

Hawaii Occupational Safety & Health Division (HIOSH)

# Field Operations Manual

CPL 02-00-159

<b>DIRECTIVE NO.:</b> CPL-02-00-159	<b>EFFECTIVE DATE:</b> April 15, 2016
<b>SUBJECT:</b> Field Operations Manual (FOM)	

## ABSTRACT

<b>Purpose:</b>	To provide Hawaii Occupational Safety and Health Division (HIOSH), OSHA State Plan program with policy and procedures concerning the enforcement of occupational safety and health standards. Also this instruction provides current information and ensures occupational safety and health standards are enforced with uniformity.
<b>Scope:</b>	HIOSH-wide
<b>References:</b>	Chapter 396, Hawaii Revised Statutes (HRS) (Hawaii Occupational Safety and Health Law) Title 12, Subtitle 8, Parts 1 - 8 Hawaii Administrative Rules (HAR)
<b>Cancellations</b>	HIOSH Field Operations Manual (FOM) dated 1/2/1992, and revised on 9/19/2002.
<b>Action Offices:</b>	All compliance branches and support staff.
<b>Originating Agency:</b>	OSHA. States must comply with same or similar

**By and under the Authority of the HIOSH Administrator**

## **Executive Summary**

This Instruction cancels and replaces the prior [1/2/1992, rev. 9/19/2002] version of the HIOSH Field Operations Manual. This Instruction constitutes HIOSH's general enforcement policies and procedures manual for use by the compliance branches and support staff in conducting inspections, issuing citations, and proposing penalties.

### **Significant Changes:**

Clarifies that "critical inspections," for consultation visits in progress, may include referrals (Chapter 2 Section VI.G.2.a.).

Clarifies that compliance officers are to present their credentials whenever they make contact with management representatives, employees, or organized labor representatives while conducting inspections (Chapter 3 Section IV.B.1).

Added language related to Workplace Violence in Chapter 3, Section II, *Inspection Planning*

Added language related to the *Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions* in Chapter 3, Section V.A.6., Chapter 4 Section I.C, Chapter 6 Section X.D., Chapter 11 Section II.N.3. and Chapter 13 Section I.D.1.c.

Changes inspection delay period to await arrival of employer representative from 1 hour to 45 minutes (Chapter 3, Section IV.B.3.).

Clarifies that although employers have four hours to provide recordkeeping records, compliance officers are to begin the walkaround inspections as soon as the opening conference is completed (Chapter 3 Section V.A.5).

Added language relating to Safety Incentive Programs in Chapter 3 Section VI., *Review of Records*.

Revised language related to *Repeated Violations*, from three to five years in Chapter 4 Section VII. *Obtaining Inspection History*.

Clarifies final order dates for repeated violations (Chapter 4 Section VII.G.2.)

Clarifies that when the proposed penalty for a posting violation would amount to less than \$250, a \$250 penalty shall be proposed (Chapter 6, Section II.C.4.).

Revised HIOSH Penalty policy in Chapter 6, Section III, *Penalty Adjustment Factors*.

Revised language to time limitation and final order in Chapter 6, Section III, *Penalty Adjustment Factors*.

Revised how Penalty Adjustment Factors are applied – History Reduction, History Increase, Good Faith, and Size. That these factors are to be applied Serially as opposed to Additive, and adds new Penalty Comparison Chart in Chapter 6, Section III., *Penalty Adjustment Factors*.

Clarifies that for purposes of repeated violations, the penalty increase factors for small and large employers is based on total number of employees nationwide (Chapter 6, Section V.B.).

Clarifies that only the penalty reduction factor for “Size” shall apply when proposing penalties for any §12-51-22, HAR, Abatement Verification Regulation (OSHA 1903.19) violations (Chapter 6, Section X.C.)

Revised section on Petitions for Modification of Abatement Dates to include “interim” approvals pending objection by the employee or employee representative (Chapter 7 Section III.).

Revised Electronic Complaints in Chapter 9, *Electronic Complaints Received via the OSHA Public Website*.

Clarifies the definitions of formal and non-formal complaints, and referrals (Chapter 9 Section I.A.).

Clarifies and modifies the *Criteria Warranting an Inspection* (Chapter 9, Section I.C.).

Added language in Chapter 11, Section II, *Fatality and Catastrophe Investigations*.

Added language in Chapter 11 Section II.G., *Families of Victims*.

Addressed the application of the Severe Violator Enforcement Program in Chapter 11, Section II.M.2., *Severe Violator Enforcement Program*.

Adds internal audit procedures for fatality/catastrophe investigations, in Chapter 11, Section II.L.

Adds information on the Hawaii Uniform Information Practices Act (UIPA) with regard to requests for information in Chapter 16.

Adds new Chapter 17, *Preemption by Other Agencies*.

### **Disclaimer**

**This manual is intended to provide instruction regarding some of the internal operations of the Hawaii Occupational Safety and Health Division, and is solely for the benefit of the Hawaii State Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Hawaii Department of Labor and Industrial Relations or the State of Hawaii. Statements which reflect current Occupational Safety and Health Review Commission or court precedents do not necessarily indicate acquiescence with those precedents. Moreover, practices and procedures developed by the U.S. Occupational Safety and Health Administration (OSHA) from their interpretation of their equivalent manual may not be binding on the State of Hawaii.**

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## **CHAPTER 16**

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# **Chapter 1**

## **INTRODUCTION**

### **I. Purpose.**

This Instruction implements the HIOSH Field Operations Manual (FOM), and replaces the prior (1/2/1992, rev 9/19/2003) version. The FOM is an enforcement policies and procedures manual that provides the compliance branches a reference document for identifying the responsibilities associated with the majority of their inspection duties.

### **II. Scope.**

This Instruction applies to the OSH branches of HIOSH, i.e., all HIOSH Branches with the exception of Boiler and Elevator Inspection Branch.

### **III. References.**

- A. Chapter 396, Hawaii Revised Statutes, the Hawaii Occupational Safety and Health Law.
- B. Chapter 1, Hawaii Revised Statutes, Common Law, Construction of Laws
- C. Chapter 92F, Hawaii Revised Statutes, Hawaii Uniform Information Practices Act
- D. Title 12, Subtitle 8, Hawaii Administrative Rules, Hawaii Occupational Safety and Health Standards
- E. Title 33, Hawaii Revised Statutes, Rules of Evidence
- F. Title 38 of the Hawaii Penal Code, Procedural and Supplementary Provisions
- G. Title 29 United States code 651, Occupational Safety and Health Act of 1970
- H. 29 Code of Federal Regulations 1903, Inspections, Citations, and Proposed Penalties
- I. 29 Code of Federal Regulations 1904, Recording & Reporting Occupational Injuries and Illnesses
- J. 29 Code of Federal Regulations 1908, Consultation Agreements
- K. 29 Code of Federal Regulations 1910, Occupational Safety and Health Standards.
- L. 29 Code of Federal Regulations 1913, Rules Concerning OSHA Access to Employee Medical Records
- M. 29 Code of Federal Regulations 1915, Occupational Safety and Health Standards for Shipyard Employment
- N. 29 Code of Federal Regulations 1917, Marine Terminals
- O. 29 Code of Federal Regulations 1918, Safety and Health Regulations for Longshoring
- P. 29 Code of Federal Regulations 1926, Safety and Health Standards for Construction
- Q. 29 Code of Federal Regulations 1928, Occupational Safety and Health Standards for Agriculture
- R. Guideline on HIOSH Accident Investigations, dated December 27, 2011.
- S. Focused Inspections in General Industry, dated September 19, 2001, revised January 30, 2003

- T. OSHA Instruction CPL 02-01-028 (formerly CPL 2-1.28A), Compliance Assistance for the Powered Industrial Truck Operator Training Standards, November 30, 2000, adopted by HIOSH on February 7, 2001.
- U. OSHA Instruction CPL 02-00-051 (formerly CPL 2-0.51J), Enforcement Exemptions and Limitations under the Appropriations Act, May 28, 1998, adopted by HIOSH on May 28, 1998.
- V. OSHA Instruction CPL 02-00-080 (formerly CPL 2.80), Handling of Cases to be Proposed for Violation-By-Violation Penalties, October 21, 1990, adopted by HIOSH on October 5, 1994 and revised on March 1, 1996.
- W. OSHA Instruction CPL 02-00-094 (formerly CPL 2.94), OSHA Response to Significant Events of Potentially Catastrophic Consequences, July 22, 1991, adopted by HIOSH on October 6, 1994
- X. OSHA Instruction CPL 02-00-098 (formerly CPL 2.98), Guidelines for Case File Documentation for use with Videotapes and Audiotapes, October 12, 1993, adopted by HIOSH on December 20, 1993.
- Y. OSHA Instruction CPL 02-00-111 (formerly CPL 2.111), Citation Policy for Paperwork and Written Program Requirement Violations, November 27, 1995, adopted by HIOSH on January 19, 1996
- Z. OSHA Instruction CPL 02-00-158, Inspection Procedures for the Respiratory Protection Standard, June 26, 2014, adopted by HIOSH on [Insert date]
- AA. OSHA Instruction CPL 02-00-125, Home-Based Worksites, February 25, 2000, incorporated in this FOM in Chapter 12, Section III.
- BB. OSHA Instruction CPL 02-00-135, Recordkeeping Policies and Procedures Manual (RKM), December 30, 2004, adopted by HIOSH on [Insert date]
- CC. OSHA Instruction CPL 02-00-157, Shipyard Employment “Tool Bag” Directive, April 1, 2014, adopted by HIOSH on [Insert date]
- DD. OSHA Instruction CPL 02-00-154, Longshoring and Marine Terminals “Tool Shed” Directive, July 31, 2012, adopted by HIOSH on August 31, 2012.
- EE. OSHA Instruction CPL-02-00-153, Communicating OSHA Fatality Inspection to a Victim’s Family, April 17, 2012, adopted by HIOSH on October 1, 2012.
- FF. OSHA Instruction CPL 02-00-151, 29 CFR Part 1910, Subpart T – Commercial Diving Operations, June 13, 2011, adopted by HIOSH on September 26, 2011
- GG. OSHA Instruction CPL 02-00-149, Severe Violator Enforcement Program (SVEP), June 19, 2010, adopted by HIOSH on May 1, 2016.
- HH. OSHA Instruction CPL 02-01-055, Maritime Cargo Gear Standards and 29 CFR Part 1919 Certification, September 30 2013, and adopted by HIOSH on [Insert date]
- II. OSHA Instruction CPL 02-01-051, 29 CFR Part 1915, Subpart B, Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment May 20, 2011, adopted by HIOSH on September 20, 2011.
- JJ. OSHA Instruction CPL 02-01-047, OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), February 22, 2010 (Not adopted by HIOSH, reference only)

