

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

DOCUMENTATION WORKSHEET AND VIOLATION CLASSIFICATION	P&P C-1B Issue Date: 2/1/87 Revised: 8/1/94, 2/1/95. 7/1/95, 2/1/97, 1/1/00, 2/1/02, 9/1/08
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AUTHORITY: California Labor Code Sections 6302(h), 6304, 6304.1, 6304.2, 6314, 6317, 6325, 6432 and 9060, and Title 8, California Code of Regulations, Sections 334 and 336.10.

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

PROCEDURES:

A. DOCUMENTATION FORMS AND WORKSHEETS

1. Cal/OSHA 1B (Documentation Worksheet)

a. The Cal/OSHA 1B (Documentation Worksheet) shall be completed by compliance personnel after conducting an inspection to document the evidence needed to substantiate each violation of a Title 8 Safety Order found during the inspection.

b. Evidence needed to substantiate a violation based on industrial hygiene sampling shall also be documented on the Cal/OSHA 1B. See Attachment A.

2. Cal/OSHA 1BX (Field Documentation Worksheet)

The Field Documentation Worksheet shall be used by compliance personnel during every inspection (1) to document the name of the establishment, a description of equipment and materials found and operations taking place in the establishment and a description of the type of hazards evaluated; (2) for

note taking for later documentation on the Cal/OSHA 1B; and (3) to document the evidentiary sufficiency of a willful violation as part of pre-issuance review and approval by the Regional Manager and the DOSH Legal Unit. See Attachment B.

3. OSHA 94 (Notetaking Sheet)

The OSHA 94 (Note Taking Sheet) can be used by compliance personnel for additional note taking during an inspection, including diagramming the worksite itself and designating the location of employees, equipment or machinery at the worksite on the graph-side of the OSHA 94. See Attachment C.

4. Willful Elements Documentation Worksheet

a. The Willful Elements Documentation Worksheet shall be completed by compliance personnel whenever a violation is to be classified as willful.

b. When a violation is to be classified as willful, compliance personnel shall attach a completed copy of the Willful Elements Documentation Worksheet to the Cal/OSHA 1B for review and approval by the District Manager. See Attachment D.

B. DOCUMENTING THE SAFETY ORDER VIOLATED

1. Title 8 Safety Order Group

Compliance personnel shall specify which group of safety orders are applicable to the type of workplace inspected. If more than one group of safety orders may be applicable, compliance personnel shall consult with the District Manager to determine which group of orders should be cited.

2. Title 8 Safety Order Section Number

Compliance personnel shall make certain that the violation to be cited correctly corresponds to the Title 8 section and subsection number which is applicable to the violation. A correctly cited section may include as many as four subsections.

3. Particularity Requirement

Compliance personnel shall ensure that each citation item describes with particularity the nature of the cited violation by incorporating the following information into the description of the violation:

- a. A reference to the specific section and subsection of the California Code of Regulations, the California Labor Code, or, in rare instances, the California Health & Safety Code, alleged to have been violated; and
- b. A description of the equipment, process, condition or other attribute of the employer's workplace which represents a violation of the cited standard.

C. ESTABLISHING AND DOCUMENTING EMPLOYEE EXPOSURE

1. Employee Exposure at a Multi-Employer Worksite

Before adoption of 8 CCR Sections 336.10, only the employer whose employees were actually exposed to the violative condition could be cited or a violative condition. 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 contracting employer, regardless of which employer's employees are exposed to the violative condition. See P&P C-1C.

NOTE: The term "employee" means every person who is required or directed by any employer to engage in any employment, or to go to work, or be at any time in any place of employment (Labor Code Section 6304.1), including any state prisoner engaged in correctional industry, as defined by the California Department of Corrections (Labor Code Section 6304.2).

