Chapter 14

# TYPES OF INSPECTIONS

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Chapter 14-A

# ACCIDENT INVESTIGATION

**Policy Statement:** It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA, to conduct a thorough investigation of the cause of every industrial accident which results in any of the following: 1) A fatal injury to one or more employees; 2) a serious injury or illness; 3) a serious exposure; or 4) the inpatient hospitalization, regardless of duration, of three (3) or more employees.

**Purpose:** This policy is intended to set forth procedures for DOSH team members to conduct workplace accident investigations 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 Code of Regulations, Title 8
- California Labor Code, Sections 6302, 6313, 6313.5, 6314, 6315, and 6317.

**Procedures:**

## I. General Issues

A. Cal/OSHA 170 is the Investigation Summary (OSHA 170). OSHA 170 is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, and hospitalizations, as well as investigations that have generated significant publicity.

B. An OSHA 170 shall be completed for:

1. All fatalities, serious injuries, serious exposures, or catastrophes (as defined in subsection B. below) which are investigated as accidents.

***NOTES***:

- An OSHA 170 shall be completed and data-entered into OIS as FINAL for all fatalities, serious injuries, serious exposures or catastrophes resulting in an inspection within five (5) days of the opening conference. OSHA 170 can be later modified to reflect any new information.

- ***EXCEPTION***: If it is determined prior to conducting an investigation that the accident involved a fatality, serious injury, serious exposure or catastrophe which was not caused by a workplace condition, e.g., a heart attack, stroke or other medical disorder not related to working conditions, it is not necessary to conduct an inspection nor to complete an OSHA 170.

- If it is determined after an investigation is initiated that the accident involved a fatality or catastrophe that was not caused by a workplace condition, then Compliance Safety and Health Officers (CSHOs) must complete an OSHA 170 to comply with OSHA/OMDS instructions. (See Forms Completion and Data Entry Instructions)

- If it is determined after an investigation is initiated that the accident involved a serious injury or serious exposure that was not caused by a workplace condition, then CSHOs are not required to complete the OSHA 170. CSHOs shall complete the Cal/OSHA 1 and include in Optional Information, Item 42, S 16 NO 170. (See Forms Completion and Data Entry Instructions)

2. All events which generate significant print or electronic media attention, but which did not involve a fatality, serious injury or serious exposure, e.g., explosion at a site where no employee was working at the time of the explosion, a crane collapse where no employees were injured, or a toxic release where no employees were exposed.

C. Only one Investigation Summary (OSHA 170) shall be completed per accident regardless of how many different inspections resulted from the accident. Photocopies of the Investigation Summary shall be placed in each accident-related case file.

D. Accident investigations are more complex and require a greater degree of technical and investigative skill to conduct than other types of non-programmed or programmed inspections. As a result, the procedures found in this P&P represent minimum guidelines for the conduct of accident

investigations and additional procedures may be needed to conduct a particular accident investigation.

E. Accident investigations often require coordination between the Division and other federal, state and local investigative agencies. In addition, CSHOs must often interact during the course of an accident investigation with many different entities including employers, employer representatives, accident victims and their families, employees and employee representatives, the general public, and representatives of the electronic and print media.

## II. Types of Accident Investigations

### A. Mandatory

The Division shall conduct an investigation into the cause of the following types of industrial accidents:

***EXCEPTION***: Investigation of an accident as specified in this section need not be conducted if the District Manager (DM) or Senior Industrial Hygienist – Supervisor (SIHS) determines, according to guidelines found in Chapter 3, that an accident investigation is unnecessary. If a determination is made that an investigation is unnecessary, the reason(s) for the determination shall be summarized and recorded on the Cal/OSHA Form 36.

1. Fatality ("FAT")

   An employee death resulting from an employment injury, illness, or exposure related to a workplace hazard or condition.

2. Serious Injury

   Any injury or illness to one or more employees which requires inpatient hospitalization for other than medical observation, or in which an employee suffers the loss of any member of the body, or suffers any serious degree of physical disfigurement, but does not include any injury or illness or death caused by an accident on a public street or highway. See Labor Code Section 6302(h).

   ***NOTES***:
   - Medical Records should be obtained as supporting evidence to prove a worker suffered a serious injury or illness.

- If a serious injury or illness is confirmed, but no investigation will be performed, personnel must include a rationale as to why an investigation is unnecessary.

3. Serious Exposure

   Any exposure of one or more employees to a hazardous substance when the exposure occurs as a result of an incident, accident, emergency or exposure over time and is of a degree or amount sufficient to create a substantial probability that death or serious physical harm in the future could result from the exposure. See Labor Code Section 6302(i).

4. Catastrophe ("CAT")

   The inpatient hospitalization, regardless of duration, of three (3) or more employees resulting from an employment injury, illness or exposure caused by a workplace hazard or condition.

   ***NOTES***:

   - It is not necessary that the injury, illness or exposure be of a serious nature if three (3) or more employees are hospitalized as a result of the injury, illness or exposure.

   - Even though the investigation of a catastrophe is not required by Labor Code Section 6313, the Division has determined that in order to be "as effective as" federal OSHA, the investigation of a catastrophe is mandatory.

B. **Discretionary**

   At the discretion of the Chief, the Division may investigate the causes of any other type of industrial accident, or occupational illness, which occurs within the state in any employment or place of employment, or which directly or indirectly arises from or is connected with the maintenance or operation of the employment, or the place of employment, and shall issue any orders necessary to eliminate the causes and to prevent reoccurrence of the accident. Labor Code Section 6313(b).

## III. Initial Investigative Procedures

A. **Initial Information**

Upon notification of an accident, the DM/SIHS shall gather as much information as possible prior to scheduling an inspection. Information required by Cal/OSHA Form 36 shall be collected from the person or entity reporting the accident.

***NOTE***: If knowledge of the accident is received from the print or electronic news media, or from sources other than an employer or an employer's representative, the employer may be contacted to obtain additional information whenever the DM/SIHS believes that such informational contact will result in a more effective inspection. Such contact shall be considered to be advance notice and procedures pertaining to advance notice in Chapter 7 shall be followed.

B. **High Profile Accidents**

Some workplace accidents attract significant, and often immediate, interest from the news media or from the public. If the District receives an inquiry from the print or electronic media about a particular accident, the DM/SIHS shall notify the Deputy Chief for Cal/OSHA Enforcement, through the Regional Manager (RM), of the source and nature of each media inquiry. The Deputy Chief will notify the DIR Deputy Director for Communications about the source and nature of the inquiry and will coordinate an appropriate response to the inquiry with the DM/SIHS.

***NOTE***: High profile cases that require Chief/Deputy Chief review must be submitted to Assistant Deputy Chief or designee for initial review no later than the 3rd month anniversary date from the opening conference or accident notification, whichever event triggers the 6-month Statute of Limitations clock. High profile cases may include, but are not limited to, cases with proposed willful violations, high media interest, multiple fatality/catastrophic injuries, cases with proposed penalties in excess of $100,000, and on a case-by-case basis as notified by either the Chief or the Deputy Chief.

Information necessary for this review includes an abbreviated copy of the file (Forms 1, 1A, 1B, 10, 170's, relevant photographs, documents acquired during the investigation, etc.) and a conference between the Headquarters reviewer (Assistant Deputy Chief or designee) and the district office staff could be necessary.

Depending upon the outcome of the initial review, the citations may be approved for issuance (perhaps with minor modifications) or the CSHOs may be asked to obtain additional information, documentation, statements, etc. If

the latter, a final review date will be established to ensure the citations are approved for issuance in a timely manner.

C. Investigator Selection, Fatality/Catastrophe Investigation Initiation and Notification of BOI and Local/Circuit Prosecutor

1. Investigator Selection

   The DM/SIHS shall select a safety engineer and/or an industrial hygienist to investigate an accident and shall base the selection on the investigator's experience with the particular industry or operation involved in the accident.

2. On-Site Presence of DOSH Civil Investigators

   Any investigation of a fatality/catastrophe ("FAT/CAT") accident report shall be initiated immediately, or within eight (8) hours if an immediate response if not feasible, but in no case shall a FAT/CAT investigation be initiated more than twenty- four (24) hours, following receipt of the FAT/CAT accident report.

3. Immediate Initial Notification

   At the time that a FAT/CAT accident investigation is begun, the District Office, Regional Office shall notify by fax (213-576-7489) or by telephone (213-576-7786), or by electronic mail (DIRDOSHBOI_Notify@dir.ca.gov), the Bureau of Investigations (BOI) and the local or circuit prosecutor of the occurrence of the FAT/CAT, and the initiation of the DOSH civil investigation. The District may use the Cal/OSHA Form 36 as a format to satisfy the immediate initial notification requirement. For catastrophes only, notify Federal OSHA of the occurrence of the catastrophe.

4. Expedited Civil Fatality/Catastrophe Investigation in Selected Cases

   When the local or circuit prosecutor requests that DOSH expedite a FAT/CAT investigation, the DM/SIHS or Regional Manager shall ensure that the particular civil investigation is completed (i.e., Closing Conference is conducted, and citations, if any, are issued) within 90 days from the date of the Opening Conference which initiated the FAT/CAT investigation.

D. **Investigative Team Approach**

If the DM/SIHS determines that an investigative team, composed of experts in specific safety or health disciplines, e.g., pressure vessels, elevators, cranes, process safety management, electrical, or medicine, is required to effectively conduct a particular accident investigation, the DM/SIHS shall so advise the Regional Manager, who will in turn advise the Deputy Chief for Cal/OSHA Enforcement of the need for an investigative team approach.

E. **Equipment**

Prior to leaving the District Office for the accident site, the DM/SIHS shall ensure that CSHOs assigned to conduct the investigation have selected personal protective equipment and other investigative equipment, such as sampling devices, which are appropriate to conduct the investigation.

As in all inspections, under no circumstances should DOSH personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. DOSH 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.

F. **Other Governmental Agency Involvement**

1. Federal, State or Local Governmental Agency -- In General

    a. When the District learns of the involvement of a federal, state or local governmental agency in the investigation of an accident in which the Division is involved, notice of the involvement shall be immediately communicated through the Regional Manager to the Deputy Chief for DOSH Enforcement.

    b. When one or more federal, state or local governmental agencies are involved in an accident investigation in which the Division is also involved, the DM/SIHS shall ensure that CSHOs conducting the Division's investigation work cooperatively with personnel from the other agencies.

2. Contractors State Licensing Board (CSLB)

    a. When a fatality or serious accident investigation involves a licensed or unlicensed contractor and the accident results in issuance of a serious, willful or repeat citation to a construction employer, the DM/SIHS shall ensure that copies of the Cal/OSHA 1, 1A, 1B, OSHA 170, and related

citations (after they become final order of the board) are sent to the Regional Manager.

After review, the Regional Manager is responsible for mailing a copy of all Cal/ OSHA 1s, 1As, 1Bs, OSHA 170s, and related citations (after they become final order of the board) to the CSLB, along with a with a cover memorandum itemizing the investigations attached thereto and corresponding District Office contact information in case the CSLB has any questions about the case or requires copies of any other investigation reports.

