

**DIVISION OF OCCUPATIONAL SAFETY AND HEALTH  
POLICY AND PROCEDURES MANUAL**

**HANDLING OF CASES TO  
BE PROPOSED FOR  
VIOLATION-BY-  
VIOLATION PENALTIES**

P&P C-10A  
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**AUTHORITY:** California Labor Code Sec. 6300 et seq. and Title 8 of the California Code of Regulations Sec. 336.

**POLICY:** The violation-by-violation policy establishes procedures for identifying and handling cases proposed for citation in which a civil penalty may be assessed for each instance of a violation in conformance with the requirement that a state occupational safety and health program like Cal/OSHA provide enforcement as effective as that provided by the federal occupational safety and health program (Federal OSHA).

In the context of the California Occupational Safety and Health (Cal/OSHA) Act, civil penalties are intended to provide an incentive to employers to prevent workplace safety and health hazards which are violations of Title 8 Safety Orders and to voluntarily correct such violative conditions when they exist. The Cal/OSHA Act intends that the incentive to correct workplace hazards be directed not only to an inspected employer, but also to any employer whose workplace contains safety and health hazards and violations of Title 8 Safety Orders.

The large proposed penalties that accompany citations with violation-by-violation penalties are not primarily intended to be punitive nor are they exclusively directed at individual sites or workplaces. Rather, violation-by-violation penalties serve the public policy purpose of increasing the impact of the limited enforcement resources available to the Division of Occupational Safety and Health by encouraging voluntary employer compliance. The criteria contained in this policy are intended to ensure that when violation-by-violation penalties are proposed, they further this public policy goal.

Instead of grouping violations for the imposition of a civil penalty, the violation-by-violation penalty process considers each instance of noncompliance as a separate violation and a penalty is proposed for each

instance. This procedure is known as the violation-by-violation, or egregious, penalty procedure. Application of these procedures is appropriate in situations where the violation in question constitutes a willful violation of a Title 8 Safety Order and meets additional criteria set forth in this policy. Since the yearly average number of willful violations which meet the criteria set forth in this policy is small, the Division expects that the cases subject to the violation-by-violation penalty policy will be rare.

## PROCEDURES:

### A. EARLY CASE IDENTIFICATION

1. As early as possible after compliance personnel initiate an inspection, District Managers shall identify cases which may be appropriate for violation- by-violation penalties according to criteria in this P&P and in the Attachment (Information Necessary for Evaluation of Potential Violation-by-Violation Cases).
2. In cases which are potential candidates for violation- by-violation penalties, District Managers shall ensure that:
  - a. Compliance personnel meticulously document an evidentiary foundation for each violation;
  - b. Technical specialists which are essential to the successful litigation of potential violation-by- violation cases are involved as early as possible in the case;
  - c. Legal Unit personnel are involved as early as possible to ensure adequate legal support to sustain the potential violation-by-violation case; and
  - d. The inspection of a potential violation-by- violation case be completed in time for the necessary review by Regional and Headquarters personnel before the expiration of the six (6) month statute of limitations for issuing a citation.

### B. CASE SELECTION CRITERIA

#### 1. Policy Statement

Case selection criteria for imposition of violation-by- violation penalties are designed to identify those cases which constitute an egregious or flagrant violation of Title 8 Safety Orders.

#### 2. Evidentiary Foundation

In all cases selected for imposition of a violation-by-violation penalty, an evidentiary foundation for classifying the underlying violation as willful shall exist as well as an evidentiary foundation supporting at least one of five other discretionary criteria demonstrating egregiousness.

### 3. Mandatory Criteria

- a. Compliance personnel shall establish and document an evidentiary foundation to support the classification of the underlying violation to be proposed for violation-by-violation penalties as Willful/Serious.
- b. A violation is willful when:
  1. Evidence shows that the employer committed an intentional and knowing (as contrasted with inadvertent) violation and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or
  2. Even though the employer was not consciously violating a safety law, the employer was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.
- c. See P&P C-1B, Section D.5., for further guidance on the elements of a willful violation.