- KK. OSHA Instruction CPL 02-01-049, 29 CFR Part 1915, Subpart I, Enforcement Guidance for Personal Protective Equipment (PPE) in Shipyard Employment, November 4, 2010, adopted by HIOSH on September 20, 2011.
- LL. OSHA Instruction CPL 02-02-035, 29 CFR 1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A, December 19, 1983. [Not adopted by HIOSH, Reference only]
- MM. OSHA Instruction CPL 02-02-09, Inspection Procedures for the Hazard Communication Standard (HCS 2012), July 9, 2015, adopted by HIOSH on [Insert date]
- NN. OSHA Instruction CPL 02-02-043, Chemical Sampling Information (CSI) Web page, July 1, 1991 [Not adopted by HIOSH, reference only].
- OO. OSHA Instruction CPL 02-02-054, Respiratory Protection Program Guidelines, July 14, 2000, [Not adopted by HIOSH, Reference Only].
- PP. OSHA Instruction CPL 02-02-043, Chemical Information Manual, July 1, 1991. [Not adopted by HIOSH, Reference Only]
- QQ. OSHA Instruction CPL 02-02-063, Inspection Procedures for Occupational Exposure to Asbestos Final rule 29 CFR Parts 1910.1001, 1926.1101, 1915.1001, January 9, 1996, adopted by HIOSH on December 15, 1995.
- RR. OSHA Instruction CPL 02-02-072, Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, August 22, 2007, adopted by HIOSH on December 19, 2007.
- SS. OSHA Instruction CPL 02-02-073, Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases, August 27, 2007, adopted by HIOSH on December 11, 2007.
- TT. OSHA Instruction CPL 02-02-074, Inspection Procedures for the Chromium (VI) Standards, January 24 2008, adopted by HIOSH on April 14, 2008.
- UU. OSHA Instruction CPL 02-02-076, National Emphasis Program – Hexavalent Chromium, February 23 2010, adopted by HIOSH on November 14, 2011
- VV. OSHA Instruction CPL 03-00-010, Petroleum Refinery Process Safety Management National Emphasis Program, August 18, 2009, adopted by HIOSH on October 1, 2009.
- WW. OSHA Instruction CPL 03-00-007, National Emphasis Program – Crystalline Silica, January 24, 2008, adopted by HIOSH on September 8, 2008.
- XX. OSHA Instruction CPL 03-00-008, Combustible Dust National Emphasis Program (Reissued), March 11, 2008, adopted by HIOSH on April 4, 2008.
- YY. OSHA Instruction CPL 03-00-009, National Emphasis Program – Lead, August 14, 2008, adopted by HIOSH on November 21, 2008
- ZZ. OSHA Instruction CPL 04-00-001 (formerly CPL 2-0.102A), Procedures for Approval of Local Emphasis Programs (LEPs), November 10, 1999, adopted by HIOSH on December 9, 1999.
- AAA. OSHA Instruction CSP 02-00-003, Consultation Policies and Procedures Manual, November 19, 2015, adopted by HIOSH on March 1, 2016.
- BBB. OSHA Instruction CSP 03-01-003, Voluntary Protection Programs (VPP) Policies and Procedures Manual, April 18, 2008, adopted by HIOSH on July 1, 2014.

- CCC. OSHA Instruction CSP 03-02-003, OSHA Strategic Partnership Program for Worker Safety and Health, November 6, 2013, adopted by HIOSH on [Insert date].
- DDD. OSHA Instruction HSO 01-00-001, National Emergency Management Plan (NEMP), dated December 18, 2003. [Not adopted by HIOSH, Reference Only]
- EEE. OSHA Instruction IRT 01-00-007, The IMIS Enforcement Data Processing Manual for Use with the NCR Computer System, dated September 20, 1993.
- FFF. OSHA Instruction TED 01-00-015, *OSHA Technical Manual*, January 20, 1999. [Not adopted by HIOSH, Reference Only]
- GGG. Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325 (11<sup>th</sup> Cir. 1983).
- HHH. Int. Union UAW v. General Dynamics Land Systems Division, 815 F. 2d 1570 (D.D. Cir. 1987)
- III. Marion Stevens dba Chapman & Stephens Company, 5 BNA OSHC 1395 (No.13535, 1977).
- JJJ. Darragh Company, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980).
- KKK. J.C. Watson Company, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008).
- LLL. Chao v. Mallard Bay Drilling, Inc., 212 F. 3d 898, (534 U.S. 235, 2002)

#### IV. Cancellations.

- A. HIOSH Field Operations Manual (FOM) dated 1/2/1992, and revised on 9/19/2002.
- B. CPL 02, Covered Chemical Facilities National Emphasis Program, October 1, 2007
- C. OSHA Instruction CPL 02-00-124 (formerly CPL 2-0.124), Multi-Employer Citation Policy, December 10, 1999, adopted by HIOSH on January 7, 2000 and now incorporated into Chapter 12, Section I of this FOM.
- D. CPL 02-00-140, Complaints Policy and Procedures, September 20, 2007
- E. CPL 02-00-145, Enhanced Enforcement Program (EEP), August 14, 2009
- F. CPL 2-1.20, OSHA/U.S. Coast Guard Authority Over Vessels, February 7, 1997
- G. CPL 2-2, Guideline on Indoor Air Quality, November 26, 1990
- H. CPL 2-2.50, Guideline on Information Dissemination System for Chemical Industry Programs, November 26, 1990
- I. CPL 2.39 CH-1, Criminal/Willful Investigations, March 4, 1982
- J. CPL 2.42 CH-1, Mine Safety and Health Jurisdiction in State-Plan States, April 7, 1983
- K. CPL 2.77 Guideline on Critical Fatality/Catastrophe Investigation Factors, March 30, 1987
- L. CPL 2.89, Guideline on Incorporating Family of Victims in Fatality Investigations, November 26, 1990
- M. Guideline for Handling Violations Found During an Inspection of a Misidentified Establishment, dated October 1, 1999
- N. HIOSH Recognition and Exemption Program, dated July 17, 2001
- O. Latex Gloves, dated August 16, 2001



- P. N.O. Memo, Guideline on Recording of Hearing Loss and Cumulative Trauma Disorders (CTDs) on the OSHA 200 Log (N.O. Memo 6/4/1991), August 14, 1991
- Q. Memo, Guidelines to Construction Officers for Programmed Construction Inspections, Construction Safety Referral Inspections, and Construction Fatality or Complaint Inspections (Memorandum 1/11/95, rev of 8/22/94), May 24 1995, Rev. September 4, 1996, and January 30, 2003
- R. Guideline on Non-Profit Corporations, October 21, 1992
- S. Guideline on Current Permanent Variances, July 20, 1994
- T. Guideline on Procedure for Handling Violations Found During an Inspection of a Misidentified Establishment, October 1, 1999
- U. HIOSH Recognition and Exemption Program, July 17, 2001
- V. Latex Gloves, August 16, 2001
- W. CPL 02-00-143, Commercial Diving Operations (29 CFR 19110, Subpart T), August 23, 2007
- X. CPL 2-0.114, Abatement Verification Regulation, 29 CFR 1903.19 – Enforcement Policies and Procedures, July 21, 1998
- Y. CPL 2-0.131 Recordkeeping, February 5, 2002 (update with new version)
- Z. CPL 2-1, Steel Erection 99-1, February 19, 1999
- AA. CPL 2-2.30, Authorization of Review of Medical Opinions, May 24, 1995
- BB. CPL 2-2.32, Authorization of Review of Specific Medical Information, May 24, 1995
- CC. CPL 2-2.33, Practice and Procedure Concerning Access to Employee Medical records – Procedures Governing Enforcement Activities, May 24, 1995
- DD. CPL 2.105, Special Emphasis Program: Lead in Construction, April 4, 1996
- EE. CPL 2.60A, Guideline on Asbestos-Related Inspections, September 28, 1998

## **V. Action Information**

### **A. Responsible Office.**

Administrator

### **B. Action Offices**

All HIOSH Branches: Occupational Safety, Occupational Health, Consultation and Training, and Administration and Technical Support.