Regional Managers should forward referral packages to Quality Assurance Unit in the Enforcement Division of Contractors State Licensing Board (CSLB) with the following contact information:

- *Address*: 9821 Business Park Drive, Sacramento, CA 95827;
- *Telephone*: (916) 255-1313 or (916) 255-3978;
- *Email*: Quality.Assurance@cslb.ca.gov.

See Section VIII.D.

***NOTE***: Labor Code Section 6313.5 provides that "[T]he Division shall transmit to the Registrar of Contractors copies of any reports made in any investigation conducted pursuant to subdivision (a) of section 6313, and may, upon its own motion or at the request of the Registrar of Contractors, transmit copies of any other reports made in any investigation conducted pursuant to subdivision (b) of Section 6313, involving a contractor licensed pursuant to Contractors' License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code)."

b. Should DOSH determine in connection with any investigation of a construction industry employer that the employer has acted willfully or with gross negligence to violate an occupational safety or health standard and the same act has also constituted an obvious violation of standards to which CSLB requires licensed contractors to adhere, DOSH will make an early referral to CSLB.

   Examples of circumstances or conditions under which DOSH will make an early referral include refusal of entry where there is a basis to suspect the existence of a serious or imminent hazard likely to cause

death or serious physical harm, a history of serious, willful or accident-related citations within the past four (4) years, and where DOSH has issued an Order to Prohibit Use (OPU).

Specific examples of serious or imminent hazards and/or reasons that DOSH would issue an OPU may include, but is not limited to, unshored trenches over 5 feet in depth, non-compliant scaffolding, lack of fall protection, unguarded equipment, dry cutting or grinding of concrete, improper removal of asbestos-containing or lead- containing building materials.

Early referral will be accomplished by DOSH contacting Quality Assurance Unit of the CSLB's Enforcement Division at (916) 255-1313 or (916) 255-3979 or via e-mail at Quality.Assurance@cslb.ca.gov either the day of or the following work day after encountering conditions that would warrant an early referral. See Section III.F.2.a.

## IV. Inspection Procedures

Inspection procedures contained in Chapter 7 are generally applicable to the conduct of all accident investigations. The following inspection procedures pertain only to accident investigations and are designed to supplement or modify the procedures found in Chapter 7.

### A. **Purpose**

Even though the primary purpose of the accident investigation is to determine the cause of the accident, CSHOs are also responsible for determining whether a violation(s) of any Title 8 Safety Orders caused the accident and whether citations should be issued pursuant to Labor Code Section 6317.

### B. **Scope**

Every accident investigation shall include a comprehensive evaluation of the circumstances and cause(s) of the accident itself. The scope of the inspection may be expanded to include the investigation of non-accident conditions under the following conditions:

1. CSHOs have obtained information indicating the likelihood of serious hazards in non-accident areas of the accident site place of employment;

2. Examination of the employer's Cal/OSHA Log of Injuries and Illnesses (Log 300) demonstrates that a significant number, or type, of injuries or

illnesses have occurred over a particular time period or in a particular department or operation.

3. An employee complaint alleging an unsafe or unhealthy condition at the accident site place of employment is received by the District while conducting the accident investigation;

4. The accident site place of employment is in a high hazard industry; or

5. A determination by the DM/SIHS based on the accident site employer's history of previous violations.

C. Abbreviated Opening Conference

When an accident investigation involves a place of employment where an imminent hazard may exist, CSHOs shall conduct an abbreviated opening conference consisting of the following items: (1) identification of the CSHO; (2) explanation of the purpose of the inspection; (3) request for permission to enter the place of employment where the accident site is located; and (4) request for an employer and/or an employee representative to accompany CSHO during the inspection.

***NOTE***: A more extensive discussion of other opening conference topics can be conducted either at the exit conference after the initial inspection is completed, or at the closing conference.

D. Evaluation of Employer's Injury and Illness Prevention Program

CSHOs must thoroughly evaluate and document the employer's Injury and Illness Prevention Program (IIPP) during every accident investigation, determine if any IIPP or Title 8 Safety Order violations caused the accident, issue citations when appropriate, use the investigation's findings to help prevent similar accidents, and send investigation reports and final orders of the Occupational Safety and Health Appeals Board (OSHAB) to the Contractors State Licensing Board (CSLB) if a contractor, licensed or unlicensed, is involved.

E. Coordination with Bureau of Investigations

1. Whenever there is a single fatality, or serious injury to three (3) or more employees, the Bureau of Investigations (BOI) is mandated pursuant to Labor Code Section 6315 to conduct an accident investigation in order to determine whether any criminal violations have occurred.

2. When responding to the accident site, the BOI Special Investigator assigned to the investigation will contact compliance personnel on site to coordinate the BOI investigative activities with those of the CSHO.

   ***NOTE***: See Chapter 5 for further information about BOI activities.

F. Abatement of Serious Violations at the Time of Inspection

To ensure that employers abate hazardous conditions CSHOs shall request and document signed certifications of abatement, photographs, detailed inspector observations and/or other records proving that the employer abated each violation that Cal/OSHA issued. CSHOs shall also complete Cal/OSHA Form 161A.

1. CSHO Observed Abatement

   a. 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.

      Observed abatement will be documented on the abatement section of the *OIS Violation Worksheet* for each violation and must include the date and method of abatement.

   b. 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.

   c. 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. These incentives are discussed with the employer during the opening conference.

   d. 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 (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).

2. Employer Abatement Assistance

a. 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 DOSH endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

b. Disclaimers

The employer shall be informed that:

i. The employer is not limited to the abatement methods suggested by DOSH;

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

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

G. Notice of Accident-Related Violation

When an accident investigation is concluded, compliance personnel shall prepare and submit to the District Manager a Notice of No Accident-Related Violation (Cal/OSHA 170B) or a Notice of Accident-Related Violation (Cal/OSHA 170C), as appropriate.

***NOTE***: See Appendices A and B of this Chapter 14-A for information on completion of Cal/OSHA 170B and 170C.

H. Family Contact

***NOTE***: Procedures relating to Family Contact apply to fatalities only and do not apply to accidents involving serious injury or exposure, regardless of how many employees are injured or exposed or the severity of the employees' injuries or exposure, with the exception of the situations when injured employees are in a coma or have other medical conditions which prevent them from discussing the circumstances of the injury or illness with DOSH investigative staff.

1. After initiating an accident investigation, CSHOs shall compile a list of the names of all deceased accident victims, their current addresses, and the names of individual(s) listed in the employer's personnel records as next-

of-kin, family members, and person(s) to contact in the event of an emergency.

2. Contacting Family Members

   When an accident investigation is initiated, the deceased employee's next-of-kin, family member, or other person designated by the employee to be notified in case of emergency shall be contacted early in the investigation and given an opportunity to discuss the circumstances of the accident. Such individuals shall be notified that they can receive, upon request, timely and accurate information about the progress and findings of the accident investigation when it is ultimately completed. DOSH staff contacting family members must exercise tact and good judgment in their discussions.

3. Information Letter (Family Contact Letter)

   The District Office shall send to the deceased's emergency contact and/or next-of-kin, the standard information letter (Family Contact Letter), 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 any special circumstances into account, including the situations when injured employees are in a coma or have other medical conditions which prevent them from discussing with DOSH investigative staff, or do not send the letter, as appropriate.

4. In addition to the standard information letter sent by the DM/SIHS or designee, the DM/SIHS will also send a letter to the victim's emergency contact or otherwise verifiable next of kin.

5. 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 contacts 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

Appeals Board decisions as these are issued, or as soon thereafter as possible. However, such information will only be provided to family members after it has been provided to the employer.

c. Copies of the accident investigation file shall be provided free of charge to the surviving family members of a deceased employee, employees disabled by the accident, or to family members representing workers who were disabled by the accident.

6. Completion of Investigation Letter to Family/Next of Kin

When communicating the results of an accident investigation to family members/next of kin, the DM/SIHS shall send the standard information letter (Next of Kin Letter – Completion of Investigation) 30 days after issuance of the citations upon the employer.

7. Post Appeal Letter to Family/Next of Kin

After all appeals have been settled the DM/SIHS shall send the Standard information letter (Next of Kin Letter - Post Appeal) upon receipt of the Decision from the Occupational Safety and Health Appeals Board (OSHAB) informing the family of the outcome of the appeal to Occupational Safety and Health Appeals Board. A copy of the Decision shall be included with the letter to the family/next of kin.

## V. Special Situations

### A. **Jurisdiction**

1. If, at any time during the course of an accident investigation, challenges or questions arise regarding the jurisdiction of the Division to conduct an accident investigation, CSHOs shall immediately notify the DM/SIHS.

2. If the DM/SIHS cannot resolve the jurisdictional issue by reference to Chapter 1, the DM/SIHS shall contact the Regional Manager to determine if the inspection should commence or continue pending resolution of the jurisdictional issue(s). The Regional Manager shall notify the Deputy Chief for Cal/OSHA Enforcement and the Legal Unit of the jurisdictional issue(s) and a determination shall be made by the Deputy Chief as soon as possible to commence or continue the investigation.

3. If more than one government agency has jurisdiction over an accident investigation, accident site, or a portion of an accident site, the District will inform the Regional Manager of the scope of activities of the other agency

and conduct a coordinated investigation with the other government agency.

B. **Rescue Operations**

***NOTE***: See Chapter 27 for further information about emergency response.

1. When rescue operations are being performed at an accident investigation site by a public safety agency, CSHOs shall make immediate contact with a representative of the public safety agency directing the rescue operations and consult with the representative about safety aspects of the rescue. If the agency representative intends to use rescue procedures that are in violation of a Title 8 Safety Order(s), and less hazardous procedures are feasible, which are not a violation of Title 8 Safety Order(s), CSHOs shall so advise the agency representative of this fact.

2. When rescue operations are being performed at an accident investigation site by a non- public safety agency employer, CSHOs shall inform the employer what Title 8 Safety Order(s) are applicable to the rescue operation. Where appropriate, the Division shall direct non-public safety agency employers to rely on public safety agencies to perform rescue operations.

C. **Refusal of Entry, Withdrawal of Consent to Inspect, and Imposition of Conditions on the Inspection**

1. If the employer refuses entry to CSHOs to the accident site or withdraws consent to inspect the accident site during the course of an investigation, compliance personnel shall contact the DM/SIHS to obtain an inspection warrant pursuant to the procedures found in Chapter 8.

2. If the employer initially consents to the accident investigation, but during the course of the investigation imposes conditions upon the performance of the investigation which render an effective investigation difficult or impossible to conduct, CSHOs shall contact the DM/SIHS to determine whether an inspection warrant should be obtained. The DM/SIHS will discuss the conditions and their effect on the conduct of the investigation with the Regional Manager and the Legal Unit.

