Chapter 25

INFORMAL AND OTHER LEGAL CONFERENCES

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Chapter 25

INFORMAL AND OTHER LEGAL CONFERENCES

Policy Statement: It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to encourage any employer who has been issued a citation or notice, or another affected person, to participate in an informal conference with DOSH personnel and discuss any evidence which affects the existence of the alleged violative condition, the classification of the alleged violation and/or the Division's calculation of the proposed civil penalty in order to promote, if possible, resolution of any issues of disagreement between the employer, or another affected person, and DOSH. It is also DOSH's policy to be prepared to fully participate in pre-hearing, settlement, and status conferences initiated by the Occupational Safety and Health Appeals Board.

Purpose: This policy is intended to set forth procedures for DOSH team members to conduct effective and efficient conferences with affected employers, or other affected people, and give employers and other affected people the opportunity to submit facts or arguments informally, either orally or in writing to the Division.

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

- California Labor Code, Sections 6308.5 and 6319(g)
- California Code of Regulation, Title 8, Section 374

Procedures:

I. Informal Conference

DOSH encourages employers to participate in an informal conference, a non-adversarial meeting that employers may request, held by virtual communication or in person at a district office. The informal conference is designed to allow an employer or affected employee(s) or their representative(s) to directly point out specific errors of fact or law to DOSH representative (District Manager [DM], Senior Industrial Hygienist Supervisor [SIHS] and/or an authorized designee, which is herein referred to as DM/SIHS/Designee), aiming to resolve any disputes or overturn decisions without formal hearing.

A. DM/SIHS/Designee are authorized to enter into Informal Settlement Agreements with an employer before the employer files a written notice of contest.

B. **Cases Where DM/SIHS/Designee Have No Settlement Authority**

1. DM/SIHS/Designee are not authorized to enter into settlement agreements for the following:

   a. High-profile cases.

      The following are high profile cases: Jumbo penalties of $100,000 or more; interest from elected officials; inquiries from the Director's office; significant media interest (e.g., NYT, LA Times, CNN, and San Francisco Chronicle); and health inspection where there is no PEL or other standard.

      DM/SIHS/Designee must contact Regional Managers (RM) when they are unsure of whether a case is high-profile. The DM/SIHS/Designee must submit all proposed settlements of the high-profile cases to the Regional Manager for review and approval. The Regional Manager must not approve the settlement of any high-profile cases that require the review and approval of the Legal Unit, Assistant Deputy Chief of Enforcement, and/or Deputy Chief of Enforcement, etc.

   b. Cases where the Regional Manager (RM), Assistant Deputy Chief of Enforcement, Deputy Chief of Enforcement, Legal Unit and/or Headquarters have settlement authority.

   c. Cases that are open with the Bureau of Investigation (BOI) Unit.

   The DM/SIHS/Designee may conduct an informal conference to listen to and document on the Cal/OSHA Form 20: *Conference Documentation Sheet* the employer's proposal to settle the case.

2. DM/SIHS/Designee are not authorized to enter into settlement agreements for the following situations:

   a. Independent employee act defense.

   b. Cases referred to the Legal Unit for legal representation.

   c. Reduction of $25K or more in penalty.

   d. Heat case involving a serious-accident-related (SAR) citation.

e. Settlement involving either of the following:

i. One or more stipulated penalties that are inconsistent with Section (§) 336 of Title 8 of the California Code of Regulation (8 CCR).

ii. Removal of “accident-related” characterization from one or more citations.

f. Cases that are open with BOI.

See Policies and Procedures (P&Ps) Chapter 7: *Inspection Procedures* and Chapter 26: *Appeals and Hearings*, and Heat SEP for more details.

C. **Timing of an Informal Conference**

Employers may request and set up an informal conference with DOSH.

1. No Appeal Filed

a. If the employer has not filed an appeal, the informal conference must be held no more than ten (10) working days following receipt of the Citation and Notification of Penalty in order to ensure an expeditious resolution of any issues.

b. In the event that either the employer or DOSH cannot conduct an informal conference within the ten (10) working days following receipt of the Citation and Notification of Penalty, the DM/SIHS/Designee must do the following:

i. Telephone or email the employer to explain the employer's 15-working-day right to appeal,

ii. Schedule an informal conference at DOSH's and the employer's earliest opportunity, and

iii. Document on the *Case Diary Log* in the case file the reasons that an informal conference cannot be held within the 10-working-day period.