## **VI. State Impact**

Hawaii has adopted a Field Operations Manual (FOM) that is substantially similar in policy to OSHA, with the exception of unique differences due to State law and office structure.

## **VII. Significant Changes**

Throughout the revised FOM, specific activities related to Legal Issues, Post-Citation Procedures and Abatement Verification, Settlements, and Specialized Inspection Procedures have been separated out to its specific chapters.

### **Chapter 1. Introduction:**

## Chapter 1 Introduction

1. Title of this chapter has been changed from “General Responsibilities and Administrative Procedures to “Introduction”.
2. Duties and responsibilities of specific HIOSH staff has been removed and incorporated into other chapters.
3. A listing of all active directives/CPLs and those that were cancelled is provided.

## **Chapter 2. Program Planning.**

1. The title of this chapter has been changed from “Compliance Programming” to Program Planning.
2. Section I: Restates HIOSH mission in terms of program activities and priorities.
3. Section II: Details HIOSH program responsibilities that are complementary to enforcement; i.e., assistance to small employers, outreach, and responding to requests for assistance.
4. Section III: Details the various cooperative programs: Hawaii Voluntary Protection Program, the Onsite Consultation program, SHARP, and Strategic Partnerships.
5. Section IV, D: Expanded discussion on Enforcement Exemptions and Limitations to include specific responsibilities of Branch Managers and CSHOs.
6. Section IV, E: Added discussion on preemptions by another Federal Agency and makes reference to Chapter 17, Preemption by Other Agencies and clarifies responsibilities when such issues arise.
7. Section IV.F: Added information on U.S. Post Office status.
8. Section IV.G: Clarifies enforcement policy related to home-based worksites and makes reference to Chapter 12, Section III for greater detail.
9. Section IV.H: Clarifies when an un-programmed related inspection is normally triggered. Burden falls on compliance officer to observe any potential hazards first before expanding the un-programmed inspection to other employers.
10. Section VI, Programmed Inspections: Updates HIOSH procedures for the Inspection Scheduling System (ISS) for both General Industry and Construction; emphasizes that the secondary list MUST be completed in the random order as generated by the Research & Statistics Office.
11. Section VI, D through F: Adds information on emphasis programs such as Special Emphasis (SEP), National Emphasis (NEP), and Local Emphasis (LEP) Programs.
12. Section VI. G. 2. a.: A provision has been added defining “other critical inspections as determined by the Administrator” to include referrals, although not limited only to referrals.
13. Section VI.G.2.c: Adds clarification that a company identified on the Severe Violator Enforcement Program (SVEP) may still receive Onsite Consultation Services, except that a consultation visit-in-progress does not block or defer an enforcement inspection.
14. Section VI.G.5: Provides rationale for not offering inspection deferral or exemption to strategic partners.

## **Chapter 3. Inspection Procedures.**

## Chapter 1 Introduction

1. II.A.2: Federal and other state plans citation history **may** be used to document employer knowledge to support a willful violation, and to determine eligibility for the history penalty reduction factor. It **may not** be used to support a repeat violation.
2. II.C: Expanded guidance is provided on CSHO safety and health at the worksite, including inspections involving workplace violence.
3. II.D: Updates information on the penalty for unauthorized advance notice – went up from \$1,000 to \$1,100.
4. III.A: The definition of a comprehensive inspection is revised to “a substantially complete and thorough inspection of all potentially hazardous areas of the establishment.”
5. IV.A.2: Reminds branch managers to adhere to the collective bargaining unit contract when either temporarily modifying a CSHO’s work schedule or requiring overtime.
6. IV.B.1: Clarifies that compliance officers are to present their credentials whenever they make contact with management representatives, employees (to conduct interviews), or organized labor representatives while conducting their inspections.
7. IV.B.3: Cautions CSHOs to make sure that the person purporting to represent management actually has the authority to allow the CSHO onto the worksite.
8. IV.B.3: Changed inspection delay period from 1 hour to 45 minutes.
9. IV.I: Clarifies that citations can only be issued if there is a violation of the law, rule, or standards and not merely for failing to comply with all of the terms of a variance.
10. V.A.: The CSHO is required to review any written hazard assessment that the employer has made in compliance with §1910.132(d) to determine appropriate personal protective equipment.
11. V.A.5: Clarifies that although employers have four hours to provide recordkeeping records, compliance officers are to begin the walkaround portion of their inspections as soon as the opening conference is completed.
12. V.C: Requires all CSHOs to request a list of chemicals on site for industrial establishments as well as their respective maximum intended inventories
13. V.D.: Expanded guidance is provided on review of voluntary compliance programs, including on-site consultation, SHARP, and VPP.
14. VI.A.: Revised guidance is provided on collection of employer injury and illness data and calculation of the DART rate.
15. VI.C: Added language related to Safety Incentive Programs, which may discourage employee reports of injuries.
16. VII.I.: Extensive guidance is provided on interviews of non-managerial employees.
17. VIII.E.: Updates discussion on economic infeasibility, incorporating HIOSH definition of “infeasible” in §12-50-2, such that employee protection is required regardless of the employer’s financial situation.
18. IX. B.1.: Clarifies that it is the CSHO’s responsibility to explain the differences between Hawaii and OSHA standards to the employer.

## **Chapter 4. Violations.**

1. I.A.4: The definition and application of horizontal and vertical standards have been revised and clarified.

## Chapter 1 Introduction

2. II.C.: The four steps needed to identify and document a serious violation has been expanded and clarified with examples.
3. III: The elements of a general duty standard violation are given an expanded discussion, with examples.
4. III.D.: Additional clarification is provided on limitation of use of the general duty standard, with examples.
5. V: Expanded and clarified guidance is provided on willful violations, with examples.
6. VI: Updated guidance is provided for criminal/willful violations.
7. VII.A.2: Violations cited by Federal OSHA and/or by other states cannot be used as a basis for a repeated violation except where the establishment would normally have been within HIOSH jurisdiction and the citation was issued under a temporary operational agreement. Violations by other jurisdictions, however, may be used to establish employer knowledge, only after they have become a final order.
8. VII.E.: Revised time limitations for basis of repeated violations from 3 to 5 years.
9. VII.G: Responsibilities of the Branch Manager in citing repeat violations are clarified.
10. VII.G.2: Clarifies final order dates for repeated violations.
11. VII.G.5.: Revised AVD language for Repeated Violations
12. VIII: Discussion on De Minimis conditions is added, with examples.
13. X.B.1: Clarifies what a “single hazardous condition” is and provides examples.
14. XI, XII, XIII, and XIV: Guidance on citing health standard violations has been updated and clarified.

## **Chapter 5. Case File Preparation and Documentation.**

1. V.B: Expanded guidance on evaluating an employer’s occupational safety and health system.
2. V.B.8: Clarification on citing for Emergency Action Plans, §1910.38 and .39.
3. VI.B.: Expanded guidance on documentation necessary to counter an affirmative defense.
4. VII.B.: Expanded guidance on when it is necessary to obtain written interview statements.
5. X: Expanded guidance is provided on Inspection Case File Activity Diary Sheet.
6. X: A Table on Order of Filing within the Case File has been included.
7. XI.A: Clarification on Statute of Limitation for issuance of citations is provided.
8. XII.C: Expanded guidance on Classified and Trade Secret Information.

## **Chapter 6. Penalties and Debt Collection.**

1. II.A.: Amends all penalties to the increased maximums as mandated by the State Legislature.
2. II.C.: Raises all minimum assessed penalties from \$100 to \$200.
3. III.B.2.: Clarifies that the employer given a history reduction must also have been inspected and found to be either in compliance or no serious violations were found;

broadens the history examination to nationwide, including federal OSHA, and State Plan State inspections; changes the period for allowing a reduction of 10 percent for history from three to five years; requires an increase of 10 percent if a citation for high-gravity serious, willful, repeated, or failure-to-abate has become a final order, i.e. not all penalty adjustments are reductions, so name change also made from penalty “reductions” to penalty “adjustments.”

4. III.B.3: Expanded clarification for reductions for good faith in light of Hawaii’s standard requiring all employers to have a safety and health program.
5. III.B.4.: Clarifies that size reduction is based on the maximum number of employees at all workplaces, nationwide, including State Plan States, at any one time during the previous 12 months.
6. III.B.5: Change to how the penalty adjustments are applied: Not added, but applied serially. Includes a table to explain the change in how penalty adjustments are made.
7. V.B: Clarifies that for purposes of repeated violations, the penalty increase factors for small and large employers is based on total employees *nationwide*.
8. V.C: Increased the repeated violation penalty for other-than serious, no initial penalty to \$250 for first repeated, \$600 for second repeated, and \$1,500 for third repeated for consistency with penalty increase factors for serious and other violations.
9. VI.B: The reduction factor for *History* is allowed for Serious Willful violations; this is in addition to the reduction factor for *Size* that has been allowed; Adds Table 6-8 which sets the High, Moderate, and Low Gravity base penalty for willful violations and applies reductions for size and/or history. Apparently no increase for history is provided.
10. VI.C.: Provides a different mechanism for determining the penalties for willful regulatory violations; e.g. multiply GBP by 10; allows reduction for size and history.
11. VII.B.4.c.: Requires Branch Manager to fully explain in the case file the rational for proposing a lesser penalty for failure-to-abate.
12. X.A.: Clarifies when a citation for failing to post the OSHA Notice (Poster) is warranted; sets the GBP levels 10% higher in accordance with legislative intent to increase penalties.
13. XIII: Expanded responsibilities and procedures for handling monies received from employers.
14. XIV.C: Expanded procedures for when a penalty becomes due and payable.
15. XIV.D: Added instructions on Installment Payment Plans, including clarifying that the minimum monthly payment amount must not be less than \$200 and the maximum term of the installment plan must not exceed 36 months.
16. XIV.E: Clarified procedures for referring cases to the Deputy Attorney General for collection.
17. XIII.F: Added state procedures for writing off debts (uncollectible penalties); Added Appendix 6A, Delinquent Account(s) Write-Off Checklist, both Short-Form and for amounts greater than \$500.