D. **Order to Preserve**

An Order to Preserve (Cal/OSHA 25A) and the Cal/OSHA 250 Placard can be issued or served by the District only under the following conditions:

1. Employer has refused permission to enter the accident site;

2. Employer has withdrawn consent to enter the accident investigation;

3. Employer has placed conditions on the performance of the accident investigation which render an effective investigation difficult or impossible to conduct; or

4. In the opinion of the DM/SIHS, it is necessary to preserve the accident site or any physical or documentary evidence contained at the accident site.

E. **Collection of Evidence**

1. As early as possible during the course of the accident investigation, CSHOs shall determine what, if any, physical evidence must be secured for subsequent inspection and/or analysis. For instance, it may be necessary to conduct analytical tests on piping systems, machinery, equipment, or other items in order to determine the cause of the accident. To facilitate the required testing and analysis, it may be necessary to take physical custody of these items.

2. Prior to taking custody of any physical evidence, approval to do so shall be obtained from the DM/SIHS and the Regional Manager in consultation with the Legal Unit. Any evidence acquired must be secured and the chain of custody maintained.

   ***NOTE***: Whenever evidence is acquired, CSHOs shall complete a Cal/OSHA 170Y and comply with the instructions contained in the 170Y.

3. For larger components that are difficult to handle or to transport, the Division, through the Legal Unit, may arrange for the joint custody of the item(s) with the employer.

F. **Return or Release of Evidence**

When the owner, or an owner's representative, of any evidence seized by the Division requests the return of the evidence, or the Division elects to return the evidence to the owner or the owner's representative, the DM/SIHS shall, before releasing the evidence, first:

1. Advise the Legal Unit and the BOI that a request for return of the evidence has been received, or that the evidence is no longer needed by the District, and that the District is planning to release the evidence;

2. Determine if any litigation involving the Division is pending, or is anticipated, which would necessitate the Division retaining custody of the evidence;

a. If any litigation involving the Division is pending, the evidence shall not be released;

b. If litigation is pending, but it does not involve the Division, advise all known litigants in writing that:

i. It is the Division's intent to release and return the evidence to the owner or the owner's representative; and

ii. Allow all interested parties 10 days to request that the evidence not be released but be retained by the Division.

3. If it cannot be determined that litigation is pending, the Division shall secure from the owner or the owner's representative a written statement that the owner is unaware of any pending or intended litigation.

4. Document the release of any evidence as follows:

a. A signed receipt for the evidence shall be obtained by the Division and the receiver shall be given a signed receipt by the Division; and

b. If any evidence has been destroyed, e.g. during destructive testing, or discarded while in the custody of the Division, a written statement describing the reason(s) why the evidence was destroyed or discarded shall be signed by the DM/SIHS and the CSHOs who originally took custody of the evidence.

## VI. Investigative Techniques

Accident investigation involves the gathering of oral and written statements from witnesses to the accident, documenting the conditions at the accident site through photographs, diagrams, maps or sketches, and collecting physical evidence including samples, documents and records.

### A. **Interviewing Witnesses**

1. General Issues

a. Familiarity with Accident Circumstances

Before interviewing a witness in an accident investigation, CSHOs shall be familiar with the general circumstances of the accident in order to conduct an effective witness interview. However, the sooner a witness is interviewed, the more accurate and candid the witness statement will be. As information accumulates during the course of an

accident investigation, it may be necessary to re-interview certain witnesses.

b. Language Barriers

i. Use of a Certified DIR Translator or Contract Translator

All DOSH accident investigator(s) shall make use of appropriate language translators when interviewing non-English-speaking injured worker(s) or employee witnesses. Appropriate language translators are Department of Industrial Relations employees who have been certified by the Department as bilingual translators in the language spoken by the witness, or individuals available in person or by telephone through contractual arrangements between a language translation vendor and the Division.

ii. Prohibition Against Use of Employer or Employer Representatives as Translators

Under no circumstances shall compliance personnel investigating a fatal or nonfatal accident make use of the services of the employer, or the employer's representative, to interview non-English-speaking injured worker(s) or employee witnesses.

2. Interview

a. Types of Witnesses

Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.

i. Percipient Witness -- is any person who saw or heard the accident, or observed the conditions prior to and/or at the time of the accident.

***NOTE***: The most important percipient witnesses in any investigation are the employees who were injured in the accident, other employees closely associated with the work activity at the time of the accident, and those employees

responsible for supervising the work activity at the time of the accident.

ii. Witness -- is any person who possesses information relating to, or explaining, the circumstances leading up to, and including, the accident.

***NOTE***: It may be necessary to contact other persons who were not percipient witnesses in order to obtain an understanding of what occurred before or during the accident, e.g., other employees, experts or managers. This is particularly true where the percipient witnesses have suffered fatal injuries or are hospitalized and cannot be contacted immediately.

b. Preparing for and Conducting the Interview

i. Initial Contact with Witness

Effective communication between the CSHO as compliance interviewer and the witness is essential to the conduct of a successful interview. The initial contact with the witness by the CSHO often determines the success or failure of the interview and should be perceived by the potential witness as non-threatening.

ii. Scheduling the Interview

CSHOs shall schedule the interview at a time which is most conducive to obtaining a complete and accurate statement from the witness. Even though CSHOs shall attempt to schedule the interview at the convenience of the witness, it is important to conduct interviews of percipient witnesses as soon as possible after occurrence of the accident. Timely interviews are important in that the witness will normally not have had an opportunity to discuss the accident with others and "rethink" what occurred.

iii. Location of the Interview

When feasible, interviews at the accident site often result in the best witness statements. The benefits of holding the interview at the accident site include better recall of accident details by the witness and a more accurate positioning of relevant items and people involved to ensure a more factual account of the accident. If interviewing at the accident site is not feasible given the conditions at the site and/or the reluctance of the witness, another mutually agreeable location should be selected.

CSHOs shall select a location at which the witness is comfortable and which will facilitate a thorough interview and an accurate witness statement. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to the Division.

iv. Interviewing Process

Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.

1) Discuss the purpose of the investigation and emphasize that the purpose of the interview is fact-finding and not fault-finding. Attempt to answer any questions the witness may have about the interview process before the actual interview begins.

2) Use a tape digital audio recorder, Employee/Witness Statement Form or statement summary to record all witness statements during the course of the interview. See Section VI.A.2.d.i-iii.

   When appropriate, reduce interviews to writing and have the witness sign the document. Transcribe video- and audio-taped 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.

3) CSHOs shall ask the witness to relate in their own words what they know about the accident.

4) The witness shall be allowed to relate what they know about the accident with minimum of interruptions from the CSHO.

5) If the witness is an employee injured in the accident and/or another employee, the CSHO shall ask the employee to explain the following:

a) Their work experience;

b) How long they have worked for their present employer;

c) How long they had been working in the job when they were injured in the accident;

d) What type of training had been given to them prior to the accident and who trained them;

e) Where they were physically located at the accident site and what they were doing at the time of the accident;

f) What they feel caused the accident; and

g) If practical, have the injured employee and/or other employee witness explain the sequence of events which occurred at the time of the accident.

6) Follow-up questions should be asked by the compliance interviewer to clarify facts or fill in any gaps in the witnesses' account of the accident.

7) After the witness has completed his or her own account of the accident, the CSHO shall then relate back to the witness the interviewer's own understanding of the witness' account of the accident. At this time there will be an opportunity to correct any misunderstandings that may have occurred and to clarify, if necessary, any of the details of the accident.

v. Sample Interview Questions Applicable to Most Accident Investigations

1) How long has the employee been employed by the employer?

2) What was the employee doing at the time of the accident?

3) Was the employee assigned to do the job (s)he was doing at the time of the accident, and who did the assigning?

4) Who was the employee's immediate supervisor, or other supervisor, for the job the employee was doing at the time of the accident?

5) Was the employee trained in the specific job and the hazards of that job? Who provided the training? Is there documentation of the training?

6) Were there any written procedures for the job that was being performed and was the employee following those procedures?

7) Was the employee working alone? If not, who were the other employees and what were they doing at the time of the accident?

8) Was the proper equipment, including personal protective equipment, being used for the job?

9) Is the process, operation or job new to the worksite?

10) Was the injured employee being supervised? What was the proximity and adequacy of supervision?

11) Did the employee receive hazard recognition training prior to the accident?

12) What was the location of the accident? What was the physical condition of the area where the accident occurred?

13) What immediate or temporary action(s) could have prevented the accident or minimized its effect?

14) What long-term or permanent action(s) could have prevented the accident or minimized its effect?

15) Had corrective action been recommended in the past, but no corrective action been taken?

16) Advise interviewee of OSHA whistleblower protections.

c. Special Interview Issues

i. Confidentiality

1) Employees injured during an accident and other witnesses can be particularly difficult to interview. They may be fearful and reluctant to provide the compliance interviewer with accurate facts about the accident. The injured employee or other employees may feel embarrassed, may be fearful of

disciplinary action, or be hesitant to talk for any number of reasons. A witness may not want to provide information that might place blame on a friend, other fellow workers, the foreman or supervisor or possibly even themselves.

2) If a witness inquires if his or her statement will be held confidential, or refuses to give a statement unless the compliance interviewer promises that it will be kept confidential, the compliance interviewer shall advise the witness that the law provides the name of a person who makes a complaint to DOSH about an unsafe or unhealthy workplace condition can be kept confidential. The name of an employee who is interviewed during the course of an accident investigation can be kept confidential if the employee complains about an existing unsafe or unhealthy workplace condition. In addition, the Division may receive information in confidence; however, such information may be ordered disclosed by a court or tribunal under circumstances where a party seeks disclosure of the information over the Division's objection.

3) CSHOs shall not offer or grant confidentiality as an inducement to obtain a statement from a witness.

4) However, once confidentiality is granted by a CSHO, it must be respected. This can create problems in that if the witness is crucial to the Division's case, the Division may not be able to proceed to prosecute the case against the employer without breaching the grant of confidentiality.

5) Therefore, if a witness will not provide a statement without a grant of confidentiality, an attempt should be made to conduct an interview at some other time or at some other location (e.g, at the employee's home). If the witness still seeks a grant of confidentiality, confidentiality may be conferred after explaining to the witness the limitation described in Section VI.A.2.c.i.(2). immediately above or consideration can be given by CSHO to the issuance of an administrative subpoena pursuant to Chapter 10.
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 tend to reveal the individual's identity), the privilege does not apply and such statements may be released.

c) Inform each witness that his/her interview statements may 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 non-threatening 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 up to $10,000 or six months in jail, or both.

ii. Employer Attorney Participation

Sometimes an attorney(s) for the employer, usually large corporate employer(s), will attempt to be present during a witness interview.

CSHOs shall make a determination if the attorney who seeks to be present during the interview actually represents the witness being interviewed. If not, the attorney does not have the right to be present unless the witness requests specifically that the attorney remains. If the witness is a supervisor or other management representative of the employer, the employer's corporate counsel normally will be present during the interview. CSHOs shall inquire a letter of representation from the witness, if one is available.

iii. Refusal to be Interviewed

1) Even though the Division has the authority in Labor Code Section 6314 to interview all witnesses to an accident, some witnesses who the Division would like to interview may refuse to give a statement.