2. Appeal Filed

If the requesting employer has filed an appeal with the Occupational Safety and Health Appeals Board (OSHAB), the DM/SIHS/Designee must conduct the informal conference as soon as possible after the employer

requests a conference, but an informal conference can be held any time prior to the day of the hearing.

3. With the assistance of the administrative staff, the DM/SIHS/Designee must prepare, sign, and send a *Notification to Employer of Informal Conference* Letter to employer. A copy of the letter must be placed in the case file and the date the letter sent to employer must be recorded in the case diary log. The letter advises the requesting employer of the following:

    a. Date, time and location of the informal conference,

    b. The occurrence of the informal conference does not extend the 15-working-day period that the employer has to file an appeal with OSHAB,

    c. Participation by the employer, an employee or an employee's representative in an informal conference does not expand or diminish the rights of the employer, the employee or the employee's representative in a proceeding before OSHAB, and

    d. Notification of Informal Conference Participants.

        It is the responsibility of the employer to notify the affected employees and their representatives of the date, time and location of the informal conference and to encourage them to attend or be available for the informal conference, which may be held in-person or by a virtual communications platform.

        NOTE: If the employer objects to the attendance or participation of any employee(s) or their representative(s), separate informal conferences shall be held. During an informal conference, separate or private discussions or virtual contact shall be permitted if any person requests such discussions.

D. **Preparation and Participation by DOSH Officials**

1. Prior to attending the informal conference, the DM/SIHS/Designee must review the case file and if necessary, consult with the inspecting Compliance Safety and Health Officers (CSHOs) about any evidentiary issues and the senior safety engineers and/or industrial hygienists for any technical assistance. The CSHOs must be advised of any major changes made by DM/SIHS/Designee as a result of the conference.

2. Documenting the Informal Conference.

DM/SIHS/Designee must ensure that notes are made indicating the basis for any decisions made at, or as a result of, the informal conference on the Cal/OSHA Form 20. DM/SIHS/Designee must thoroughly and accurately complete the Cal/OSHA Form 20.

E. **Conducting the Informal Conference**

The DM/SIHS/Designee must conduct the informal conference as follows:

1. Opening Statement

In the opening statement, the DM/SIHS/Designee must discuss the following with the employer:

a. Purpose of the informal conference

b. Notification to Employee(s) and/or Their Union Representatives

i. It is the responsibility of the employer to notify affected employee(s) or their representatives of the informal conference, date, time and location and to encourage them to attend.

ii. At the time of the informal conference, the employer must provide a *Letter of Certification of Notification to Employees and/or Their Union Representatives of the Information Conference*.

iii. If the employer has not notified the affected employee(s) and/or employee representative(s) of the informal conference, the DM/SIHS/Designee must not proceed with the conference. The DM/SIHS/Designee must do the following:

1) Reschedule the informal conference,

2) Inform the employer that they must notify the affected employee(s) or employee representative of the date, time, and location of the informal conference, and

3) Document on the Cal/OSHA Form 20.

c. Citation Final Order.

d. At the start of the conference, the DM/SIHS/Designee must inform the employer that to appeal, the employer must notify the OSHAB of their appeal within 15 working days of receipt of the citation. The employers' participation in this conference does not change the appeal due date. If the employers do not appeal or reach a settlement agreement with

DOSH before the appeal deadline, the citation will become final and unreviewable.

e. Rights of participants.

f. Settlement authority limitations, if any.

g. Process if settlement is reached at an informal conference and/or prior to hearing.

2. Conference

The conference shall include discussion of any relevant matters including, but not limited to, citations, safety and health programs, conduct of the inspection, means of correction and penalties in accordance with the following:

a. All parties shall be encouraged to participate fully so their views can be properly considered.

b. Positions on all issues discussed shall be fully considered before making a determination regarding possible settlement of the case in accordance with current DOSH procedures.

c. DOSH representatives must make every effort to assist both the employer and the affected employees and their representatives in improving safety and health in the workplace.

d. DOSH representatives must discuss employer's factual disputes but may not address employer's legal arguments. No opinions by DOSH representatives regarding the legal merits of an employer's case shall be expressed during the informal conference.

e. There must be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the District Attorney for criminal prosecution.

f. Services Available to Employers.

If the employers request abatement assistance, the DM/SIHS/Designee must do the following:

i. Inform the employers that DOSH is willing to work with them even after citations have been issued.

ii. Inform the employer of the availability of DOSH on-site consultation services for which they may qualify. Such services are provided at no charge to the employer.