#### **Chapter 7. Post-Citation Procedures and Abatement Verification.**

1. I.A. note: Added procedures for notifying employers that HIOSH does not accept electronic or faxed copies of contest letters.

2. II: Provided more specific instructions on documenting issues, discussion and results of an informal conference using either the Informal Conference Agreement (ISA), or the Informal Conference Summary (ICS).
3. III: Provided updated policies and procedures on Petitions for Modification of Abatement Date (PMAs), including “interim” approval of PMAs pending objection by employee or employee representatives.
4. IV through XII: Updates policies and procedures on the Abatement Verification Regulation, §12-51-22, HAR.
5. XII.B: Added Severe Violator Enforcement Program (SVEP) follow-up policies and procedures.
6. XII.E: Added provisions for §396-4(d)(7) enforcement.

### **Chapter 8. Settlements.**

1. I: Expanded information and clarification of responsibilities for Informal Settlement Agreements
2. II: Added information on Post Contest Settlement (Formal Settlement Agreement); that this type of settlement is approved by the Hawaii Labor Relations Board in accordance with current DLIR procedures.

### **Chapter 9. Complaint and Referral Processing.**

1. I.A.1: Clarifies the definitions of formal and non-formal complaints, and referrals.
2. I.A.1: The definition of complaint has been clarified to include only present employees, not past employees.
3. I.A.1.a: The potential harm necessary to file a complaint has been clarified to include health harm as well as physical harm.
4. I.C.2: Clarifies that a formal complaint that alleges a recordkeeping deficiency that indicates the existence of a serious safety or health violation is a criterion warranting an inspection.
5. I.E.5: Allows electronic complaints where a current employee has provided their name and checked the “This constitutes my electronic signature” box to be considered a formal complaint.
6. I.G.3: Address responsibilities for a joint (safety and health) inspection of a complaint.
7. III.: Revises Decision Trees for Complaints.

### **Chapter 10. Industry Sectors.**

1. I. **Agriculture.**
  - a. OSHA/HIOSH’s main policies and procedures in the agriculture industry are gathered together for the first time.
  - b. Paragraph I.E: Coverage of pesticides by OSHA/HIOSH and EPA are addressed, including use of the Hazard Communication standard.
2. III. **Maritime:** A compilation of all resources, policies and procedures regarding maritime inspections is added, including Security procedures; clarifies when HIOSH may be using the maritime standards, i.e., public sector workers

### **Chapter 11. Imminent Danger, Fatality, Catastrophe and Emergency Response.**

1. This chapter incorporates and replaces OSHA Instruction CPL 02-00-137, Fatality/Catastrophe Investigation Procedures, April 14, 2005, and HIOSH prior FOM Chapters VII, and VIII.
2. II: Updates policies and procedures on Fatality and Catastrophe Investigations including investigation and interview procedures, documentation requirements, as well as notification to the victim's family; references HIOSH Guideline on Conducting Accident Investigations, dated December 27, 2011.
3. II.G: Amends the next-of-kin letter as to be signed by the Director, and procedures to send the draft letter along with a brief two to three sentence summary of the incident that resulted in a fatality.
4. II.L: Audit procedures to evaluate compliance with, and the effectiveness of fatality/catastrophe investigation procedures has been added.
5. II.M.: Expands paragraph on considerations of fatality/catastrophe investigations to other programs and activities such as homeland security and SVEP; increases threshold for cases considered to be "significant" to \$50,000 in proposed penalties or those "which involve novel enforcement cases".
6. II.N.: Adds guidance for workplace fatalities caused by natural causes, workplace violence and motor vehicle accidents.
7. III: A section on rescue operations and emergency response has been added.

### **Chapter 12. Specialized Inspection Procedures.**

1. I: Multi-Employer Workplace/site Policy. CPL 02-00-124 (formerly CPL 2-0-124), December 10, 1999, adopted by HIOSH on January 7, 2000 has been incorporated into this chapter.
2. II: Temporary labor Camps: Guidance has been updated and expanded.
3. II.A: A provision has been added to clarify that §1910.142 Temporary Labor Camp Standards apply to non-agriculture workplaces as well as to agriculture workplaces.
4. II.E: A provision has been added that discusses when other Part 1910 standards may be cited for hazards that are not covered by §1910.142 for non-agriculture housing.
5. III.: Home-Based Worksites Policy has been added, based on CPL 02-00-125, February 25, 2000, with minor modifications.

### **Chapter 13. Federal Agency Safety and Health Programs.**

Not applicable to HIOSH, included only as a place holder

### **Chapter 14. Health Inspection Enforcement Policy.**

[Reserved]

### **Chapter 15. Legal Issues.**

1. I: Expanded discussion and instructions on the use of administrative subpoenas.
2. II: Added section on when HIOSH personnel is served with a subpoena.

3. IV: Added section on Equal Access to Justice Act; explains that legislative oversight in lieu of EAJA is applicable to HIOSH.
4. VII: Expanded how contested cases are processed
5. IX: Added information on the procedures of the Hawaii Labor Relations Board (HLRB) when hearing HIOSH cases.
6. XIII: Clarifies citation final order dates.
7. XIV: Adds court enforcement under section 4(d)(7) of HIOSH Law.
8. Appendix A: Added sample of Subpoena Duces Tecum including Exhibit A.
9. Appendix B: Added sample of Subpoena Ad Testificandum
10. Appendix C: Added sample Return of Service form.

**Chapter 16. Disclosure under the Hawaii Uniform Information Practices Act (UIPA).**

1. Added new chapter on State law and regulations regarding requests for documents/ records.
2. Added sample forms HIOSH-OIP-4 (Notice to Requester) forms for specific types of requests.

**Chapter 17. Preemption by Other Agencies.**

1. Added new chapter, Preemption by Other Agencies.

**VIII. Background.**

The HIOSH Field Operations Manual (FOM) was last revised on 9/19/2002, but the revisions were not comprehensive and did not incorporate many of the existing additional directives, memorandums, and interpretations, previously issued as Guidelines on Occupational Safety and Health (GOSH).

This Instruction, the HIOSH Field Operations Manual, CPL 02-00-159, incorporates and replaces the prior FOM and some of the subsequent directives and memoranda, and provides a single, updated source of instruction on general HIOSH enforcement policies and procedures.

The FOM is designed to be updated on a regular basis by amending chapters or sections thereof to embody modifications and clarifications to HIOSH's general enforcement policies and procedures.

**IX. Definitions and Terminology.**

**A. The Law.**

This term refers to the Hawaii Occupational Safety and Health Law, Chapter 396, Hawaii Revised Statutes.

**B. Compliance Safety and Health Officer (CSHO).**

This term refers to both Occupational Safety & Health Compliance Officers (OSHCs) and Environmental Health Specialists (EHSs).

**C. He/She and His/Hers.**

The terms *he* and *she*, as well as *his* or *her*, when used throughout this manual, are interchangeable. That is, male(s) applies to female(s), and vice versa.



**D. Professional Judgment.**

All HIOSH employees are expected to exercise their best judgment as safety and health professionals and as representatives of the State of Hawaii and the Hawaii Department of Labor & Industrial Relations in every aspect of carrying out their duties.

**E. Workplace and Worksite.**

The terms *workplace* and *worksite* are interchangeable. *Workplace* is used more frequently in general industry, while *worksite* is more commonly used in the construction industry.

## **Chapter 2**

### **PROGRAM PLANNING**

#### **I. Introduction.**

HIOSH's mission is to assure the safety and health of Hawaii's working men and women by promulgating and enforcing standards and regulations; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health as well as the development of comprehensive safety and health management systems. Effective and efficient use of resources requires careful, flexible planning. In this way, the overall goal of hazard abatement and employee protection is best served.

#### **II. HIOSH Responsibilities.**

##### **A. Providing Assistance to Small Employers.**

1. In Hawaii, more than 95% of businesses are small employers employing less than 100 employees in all facilities. It makes sense, therefore, that HIOSH provides assistance to small employers in order to achieve our mission.
2. Where resources permit, HIOSH will have in place programs to provide guidance and compliance assistance to small employers.
  - a. Safety and Health Conferences:

HIOSH normally co-sponsors at least one or more safety and health conferences/workshops each year in order to lower the cost of attending for small businesses. Our participation in the planning of these conferences/workshops is geared towards promoting participation by small business -- providing them a mix of awareness, technical, and program management training, and ensuring that handouts and resources are readily available.
  - b. HIOSH Webpage:

Specific information of interest to small employers, including links to other websites helpful to small businesses, e.g. OSHA Small Entity Compliance Guidelines, and e-tools.
  - c. Telephone Information Line:

The HIOSH Consultation and Training Branch provides an "Information" telephone number where callers can seek assistance. Although HIOSH is not able to provide same-day service, callers will often receive answers to their inquiries within a week or two.
  - d. E-mail Information:

Anyone can e-mail a question or concern to [labor.hiosh@hawaii.gov](mailto:labor.hiosh@hawaii.gov). Questions are usually answered within a week or two, as resources permits.