2) If a potential witness refuses to give a statement, the compliance interviewer shall immediately notify the DM/SIHS.

3) The DM/SIHS, through the Regional Manager, shall consult with the Legal Unit about the appropriateness of issuing an administrative subpoena to compel the witness to provide a statement.

***NOTE***: Even after being served with an administrative subpoena, supervisors or other management personnel may legitimately invoke their Fifth Amendment privilege against self-incrimination in refusing to provide the Division a statement.

d. Methods for Recording Witness Statements

i. Audio Recording

Audio recording is the preferred method for recording a witness statement. If an audio recorder is used, it is important to record the following information prior to the interview:

1) The time, location and who is present at the interview;

2) The acknowledgement of all present that a tape audio recorder is being used;

3) Consent to audio record the statement; and

4) Indication by time when breaks are taken during the course of the interview.

5) Document if the witness or employee refuses the audio recording.

ii. Written Statement (See Cal/OSHA 170AX)

A statement written by the witness or by the CSHO and then signed by the witness is the next preferred method for recording a witness statement. A more complete statement may be obtained if it is written by the CSHO and then reviewed and signed by the witness.

iii. Statement Summary

If the witness refuses to have his or her statement tape recorded, or refuses to give a written statement, then a written summary of the interview must be prepared by the CSHO. The statement summary should contain the date, time, location of the interview, and a summary of the interview in as much detail as possible to ensure that if, at a later time, the witness makes other statements which are inconsistent with his or her original statement, the statement prepared by the CSHO shall be credible.

iv. Post-Interview

During the course of the accident investigation, additional facts may come to the attention of CSHO which will require re-interviewing witnesses or require that newly identified witnesses be interviewed.

v. Denial by Employee to be Interviewed

If during an attempt to interview the witness a refusal is encountered, CSHO shall document the circumstances in the case file.

B. Photographs, Diagrams, Maps and Sketches

1. General

Documentation of the accident by means of photographs, diagrams, maps and sketches of the accident site and work activities is as important in an accident investigation as obtaining complete and accurate witness statements.

2. Photographs

a. Photographs of the accident site, and the equipment, machinery or other items associated with the accident shall be taken to provide a permanent record of the accident conditions.

b. The following types of photographs shall be taken:

i. Photographs showing an overview of the accident site in general; and

ii. Photographs showing a detailed or close-up view of the accident site, equipment damaged during the accident, or other instrumentalities involved in the accident.

c. CSHOs shall identify on the back of each photograph taken and developed the date and time the photograph was taken and what the photograph depicts with sufficient detail to prevent any confusion. Photographs shall be organized in a photo-mounting sheet, with two photos per page.

***NOTE***: Identification of photographs is especially important when "close-up" photographs are taken as the photograph does not provide its own frame of reference. When appropriate, utilize ruler or other items in the photograph to provide an internal frame of reference within the photograph itself.

d. CSHOs shall ascertain whether other government agencies involved in the investigation of the accident, or print or electronic media, have taken and developed photographs or film of the accident and shall request copies of those photographs or films.

e. Photographs taken by the Division shall be deemed confidential as required pursuant to Labor Code Section 6314 and shall not be released to the public unless the employer consents to their release.

3. Diagrams, Maps and Sketches

a. Diagrams, maps and sketches are an effective way to describe the accident site and work operations involved in the accident. Diagrams, maps and sketches are especially effective in depicting the location of employees involved in work operations and their relationship to the accident instrumentalities, such as machinery, equipment and other items.

b. As with photographs, it is important to present an overall perspective of the accident site. For instance, if the accident involves high voltage contact by a crane, the diagram, map or sketch should depict an overview of the accident site, noting the location of the wires, the employees and equipment with measurements, as well as a profile view depicting the height of the wires in relation to the crane and the adjacent work area.

c. Diagrams, maps and sketches do not have to be drafted to scale. However, it is important to clearly identify critical items depicted in the diagram, map or sketch, as well as reference items, including the following:

i. The identity of the employees;

ii. Name of the machinery or equipment;

iii. Measurements of distance; and

iv. Reference to compass directions or to adjacent streets or buildings.

***NOTE***: Where possible, review the diagram, map or sketch with the accident witnesses and have them sign the diagram, map or sketch to attest to its accuracy.

4. Where it is necessary to depict numerous items, the long-hand description of items may clutter the diagram, map or sketch making it unreadable. In such instances, use a legend at the bottom of the diagram, map or sketch, i.e., a letter or number designation given to the items depicted in the diagram, map or sketch with the long- hand description then provided in the legend.

5. The graph side of the OSHA 94: *Note Taking Sheets* may be used for any diagrams, maps or sketches.

C. **Collection of Documents, Records and Other Items**

*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 time of the incident; Employee deceased/injured; Nature of injury – fracture, amputation, etc.; and Prognosis of injured employee.

2. Incident Data

   Potential items to be documented include: How and why did the incident occur; 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 accident.

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: 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.

   a. Documents, records and other papers constitute an important element of every accident investigation. Often documentary evidence is the only type of evidence that will reveal the cause(s) of the accident. Papers lead to a thorough examination of the policies, standards and specifications that created the environment or shaped the attitudes and actions of people involved in the accident. They often show irrefutable evidence that generally does not come out in witness interviews.
   b. Documents, records and other items need to be collected at the time of the accident and preserved until they can be examined and considered in the analysis. When used in an appeals case, it is particularly important to be able to prove that the documents were secured and unchanged from the time of the accident until made a matter of record. Accident investigation pre-planning should include procedures for the identification of documents and records to be collected and designation of who will be responsible for their collection.

c. The Division has the authority to review and obtain custody of all documents and records relevant to the investigation and may do so by means of a subpoena duces tecum. If CSHOs are refused their legitimate request to examine or copy relevant documents or records, they shall notify the DM/SIHS who will in turn consult with Legal Unit regarding obtaining a subpoena or issuing an Order To Preserve (Cal/OSHA 25A).

***NOTES***:

- When an employer declines to provide documents, records or other items to the Division unless they are held confidential, the DM/SIHS will consult with the Legal Unit to determine if and how the documents, records or other items can be held confidential.

- See Chapter 10 for procedures to obtain a subpoena duces tecum.

d. Recommended Documents for Collection

i. Injury and Illness Prevention Program (see Chapter 13);

ii. Records that establish management policies governing the activity involved in the accident, e.g., Code of Safe Work Practices;

iii. Condition reports, hazard reports and analysis records that reflect decisions regarding the accident environment;

iv. Facility specifications and descriptions that construct the work environment;

v. Purchasing specifications and directives that reflect decisions regarding equipment and work materials;

vi. Equipment installation, repair, maintenance and critical parts inspection records that reflect priorities and control of work;

vii. Equipment manufacturers' and company's operator manuals, work instructions, operator training criteria and skill certification requirements that reflect program standards;

viii. Employee selection, placement, and training records that relate to operators, repair and maintenance workers and supervisors;

ix. Work records that relate to the job and individual employee with respect to task assignment, classification, hazard exposure or health exposure; and

x. Log of Injuries and Illnesses (CAL/OSHA 300) for current and subsequent years along with Employer's Report of Injuries and Illnesses (5020) for accident and any other identified injuries or illnesses of interest.

***NOTE***: This list is not exhaustive and is intended to provide guidance as to the types of documents and records that may be relevant to the investigation. The guiding principle for CSHOs is to collect all records relating to the accident until knowledge of factors or examination of individual records determines that certain records are not relevant to the accident investigation.

## VII. Office Procedures

For all fatality/catastrophe accident events, the completed OSHA 170, together with the Cal/OSHA Form 170B or 170C, shall be submitted to the DM/SIHS and Regional Manager for review and signature prior to the Closing Conference, whether or not any citations are proposed to be issued.

For all other accident events, the completed OSHA 170, together with the Cal/OSHA Form 170B or 170C, shall be submitted to the DM/SIHS for review and signature.

## VIII. Forms Distribution

A. The District Office is responsible for filing OSHA 170, and Cal/OSHA Form 170B or 170C, with the inspection report after being signed by the compliance personnel, the DM/SIHS and the Regional Manager, in the case of a fatality or catastrophe (see Section VII above). If more than one inspection results from the event, e.g., multi-employer worksites, file a copy of OSHA 170 in all resulting case files.

B. The District Office is responsible for data entry of the OSHA 170 into OIS and for faxing a photocopy of the OSHA 170 to the Bureau of Investigations (BOI). District Offices in Regions I, II, V (North) and VI (North) and District Offices in Regions III, IV, V (South) and VI (South) shall submit to the BOI office by fax (213-576-7489) and email (DIRDOSHBOI_Notify@dir.ca.gov).

C. The District Office is responsible for mailing a photocopy of the OSHA 170 to the Regional Manager, together with the Cal/OSHA Forms 1 (which has the employer address), 1A and 1B. When the investigation is of a licensed or unlicensed contractor, a copy of the related citations, after they become final orders of the board, shall be included.

D. The Regional Office is responsible for mailing a copy of all Cal/OSHA Forms 1s, 1As, 1Bs, OSHA 170s, and related citations, after they become final orders of the board, related to investigations of licensed or unlicensed contractors to:

The Contractors State Licensing Board (CSLB) – Quality Assurance Unit of the CSLB's Enforcement Division at 9821 Business Park Drive, Sacramento, CA 95827, telephone (916) 255-1313 or (916) 255-3978, together with a cover memorandum itemizing the investigations attached thereto and corresponding District Office contact information.

***NOTE***: The Regional Office will maintain a record of the referral by recording same onto a CSLB referral log.

E. The District Office is responsible for faxing a copy of the Cal/OSHA Form 170 for all fatalities, including any subsequent modifications, to the DOSH CFOI Unit.

F. The District Office is responsible for mailing a copy of the Cal/OSHA Form 170B or 170C to the employer by certified mail, return receipt requested, when instructed by the DM/SIHS.

## IX. OIS Data Entry for the OSHA 170

See OIS Data Entry for the OSHA 170.

## X. Narrative Summary of Investigation (Cal/OSHA Form 170)

***NOTE***: CSHOs shall complete all items on the Cal/OSHA Form 170 Purpose

Cal/OSHA Form 170 is designed to provide a concise summary of the accident investigation in narrative form.

A. Content

The Narrative Summary of the Investigation shall, at a minimum, include the following elements:

1. Description of the accident:

    a. Date, time and location of accident;

b. How Division learned of the accident and date and time of compliance personnel's arrival at the accident site;

c. Employees and nonemployees killed, injured or exposed, and how they were killed, injured or exposed. Do not use employees' names in the narrative summary. Rather, assign a number to the employees or nonemployee listed in "Information on Injured," and refer to that employee or nonemployee by that number.

d. Where injured employees were medically treated or hospitalized.