2. Establishing Employee Exposure

a. Observed Employee Exposure -- Uncommon Situation

Employee exposure can be established if compliance personnel directly observe or witness exposure of the employee(s) to a hazard which is a violation of a Title 8 Safety Order.

b. Unobserved Employee Exposure -- More Common Situation

Employee exposure can also be established if compliance personnel obtain witness statements or other admissible evidence which indicates that employees were exposed to a hazard which is a violation of a Title 8 Safety Order.

NOTE: If a citation is based on unobserved exposure, the citation shall be issued no later than six months after the occurrence of the violation.

EXCEPTION: When the employer's concealment of a violative condition by failure to comply with a Title 8 reporting requirement results in the Division's inability to discover the violation within the six-month period, the deadline to issue a citation or notice may be extended to six months from the date the Division discovers the violation. However, upon discovery of such a violation, the Division has only six months in which to issue the citation or notice.

c. Zone of Danger

(1) To establish a violation, compliance personnel shall document that the employee(s) came within the "zone of danger" associated with the violative condition, i.e., in such proximity to the hazard that there is a reasonable basis to conclude that employee exposure to the violative condition has occurred.

(2) Employees can come within the zone of danger of the hazard while:

- i. Performing work-related duties;
- ii. Pursuing personal activities during work hours; or
- iii. Employing normal means of ingress and egress to their work stations.

3. Documenting Employee Exposure

Compliance personnel shall document employee exposure for every violation by obtaining one or more of the following types of evidence:

a. An oral or written statement from the immediate supervisor of the exposed employee(s), which may include an admission that a violation has occurred;

NOTE: Compliance personnel should attempt to obtain a signed written statement whenever possible.

b. An oral or written statement from exposed employee(s);

NOTE: Compliance personnel should attempt to obtain a signed written statement whenever possible.

c. Photographs of the place of employment demonstrating the violative conditions, machinery or equipment;

d. Any relevant documents, e.g., autopsy reports, job duty description for exposed employees, and the employer's personnel and safety policy guidelines;
or

e. A written statement by compliance personnel setting forth an eyewitness account of employee exposure.

4. Employee Exposure Not Needed for a Regulatory Violation

Evidence of employee exposure is not required to establish a regulatory violation.

D. DOCUMENTING EMPLOYER-EMPLOYEE RELATIONSHIP

1. Employment Relationship Requirement

a. Single Employer Worksite

Compliance personnel shall not cite an employer for a violation of a Title 8 Safety Order unless it can be established that the exposed employee(s) had an employment relationship at the time the violation occurred with the employer which compliance personnel plan to cite.

b. Multi-Employer Worksite

See P&P C-1C.

2. Direction and Control Test

a. An employment relationship can be established by documenting which entity has direction and control of the work activities of employee(s) exposed to the hazard associated with the violation.

b. Compliance personnel shall document which employer representative corroborated the exposed employee(s) statement regarding his or her employment relationship with the employer.

NOTE: If a dispute arises about who the exposed employee's employer is, compliance personnel shall document the facts which establish that the cited employer exercised direction and control over the exposed employee(s).

c. Inspections Involving Dual Employers -- See P&P C-1D

d. Multi-Employer Worksite Inspections -- See P&P C-1C

E. DOCUMENTING ELEMENTS OF THE VIOLATION

1. Violative Condition

During the course of each investigation or inspection, compliance personnel shall

a. Identify each observed workplace hazard, or condition, which is a violation of a Title 8 Safety Order by documenting each descriptive element of the violation to be cited;

b. Summarize each item of evidence found during the inspection which substantiates the descriptive element; and

c. Specify the classification of the evidence on the Cal/OSHA 1B and the Field Documentation Worksheet.

2. Elemental Analysis Example: 8 CCR Section 3382(a) states in part that:

"Employees (Element 1) working (Element 2) in locations where there is the risk of receiving eye injuries such as punctures, abrasion, contusions, or burns (Element 3) as a result of contact with flying particles, hazardous substances, projections or injurious light rays (Element 4) which are inherent in the work or environment (Element 5), shall be safeguarded by means of face or eye protection (Element 6)."