## **B. HIOSH Outreach Program.**

The Administrator will ensure that the division maintains an outreach program appropriate to local conditions and the needs of the service area. The plan may include awareness programs, assistance in developing compliance safety and health management systems, training and education services, referral services, cooperative programs, abatement assistance, and technical services.

## **C. Responding to Requests for Assistance.**

All requests from employers or employees for compliance information or assistance shall receive timely, accurate, and helpful responses from HIOSH. See the section on Information Requests in this chapter for additional information.

# **III. HIOSH Cooperative Programs Overview.**

OSHA offers a number of avenues for businesses and organizations to work cooperatively with the division. Compliance Officers should discuss the various cooperative programs with employers.

## **A. Hawaii Voluntary Protection Program (HVPP).**

The Hawaii Voluntary Protection Program (HVPP) is designed to recognize and promote effective safety and health management. A hallmark of HVPP is the principle that management, labor, and HIOSH can work together in pursuit of a safe and healthy workplace. A HVPP participant is an employer that has successfully designed and implemented a health and safety management system at its worksite that exceeds HIOSH requirements, and it is exempt from programmed inspections.

NOTE: See CSP 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual, dated April 18, 2008, adopted by HIOSH on December 27, 2014 for additional information.

## **B. Onsite Consultation Program.**

1. The HIOSH Onsite Consultation Program offers a variety of services at no cost to employers.
  - a. These services include assisting in the development and implementation of an effective safety and health management system, identifying hazards at the worksite, and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority.
  - b. The Onsite Consultation Program is separate from HIOSH's enforcement efforts. Under onsite consultation programs, no citations are issued, nor are penalties proposed.
2. Safety and Health Achievement Recognition Program (SHARP).
  - a. Another program that recognizes employers' efforts to create a safe workplace and exempts them from programmed inspections is the Safety and Health Achievement Recognition Program (SHARP).

- b. SHARP is designed to provide incentives and support those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from HIOSH programmed inspections.

NOTE: See CSP 02-00-003, Consultation Policies and Procedures Manual, dated November 19, 2015, adopted by HIOSH on March 1, 2016 for additional information.

### **C. Strategic Partnerships.**

1. Organizations can enter into Strategic Partnerships with HIOSH to address specific safety and health issues. In these partnerships, HIOSH enters into extended, voluntary, cooperative relationships with groups of employers, employees, and employee representatives (sometimes including other stakeholders, and sometimes involving only one employer) in order to encourage, assist, and recognize efforts to eliminate serious hazards and to achieve a high level of employee safety and health.

NOTE: See CSP 03-02-002, OSHA Strategic Partnership Program for Worker Safety and Health, effective February 10, 2005, for additional information.

2. HIOSH does NOT offer programmed inspection exemption for strategic partnerships. A focused inspection may, however, be included as part of the partnership agreement.
3. Recognition and appreciation of the efforts of HIOSH's strategic partners may include one or more of the following:
  - a. Press releases, website articles;
  - b. Plaques, Medals, Trophies, Awards and/or pins; and
  - c. Certificates of Appreciation

[No Alliance Program]

## **IV. Enforcement Program Scheduling.**

### **A. General.**

1. HIOSH's priority system for conducting inspections is designed to allocate available HIOSH resources as effectively as possible to ensure that maximum feasible protection is provided to working men and women. The Administrator will ensure that inspections are scheduled within the framework of this chapter, that they are consistent with the objectives of the division, and that appropriate documentation of scheduling practices is maintained.
2. The Administrator will also ensure that HIOSH resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Administrator may consider requesting additional assistance from OSHA, e.g., the Health Response Team. HIOSH will retain control of the inspection.

## B. Inspection Priority Criteria.

Generally, priority of accomplishment and of assigning staff resources for inspection categories is as shown in Table 2-1 below:

**Table 2-1: Inspection Priorities**

Priority	Category
First	Imminent Danger
Second	Fatality/Catastrophe
Third	Complaints/Referrals
Fourth	Programmed Inspections

### 1. Efficient Use of Resources.

Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection. An example of such a deviation would be when the division commits a certain percentage of resources to programmed [Special Emphasis Program \(SEP\)](#) inspections such as a [National Emphasis Program \(NEP\)](#) or a [Local Emphasis Program \(LEP\)](#). Inspection scheduling deviations must be documented in the case file.

### 2. Follow-up Inspections.

In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. In general, follow-up inspections shall take priority over all programmed inspections and any un-programmed inspection in which the hazards are anticipated to be other-than-serious.

NOTE: See [Chapter 7, Post-Citation Procedures and Abatement Verification](#), for additional information.

### 3. Monitoring Inspections.

When a monitoring inspection is necessary, the priority is the same as for a follow-up inspection.

NOTE: See [Chapter 7, Post-Citation Procedures and Abatement Verification](#), for additional information.

### 4. Employer Information Requests.

Contacts for technical information initiated by employers or their representatives will not trigger an inspection, nor will such employer inquiries protect the requesting employer against inspections conducted pursuant to existing policy, scheduling guidelines and inspection programs established by the division.

### 5. Reporting of Imminent Danger, Catastrophe, Fatality, Amputations, Accidents, Referrals or Complaints.

The Administrator and Branch Managers will act in accordance with established inspection priority procedures.

NOTE: See Section V. of this chapter, [Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling](#), for additional information.

### **C. Effect of Contest.**

If an employer has contested a citation and/or a penalty from a previous inspection at a specific worksite, and the case is still pending before the Hawaii Labor Relations Board, the following guidelines apply to additional inspections of the employer at that worksite:

1. If the employer has contested the penalty only, the inspection will be scheduled as if there were no contest;
2. If the employer has contested the citation itself or any items therein, then programmed and un-programmed inspections will be scheduled, but all items under contest will be excluded from the inspection unless a potential imminent danger is involved.

NOTE: See [Paragraph IV.B., Inspection Priority Criteria](#), of this chapter for additional information.

### **D. Enforcement Exemptions and Limitations.**

1. In providing funding for HIOSH through OSHA, Congress has consistently placed restrictions on enforcement activities for two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on OSHA activities, which also affects the state's ability to use federal matching funds, through the annual Appropriations Act.
2. Before initiating an inspection of an employer in these categories the Branch Manager will evaluate whether the Appropriations Act for the fiscal year would require the state to use 100% state funds for the inspection. Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition against the use of matching funds applies, the inspection shall continue, however, all time charges shall be made against the 100% state time code: 756.

NOTE: See [CPL 02-00-051](#), Enforcement Exemptions and Limitations under the Appropriation Act, dated May 28, 1998, adopted by HIOSH on July 10 1998, for additional information.

### **E. Preemption by another Federal Agency.**

1. Section 4(b)(1) of the OSH Act states that the Act does not apply to working conditions over which other federal agencies exercise statutory responsibility to prescribe standards for safety and health. This means that where OSHA is not able to grant the State jurisdiction over worker health and safety, the State may not conduct enforcement activities. See Chapter 17, Preemption by Other Agencies.
2. Note that pre-emption does not apply to conditions affecting the health and safety of a state or county employee. For example, if a state or county employee's vehicle used on public roadways is unsafe, HIOSH would have jurisdiction.
3. If a question arises, usually upon receipt of a complaint, referral, or other inquiry, consult the list of Memorandums of Understanding (MOU) on the OSHA website to determine if the issue has been previously addressed. A MOU is an agreement created to address/resolve coverage issues and to

improve the working relationships between other Federal agencies and organizations regarding employee safety and health.

4. At times, an inspection may have already begun when the coverage jurisdiction question arises. Any such situation will be brought to the attention of the Branch Manager as soon as they arise, and dealt with on a case-by-case basis.
5. Two examples of MOUs include the following:
  - a. Mine Safety and Health Administration – Interagency Agreement between the Mine Safety and Health Administration and OSHA, dated March 29, 1979.
  - b. United States Coast Guard/U.S. Department of Transportation – Authority of Coast Guard and OSHA regarding enforcement of safety and health standards aboard vessels inspected and certified by the Coast Guard, dated March 4, 1983.

#### **F. United States Postal Service.**

1. The Postal Employee Safety Enhancement Act of 1998 applies the Act to the U.S. Postal Service in the same manner as the Act applies to a private sector employer.
2. HIOSH, at the request of the post office employees, elected not to cover the U.S. Postal Service, as did all other states. Thus, Federal OSHA retains authority to cover the U.S. Postal Service nationwide. Federal coverage in State Plan States encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Coverage includes contractor-operated facilities engaged in mail operations and postal stations in public or commercial facilities. HIOSH continues to exercise jurisdiction over all other private sector contractors working on U.S. Postal Service sites who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction employees. See the Final Rule on State Plans Coverage of the U.S. Postal Service (*Federal Register*, June 9, 2000 (65 FR 36618))

#### **G. Home-Based Worksites.**

1. The division will not normally perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksites (e.g., filing, keyboarding, computer research, reading, and writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, and file cabinet).
2. HIOSH will only conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality.