2. Description of the employer(s) at whose worksite(s) the accident occurred:

   a. Type of establishment; and

   b. General industrial activity in which the employer engages and the specific activity taking place at the accident site.

3. Responses to the following questions:

   a. What were the workers doing, or what process was in progress, at the time of the accident?

   b. Who was the employee's immediate supervisor, or other supervisor, for the job the employee was doing at the time of the accident?

   c. Where were the killed, injured or exposed employees when the accident occurred?

   d. What kind of equipment was involved, if any? Include manufacturer's name, name of equipment, model number or serial number, and any significant measurements, such as depth of trench or height of scaffold.

   e. What type of injuries were sustained?

   f. What factors caused the accident?

      ***NOTE***: Document the accident's causes or contributing factors that enforcement personnel uncovered during the inspection. Indicate what factors caused or reasonably caused the accident based only on facts discovered during the course of the accident investigation. CSHOs shall not include statements which are not based on a factual foundation, e.g., statements that "employee negligence" or "inattention to the job" should not be included in the narrative summary unless substantiated by facts.

4. List of witnesses or persons interviewed, including telephone numbers and addresses.

   ***NOTE***: Include the identity of the employer, officer, management officials, or supervisor who had direction, management, control or custody of the accident site. Such information is important to the accident investigation performed by personnel from the Bureau of Investigations.

5. List the accident-related violation(s), if any, and their severity. Indicate whether no violations were found and the reason(s) for this.

B. Use photographs, diagrams, maps or sketches if they help you in describing the accident and the reader in understanding the accident. Attach the reports from other investigating agencies, if available.

**Appendices:**

A. Notice of No Accident-Related Violation

B. Notice of Accident-Related Violation

## Chapter 14-A: Appendix A

# NOTICE OF NO ACCIDENT-RELATED VIOLATION

It is the policy of DOSH to prepare a Notice, following each investigation of an industrial accident or occupational illness, for the employer to post in the workplace for three working days if no violations are found during the investigation which relates to the accident or illness.

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

- California Labor Code, Section 6318(a).

This appendix outlines the procedures for notice of no accident-related violation.

A. FIELD PROCEDURES

1. Determination of No Accident-Related Violation

   After a thorough investigation of each industrial accident or occupational illness, compliance personnel shall determine whether any violation noted during the course of the investigation is related to any fatal or serious injury, illness or exposure.

2. Issuance of Notice of No Accident-Related Violation After Investigation (Cal/OSHA Form 170B)

   Compliance personnel shall prepare a Notice of No Accident-Related Violation After Investigation for issuance from the District Office when no violations are noted during the investigation of an industrial accident or occupational illness which are related to the accident or illness.

3. Employer's Posting Requirement

   When a Cal/OSHA Form 170B is issued to an employer, compliance personnel shall inform the employer during the Closing Conference that the employer is required to post the Cal/OSHA Form 170B in a prominent location for three working days.

B. OFFICE PROCEDURES

1. Compliance personnel shall complete the Notice of No Accident-Related Violation After Investigation (Cal/OSHA Form 170B) and submit the completed Form 170B to the District Manager for review and approval prior to issuance.

2. After approval by the District Manager, Office Support Staff shall make copies of the Cal/OSHA Form 170B for the inclusion in the employer's case file, and then either:

   a. Enter the date of issuance in Item 8 of the Form 170B and mail the original to the employer, Certified Mail--Return Receipt Requested, along with any pertinent enforcement documents, or

   b. Return the Form 170B to compliance personnel for delivery to the employer during the Closing Conference.

C. FORM COMPLETION

1. Office

   Enter the name, address and telephone number of the issuing District Office.

2. Employer Address

   Enter name and mailing address of the employer.

3. Page

   Enter page number in the first space provided and in the next space provided, enter total number of pages.

4. Investigation Information

   Enter the location of the inspection site, the name of the inspecting compliance personnel and the date of the inspection.

   NOTE: If the inspection requires more than one day, indicate the inclusive dates.

5. Description Of Condition Inspected

   For each injury or illness, enter in easily understandable language a description of the circumstances or condition which caused the industrial accident or occupational illness. Note the exact location of the accident, referencing the site, building, and/or plant.

6. Signature of Compliance Personnel

   Compliance personnel shall sign his or her name legibly.

7. Signature of DM/SIHS/Designee

   DM/SIHS/Designee shall sign their name legibly.

8. Date of Issuance

   Enter the date that the Notice (Cal/OSHA Form 170B) was mailed or delivered to the employer.

9. Date Investigation Completed

   Enter the date that the inspection was completed.

10. Region, District, SE/IH ID Number, Optional Report No., Cal/OSHA Form 1 Report No.

    Enter the Region, District, SE/IH ID Number, Optional Report Number and the Cal/OSHA Form 1 preprinted Nine- digit Report No. in the spaces provided.

## Chapter 14-A: Appendix B

# NOTICE OF ACCIDENT-RELATED VIOLATION

It is the policy of DOSH to prepare a Notice for the employer, following each investigation of an industrial accident or occupational illness, if a fatal or serious injury, illness or exposure was related to a serious, willful or repeat violation or the employer's failure to correct a previously cited serious violation within the time fixed for abatement.

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

- California Labor Code, Section 6319(d).

This appendix outlines the procedures for notice of accident-related violation.

A. FIELD PROCEDURES

1. Determination of Accident-Related Violation After Investigation

   After a thorough investigation of each industrial accident or occupational illness, compliance personnel shall determine whether a serious, willful or repeat violation, or the employer's failure to correct a previously cited serious violation within the time fixed for abatement, noted during the course of the investigation, is related to any fatal or serious injury, illness or exposure at the investigated workplace.

2. Issuance of Notice of Accident-Related Violation After Investigation (Cal/OSHA Form 170C)

   Compliance personnel shall prepare a Notice of Accident-Related Violation After Investigation for issuance from the District Office when violations referenced in subsection A.1. are noted during the investigation of an industrial accident or occupational illness which are related to the accident or illness.

3. Inspection Report

   Upon request, compliance personnel shall provide the employer with a copy of the inspection report at a nominal copying cost.

B. OFFICE PROCEDURES

1. Compliance personnel shall complete a separate Notice of Accident-Related Violation After Investigation (Cal/OSHA Form 170C) for each accident-related

violation, and submit the completed 170C Forms to the District Manager for review and approval prior to issuance.

2. After approval by the District Manager, Office Support Staff shall make copies of the Cal/OSHA 170C Forms for the inclusion in the employer's case file, and then either:

   a. Enter the date of issuance in Item 8 of the 170C Forms and mail the original(s) to the employer, Certified Mail-Return Receipt Requested, along with other pertinent enforcement documents, or

   b. Return the 170C Forms to compliance personnel for delivery to the employer during the Closing Conference.

C. FORM COMPLETION

1. Office

   Enter the name, address and telephone number of the issuing District Office.

2. Employer Address

   Enter name and mailing address of the employer.

3. Page

   Enter page number in the first space provided and in the next space provided, enter total number of pages.

4. Investigation Information

   Enter the location of the inspection site, the name of the inspecting compliance personnel and the date of the inspection.

   NOTE: If the inspection requires more than one day, indicate the inclusive dates.

5. Description of Condition Inspected

   For each injury or illness, enter in easily understandable language a description of the circumstances or condition which caused the industrial accident or occupational illness. Note the exact location of the accident, referencing the site, building, and/or plant. In addition, indicate the classification and Title 8 Safety Order section of each violation related to the condition(s) described in Item 5.

6. Signature of Compliance Personnel

Compliance personnel shall sign their name legibly.

7. Signature of DM/SIHS/Designee

   DM/SIHS/Designee shall sign their name legibly.

8. Date of Issuance
   Enter the date that the Notice (Cal/OSHA Form 170C) was mailed or delivered to the employer.

9. Date Investigation Completed

   Enter the date that the inspection was completed.

10. Region, District, SE/IH ID Number, Optional Report No., Cal/OSHA Form 1 Report No.

    Enter the Region, District, SE/IH ID Number, Optional Report Number and the Cal/OSHA Form 1 preprinted Nine- digit Report No. in the spaces provided.

## Chapter 14-B

# MULTI-EMPLOYER WORKSITE INSPECTIONS

**Policy Statement:** It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to enforce the multi-employer worksite regulations in a manner that promotes workplace safety and health on multi-employer worksites; and (2) to gather sufficient evidence to determine whether employers at a multi-employer worksite are citable for violative conditions observed at that worksite.

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

- California Labor Code, Sections 6400, 6401, 6401.7, 6402 through 6404 and Title 8, California Code of Regulations, Sections 336.10 and 336.11.

**PROCEDURES:**

## I. WHAT IS A "MULTI-EMPLOYER WORKSITE"?

A multi-employer worksite is any worksite, permanent or temporary, where more than one employer (and his or her employees) work, usually but not necessarily at the same time. The most common multi-employer worksites are temporary worksites at which construction activities take place. Other examples include permanent worksites at which outside contractors perform activities at that worksite, including, but not necessarily limited to, construction, environmental or janitorial services, repairs and deliveries.

## II. MULTI-EMPLOYER WORKSITE VS. DUAL-EMPLOYER SITUATION

A multi-employer worksite should not be confused with a dual-employer situation. A dual-employer situation exists whenever an employee has two employers at the same time. The most common example of a dual-employer situation is when an employee of a temporary help agency works for another employer at the other employer's worksite. See Chapter 14-C. The multi-employer and dual-employer concepts are not mutually exclusive. It is possible to have a dual-employer situation at a multi-employer worksite, e.g., where a temporary employee is supplied to a construction contractor to work at a multi-employer worksite.

## III. CATEGORIES OF EMPLOYERS CITABLE UNDER SECTION 336.10

Before the adoption of 8 CCR Sections 336.10 and 336.11, only the employer whose employees were actually exposed to a violative condition could be cited for a violation. Such an employer is called the "exposing employer" (as defined in Section E.1. below).

Beginning in January of 2000, Labor Code Section 6400 and 8 CCR Section 336.10 now permit the Division to cite, in specified circumstances, an employer who is responsible for a violative condition, e.g., a creating, controlling and/or a correcting employer (as defined in Section E.2., 3. and 4. below), regardless of which employer's employees are exposed to the violative condition.

NOTE: A sole proprietor is not an employee. Therefore, if a sole proprietor is the only person exposed to a violative condition, there is no citable violation. See Labor Code Section 3300(c), which requires that, in order to be regarded legally as an employer, the "employer" must have a "natural person in service."

## IV. AFFIRMATIVE DEFENSE AVAILABLE TO "EXPOSING EMPLOYERS" UNDER SECTION 336.11

8 CCR Section 336.11 creates a defense for an exposing employer in specified circumstances where the violative condition is not the fault of the exposing employer and has been created, or allowed to go uncorrected, by another employer, and the exposing employer has taken reasonable steps to protect its employees. Section 336.11 obligates compliance personnel to determine whether the "exposing employer" defense applies in a multi-employer situation. If it is determined that the defense applies, then the exposing employer shall not be cited. If an exposing employer disagrees with a Division determination that the Section 336.11 defense is inapplicable and appeals a multi-employer citation on that basis, it is the employer's burden to demonstrate that the defense applies.