<u>ELEMENT</u>	<u>EVIDENCE SUMMARY</u>	<u>TYPES OF EVIDENCE</u>
1. Employees	Three in a service garage	EOS
2. Working	Checking/adding oil and water	OB
3. Location with risk of eye injuries, e.g.,	working around batteries and motor and motor oil	

puncture	N/A	
abrasion	N/A	
contusions	N/A	
burns	H ₂ SO ₄ (battery)	OOS
4. As a result of contact with:		
flying particles	N/A	
hazardous substances	H ₂ SO ₄ (battery)	OOS, and
projections, or	N/A	CSE/IH experience
injurious light rays	N/A	
5. Inherent in the work	Oils and acids	OB, PH
or environment	used in the garage	
6. Shall be safeguarded	No goggles or face	EA, PH
with face or eye protection	shields provided	

3. Types of Evidence

Document the specific statements, personal observations and records that you will be using to support the elements and classification of the violative condition(s) on the 1BX, Documentation Worksheet.

Compliance personnel shall use the abbreviations below to enter the types of evidence most commonly used to document the elements and classification of the violative condition on the Cal/OSHA 1B:

a. Observation (OB)

Notice or perception of work areas, employers, employees or other persons, equipment, parts, machinery, workstations, work practices, work conditions, or other pertinent evidentiary circumstance which can prove a descriptive element of the violative condition.

b. Employer Admission (EA)

Employer, or employer representative, admits knowledge that an element of the violative condition exists or existed.

c. Employer Oral Statement (EOS)

Employer, or employer representative, declares or asserts any information which can prove a descriptive element of the violative condition.

d. Other Oral Statement (OOS)

Any other person declares or asserts any information which can prove a descriptive element of the violative condition.

e. Employer Written Statement (EWS)

Employer, or employer representative, declares or asserts in writing any information which can prove a descriptive element of the violative condition.

f. Other Written Statement (OWS)

Any person declares or asserts any information which can prove a descriptive element of the violative condition.

g. Photograph (PH)

Still or moving picture(s) depicting a pertinent evidentiary circumstance(s) which can prove a descriptive element of the violative condition.

h. Business Record (BR)

Any written record made in the regular course of business activities which can prove a descriptive element of the violative condition.

i. Document (DO)

Any other written information which can support a descriptive element of the violative condition which can prove a descriptive element of the violative condition.

j. Sample Measurement (SM)

Any sample or measurement taken in the course of an inspection or investigation which can prove a descriptive element of the violative condition. See Section C.3.e.

k. Monitoring Measurement (MM)

Any monitoring or measurement of employee exposure taken in the course of an inspection or investigation which can prove a descriptive element of the violative condition.

l. Equipment/Parts/Machinery (EPM)

Any information from equipment, parts, machinery or processes taken in the course of an inspection or investigation which can prove a descriptive element of the violative condition.

m. Other (Specify!)

Any other type of evidence which can prove a descriptive element of the violative condition, e.g. experience or knowledge of the Cal/OSHA engineer or industrial hygienist.

3. Location, Operation, Equipment and Instances

a. Compliance personnel shall document the location and the condition of the inspected workplace and, where applicable, document the ambient weather conditions that are present during the inspection.

b. Compliance personnel shall document the type of operation which occurs at the inspected workplace and, where applicable, the specific type of raw materials, equipment and processes used, as well as production scheduling, shall be documented.

c. Compliance personnel shall document the type of equipment in violation, including the name of the manufacturer, the identification number, model or serial number, and any other identifying information.

d. Compliance personnel shall document the exact location of each instance of a violative condition within the inspected workplace.