NOTE: See Chapter 12, Section III, Home-Based Worksites for additional information

## **H. Inspection/Investigation Types.**

### **1. Un-programmed.**

Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as un-programmed. This type of inspection responds to:

- a. Imminent Dangers;
- b. Fatalities/catastrophes;
- c. Complaints; and
- d. Referrals.
- e. It also includes follow-up and monitoring inspections scheduled by the Branch.

NOTE: This category includes all employers/employees directly affected by the subject of the un-programmed inspection activity, and is especially applicable on multi-employer worksites.

NOTE: Not all complaints and referrals qualify for an inspection. See [Chapter 9, Complaint and Referral Processing](#), for additional information.

NOTE: See [Chapter 12, Specialized Inspection Procedures, Multi-Employer Workplace/Worksite](#) which incorporated CPL 02-00-124 (CPL 2-0.124), Multi-Employer Worksite Citation Policy, dated December 10, 1999, adopted by HIOSH on January 7, 2000 for additional information.

### **2. Un-programmed Related.**

Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as un-programmed related.

An example would be: A trenching inspection conducted at the un-programmed worksite where the trenching hazard was not identified in the complaint, accident report, or referral.

If the compliance officer does not observe or note a hazard involving another employer at a multi-employer worksite during the inspection of the employer who is the subject of the original un-programmed (or programmed) inspection, there would normally not be an un-programmed related inspection conducted. Just being at the same worksite will not trigger an un-programmed related inspection. The compliance officer will notate the reason, e.g., the hazard observed or noted, for expanding the original un-programmed inspection to other employers.

### **3. Programmed.**

Worksite safety and health inspections that have been scheduled based upon objective or neutral selection criteria are programmed inspections, such as the Inspection Scheduling System (ISS). The worksites are selected according to state scheduling plans for safety and for health or under local and national special emphasis programs.

### **4. Program Related.**



Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers. See 2.c. above for documenting when the compliance officer determines that conducting a program related inspection is necessary.

## **V. Un-programmed Activity – Hazard Evaluation and Inspection Scheduling.**

Enforcement procedures relating to un-programmed activity are located in subject specific chapters of this manual:

- ▶ Imminent Danger, see [Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.](#)
- ▶ Fatality/Catastrophe, see [Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.](#)
- ▶ Emergency Response, see [Chapter 11, Imminent Danger, Fatality, Catastrophe, and Emergency Response.](#)
- ▶ Complaint/Referral Processing, see [Chapter 9, Complaint and Referral Processing.](#)
- ▶ Whistleblower Complaints, see [Chapter 9, Complaint and Referral Processing.](#)
- ▶ Follow-ups and Monitoring, see [Chapter 7, Post-Citation Procedures and Abatement Verification.](#)

## **VI. Programmed Inspections.**

### **A. Inspection Scheduling System (ISS).**

In order to achieve HIOSH's goal of reducing the number of injuries and illnesses that occur at individual worksites, the Inspection Scheduling System (ISS) directs enforcement resources to those industries where the highest rates of injuries and illness have occurred, based on the Bureau of Labor Statistics (BLS) latest annual survey. The ISS is HIOSH's primary programmed inspection plan for non-construction worksites that have 11 or more employees.

The ISS is comprised of two lists: The primary inspection list and a secondary list. The primary inspection list is made up of all establishments that will be inspected within the fiscal year, and can therefore be inspected at any time during the fiscal year in order to efficiently utilize inspection resources. The primary list is comprised of establishments in industries with the highest injury and illness rates in the State, or those with high rates that appear to be trending upward. The secondary list is to be used if the primary list has been exhausted and may, therefore, not always be completed during the fiscal year. To ensure fairness and objectivity in inspections, the Research and Statistics Office (R&S) will apply a random number selection order to this secondary list. Compliance officers MUST inspect this list in the order given by R&S.

### **B. Scheduling for Construction Inspections.**

Due to the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve

more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. The Research & Statistics Office will provide a randomly selected list of construction projects from building permits issued by the various counties. This list will contain the projected number of sites per island and island area (Hawaii County) that HIOSH plans on inspecting during the next quarter, with a multiplication factor to consider projects which have already been completed or jobs not yet started.

Similar to the secondary ISS list for general industry, the inspections must be performed in the order given by R&S. If a project has been completed before the inspector arrives at the worksite, the compliance officer will so notate on the Inspection (OSHA-1). If the project has not yet started, the compliance officer may return at a later date during the quarter, and if the inspection is not able to be performed during the quarter, the worksite may be carried over into the next quarter if the branch manager so determines. This information must be notated in the Narrative (OSHA 1A), including the reason why it was necessary to carry over the worksite into the next quarter. Acceptable reasons may include the current phase and/or scope of the project.

### **C. Scheduling for Maritime Inspections**

Private sector businesses engaged in maritime activities remain under the jurisdiction of OSHA. The State, however, has authority over state and county public sector maritime employment. Such employment typically encompasses management and maintenance of harbors and piers where maritime activities may occur.

As the number of such employees is relatively small and the work performed is essentially incidental to maritime activities, no separate scheduling for maritime inspections is required. CSHOs will address hazards to such employees through un-programmed activities such as referral, complaints, and fatalities.

### **D. Special Emphasis Programs (SEPs).**

OSHA's Special Emphasis Programs provide for programmed inspections of establishments in industries with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. SEPs are also based on potential exposure to health hazards. HIOSH may choose to participate in one or more of OSHA's SEPs under the following circumstances:

1. Hawaii has sufficient numbers of the establishments with the SEP's selection criteria to be of concern; and
2. HIOSH has sufficient resources to effectively implement the SEP.

### **E. National Emphasis Programs (NEPs).**

OSHA develops National Emphasis Programs to focus outreach efforts and inspections on specific hazards in a workplace. HIOSH may choose to participate in one or more of OSHA's NEPs under the following circumstances:

1. Hawaii has sufficient numbers of the establishments within the industries identified in the NEP to be of concern; and
2. HIOSH has sufficient resources to effectively implement the NEP.

## **F. Local Emphasis Programs (LEPs).**

1. An LEP is a HIOSH initiated special emphasis program based on knowledge of local industry hazards or local industry injury/illness experience. Since it is a deviation from the regular Inspection Scheduling System, OSHA notification and approval is required. When approved, OSHA will assign a specific LEP code so that inspection activity under the LEP can be tracked for evaluation purposes.

NOTE: See CPL 04-00-001 (formerly CPL 2-0.102A), Procedures for Approval of Local Emphasis Programs (LEPs), dated November 10, 1999 and adopted by HIOSH on December 9, 1999, for additional information.

2. LEPs must only be utilized when data indicates that the numbers or severity of occupational fatalities, injuries or illnesses occurring within the particular industry or as a result of the specific process or equipment require immediate intervention. Under such circumstances resources must be applied to address the hazards on a priority basis.

## **G. Inspection Scheduling and Interface with Cooperative Program Participants.**

Employers who participate in voluntary compliance programs may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Branch Manager will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.

Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity:

- [Hawaii Voluntary Protection Program \(HVPP\)](#);
- [Pre-SHARP](#) and [SHARP](#) Participants;
- [Consultation 90-Day Deferrals](#); and
- [HIOSH Strategic Partnerships](#).

### **1. Hawaii Voluntary Protection Program.**

#### **a. HIOSH HVPP Coordinator Responsibilities.**

The HIOSH HVPP Coordinator must keep the Compliance Branch Managers informed regarding HVPP applicants and the status of participants in the HVPP. This will prevent unnecessary scheduling of programmed inspections at HVPP sites and ensure efficient use of resources. Branch Managers should be informed:

- That the site can be removed from the programmed inspection list. Such removal may occur no more than 75 days prior to the scheduled onsite evaluation date;
- Of the site's approval for the HVPP program;
- Of the site's withdrawal or termination from the HVPP program; and

- If the HIOSH HVPP Coordinator is the first person notified by the site of an event requiring enforcement; e.g. fatality, catastrophe, etc. he/she must immediately forward the information to the appropriate Branch Manager.
- b. Programmed Inspections and HVPP Participation.
  - **Inspection Deferral.**

Approved sites must be removed from any programmed inspection lists for the duration of participation, unless a site chooses otherwise. The applicant worksite will be deferred starting no more than 75 calendar days prior to the commencement of its scheduled pre-approval onsite review.
  - **Inspection Exemption.**

The exemption from programmed inspections for approved HVPP sites will continue for as long as they continue to meet HVPP requirements. Sites that have withdrawn or have been terminated from HVPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.
- c. Un-programmed Enforcement Activities at HVPP Sites.

When HIOSH receives a complaint, or a referral other than from the HIOSH HVPP onsite team, or is notified of a fatality, catastrophe, or other event requiring an enforcement inspection at a HVPP site, the Branch Manager must initiate the inspection following normal HIOSH enforcement procedures.