### 4. Discretionary Criteria

Compliance personnel shall establish and document an evidentiary foundation to support one of the following discretionary criteria in order for a violation to qualify for violation-by-violation penalties:

- a. The violation resulted in one or more fatal employee injuries, or greater than three (3) serious employee injuries, illnesses or exposures;
- b. The violation resulted in a Lost Workday Incidence Rate of employee injury or illness for the employer which exceeds the industry average by fifty percent (50%), corrected for the number of full-time employees the employer has working at the time of the violation;

NOTE: The Lost Workday Incidence Rate equals the number of injuries and illnesses multiplied by 200,000 and the product divided by the number of employee hours worked.

- c. The employer has an extensive history of past serious violations of Title 8 Safety Orders (which have become final orders of the Occupational Safety and Health Appeals Board) and which exceed the industry average of serious violations by fifty percent (50%), corrected for the number of full-time employees the employer has working at the time of the violation;

NOTE: For the industry average of serious violations, contact the Program Office.

- d. The employer has a history of intentionally disregarding its responsibilities under the California Occupational Safety and Health (Cal/OSHA) Act to provide a safe and healthful workplace for its employees; or
- e. The employer's present conduct, taken as a whole, amounts to flagrant bad faith in the performance of the employer's duties under the Cal/OSHA Act.

### C. PENALTY CALCULATION

1. In general, penalties for safety and health violations are to be calculated in accordance with the gravity- based penalty procedures found in P&P C-10.
2. A separate gravity-based penalty shall be calculated for each instance of violation subject to the violation-by-violation policy as follows:
  - a. In calculating penalties for each violation, the particular factors associated with the particular violation shall be used conservatively to calculate a gravity-based penalty;

EXAMPLE: The number of employees exposed will be low, since each violation is penalized separately.

- b. The adjustment factor for Size shall be applied, if applicable;
- c. The adjustment factor for Good Faith shall normally not be applied.

NOTE: For application of the violation-by-violation policy to Willful/Regulatory violations, including Recordkeeping violations, District Managers shall contact the Legal Unit for assistance.

3. Guidance on classification of Hazard Communication Standard violations can be found in P&P C-43.
4. What constitutes a separate violation for purposes of applying the violation-by-violation penalty policy depends on the following factors:
  - a. In cases involving violations of a Title 8 Safety Order, the text of the Safety Order shall support a citation for separate violations.

EXAMPLES:

1. 8 CCR 3203(a)(7) is a requirement for the employer to train each employee in safety and health. For each employee not so trained there is a separate violation of the standard.
2. 8 CCR 4189 et seq. sets forth requirements for guarding of power presses. Consequently, each power press found unguarded is a separate violation of the standard.
3. 8 CCR 5141 requires the implementation of engineering and work practice controls to reduce employee exposure to air contaminants. Thus, a separate violation exists for each identifiable source of air contamination to which feasible engineering controls have not been applied irrespective of the number of employees overexposed.
- b. Substantially similar violative conditions cannot be penalized on a violation-by-violation basis under two different Title 8 Safety Orders.

EXAMPLES:

3. 8 CCR 5208(c) prohibits exposure of any employee to airborne concentration of asbestos in excess of 0.2 fibers per cubic centimeter of air (8 hr TWA). Hence, each employee overexposed constitutes a separate violation.
4. 8 CCR 5208(i)(1) requires employers to provide respirators to employees overexposed to asbestos and to ensure their use whenever they are required; e.g., in cases where airborne concentrations of asbestos exceed the PEL.
  - a. Employees without respirator protection have already been cited for overexposure under 8 CCR 5208(c).
  - b. Respirators are required for overexposure to asbestos. Thus, violation-by-violation penalties for each overexposed employee would be tantamount to a second penalty for substantially the same violative condition and would be inappropriate.

5. 8 CCR 5208(i)(2) requires that the employer select the appropriate respirator according to Table 1. For the same reason as given in subparagraph (2)(b) above, respirators with the incorrect filters cannot be penalized using violation-by-violation penalty procedures when airborne concentrations exceed the PEL.
6. When airborne concentrations exceed fifty times the PEL and only half-mask respirators are used, the violation is no longer substantially similar and each such respirator may be penalized as a separate violation when provided to an exposed employee for respiratory protection.
5. All violations not recommended for consideration under the violation-by-violation penalty policy shall be classified and issued in accordance with the procedures found in P&P C-1B, C-2 and C-10.