4. Injury or Illness

Compliance personnel shall document any injuries or illnesses which are entered on the employer's Log of Occupational Injuries and Illnesses (OSHA Log 300) and which relate to the violative condition by including a copy of the Log and any report concerning the injury or illness generated by the employer, such as Employer's Report of Occupational Injury or Illness (Form 5020), Insurer's Report of Occupational Injury or Illness (Form 5021), or accident investigation reports, in the inspection file.

5. Measurements

a. Compliance personnel shall take exact measurements of all items associated with the violative condition, such as height of guardrails, distance of the belts and pulley drives above the floor level, depth of trenches and excavations and results of any sampling obtained from direct reading instrumentation. NOTE: Use OSHA 94 to draw diagrams and identify measurements on the graph-side of the 94.

b. Compliance personnel shall not rely solely on non-objective types of "measurements" based on their own visual acuity, sense of smell or hearing to document a violation.

F. DOCUMENTING A REGULATORY VIOLATION CLASSIFICATION

1. Definition

A violation is Regulatory if it pertains to a Title 8 permit, posting, reporting or recordkeeping requirement and is not classified as General or Serious.

2. Elements of a Regulatory Violation

a. Permit, Posting, Reporting or Recordkeeping

Violations of a specific Title 8 permit, posting, reporting or recordkeeping requirement shall be classified as Regulatory unless determined to be General or Serious.

b. Not General or Serious Violation

Violations which meet the elements of a general or serious violation shall be classified as such.

3. Examples of Regulatory Violations

For examples of some, but not all, noncarcinogen and carcinogen regulatory violations, see Attachment E.

G. DOCUMENTING A GENERAL VIOLATION CLASSIFICATION

1. Definition

A violation is General if the violation has a relationship to occupational safety and health, but is specifically determined not to be of a serious nature.

2. Elements of a General Violation

a. Relationship to Occupational Safety and Health

The injury or illness that would most likely result from the violative condition would probably not cause death or serious physical harm but does have a relationship to occupational safety and health

b. Specifically Determined Not To Be Serious

If there is no evidence to substantiate either of the two elements for a serious violation--substantial probability of death or serious physical harm, or employer knowledge--only then can the violation be specifically determined not to be Serious.

H. DOCUMENTING A SERIOUS VIOLATION CLASSIFICATION

1. Definition

A violation is Serious if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:

a. A serious exposure exceeding an established permissible exposure limit, or

b. A condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.

2. Evidentiary Elements for a Serious Violation: (a) Substantial Probability of Death or Serious Physical Harm and (b) Employer Knowledge

a. Substantial Probability of Death or Serious Physical Harm

(1) Substantial Probability

The term "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result, assuming an accident or exposure occurs as a result of the violation. The probability that death or serious physical harm will occur has to be substantial, i.e., almost certain to occur.

(2) Death

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

(3) Serious Physical Harm

The term "serious physical harm" refers to an injury or illness meeting the following criteria:

(a) Injury

A temporary, prolonged or permanent impairment of the body in which part of the body is made functionally useless or substantially reduced in efficiency on or off the job. Injuries involving such impairment would usually require treatment by a physician and may include the following:

- i. Amputation (loss of all or part of a body appendage which includes the loss of bone);
- ii. Concussion;
- iii. Crushing (internal, even though the skin surface may be intact);
- iv. Simple or compound fracture;

v. Thermal, electric and chemical burn or scald; or

vi. Cut, laceration or puncture involving significant bleeding and/or requiring suturing.

(b) Illness

A condition which could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body. Such conditions include:

i. Cancer;

ii. Lung diseases, such as silicosis, byssinosis, asbestosis or occupational asthma;

iii. Infectious diseases, such as human immunodeficiency virus (HIV) infection; hepatitis virus (HBV) infection AIDS and tuberculosis (TB);

iv. Poisoning from the inhalation, ingestion or skin absorption of a toxic substance which adversely affects a bodily system; or

v. Noise-induced hearing impairment.

b. Employer Knowledge

Even though Labor Code Section 6432(b) makes it the employer's responsibility to prove that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation, compliance personnel shall gather evidence of employer knowledge of the violative condition before classifying the violation as Serious.