  - The Branch Manager must immediately notify the HIOSH HVPP Coordinator of any fatalities, catastrophes or other accidents or incidents occurring at a HVPP worksite that require an enforcement inspection; as well as of a referral or complaint that concerns a HVPP worksite, including complaint inquiries that would receive a letter response.
  - If the HIOSH HVPP Coordinator is the first person notified by the site of an event requiring an enforcement inspection, he/she must immediately notify the appropriate Compliance Branch Manager and the Administrator.
  - The inspection will be limited to the specific issue of the un-programmed activity. If citations are issued as a result of the inspection, a copy of the citation will be sent to the HIOSH HVPP Coordinator, who will determine whether the nature of the citations indicate a need to re-evaluate the HVPP status of the site. See CSP 03-01-003, *Voluntary Protection Programs (VPP): Policies and Procedures Manual*, dated April 18, 2008, adopted by HIOSH on December 27, 2014

## 2. Consultation.

- a. Consultation Visit in Progress.
  - If an onsite consultation visit is in progress, it will take priority over HIOSH programmed inspections as outlined below. An onsite consultation visit shall be considered to be a visit-in-progress in

relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates (including extensions). If an onsite consultation visit is already in progress it will terminate when the following kind of HIOSH compliance inspection is about to take place:

- Imminent danger inspection:
- Fatality/catastrophe inspection;
- Complaint inspections; and
- Other critical inspections, as determined by the Administrator (such as a reportable accident investigation)
- Other “critical inspections” may include, but are not limited to, referrals as defined in [Chapter 9, Complaint and Referral Processing](#). Following an evaluation of the hazards alleged in a referral, if the Administrator determines that enforcement action is required prior to the end of an abatement period established by the Consultation & Training (C&T) Branch, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.
- For purposes of efficiency and expediency, an employer’s worksite shall not be subject to concurrent consultation and enforcement-related visits. The following excerpts from CSP 02-00-003, *Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement*, dated November 19, 2015 and adopted by HIOSH on March 1, 2016, to clarify the interface between enforcement and consultation activity at the worksite:
  - Full Service Onsite Consultation Visits. If a worksite is undergoing a full service both (for both safety and health) onsite consultation visit, which provides a complete safety and health hazard survey of all working conditions, equipment, processes, and HIOSH-mandated safety and health programs at the worksite, programmed enforcement activity may not occur until after the end of the worksite’s visit-in-progress status.

When an employer requests a full service onsite consultation visit, it can be presumed that HIOSH consultants have identified all hazards and that the employer has subsequently corrected all hazards. Therefore, any enforcement activity should be deferred or delayed to the next inspection cycle.
  - Full-Service Safety or Health On-site Consultation Visits. When an on-site consultation visit-in-progress is discipline-related, whether for safety **or** health, programmed enforcement activity may not proceed until after the worksite’s visit “In Progress” status and is limited to the discipline NOT examined by the consultation visit.
  - Limited Service On-Site Consultation Visits. If a worksite is undergoing a limited-service on-site consultation visit, whether focused on a particular type of work process or hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement

activity must be limited to those areas not addressed by the scope of the consultative visit (posted List of Hazards).

The consultant must not inform the employer of any impending enforcement activity.

b. Enforcement Follow-Up and Monitoring Inspections.

If an enforcement follow-up or monitoring inspection is to be conducted while a worksite is undergoing an onsite consultation visit, the inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In these instances, the consultant must halt the onsite consultation visit until the enforcement inspection has been completed. In the event HIOSH issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit may not proceed regarding the newly cited item(s) until they have become final order(s).

c. Enforcement Programmed Inspections.

Onsite Consultation and 90-Day Deferral

- If an establishment has requested an initial full-service comprehensive consultation visit for safety **and** health from C&T Branch, and that visit has been scheduled (a definite date has been set), a programmed inspection may be deferred for 90 calendar days from the date of the notification by C&T to the Compliance Branch Managers, via memo and by posting on the “shared” internal site. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is “in progress.”
- HIOSH may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

NOTE: See CSP 02-00-003, Consultation Policies and Procedures Manual, Chapter 7: Relationship to Enforcement, dated November 19, 2015 and adopted by HIOSH on March 1, 2016, for additional information.

Severe Violator Enforcement Program (SVEP)

A company identified on the OSHA/HIOSH Severe Violator Enforcement Program (SVEP) list may still receive Onsite Consultation Services. Although the company is receiving consultation services, in this situation, Consultation visit-in-progress status does not block enforcement from performing an inspection.

**3. Pre-Safety and Health Achievement Recognition Program (Pre-SHARP) Status.**

- a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification

survey, including a comprehensive assessment of the worksite's safety and health management system.

- b. The deferral time frame recommended by the C&T Branch Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving Pre-SHARP status, employers may be granted a deferral from HIOSH programmed inspections. The following types of incidents can trigger a HIOSH enforcement inspection at Pre-SHARP sites:
  - Imminent danger;
  - Fatality/catastrophe; and
  - Formal complaints.

#### **4. Safety and Health Achievement Recognition Program (SHARP).**

SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from HIOSH programmed inspections, see §1908.7(b)(4) as amended by HIOSH [Refer to Chapter 12-160, HAR]

##### **a. Duration of SHARP Status.**

All initial approvals of SHARP status will be for a period of up to two years, commencing with the date the Administrator approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of up to three years.

##### **b. HIOSH Inspection(s) at SHARP Worksites.**

As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from HIOSH's Programmed Inspection Schedule. However, pursuant to §1908.7(b)(4)(ii), the following types of incidents can trigger a HIOSH enforcement inspection at SHARP sites: [imminent danger](#); [fatality/catastrophe](#); or [formal complaints](#).

*NOTE: See CSP 02-00-003, Consultation Policies and Procedures Manual, Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-SHARP, dated November 19, 2015 and adopted by HIOSH on March 1, 2016, for additional information.*

#### **5. HIOSH Strategic Partnership Program (HSPP).**

At HIOSH's discretion, an establishment operated by a partner may receive a limited scope or "focused inspection" in which the focus is limited to specific hazards, hazardous areas, operations, conditions or practices at the establishment.

Since, SHARP or HVPP status is available to all employers in the state, offering inspection deferral or exemption to strategic partners undermines participation in these other programs, and is therefore, not available to them.

*Note: See GOSH Focused Inspections in General Industry dated September 19, 2001, revised on January 30, 2003.*

## **Chapter 3**

### **INSPECTION PROCEDURES**

#### **I. Inspection Preparation.**

The conduct of effective inspections requires judgment in the identification, evaluation, and documentation of safety and health conditions and practices. Inspections may vary considerably in scope and detail depending on the circumstances of each case.

#### **II. Inspection Planning.**

It is important that the Compliance Officer (CSHO) adequately prepare for each inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection.

##### **A. Review of Inspection History.**

1. Compliance Officers will carefully review data available at the Office for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the industry. CSHOs will also conduct an establishment search by accessing the OIS database. CSHOs should use name variations and address-matching in their establishment search to maximize their efforts due to possible company name changes and status (e.g., LLC, Inc.).
2. If an establishment has an inspection history that includes citations received while performing work in other jurisdictions, i.e. OSHA or other states, CSHOs should be aware of this information. This inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and may be considered in determining eligibility for the history penalty reduction. However, the federal OSHA or other state citation may **not** be used to support a repeat violation.

##### **B. Review of Cooperative Program Participation.**

CSHOs will access the Inspection Exemption list in the shared drive to obtain information about employers who are currently participating in cooperative programs. CSHOs will verify whether the employer is a current program participant during the opening conference. CSHOs will be mindful of whether they are preparing for a programmed or un-programmed inspection, as this may affect whether the inspection should be conducted and/or its scope. See [Paragraph V.D. of this chapter, Review of Voluntary Compliance Programs.](#)

##### **C. Safety and Health Issues Relating to CSHOs.**

###### **1. Hazard Assessment.**

If the employer has a written certification that a hazard assessment has been performed pursuant to §1910.132(d), the CSHO shall request a copy. If the hazard assessment itself is not in writing, the CSHO shall ask the person who signed the certification to describe all potential workplace hazards and then select appropriate protective equipment. If there is no hazard assessment, the



CSHO will determine potential hazards from sources such as the OSHA 300 Log of injuries and illnesses and shall select personal protective equipment accordingly.

## **2. Respiratory Protection.**

CSHOs must wear respirators when and where required, and must care for and maintain respirators in accordance with the CSHO training provided.

- a. CSHOs should conduct a pre-inspection evaluation for potential exposure to chemicals. Prior to entering any hazardous areas, the CSHO should identify those work areas, processes, or tasks that require respiratory protection. The hazard assessment requirement in §1910.132(d) does not apply to respirators; see CPL 02-02-054, *Respiratory Protection Program Guidelines*, dated July 14, 2000. CSHOs should review all pertinent information contained in the establishment file and appropriate reference sources to become knowledgeable about the industrial processes and potential respiratory hazards that may be encountered. During the opening conference, a list of hazardous substances should be obtained or identified, along with any air monitoring results. CSHOs should determine if they have the appropriate respirator to protect against chemicals present at the work site.
- b. CSHOs must notify their supervisor or the respiratory protection program administrator:
  - If a respirator no longer fits well (CSHOs should request a replacement that fits properly);
  - If CSHOs encounter any respiratory hazards during inspections or on-site visits that they believe have not been previously or adequately addressed during the site visit; or
  - If there are any other concerns regarding the program.

## **3. Safety and Health Rules and Practices.**

Section 12-51-7(c) requires that CSHOs comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by HIOSH standards or by the employer for the protection of employees.

## **4. Restrictions.**

CSHOs will not enter any area where special entrance restrictions apply until the required precautions have been taken. It shall be the Branch Manager's responsibility to determine that an inspection may be conducted without exposing the CSHO to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.