#### D. CASE DOCUMENTATION REQUIREMENTS

##### 1. Documentation

Whenever a case is selected for imposition of violation-by-violation penalties, the District Manager shall develop written responses to the issues raised in the Attachment. Supporting documentation shall be provided and cross-referenced whenever possible.

NOTE: Mandatory use of the questions in the Attachment is intended to provide a consistent format to aid in review of these cases, as well as to ensure as far as possible uniformity of case development throughout Regions and Districts.

##### 2. Evidence

- a. The evidence necessary to support violation-by-violation penalties shall be obtained early in the investigation and well-documented in the case file. Adequate evidence must exist for each separate violation and may consist of the following:
  1. Photographs, videotapes, audiotapes, sampling data, and witness statements, shall be used whenever possible to provide supporting evidence of violative conditions; and
  2. Company documents supporting knowledge of the standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by subpoena as appropriate.

**EXAMPLES:** Internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant safety to plant management or corporate safety, recognizing violations and bringing them to the attention of higher management, and notes relating to Cal/OSHA activities and industry practice in other companies or industries.

- b. During the inspection, compliance personnel shall question employers explicitly about the following:
  - 1. If, and when, they recognized the hazardous nature of each of the violations;
  - 2. If they knew what relevant Title 8 Safety Orders require and, if they answer affirmatively, what steps the employer had taken to abate the violative condition(s) and why the violative conditions had not been abated; and
  - 3. If they knew of the documents identified in Section D. 2.a.(2)EXAMPLES above, and what those documents contained.
- c. Employer responses shall be carefully documented in writing, and/or electronically recorded.

**NOTE:** If feasible, compliance personnel shall have a second person present as a witness during the employer interview.

- d. Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
- e. Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described. Copies of the Log 300 and Form 5020 (or 301) shall be obtained for each related injury or illness.
- f. The need for subpoenas and medical access orders shall be decided and documents obtained as soon as possible.
- g. The need for technical experts shall also be decided and necessary arrangements made early.

**NOTE:** Experts will be needed for cases involving complex violations, e.g., process safety management, or the feasibility of abatement methods.

- h. Particular attention shall be paid to anticipating and preparing for possible employer defenses.
3. Legal Unit Involvement

Early involvement of the Legal Unit is essential to examine and evaluate the documentation and all other evidence supporting the violations and to determine whether expert witnesses or depositions will be necessary, as well as to provide sufficient time to write a legal opinion on the merits of the case.

- a. The District Manager, through the Regional Manager, shall seek assistance from the Legal Unit periodically throughout the case development process.
- b. The Regional Manager shall ensure that such involvement of the Legal Unit is initiated at least four (4) full months prior to the six month statute of limitations for Citation issuance.
- c. The Regional Manager shall also ensure that the entire documentation package including Cal/OSHA Form 1Bs, documentary evidence, statements, and photographs, is made available to the Legal Unit eight (8) weeks prior to the six month statute of limitations for citation issuance.

## E. CITATIONS

The Cal/OSHA Act authorizes penalties to be proposed for each violation, but limits the maximum amount of the civil penalty that can be proposed. The following procedures shall be followed in issuing citations proposing violation-by-violation penalties:

- 1. Each separate violation shall specify its own Standard Alleged Violation Element (SAVE) and the SAVE shall be repeated for each violation instance or, if a SAVE is not used, the text of the Title 8 Safety Order violated shall be specified;
- 2. Each separate violation shall have its own Alleged Violation Description which will describe with particularity the violative conditions associated with each instance; and
- 3. Each separate violation shall have its own penalty calculated in accordance with the procedures found in P&P C-10.

## F. REGIONAL AND HEADQUARTERS REVIEW



The procedures and timetables given below are to be followed in all cases involving violation-by-violation penalties.