3. Determining Whether A Violation Is Serious

a. Step One

Determine the type of injury or illness which the cited standard is designed to prevent.

(1) Compliance personnel need not determine the exact way in which an injury or illness would occur. It is sufficient to establish that an injury or illness could occur as a result of violating the standard.

EXAMPLES: Falling, when guard rails are required by Title 8; tripping, when tripping protections are required by Title 8; amputations, when point of operation guards are required; or other similar examples.

NOTE: Compliance personnel shall note in Item 22 on the Cal/OSHA 1B any facts supporting the element(s) of the cited standard.

(2) If more than one type of injury or illness existed at the inspected workplace which the standard is designed to prevent, compliance personnel shall document which type could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on results of that determination.

b. Step Two

Determine the injury or illness which is reasonably likely to result from the violative condition identified in Step 1.

(1) In making this determination, compliance personnel shall consider all factors which would affect the severity of the injury or illness which could reasonably be predicted to result from the exposure. Compliance personnel shall not give consideration to factors which relate to the probability that an injury or illness will occur.

(2) Compliance personnel shall document in Item 26 on the Cal/OSHA 1B the likely consequences of the injury or illness, assuming that an accident or exposure does occur.

EXAMPLES: Falling from elevation can result in broken bones, cuts, lacerations, internal crushing, concussion or death; tripping can result in abrasions or bruises, but if other hazards are present in the workplace such as broken glass on the floor, deep lacerations requiring skin suturing can occur.

NOTE: For conditions involving exposure to air contaminants (chemical or physical agents), compliance personnel shall consider the concentration levels of the air contaminant when determining the type of illness which could reasonably result from the exposure.

c. Step Three

Determine if the types of injury or illness identified in Step 2 could include death or serious physical harm.

(1) Compliance personnel shall make reference in Item 26(c) of the Cal/OSHA 1B whether the violation to be classified is one which has a substantial probability of resulting in death or serious physical harm.

(2) If the violation to be classified is one that is referenced in Attachment F as associated with a substantial probability of death or serious physical harm, but the compliance personnel plans to classify the violation as General, compliance personnel shall justify in Item 26(c) of the Cal/OSHA 1B the reason why the violation is not going to be classified as serious, i.e., lack of employer knowledge.

NOTE: Attachment F does not represent an exclusive list of violative conditions associated with a substantial probability of death or serious physical harm. Violative conditions other than those listed in Attachment F may also be classified as serious but only if the elements of a serious violation can be satisfied.

d. Step Four

(1) For the Division to be in a position to present evidence at an informal or pre-hearing conference, or at an administrative hearing that the employer did know, or with the exercise of reasonable diligence could have known, of the presence of a serious violation, compliance personnel shall gather evidence of employer knowledge during every inspection and investigation.

(2) After completion of Steps (1) through (3), a violation shall be classified as serious unless compliance personnel determine, based on evidence of employer knowledge gathered during the investigation, that the employer is able to demonstrate that there was neither actual nor constructive knowledge of the violative condition.

(3) Obtaining evidence of employer knowledge can be accomplished in two ways:

(a) Actual Knowledge -- The employer actually knew of the violative condition.

NOTE: Since a foreman or a supervisor represents the employer, knowledge by a supervisor or foreman of a violative condition is equivalent to employer knowledge.

(b) Constructive Knowledge -- Employer could have known of the violative condition through reasonable diligence, i.e., a degree of care or attention as might be expected from an employer of ordinary prudence and activity.

NOTE: As a general rule, if a violation was discovered which had existed for a significant period of time, compliance personnel can assume that the employer could have discovered the same condition through the exercise of reasonable diligence. Even if a particular violative condition had been in existence only for a short time, but information acquired during the inspection revealed that the same condition was a typical, frequent or recurrent practice, the employer has constructive knowledge of the violation. In contrast, if it were determined that the violative condition occurred as a result of employee misconduct, the employer would not have had constructive knowledge of the violation.