## V. TYPES OF CITABLE EMPLOYERS AT A MULTI-EMPLOYER WORKSITE

1. Exposing Employer

The "exposing employer" is an employer whose employees were exposed to the violative condition at the worksite regardless of whether that employer created the violative condition. Before the adoption of 8 CCR Section 336.11, the exposing employer was the only category of employer that could be cited by the Division.

EXAMPLE 1: A painting contractor's employees were allowed to work on scaffolding at a building renovation project without required guardrails. The painting contractor is citable as the exposing employer, unless it can demonstrate that the Section 336.11 defense applies. This employer is citable regardless of whether some other employer is also citable.

2. Creating Employer

The "creating employer" is an employer who actually created the violative condition.

EXAMPLE 2: Prior to the painting contractor's employees accessing the scaffolding in Example 1, a drywall contractor removed the required guardrails from the scaffold and then left the site. Only the painting contractor's employees accessed the scaffolding with guardrails removed, and thus, only these employees were exposed to the violative condition. The drywall contractor is potentially citable as a creating employer, regardless of whether the exposing employer, or another category of employer, is also citable.

EXAMPLE 3: In Example 1, the erection of the scaffolding was subcontracted by the general contractor. The scaffolding contractor did not install the guardrails after erecting the scaffolding because the general contractor ordered the scaffolding contractor to stop and work somewhere else at the project. A couple of days later, forgetting that the scaffold erection had not been completed, the general contractor's foreman ordered the painting contractor to begin work on the scaffold. The general contractor is potentially citable as the creating employer, regardless of whether some other employer is also citable.

3. Controlling Employer

A "controlling employer" is an employer who is responsible for safety and health conditions at the worksite and who has the authority to correct the violation. Evidence of an employer's "control" can be demonstrated in any of three ways:

a. Explicit Contract Provisions Pertaining To Worksite Safety

Control can be demonstrated through explicit contract provisions pertaining to worksite safety. This means that an employer is a controlling employer because it has the power under a written contract to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

EXAMPLE 4: The general contractor at the worksite in Examples 1 and 2 was responsible by a specific contractual provision to conduct daily worksite safety inspections and to order the immediate correction of hazards identified by the inspections. On several occasions the general contractor received complaints that the individual hired to perform the inspections by the general contractor was not performing them in a timely manner, but the general contractor never made an inquiry in response to the complaint. Then the inspector failed to conduct an inspection on the morning of the day that the painting contractor's employees began to work on the unguarded scaffolding. Had the inspection been conducted, the lack of guardrails could have been discovered before the employees accessed the unguarded scaffolding and the problem could have been corrected. The general contractor is potentially citable as the controlling employer, regardless of whether some other employer is also citable.

b. Any Type of Contract Authority that Directly Affects Worksite Safety

Where there is no explicit contract provision granting the right to control safety, or

where the contract says the employer does not have such a right, an employer may still be a controlling employer. In this case, the power to control safety results from exercising, or failing to exercise, contract authority in a manner that directly affects worksite safety. For example, if an employer controls the scheduling of work and fails to adjust the work schedule when that becomes necessary to prevent a worksite safety hazard, then the employer becomes potentially citable as a controlling employer because of the direct connection between the employer's failure to act and the exposure of employees to the worksite hazard. Similarly, an employer who controls the flow of essential information at a worksite can be become citable as a controlling employer by failing to deliver information to another employer when that information is necessary to prevent exposure of employees to a worksite hazard.

EXAMPLE 5. A construction manager is contractually obligated to set schedules and determine construction sequencing. However, the contract states that the construction manager does not have a right to require compliance with safety and health requirements. Subcontractor A asks the construction manager to alter the schedule so that Subcontractor A will not have to start work in an area requiring guardrails until the Subcontractor B, who is responsible for installing the guardrails, has finished installing them. The construction manager is contractually responsible for deciding whether to approve Subcontractor A's request. The construction manager never responds to the request, and Subcontractor A begins work without the guardrails being installed, exposing its employees to the guardrail violation. The construction manager is citable for the violative condition, regardless of whether some other employer is also citable.

EXAMPLE 6: The owner of the worksite in Examples 1 and 2, who is an employer, hired an engineering contractor to perform daily inspections to make sure that structural specifications for the project were being met. The owner did not have responsibility by contract for safety at the site but did attempt to correct safety problems when they were brought to the owner's attention. The engineering contractor did not have authority to order correction of safety hazards. The other contractors at the site neither relied upon the engineering contractor for, nor considered him to be a source of, information about safety hazards at the site. The engineering contractor saw the unguarded scaffolding on the morning before the painting contractor's employees began to work on it, but took no action. Neither the owner of the worksite nor the engineering contractor is citable as a controlling or correcting employer.

c. Actual Practice

Regardless of whether a contract exists, or if a contract exists, regardless of what provisions it contains, an employer's control over worksite safety can be shown to exist by obtaining evidence of the employer's actual practices at the worksite. It is not necessary to rely on contract provisions as evidence of an employer's authority when such authority is clear from actual behavior among employers at the worksite.

EXAMPLE 7. The general contractor at the worksite in Examples 1 and 2 was not

responsible under any specific or general contractual provision to identify or order the correction of worksite safety hazards. In addition, the exact nature of the general contractor's authority was unclear under the governing written contract. However, the general contractor made it a routine practice to order subcontractors to make changes in their work practices, including the correction of safety hazards. Its authority to do this was not disputed. At the time that the painting contractor's employees began to work on the unguarded scaffolding, the general contractor was present and giving direction to the painting contractor's foreman. However, the general contractor did not make any attempt to stop the painting contractor's employees from accessing the unguarded scaffolding. The general contractor is potentially citable as the controlling employer, regardless of whether some other employer is also citable.

4. Correcting Employer

The "correcting employer" is an employer who has the specific responsibility to correct the violative condition.

EXAMPLE 8: The individual who conducted the daily worksite safety inspections for the general contractor in Example 4 was not the general contractor's employee, but the employee of a subcontractor hired by the general contractor to perform the safety inspections. The subcontractor is potentially citable as a correcting employer, regardless of whether some other employer is also citable.

EXAMPLE 9: Before the drywall contractor came to the worksite in Examples 1 and 2, an asbestos contractor was hired to remove spray-on asbestos from the ceiling pan and parts of the interior walls of the building. In the course of installing new wallboard, the drywall contractor's employees disturbed an area of asbestos that the asbestos contractor was specifically obligated to remove, and were substantially exposed to asbestos before the omission was discovered. The asbestos contractor is potentially citable as the correcting employer, regardless of whether some other employer is also citable.

NOTE: It is important to remember that the four categories of employers at a multi-employer worksite are not necessarily mutually exclusive. Each type of employer may or may not exist at the particular worksite under inspection. In addition, an employer may fit into more than one category. For example, an employer may be both a creating and a correcting employer, or a correcting and controlling employer.

## VI. CONDUCTING A MULTI-EMPLOYER WORKSITE INSPECTION

1. Opening Conference

For information on how to conduct an Opening Conference at a multi-employer worksite, see Chapter 7.

a. Documenting Evidentiary Foundation for Employer Citability
General

When a violative condition is observed at a multi-employer worksite, compliance personnel shall obtain and document evidence of all of the following items with respect to each potentially citable employer:

(1) Name and address of the employer;

(2) Description of the type of activity performed by the employer at the worksite;

(3) A copy of the contract or contracts describing the respective roles and obligations of all the employers at the worksite.

NOTE: When considering citing a "controlling" employer, compliance personnel shall evaluate all provisions of the written contract between the owner or general contractor and the controlling employer.

(4) For each violative condition found, the specific facts that describe the employer's involvement in creating or failing to correct the violation, including those facts that identify the employer as an exposing, creating, controlling and/or correcting employer;

(5) For each violative condition found, a specific determination as to whether the employer is an exposing, creating, controlling and/or correcting employer.

NOTE: If an employer fits into more than one category for a violation, each applicable category shall be identified.

(6) For each violative condition found for which a creating, controlling or correcting employer has been identified, evidence which will determine the degree of responsibility on the part of each creating, controlling and correcting employer for the violative condition(s) as follows:

(a) Awareness of Violative Condition

When, if ever, did the employer become aware of the violative condition? Awareness of the violation indicates greater responsibility. Similarly, the longer an employer is aware of a violation without correcting it, the greater will be the employer's responsibility.

(b) Foreseeability

How foreseeable was the occurrence of the violative condition? Did the violation exist as a matter of custom and practice at the worksite?

Even if an employer is not aware of the violative condition, if it is foreseeable the employer may have some responsibility for it. The more foreseeable a violation is for an employer, the greater will be the employer's responsibility for it. The most foreseeable violations are those which occur most frequently in the employer's particular line of work, those which are recognized and addressed as a matter of standard practice in the employer's industry and those which have existed for a substantial period of time at the worksite.

(c) Reasonable Steps to Protect Employees

Did the employer exercise reasonable steps to protect employees given the information known and available to the employer? An employer who is aware of the violation and takes no action to correct it or prevent employee exposure to it has a high degree of responsibility for the violation. In general, an employer's responsibility for a violation diminishes as the evidence becomes clearer that the employer acted reasonably to protect employees given (1) the information known by or available to the employer before the violation occurred, (2) the foreseeability of the violation, (3) the employer's degree of control over the violation or employee exposure to it, and (4) the actual steps taken by the employer to protect employees from the violative condition.

(7) Any other evidence which supports or weighs against citing the employer for the violation.

b. Exposing Employer Defense

For exposing employers, compliance personnel shall additionally document answers to the following questions, to the extent that the preceding documentation does not fully answer them:

(1) Did the exposing employer create the violative condition?

(2) Did the exposing employer have responsibility or the authority to correct the violative condition?

(3) Did the exposing employer have the ability to correct or remove the violative condition?

(4) Can the exposing employer demonstrate that the appropriate employers were specifically notified, or were aware, of the violative conditions to which the employees of the exposing employer were exposed?

(5) Did the exposing employer take appropriate alternative measures, to the extent feasible, to protect employees from the violative condition, instruct the employees to recognize the violative condition, and, where necessary, inform the employees how to avoid the dangers associated with it.

## VII. CITATION POLICY

1. Exposing Employer -- When to Cite

Each exposing employer shall be cited for each violative condition to which that employer's employees were exposed, unless it is determined that the answers to the questions in Section F.2.b.(1) through (3) are "No", and the answers to questions F.2.b.(4) and (5) are "Yes."