1. Documentation Package

a. District Manager Preparation

1. The District Manager shall provide adequate documentation of cases involving violation- by-violation penalties and prepare two copies of the documentation package for all violation-by-violation penalties which shall be forwarded to the Regional Manager for review.
2. The documentation package submitted for Regional review shall, at a minimum, include:
  - a. A briefing memorandum summarizing the Case Documentation Requirements obtained under Section D. of this policy;
  - b. Copies of all Cal/OSHA Form 1Bs related to the violations to be proposed for violation-by-violation penalty handling;
  - c. Copies of all critical evidence establishing the willfulness of the violations;
  - d. Copies of all critical evidence establishing the justification for violation-by-violation citation and penalty;
  - e. Copies of samples of each type of violation in the proposed violation-by- violation penalties; and
  - f. Copies of the Cal/OSHA Form 10 showing penalty calculations.

b. Regional Manager Review

1. If the Regional Manager, after review of the case file material, believes that the case is appropriate for violation-by-violation penalty procedures, a copy of the complete documentation package shall be forwarded to the Legal Unit for legal analysis and composition of a legal opinion as soon as practicable after completion of the review, but no later than eight (8) weeks before the six month statute of limitations is due to expire.
2. The Regional Manager shall also be responsible for composing a summary of the most cogent reasons supporting the egregiousness of the violation and the appropriateness of the application of the violation-by-violation penalty and include the summary with the

documentation package forwarded to the Legal Unit. The summary shall include the following:

- a. An outline of the facts of the inspection, including inspection type, company name and size, operation involved and employee representative, if any;
  - b. The Cal/OSHA inspection history (nationwide, statewide and at this particular worksite);
  - c. A brief summary of violations found, the number and nature of proposed citations and the amount of the proposed penalty;
  - d. A brief justification of willfulness and egregiousness; and
  - e. Any novel issues involved in the case or issues with implication for program or litigation policy.
- c. Legal Unit Review

The Legal Unit shall include a copy of their written legal opinion with the documentation package and submit the complete documentation package to the Chief and the Deputy Chief for Field Operations as soon as possible after completion of the legal opinion but no later than four (4) weeks before the six month statute of limitations is due to expire.

## 2. Timetable

It is critical to the development of a uniform violation-by-violation penalty policy that all cases appropriate for violation-by-violation penalty be handled appropriately. Regional and District Managers shall adhere as closely as possible to the timetables described below.

- a. Failure to supply the required documentation by the times designated in the following subsections may preclude issuance of violation-by-violation penalties in otherwise appropriate cases.
- b. Regional and District Managers shall take care not to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.
- c. Within one month after the start of an inspection which appears to be appropriate for consideration for violation-by-violation penalties:
  1. The District Manager shall notify the Regional Manager of a potential egregious case. The Regional Manager in turn

shall notify the Deputy Chief for Field Operations of the following:

- a. Establishment name;
- b. District Office of jurisdiction;
- c. Six month statute of limitations deadline;
- d. Opening conference date; and
- e. General type of apparent violations, e.g., safety or health.

The Regional Manager shall notify the Legal Unit of the impending case and seek advice as to necessary documentation and involvement of outside experts.

- d. The Regional Manager shall establish an appropriate timetable for periodic submission of the case by the District Manager for Regional and Legal Unit review.
  1. After sixty (60) days, the District Manager shall ensure that the case is submitted to the Regional Manager for information.
  2. The Regional Manager shall submit the case to the Legal Unit for an interim legal review, evaluation and guidance.
  3. As the case is being developed and as additional information becomes available, the Regional Manager shall ensure that this information is submitted to the Legal Unit for additional evaluation.
- e. No later than 8 weeks before the six month statute of limitations for Citation issuance, the entire documentation package shall be submitted to the Legal Unit for final legal analysis and for a written legal opinion as outlined in Section F.1.c.
- f. At the same time, a copy of the complete briefing package and relevant portions of the case file shall be submitted to the Chief and the Deputy Chief for Field Operations.
- g. After receipt of the documentation package and opinion from the Legal Unit, the Chief and Deputy Chief shall determine whether the case warrants application of the violation-by-violation policy. No later than fifteen (15) days before the six month statute of limitations is due to expire, at a time to be determined by the Chief, the Deputy Chief shall inform the appropriate Regional and District Managers concerning application of the policy and appropriate citations and penalties to be issued.

Attachment:

## Information Necessary for Evaluation of Violation-By-Violation Cases