4. Special Serious Violations

a. Carcinogen

Any violation respecting the use of a carcinogen as defined in 8 CCR Section 330(f) shall be cited as serious, unless the element of employer knowledge is lacking or the Division determines that the violation is minor and resulted in no substantial health hazard.

EXCEPTION: If the violation references the use of a carcinogen which is covered by a specific Title 8 Standard, e.g., asbestos, vinyl chloride, 1,2-dibromo-3-chloropropane (DBCP), coke oven emissions, acrylonitrile, inorganic arsenic, ethylene dibromide (EDB), ethylene oxide, formaldehyde and methylenedianiline, then compliance personnel shall consult with the District Manager and/or the Regional Senior Industrial Hygienist to determine the appropriate classification for the carcinogen use violation.

b. Tower Cranes -- For serious violations involving tower cranes, see P&P C-41A.

I. DOCUMENTING A REPEAT VIOLATION CLASSIFICATION

1. Definition

A violation is Repeat when the employer has corrected or indicated correction of a violation for which a citation was previously issued and upon a later inspection by the Division the employer is found to have committed a violation of the same Title 8 Safety Order a second time within a period of three (3) years following the date that the previous violation became a Final Order.

NOTE: For the purpose of considering whether a violation is a repeat violation, a repeat citation issued to employers having fixed establishments

shall be limited to the cited establishment and for employers engaged in businesses having no fixed establishment, a repeat violation shall be based on prior violations within the same Region of the Division.

2. Determining Whether a Violation is a Repeat Violation

a. Compliance personnel shall check the Regional Citation History to determine the employer's prior citation history.

b. Compliance personnel shall document in the inspection file a copy of the previous citation.

NOTE: If the previous citation was issued out-of-District, compliance personnel shall request that Office Support Staff obtain a copy of the citation from the issuing District as well as a copy of the signed Cal/OSHA 160 and 161.

J. DOCUMENTING A WILLFUL VIOLATION CLASSIFICATION

1. A violation is Willful when:

a. 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

b. 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.

2. Willful Violation Definition Elements

a. Willful Failure to Comply with the Law

(1) Employer Knows What the Regulation Requires

The term "conscious of the fact that what he is doing constitutes a violation of a safety law" means that the employer knows what the regulations requires.

(2) Intentional and Knowing

The term "intentional and knowing (as contrasted with inadvertent) violation" means that the employer intends to engage in conduct which the employer knows is a violation of a regulation.

b. Willful Failure to Address A Hazard

(1) Awareness of Unsafe or Hazardous Condition

The term "aware that an unsafe or hazardous condition existed" means that the employer knows that a workplace condition represents a hazard. Even though an employer might not actually be aware of an unsafe or hazardous condition, the employer is constructively aware if the employer acts with reckless disregard of facts which would have a reasonable employer on notice.

(2) No Reasonable Effort to Eliminate the Condition

The term "made no reasonable effort to eliminate the condition" means that the employer made no reasonable effort to address the hazard.

3. Determining Whether a Violation is Willful

a. Compliance personnel shall document facts which support each element of a willful violation on the Willful Elements Documentation Worksheet. See Attachment D.

b. Willful violations shall be further classified as willful regulatory, general or serious violations.