2. Creating, Controlling and Correcting Employers

a. When to Cite

Each creating, controlling and correcting employer shall be cited for each violative condition as to which it has been determined, pursuant to Section F.2.a.(6), that the employer's degree of responsibility for the violative condition warrants issuance of a citation.

b. Sample Citation Allegations

The following are sample citation allegations based on the Examples in Section E. If compliance personnel issue a citation to a creating, controlling and/or a correcting employer, they shall utilize the following basic approaches:

(1) Creating Employer

"On (date) employees were exposed to scaffolding without guardrails. (Creating employer) removed the guardrails from the scaffolding at (location), which resulted in the employees of (the exposing employer) being exposed to the violation."

(2) Controlling Employer

"On (date) employees were exposed to scaffolding without guardrails, (Controlling employer) was responsible for safety and health conditions at the site (by explicit contract provisions, by other type of contract authority that directly affects safety and health, or by actual practice) and failed to protect the employees of (exposing employer) from unguarded scaffolding."

(3) Correcting Employer

"On (date) employees were exposed to asbestos which was not worked wet. (Correcting employer) was specifically designated to remove asbestos at (location) and failed to do so, resulting in the employees of (exposing employer) contacting and handling asbestos in a dry state."

(4) Combination of Creating Employer and Controlling Employer "On (date)

employees were exposed to scaffolding without guardrails.
(Creating employer) removed the guardrails from the scaffolding at (location), which resulted in the employees of (the exposing employer) being exposed to the violation. The employer was also responsible for safety and health conditions at the site and failed to protect the employees of (exposing employer) from unguarded scaffolding."

NOTE: If other citation allegation formats are utilized, they shall be written as concisely as possible, consistent with the requirements of particularity.

c. Penalty Calculations

When determining "extent" and "likelihood" for the purpose of penalty calculations, the total number of employees exposed to the violative condition, regardless of who is the employer, shall be used.

## VIII. PRE-ISSUANCE CITATION REVIEW

1. Compliance Personnel

After completing the gathering of the evidence listed in Section F.2.a. and b., compliance personnel shall make a recommendation for the issuance of citations for exposing, creating, controlling and/or correcting employers to the District Manager as soon as possible following completion of the inspection.

2. District Manager

a. General

The District Manager shall review all recommendations from compliance personnel for issuance of citations to exposing, creating, controlling or correcting employers at a multi-employer worksite to determine the appropriateness of citation issuance and shall complete District review as soon as possible after receiving the citation issuance recommendations from compliance personnel.

b. Creating, Controlling and Correcting Employer

If the District Manager determines that a citation should be issued to a creating, controlling or correcting employer, the District Manager shall forward the proposed citation, along with a copy of the Documentation Worksheet to the Regional Manager for review and concurrence.

c. Exposing Employers

(1) When a citation is to be issued to an exposing employer at a worksite which is the subject of citations to creating, correcting and/or controlling employer, the District

Manager shall forward the proposed citation, along with a copy of the Documentation Worksheet to the Regional Manager for review.

(2) The District Manager shall review all proposals not to cite an exposing employer pursuant to Section G.1. If the District Manager believes that a citation should not be issued because the employer meets the exposing employer defense, the District Manager shall consult with, and receive concurrence from the Regional Manager, before making the decision not to cite the exposing employer.

3. Regional Manager

The Regional Manager shall ensure a prompt and complete review of, and response to, all District proposals to cite a creating, controlling or correcting employer, and all District proposals not to cite an exposing employer.

## IX. CITATION APPEALS

Any citation issued to a creating, correcting or controlling employer, whose own employees are not exposed to the violative condition, which is appealed by the employer shall be immediately referred to the Legal Unit for representation. See Chapter 26, Section C.2.c.(1)(f).

## Chapter 14-C

# DUAL-EMPLOYER INSPECTIONS

**Policy Statement:** It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to respond appropriately when an inspection reveals that a dual-employer situation exists. This is to be accomplished by gathering sufficient information to determine which employer(s) are to be cited for violations identified at a worksite, in a manner that is fair, consistent with decisions of the Occupational Safety and Health Appeals Board (OSHAB) and the California courts, and protective of employee health and safety. Dual-employer situations should not be confused with multi-employer situations, which is where employees of two or more employers are present at the worksite.

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

- California Labor Code, Sections 6400, 6401, 6401.7, and 6402 through 6404; decisions of the Occupational Safety and Health Appeals Board (OSHAB) and California appellate courts.

## BACKGROUND

### I. TYPES OF DUAL EMPLOYERS

A "dual-employer" situation is where an employee has two employers at the same time. Both employers are potentially liable for a violative condition to which an employee has been exposed.

#### 1. Traditional primary employers

The traditional, most common dual-employer situation is one involving a **temporary agency, staffing firm**, or **employee-leasing company** that deploys an employee to work at another employer's worksite under the supervision and control of that other employer:

- The company supplying the employee (or having the employee on its payroll) is known as the "**primary employer**." The primary employer is sometimes referred to as the "**payroll**" or "**contractual**" employer of the worker. The primary employer contracts with the employee to perform work in exchange for wages or a salary, issues the employee's paycheck, secures workers' compensation insurance for the employee,

and usually retains hiring and firing authority.

- The company supervising the employee at the worksite and controlling the employee's work is known as the "**secondary employe**r." The secondary employer is sometimes referred to as the "**site employer**" or "**host employer**."

- A mnemonic you might find useful is: "**P**rimary **P**rocesses **P**ayroll; **S**econdary **S**upervises **S**ite."

### 2. Professional employer organizations

In recent years, a newer category of employers calling themselves "**professional employer organizations**" (**PEOs**) has become common in California. A PEO is a company to which client employers outsource their human resources functions such as payroll, tax withholding, workers' compensation, and employee benefits. Unlike traditional primary employers, PEOs do not typically deploy workers to a client's worksite. Not all companies operating as PEOs call themselves by that name; some call themselves staffing, leasing, outsourcing, or "business solutions" companies.

While the PEO handles a client employer's human resources functions, the client employer remains responsible for managing the other aspects of its business. PEOs sometimes provide services related to injury and illness prevention and other matters concerning workplace safety and health, but day-to-day OSH compliance is usually excluded from their contractual duties.

The laws governing PEOs are complex and continually evolving, and PEOs themselves are continually changing to provide new and varied services for their clients. Under current OSHAB case law, a PEO that has some degree of direction and control over employees (e.g., through hiring, terminating,
reassigning, disciplining, and determining the wages of employees) is considered an "employer" subject to Cal/OSHA jurisdiction. (This is regardless of the terms of any contract between the PEO and client employer regarding respective responsibilities, which may differ from actual practice.) A PEO that is an "employer" is the "**primary employer**" of the employees, with the client employer being the employees' "**secondary employer**."

*IMPORTANT: Every inspection involving a PEO must be evaluated carefully on a case-by-case basis. Compliance personnel should contact the Legal Unit as early as possible in any inspection involving a PEO, to obtain assistance in analyzing the facts and developing the case.*

## II. The Secondary Employer's Responsibilities

The secondary employer is fully responsible for the health and safety of the

employees who are also employed by the primary employer. The fact that the primary employer may also be responsible for the health and safety of the same employees does not reduce or eliminate the secondary employer's responsibility to those employees, which is the same as the responsibility the secondary employer has to its own internal employees.

## III. The Primary Employer's Responsibilities

### 1. Basic Responsibilities

A series of OSHAB and California appellate court decisions have delineated the basic responsibilities of primary employers. The primary employer must:

a. Establish, implement, and maintain an effective IIPP. The IIPP must include:

(1) A system for communicating effectively with employees about occupational safety and health (8 CCR § 3203(a)(3));

(2) Procedures for initial and periodic inspections to identify and evaluate workplace hazards at the secondary employer's site (8 CCR § 3203(a)(4));

(3) A procedure to investigate occupational injuries and illnesses (8 CCR § 3203(a)(5));

(4) Procedures for either abating site-specific hazards to which the primary employer's employees are exposed (8 CCR § 3203(a)(6)) or if the primary employer does not have control over the worksite, procedures for working with the secondary employer to timely abate the hazards and, if necessary, for removing its employees from a hazardous or unhealthy worksite until the hazards or unsafe conditions are corrected.

(5) Appropriate training for new employees and whenever the primary employer becomes aware of a new or previously unrecognized hazard (8 CCR § 3203(a)(7)). This training may be done by or in cooperation with the secondary employer.

b. Provide appropriate personal protective equipment (PPE) and training on the use of PPE, or ensure that the secondary employer provides the PPE and the training. In most cases, the secondary employer is in the best position to determine the appropriate PPE. Therefore, the primary employer should coordinate with the secondary employer to fulfill this requirement.

c. Inform its employees that its safety rules apply wherever they are working and that if they are asked to perform a task they believe is dangerous and/or in violation of the primary employer's safety rules, they may refuse to do it and may return to the primary employer for reassignment without penalty. (This basic responsibility may not apply to PEOs, which do not usually deploy employees to work at their client employers' worksites.)

The primary and secondary employers may cooperate in fulfilling these basic responsibilities. For example, the secondary employer might agree to provide the necessary job-related training to the primary employer's employees, or the secondary employer might provide appropriate PPE or training on the PPE to the primary employer's employees. Regardless, the primary employer is responsible for ensuring these basic responsibilities are fulfilled.

### 2. Responsibility for Ensuring the Worksite Is Safe

The extent of the primary employer's responsibility for ensuring the worksite is safe for its employees depends on a number of factors, including (1) whether the primary employer had authority to enter the secondary employer's worksite to *supervise* its employees' work; (2) the amount of influence the primary employer exerted over worksite conditions; and (3) whether the violation arose because the secondary employer relied on the primary employer for advice or consultation about workplace safety and health.

As an example, in a Decision After Reconsideration (DAR) in 2014 called *Staffchex*, the OSHAB held a primary employer liable for a serious accident-related violation because the employer had not prohibited its employees from working on an unguarded machine. The primary employer's on-site supervisor knew about the hazard, but he lacked authority from the primary employer to intervene with the secondary employer to resolve safety issues. The OSHAB held that the primary and the secondary employer are each independently required to protect the safety of the employees, regardless of any contract between the two employers. In other words, an employer cannot defend itself against an occupational safety and health citation by arguing it contracted away or delegated to some other employer its own occupational safety obligations. As the Appeals Board explained: "Each employer in the state of California owes a duty to its employees to furnish a safe and healthful place of employment."

The Appeals Board and the courts have also recognized there are limits to what can reasonably be expected of a primary employer when a secondary employer supervises the employees but excludes the primary employer from the worksite. Even in those cases, however, a primary employer must still take all reasonable steps necessary to protect the health and safety of its employees.

The central issue to keep in mind when evaluating situations that may not exactly fit the Appeals Board model is the reasonableness of the steps the primary employer took to ensure the safety of its employees at the secondary site. The reasonableness of the primary employer's efforts depends on the severity of the hazards and the extent to which the primary employer has influence over conditions at the secondary worksite.

The Appeals Board decisions do not address many of the complexities that compliance personnel are currently encountering and will continue to encounter in this area, such as the applicability of these rules when the primary employer has been excluded from the secondary worksite for a legitimate reason.