3. Decisions

a. At the end of the informal conference, DM/SIHS/Designee must make a decision as to what action is appropriate in light of facts and evidence provided during the conference. DM/SIHS/Designee cannot make decision for high-profile cases or cases outside their authority to settle.

b. When preparing to make decision to settle a case, DM/SIHS/Designee must make a reasonable effort to obtain the views of the employee representative, if there is one, and if they did not attend the conference.

c. Citations Not Appealed by the Employer.

If any amendments of the citations have not been appealed, DM/SIHS/Designee must amend and issue these citations within 15 working days of receipt of the citation.

d. Citations Appealed.

i. If citations have been appealed and if DM/SIHS/Designee have reached a settlement with the employer, the settlement must be recorded on Cal/OSHA Form 20.

ii. DM/SIHS/Designee must submit via email the agreed upon settlements between DOSH and the employer to the Administrative Law Judge (ALJ) and employer.

1) The email's subject is entitled *Terms of Settlement Agreement*.

2) The email must contain the terms of the settlement agreement such as, but not limited to: Change in penalty amounts, change in classification, and any other terms and conditions.

3) Non-admissions clause.

a) The email of the *Terms of Settlement Agreement* must contain the non-admissions clause upon employer's request and must not be modified.

b) The clause is as follows:

The Division does not object to the following Standard Non-Admissions Clause. “IT IS STIPULATED by and between the parties that the settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer.

The parties further stipulate that neither employer’s agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board”.

4) If DOSH proposes the withdrawal of any citation or notice, DOSH must request a cost waiver.

4. *Closing* – Completing Cal/OSHA Form 20

a. The DM/SIHS/Designee must compile and record on Cal/OSHA Form 20 a summary of the informal conference discussion including the issues discussed, course of actions agreed upon by the parties, results of the conference, reasons for any proposed changes to citation(s), penalties, etc.

b. The DM/SIHS/Designee must thoroughly and accurately complete the Cal/OSHA Form 20. The Cal/OSHA Form 20, together with any other relevant documents, video, and evidence provided by the parties, shall be placed in the **confidential** section of the case file.

II. Pre-Hearing and Other Conferences

A. Scope

1. Pre-hearing Conference – 8 CCR § 374

a. The Occupational Safety and Health Appeals Board at any time before a hearing, upon motion of a party or upon its own motion may notice

and order a prehearing conference for the purposes of simplifying the issues, expediting a hearing and affording parties an opportunity to participate in the disposition of the appeal. The prehearing conference may be conducted by means of a telephone conference call. *8 CCR § 374(a)*

b. Each party to a pre-hearing conference shall be prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the Administrative Law Judge (ALJ) has compelled discovery prior to the prehearing, and to do such other things as may aid in the disposition of the proceeding. *8 CCR § 374(b)*

c. The failure of a party or its representative to prepare for and participate in the pre-hearing conference shall be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party. *8 CCR § 374(c)*

2. Status Conference – 8 CCR § 374.2

a. The Occupational Safety and Health Appeals Board at any time before hearing, upon motion of a party or upon its own motion, may notice and order a status conference to discuss the issues to be presented, the witnesses to be called, the status of discovery requests, pending and contemplated motions, and any other matters that may aid in expediting the hearing or otherwise disposing of the case. The status conference may be conducted by means of a telephone conference call. *8 CCR § 374.2(a)*

b. The failure of a party or its representative to appear and participate in the status conference may be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party. *8 CCR § 374.2(b)*

3. Settlement Conference – 8 CCR § 374.3

The Occupational Safety and Health Appeals Board on its own motion, or upon written request of a party, may schedule a settlement conference to be held before an administrative law judge who shall not hear the appeal, unless otherwise stipulated by the parties. Each party shall attend or be represented by a person authorized to negotiate regarding settlement. The settlement conference may be conducted by means of a telephone conference call. *8 CCR § 374.3(a)*

B. **Preparation and Participation by DOSH Officials**

1. DM/SIHS/Designee must be fully prepared to participate in any conference scheduled by the Occupational Safety and Health Appeals Board.

2. Prior to attending a Pre-hearing, Status, and Settlement conference, DM/SIHS/Designee must review the case file and, if necessary, consult with the inspecting CSHOs about any evidentiary issues. If an informal conference was held, the DM/SIHS/Designee must review notes recorded on the Cal/OSHA Form 20.