4. Pre-Issuance Evidentiary Review of All Proposed Willful Violations

a. District Manager Review

Prior to issuing any willful/regulatory, willful/general or willful/serious violation of any section or subsection of Title 8 of the California Code of Regulations, each District Manager shall:

(1) Review the documentation generated by district compliance personnel to support the issuance of a willful violation and determine if the documentation in the case file establishes that evidence exists for each element of a willful violation; and

(2) If the District Manager determines that documentation establishes that each of the elements for a willful classification have been established, the District Manager shall ensure that a complete documentation package, including the Cal/OSHA 1B and the Willful Elements Documentation Worksheet for each proposed willful violation, is sent to the Regional Manager

and the Chief Counsel of the DOSH Legal Unit at least six weeks prior to planned issuance of the citation(s).

b. Legal Review

(1) Scope of Legal Unit Review

Legal Unit attorney(s) shall review district case file documentation to determine the sufficiency of the evidentiary foundation for each element of a willful violation based on general principles of law and pertinent case law from the Occupational Safety and Health Appeals Board and other relevant courts.

(2) Meetings

At the request of any party, the District Manager, district compliance personnel and Legal Unit attorney(s) shall meet to review the evidentiary foundation for the willful violation(s).

(3) Documentation

When necessary, the Legal Unit attorney(s) shall request additional documentation from the District Manager to support one or more elements of the willful violation(s). The requested documentation shall be provided by the District Manager as soon as possible to complete the legal review of the evidentiary foundation for the willful classification.

(4) Written Legal Analysis

Upon completion of legal review, the reviewing Legal Unit attorney shall prepare a written analysis of the sufficiency of the evidentiary foundation for each willful violation and send a summary of the findings of that analysis to the District Manager for inclusion with the case file.

NOTE: To the extent feasible, the Legal Unit attorney assigned by the Chief Counsel to conduct pre-issuance evidentiary review of the willful violation(s) shall be assigned to represent the Division in the event that an appeal is filed by the employer.

(5) Time Frames

(a) The District Manager shall initiate Legal Unit review at least six weeks prior to the date of planned citation issuance.

(b) The Legal Unit attorney shall complete review of the evidentiary foundation for a willful violation at least two weeks prior to the date of planned citation issuance.

NOTE: Time frames for initiation of Legal Unit review, and submission to the District Manager at the conclusion of Legal Unit review, may be modified, but only upon the occurrence of exigent circumstances.

K. DOCUMENTING VIOLATION GRAVITY BY DETERMINING SEVERITY, EXTENT AND LIKELIHOOD

1. Severity

a. Regulatory Violation

No adjustment is made for a regulatory violation based on gravity.

b. General Violation

(1) Health

When the safety order violated pertains to employee illness or disease, Severity shall be based upon the degree of discomfort, temporary disability and time lost from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. Based on the foregoing criteria, Severity is rated as follows:

(a) LOW --No time lost from work or normal activity, or minimum discomfort.

(b) MEDIUM --Loss of a part or all of a day from work or normal activity including time or medical attention; or moderate temporary discomfort.

(c) HIGH --Loss of more than one day from regular work or normal activity including time for medical attention, or considerable temporary discomfort.

(2) Safety

When the safety order violated does not pertain to employee illness or disease, Severity shall be based on the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:

(a) LOW --Requiring first aid only.

(b) MEDIUM --Requiring medical attention but not more than 24-hour hospitalization.

(c) HIGH --Requiring more than 24-hour Hospitalization.

c. Serious Violation

Even though the severity of all serious violations is considered HIGH, compliance personnel shall circle "S" on Item 12 of the Cal/OSHA 1B.

2. Extent

a. Health

When the safety order violated pertains to employee illness or disease, Extent shall be based on the number of employees exposed as follows:

(1) LOW --1 to 5 employees

(2) MEDIUM --6 to 25 employees

(3) HIGH --26 or more employees

b. Safety

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. Compliance personnel shall determine the degree to which a safety order is violated by determining how widespread the violation is at the inspected workplace. This is done by determining the ratio of the number of violations pertaining to the particular safety order to the number of possibilities for a violation of the particular safety order at the inspected workplace. Depending on the foregoing, Extent is rated as follows:

(1) LOW

When an isolated violation of the safety order occurs, or less than 15% of the units are in violation;

(2) MODERATE

When occasional violation of the safety order occurs or 15-50% of the units are in violation;

(3) HIGH

When numerous violations of the safety order occur, or more than 50% of the units are in violation.