## PROCEDURES

*IMPORTANT: Dual-employer cases and especially PEO cases can be complicated. Please seek advice from the Legal Unit as early as possible in any inspection involving a PEO or other complex dual-employer relationship.*

### I. Is There a Dual-Employer Situation?

1. If an inspection might involve a dual-employer situation, compliance personnel must collect evidence in their investigation to determine whether employees were paid by an entity other than the employer that was supervising and controlling the employee's work.

2. If the answer is NO, then there is no dual-employer issue and no need to continue following the instructions in this P&P section.

3. If the answer is YES, then compliance personnel must evaluate each employer's responsibility for any violations of health and safety regulations.

### II. Secondary Employer's Liability

Compliance personnel must first determine whether employees were exposed to one or more violative conditions. The secondary employer must be cited for each violation at the worksite to which an employee was exposed. This determination must be independent of whether the primary employer is also liable for the violation.

### III. Primary Employer's Liability

If the primary employer's employees were not exposed to violative conditions at the worksite, do not issue any citations to the primary employer, even if the primary employer failed to fulfill one or more of its basic responsibilities. Instead, compliance personnel may consider issuing an Information Memorandum to direct the primary employer's attention to a workplace condition that has the potential of becoming a

hazard to the safety or health of the primary employer's employees in the future. (See Chapter 23.)

If the primary employer's employees were exposed to one or more violative conditions at the worksite:

1. **Failure to Fulfill Basic Responsibilities.** Compliance personnel must determine whether the primary employer fulfilled its basic responsibilities discussed above under "BACKGROUND — C. The Primary Employer's Responsibilities":

    a. If the primary employer did not fulfill its basic responsibilities to establish, implement, and maintain an effective IIPP, cite the primary employer for the particular violations under section 3203 that contributed to employees being exposed to violative conditions at the worksite.

    b. If the primary employer did not use reasonable diligence to provide, or ensure the secondary employer provided, appropriate PPE and training on the use of the PPE, cite the primary employer for the particular PPE violations that contributed to employees being exposed to violative conditions at the worksite.

    c. If the primary employer did not fulfill its basic responsibility to inform its employees that its safety rules apply wherever they are working and that if they are asked to perform a task they believe is dangerous and/or in violation of the primary employer's safety rules, they may refuse to do it and may return to the primary employer for reassignment without penalty, cite the primary employer for violation of IIPP training requirements in section 3203(a)(7), with a reference to section 3203(a)(3).

(This basic responsibility may not apply to PEOs, which do not usually deploy employees to work at their client employers' worksites.)

2. **Liability for Hazardous Conditions at the Worksite.** Compliance personnel must also determine whether the primary employer knew or should have known of hazardous conditions to which its employees were exposed (e.g., lockout/tagout, guardrail, machine guarding, hazard communication, and permissible exposure limit violations):

    a. If the primary employer did not know and reasonably could not have known of the hazardous conditions, do not cite the primary employer for violations related to the hazardous conditions.

    b. If the primary employer knew or reasonably should have known of the hazardous conditions, compliance personnel must evaluate the

reasonableness of the primary employer's efforts to ensure the safety of its employees. Liability for a hazardous condition is based on the extent to which the primary employer took appropriate, feasible steps to protect its employees. If the primary employer should have but did not take reasonable steps to either remove its employees from exposure to the hazardous condition or work with the secondary employer to abate the violations, cite the primary employer for violations related to the hazardous conditions.

## IV. Recordkeeping

If the secondary employer is not exempt from the Log 300 recording requirements in Title 8, sections 14300 to 14400, gather evidence to show whether the secondary employer entered on its Log 300 all recordable injuries and illnesses of employees it supervised, including employees of the primary employer.

NOTE: The primary employer is not required to log injuries and illnesses occurring at the secondary worksite unless the primary employer provides supervision on a day-to-day basis. Any injury or illness should be recorded on the Log 300 only once, either by the secondary employer or the primary employer, depending on which employer is supervising the employee on a day-to-day basis. (See Title 8, section 14300.31).

## V. Reporting Work-Related Deaths and Serious Injuries and Illnesses

Both primary and secondary employers are required to report work-related deaths and serious injuries and illnesses to the Division.

However, under OSHAB case law there is a narrow exception to this rule. One employer may specifically authorize another employer to report a death or serious injury or illness to the Division, as long as the other employer makes the report and explicitly tells the Division the report is being made on *behalf of both* employers. In such a case, both employers are considered to have fulfilled their duty to report.

## Chapter 14-D

# FOLLOW-UP INSPECTIONS

**Policy Statement:** It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, shall conduct follow-up inspections of previously inspected workplaces in accordance with applicable provisions of the California Labor Code.

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

- California Labor Code, Sections 6320, 6319, 6423 and Title 8, Section 340.4

**APPLICATION:** Applies only to Follow-up inspections for previously inspected workplaces where compliance with orders issued by the Division or abatement of violations did not take place during the inspection (see 8CCR Section 340.4(b)). It does not apply to any other type of inspection performed by district office compliance investigators/inspectors.

Mandatory Follow-Up Inspection:

A. The Division shall conduct a mandatory follow-up inspection of a previously inspected workplace when an order issued by the Division has not been complied with or when a violation has not been abated at the end of the period fixed for compliance with the order or abatement of the violation (see 8CCR Section 340.4(b)(4)). The mandatory follow-up inspections shall be undertaken in the circumstances and within the time frames set forth in items 1 through 3 below:

   1. A mandatory follow-up inspection shall be conducted within 30 days after the end of the period fixed for compliance with a Special Order or Order to Take Special Action;

   2. A mandatory follow-up inspection shall be conducted within 30 days after the end of the period fixed for abatement when the hazardous workplace condition to be abated was cited as either:

      - A serious violation of the Injury Illness Prevention Program (see Labor Code Section 6401.7; 8CCR Sections 3203 and 1509)

- A willful/serious or repeat/serious violation
- A serious violation where the period fixed for abatement is less than six (6) days

- A serious violation of a special order or order to take special action.

3. A mandatory follow-up inspection shall be conducted within 45 days after the end of the period fixed for abatement of a serious violation or order when (1) the Division has not received evidence of abatement or a signed statement of abatement compliance from the employer within 10 days after the end of the fixed period of abatement, and (2) the Division has notified the employer that an additional civil penalty for failure to abate could be assessed retroactively per Labor Code Section 6319.

B. The Division shall conduct a mandatory follow-up inspection for a Citation alleging a serious violation not abated during the original inspection, and not otherwise subject to a follow-up inspection, in at least twenty percent (20%) of workplaces with such Citations and at the end of time fixed for abatement or within a reasonable time thereafter, even though the Division has received the Employer's Signed Statement of Abatement of Serious Violation (Cal/OSHA Form 161).

Discretionary Follow-Up Inspection:

The Division may conduct a discretionary follow-up inspection when the Division has previously issued to an employer any of the following:

- An Order Prohibiting Use (OPU);

- A Temporary Restraining Order (TRO);

- A Citation that alleges a Willful or Repeat Regulatory or General violation;

- A Citation that alleges a Regulatory or General violation and the employer has failed to return the Employer's Signed Statement of Abatement of Regulatory and/or General Violations (Cal/OSHA Form 160); or

- Whenever the district manager determines the Follow-up inspection is an appropriate use of compliance resources.

Effect of an Appeal on Follow-Up Inspection(s)

- District office compliance personnel conducting the Follow-Up Inspection shall limit the scope to the non-appealed Order, Citation or Citation Item.

- A follow-up inspection of an appealed Order, Citation or Citation Item shall

only be conducted after the appeals process has been completed.

NOTE: In most cases, the appeals process for a contested violation is complete when the Administrative Law Judge's (ALJ) Decision is filed, and the time for a party to petition for reconsideration of the ALJ's Decision has elapsed, (i.e., 35 days).

**PROCEDURES:**

## I. DISTRICT OFFICE ADMINISTRATIVE PERSONNEL

1. The district office management services technician(s) (MSTs) shall run the "Open Inspection" report from the OSHA Information System (OIS) data base on and monthly basis and whenever directed/requested by management.

2. The MST shall analyze the data on the "Abatement Not Complete" tab of the "Open Inspection" report and prepare a report identifying those inspections that meet the criteria for a mandatory follow-up inspection. The report shall be titled "Mandatory Follow-up Inspection(s)".

3. The MST shall submit the mandatory follow-up inspection report to the district manager each month.

   NOTE: For those district offices who do not have an MST, the regional office administrative personnel shall perform the tasks listed above in items 1 – 3.

## II. DISTRICT MANAGER

1. The district manager shall evaluate the mandatory follow-up inspection report for accuracy.

2. The district manager shall promptly assign all inspection(s) listed in the report that he/she determines require a mandatory follow-up inspection to district office compliance inspectors for onsite inspections.

3. The district manager may select and assign a discretionary follow-up inspection to district office compliance investigators/inspectors on a case-by-case basis.

   NOTE: In making the determination, if a follow-up inspection of a cited violation is appropriate, the district manager shall consider the employer's desire to comply with the California Occupational Safety and Health Act ("Act"), the number and type of cited violations, and any

recommendations made by compliance personnel about the need for a follow-up inspection.

4. The district manager shall promptly refer all matters of employer submittal of fraudulent statement of abatement to the Bureau of Investigations (BOI) for investigation.

## III. DISTRICT OFFICE COMPLIANCE PERSONNEL

1. Compliance inspectors assigned a follow-up inspection shall open the inspection based on the priority given to the assignment by the district manager.

2. Compliance inspectors shall prior to conducting a follow-up inspection, obtain the previous inspection file and at a minimum review the following documents:

   a. Cal/OSHA Form 2 (alleged violation description);

   b. Employer submittals of Cal/OSHA Form 160 and 161; and

   c. Notice of Verification of Abatement of Serious Violations Form 161A.

3. Compliance inspectors shall follow the inspection protocols contained in Chapter 7.

4. Compliance inspectors, during the walkaround, shall inspect all areas of the workplace in which violations were cited during the original inspection to ascertain if the cited violations have been abated by the employer.

   NOTE: If the compliance inspector identifies new violative conditions during the walkaround which were not present during the original inspection, these new violations shall be cited.

5. Compliance inspectors shall document in their case file that the employer did not comply with the cited standard or regulation or eliminated the hazard identified by the Division during the original inspection. Documents demonstrating that abatement was not completed may include, but not be limited to, evidence in the form of photographs, video(s), audio and/or written records, etc.

6. Compliance inspectors shall inform the district manager immediately upon discovery that an employer has submitted a fraudulent statement of abatement.

   NOTE: Any employer who submits a signed statement affirming

compliance with the abatement terms of the citation, and is found by the district during a follow-up inspection not to have abated the violation(s), is guilty of a public offense punishable by imprisonment for not more than one year, a fine of $30,000 for an individual or $300,000 for a corporation or a limited liability company, or both.