposition transcript, CSHOs must review it carefully for any errors and notify the court reporter of any potential errors and corrections.

   e) Unless the deposing attorney has secured a protective order under California Code of Civil Procedure section 2025.420(b)(12), CSHOs are permitted to bring their DM/SIHS/Designee with them to the deposition, in-person or remote.

      The DM/SIHS/Designee is permitted to observe and be present for moral support. However, they are not permitted to object, comment, or otherwise participate in the deposition.

   f) If the DM/SIHS/Designee intends to be present at the deposition, CSHOs should notify the deposing attorney that the DM/SIHS/Designee will be attending the deposition with them.

      i) If the deposing attorney objects to the DM/SIHS/Designee attending, inform the attorney that the DM/SIHS/Designee will be in attendance absent a protective order prohibiting the DM/SIHS/Designee's attendance.

      ii) If the deposing attorney refuses to allow the DM/SIHS/Designee to be present or subsequently ejects them from the deposition, CSHOs should

suspend the deposition immediately. CSHOs should contact the Legal Unit for further assistance.

IV. Discovery

CSHOs and DM/SIHS/Designee must promptly comply with all discovery requests involving an appeal before the Occupational Safety and Health Appeals Board.

If the particular case, or the discovery portion of the case, is being handled by the Legal Unit, promptly contact the appropriate Legal Unit office and fax the discovery request or upload the request to the Legal Unit case management system, LEGEND.

V. Requests for Informal Interviews

CSHOs must not grant interviews to non-Division personnel, including private attorneys or investigators, who wish to question CSHOs about inspections, files or records of the Division. This applies to both open and closed inspections.

VI. Letters Requesting Documents

Letters requesting documents that do not come from a party to an open appeal should be treated as a request under Public Records Act. CSHOs must immediately notify their DM/SIHS/Designee, Regional Manager, and PRA Unit.