3. Likelihood

a. Likelihood is the probability that injury, illness or disease will occur as a result of the violative condition.

b. Compliance personnel shall document the Likelihood of a violation by obtaining evidence to support the following criteria:

(1) The number of employees exposed to the violative condition;

(2) The extent to which the violation has in the past resulted in injury or illness to the employees of the inspected workplace and/or to industry in general, as shown by experience, available statistics or records.

(3) Depending on evidence to support the above two criteria, compliance personnel shall rate Likelihood as Low, Moderate or High.

L. INDEPENDENT EMPLOYEE ACT AFFIRMATIVE DEFENSE

1. Affirmative Defense In General

An affirmative defense is an argument by the employer that the employer should not be held responsible for the violation for which the employer was cited by the Division. If each element of the affirmative defense is established by the employer during an administrative hearing, it will excuse the employer from a violation which has otherwise been proven by the Division.

2. Independent Employee Act Defense

a. Elements Employer Must Prove

(1) The employee was experienced in the job being performed;

(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;

- (3) The employer effectively enforces the safety program;
- (4) The employer has a policy which it enforces of sanctions against employees who violate the safety program; and
- (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirement.

b. Compliance Personnel Documentation Requirements

- (1) Compliance personnel shall document all facts related to the five elements of the independent employee act defense when it becomes evident, either from a statement by the employer or another person during the inspection or from the circumstances surrounding the alleged violations, that the independent employee act defense may become an issue in the case. Compliance personnel shall make the District Manager aware of all facts supporting an independent employee act defense;
- (2) Even though establishing the five elements of the independent employee act defense is the employer's responsibility, compliance personnel shall be prepared to respond when the employer raises the defense at an informal conference, a pre-hearing conference or at an administrative hearing; and
- (3) If the District Manager believes that a citation should not be issued because the employer to be cited can establish all five elements of independent employee act defense, the District Manager shall consult with, and receive concurrence from, the Regional Manager and the Legal Unit before making a final determination not to issue, or to withdraw, the citation.

M. VARIANCES

1. Compliance personnel shall not cite an employer for a condition which is in compliance with an approved temporary variance granted by the Division of Occupational Safety and Health or with a permanent variance from the Occupational Safety and Health Standards Board.

NOTE: Compliance personnel shall verify the existence of an approved temporary or permanent variance by contacting the Deputy Chief.

2. If the compliance personnel determines that the employer has filed an application for a temporary or permanent variance regarding a condition which is determined to be a violation, compliance personnel shall determine

the status of the variance request by contacting the Deputy Chief. If the variance has not been granted, the employer shall be cited for the violation.

N. OFFICE PROCEDURES

1. The Cal/OSHA 1B is data entered in the District in which the inspection was performed. Any exceptions to this must be arranged with the Regional IMIS Coordinator.

2. After the Cal/OSHA 1B is data entered, the Citation and Notification of Penalty can be generated by IMIS. If the citation has been field-issued, the Cal/OSHA 1B is data-entered, but the citation shall not be generated. See P&P C-2.

3. The completed Cal/OSHA 1B and all related documentation shall be filed in the District Office Employer Case File.

FORMS COMPLETION and IMIS DATA ENTRY FOR THE Cal/OSHA 1B and the Cal/OSHA 1BX

Attachments: A --Cal/OSHA 1B (Documentation Worksheet)

B --Cal/OSHA 1BX (Field Documentation Worksheet)

C --OSHA 94 (Note Taking Sheet)

D --[Willful Elements Documentation Worksheet](#)

E --[Examples of Carcinogen and Noncarcinogen Regulatory Violations](#)

F --[Title 8 Safety Orders Associated with a Substantial Probability of Death or Serious Physical Harm](#)