3. Settlement Agreement between DOSH and Employer.

   a. DM/SIHS/Designee must submit via email the agreed upon settlements between DOSH and the employer to the Administrative Law Judge and employer. See Section I.E.3.d of this policy for more information on how to email the terms of settlement agreements.

   b. The DM/SIHS/Designee must present such settlement at the time of the Pre-hearing conference to the ALJ and employer, if not previously emailed.

4. Completing Cal/OSHA Form 20.

   The DM/SIHS/Designee must compile and record on Cal/OSHA Form 20 a summary of any conference meeting discussion including the issues discussed, course of actions agreed upon by the parties, results of the conference, reasons for any proposed changes to citation(s), penalties, etc. The DM/SIHS/Designee must thoroughly and accurately complete the Cal/OSHA Form 20. The Cal/OSHA Form 20, together with any other relevant documents, video, evidence provided by the parties and recordings of the discussion shall be placed in the **confidential** section of the case file.

III. Amending and Withdrawing Citations

A. The DM/SIHS/Designee has the authority to amend and withdraw citations of cases under their authority, but **not in cases** where the Regional Manager, Assistant Deputy Chief of Enforcement, Deputy Chief of Enforcement, Legal Unit and/or Headquarters have settlement authority.

B. The DM/SIHS/Designee may amend a citation for the following reasons, but only if an appeal has not been docketed:

1. Correction of errors/change in violation.

2. Correction of proposed penalty amount.

3. Extension of abatement.

4. Adding citations or citation items.

5. Withdrawing citations or citation items.

6. Changing a citation to a *Notice in Lieu*.

C. Reasons for Amending or Withdrawing Citations and Civil Penalties as a Result of an Informal or Formal Conference (Pre-hearing, Settlement, Status, etc.).

1. Change in Violation(s)

   Based upon the evidence presented and/or provided to DOSH by the employer at the time of an informal conference or any other time or based upon a review of evidence held by DOSH, the DM/SIHS/Designee may amend or make a motion to amend a citation to change either the section number(s) cited or the description of alleged violation(s).

2. Change in Violation Classification

   Based upon the evidence presented and/or provided to DOSH by the employer at the time of an informal conference or any other time or based upon a review of evidence held by DOSH, the DM/SIHS/Designee may amend or make a motion to amend a citation to change the classification of the alleged violation(s).

3. Change in Penalty Amount Initiated by DOSH

Based upon the evidence presented and/or provided to DOSH by the employer at the time of an informal conference or any other time or based upon a review of evidence held by DOSH, the DM/SIHS/Designee may amend or make a motion to amend a citation to change the amount of the proposed penalty.

4. Change in Abatement Date(s)

   Based upon the evidence presented at an informal or pre-hearing conference by the employer or based upon a review of evidence held by DOSH, the DM/SIHS/Designee may amend a citation or Notice or make a motion to amend a citation to extend the date for abatement. See Chapter 19: *Abatement*.

5. Withdrawal of a Violation

   a. Based upon evidence presented at an informal or pre-hearing conference by the employer or based upon a review of evidence held by DOSH indicating that a violation may not be sustained, the DM/SIHS/Designee may withdraw or make a motion to withdraw the violation. The violation may only be withdrawn if it has not become OSHAB's final order.

   b. If the citation to be withdrawn has become OSHAB's final order, the DM/SIHS/Designee must request Legal Unit assistance.

6. Changing a Citation for a *Notice in Lieu*

   Based upon evidence presented at an informal or pre-hearing conference by the employer, or based upon further review of evidence held by DOSH indicating that a violation meets the requirements for conversion to a *Notice in Lieu* (8 CCR § 332.1: *Issuance of Notice*), the DM/SIHS/Designee may withdraw the citation and issue a *Notice in Lieu* in accordance with Chapter 22: *Notice*.

IV. Settlement Terms

A. Upon receipt of the final order from OSHAB, the DM/SIHS/Designee must confirm that the language in the Summary Table correctly reflects the settlement terms agreed upon.

   1. If the language in the order is not accurate, the DM/SIHS/Designee must contact OSHAB to request a correction. DM/SIHS/Designee must include employer when communicating with OSHAB.

2. If OSHAB refuses to correct the Summary Table, contact the Legal Unit for assistance in taking appropriate legal action.

B. Regional Managers must audit ten percent (10%) of the settlement cases handled by district offices in a calendar year.