NOTE: Also such restrictions apply 1) to facilities where incidents of workplace violence precipitated the inspections and 2) in industries OSHA has identified as having a high risk for workplace violence (specifically: late-night retail, social service and health care settings, and correctional facilities).

## **5. Workplace Violence – CSHO Training and Workplace Violence Prevention Programs.**

- a. CSHO Training.

Prior to conducting an inspection in response to a complaint of a workplace violence, a CSHO must have received training that addresses the issues of workplace violence. Such training should include OSHA's 1000 Course, HIOSH Office training, or other similar course work.

b. DLIR Workplace Violence Prevention Programs.

- CSHOs should be aware and familiar with the DLIR workplace violence program, located on the DLIR Intranet.
- CSHOs should also be aware and familiar with the OSHA Safety and Health Management System, ADM 04-00-001, (May 23, 2011), as a guide.

c. Establishment Workplace Violence Prevention Programs.

If the employer is in an industry OSHA has identified as a high risk for workplace violence (such as late-night retail, social service, and health-care settings, and correctional facilities) the CSHO should inquire about the existence of a workplace violence prevention program. If such a program exists, the CSHO shall ask the person responsible for the program to describe all the potential workplace violence hazards. If there is no workplace violence prevention plan, the CSHO will determine potential workplace violence hazards from sources such as the OSHA 300 log of injuries and illnesses and other relevant records.

NOTE: if training is provided to staff members on workplace violence, the CSHO should conduct the inspection with a staff member who has received the training. If the CSHO does not deem that the existing protections are sufficient, the CSHO should not enter the facility or area within the facility that he or she considers dangerous.

d. CSHOS must notify their supervisor if they experience or witness any incident of workplace violence.

**D. Advance Notice of an Inspection.**

**1. Policy.**

§396-4(b)(6), Hawaii Revised Statutes contains a general prohibition against the giving of advance notice of inspections, except as authorized by the director or the director's designee. The Law regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Law prohibits unauthorized advance notice, and further applies a penalty of up to \$1,100 and/or imprisonment of up to six months for unauthorized advance notice.

a. Advance Notice Exceptions.

There may be occasions when advance notice is necessary to conduct an effective investigation. These occasions are narrow exceptions to the statutory prohibition against advance notice. Advance notice of inspections may be given only with the authorization of the Branch Manager or Administrator and only in the following situations:

- In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;

- When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary;
- To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
- When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

NOTE: The regulation at §12-51-6(b), HAR says that except in imminent danger situations and in other unusual circumstances, the advance notice authorized here “shall not be given more than twenty-four hours before the inspection is scheduled to be conducted.”

b. Delays.

Advance notice exists whenever HIOSH sets up a specific date or time with the employer for the CSHO to begin an inspection. Any delays in the conduct of the inspection shall be kept to an absolute minimum. Lengthy or unreasonable delays shall be brought to the attention of the Branch Manager. Advance notice generally does not include non-specific indications of potential future inspections.

In unusual circumstances, the Branch Manager may decide that a delay is necessary. In those cases, the employer or the CSHO shall notify affected employee representatives, if any, of the delay and shall keep them informed of the status of the inspection.

**2. Documentation.**

The conditions requiring advance notice and the procedures followed shall be documented in the case file.

**E. Pre-Inspection Compulsory Process.**

§12-51-4(b), HAR, authorizes the division to seek a warrant in advance of an attempted inspection if circumstances are such that “pre-inspection process (is) desirable or necessary.” §396-4(d)(5), HRS authorizes the division to issue administrative subpoenas to obtain evidence related to a HIOSH inspection or investigation. See Chapter 15, Legal Issues.

**F. Personal Security Clearance.**

Some establishments have areas that contain material or processes that are classified by the U.S. Government in the interest of national security. Whenever an inspection is scheduled for an establishment containing classified areas, the Branch Manager shall assign a CSHO who has the appropriate security clearances. The ATS Branch Manager shall ensure that an adequate number of CSHOs with appropriate security clearances are available within the state and that the security clearances are current.

**G. Expert Assistance.**

1. The Branch Manager shall arrange for a specialist and/or specialized training, preferably from within HIOSH or OSHA, to assist in an inspection or investigation when the need for such expertise is identified. Outside consultants may also be procured.

2. OSHA specialists may accompany CSHOs or perform their tasks separately. CSHOs must accompany outside consultants. OSHA specialists and outside consultants shall be briefed on the purpose of the inspection and personal protective equipment to be utilized.

### **III. Inspection Scope.**

Inspections, either programmed or un-programmed, fall into one of two categories depending on the scope of the inspection:

#### **A. Comprehensive.**

A comprehensive inspection is a substantially complete and thorough inspection of all potentially hazardous areas of the establishment. An inspection may be deemed comprehensive even though, as a result of professional judgment, not all potentially hazardous conditions or practices within those areas are inspected.

#### **B. Partial.**

A partial inspection is one whose focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment.

1. A partial inspection may be expanded based on information gathered by the CSHO during the inspection process consistent with the Law and HIOSH priorities.
2. CSHOs shall use established written guidelines and criteria, such as HIOSH directives or guidelines, and LEPs, in conjunction with information gathered during the records or program review and walkaround inspection, to determine whether expanding the scope of an inspection is warranted.

### **IV. Conduct of Inspection.**

#### **A. Time of Inspection.**

1. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.
2. The Branch Manager and the CSHO shall determine if alternate work schedules are necessary regarding entry into an inspection site during other than normal working hours.

The Branch Manager must be cognizant of the appropriate collective bargaining unit contract when either temporarily modifying a CSHO's work schedule or requiring overtime. When the work day is to be significantly modified, overtime should rarely be an option, as the CSHO would also still be required to be on duty during his/her regular work shift.

#### **B. Presenting Credentials.**

1. CSHOs are to present their credentials whenever they make contact with management representatives, employees (to conduct interviews), or organized labor representatives while conducting their inspections.
2. At the beginning of the inspection, the CSHO shall locate the owner representative, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor.

3. CSHOs should make sure that the person does actually represent owner/management and has the authority to allow the CSHO onto the worksite or work project by asking appropriate questions. If the individual cannot definitely state that they have such authority, the CSHO is to ask them to contact the employer by telephone and either obtain verbal approval to proceed with the inspection or await their arrival. See item 4. below,
4. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. If the employer representative is coming from off-site, the inspection should not be delayed in excess of **45** minutes. If the workforce begins to depart from the worksite, the CSHO should contact the Branch Manager or Administrator for guidance. If the person in charge at the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

### **C. Refusal to Permit Inspection and Interference.**

§396-4(b)(1), Hawaii Revised Statutes, provides that CSHOs may enter without delay during regular working hours and at reasonable times any establishment covered under the Law for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

NOTE: On a military base or other Federal Government facility, the following guidelines do not apply. Instead, a representative of the controlling authority shall be informed of the contractor's refusal and asked to take appropriate action to obtain cooperation.

#### **1. Refusal of Entry or Inspection.**

- a. When the employer refuses to permit entry upon being presented proper credentials, or allows entry but then refuses to permit or hinders the inspection in some way, an attempt shall be made to obtain as much information as possible about the establishment. See [Chapter 15, Legal Issues](#), for additional information.
- b. If the employer refuses to allow an inspection of the establishment to proceed, the CSHO shall leave the premises and immediately report the refusal to the Branch Manager. The Branch Manager shall notify the Deputy Attorney General (DAG).
- c. If the employer raises no objections to inspection of certain portions of the workplace but objects to inspection of other portions, this shall be documented. Normally, the CSHO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.
- d. In either case, the CSHO shall advise the employer that the refusal will be reported to the Branch Manager and that the division may take further action, which may include obtaining legal process; i.e. search warrant.
- e. On multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry.

## **2. Employer Interference.**

Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine whether or not to consider this action as a refusal. See §12-51-4(a).

Examples of interference are employer refusals to permit:

- the walkaround;
- the examination of records essential to the inspection;
- the taking of essential photographs and/or videotapes;
- the inspection of a particular part of the premises;
- private employee interviews; or
- the attachment of sampling devices.

## **3. Forcible Interference with Conduct of Inspection or Other Office Duties.**

Whenever a HIOSH employee encounters forcible resistance, opposition, interference, etc., or is assaulted or threatened with assault while engaged in the performance of official duties, all investigative activity shall cease.

- a. If a CSHO is assaulted while attempting to conduct an inspection or at any other time, they shall contact the proper authorities such as the police and immediately notify the Branch Manager.
- a. Upon receiving a report of such forcible interference, the Branch Manager shall immediately notify the Administrator.
- b. If working at an offsite location, CSHOs should leave the site immediately to a safe location pending further instructions from the Branch Manager.

## **4. Obtaining Compulsory Process.**

If it is determined, upon refusal of entry or refusal to produce evidence required by subpoena, that a warrant will be sought, the Branch Manager shall proceed according to guidelines and established procedures warrant applications. See [Chapter 15. Legal Issues](#).

## **D. Employee Participation.**

CSHOs shall advise employers that §396-8(c), HRS and §12-51-8, HAR require that an employee representative be given an opportunity to participate in the inspection.

1. CSHOs shall determine as soon as possible after arrival whether the workers at the inspected worksite are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the inspection.
2. If an employer resists or interferes with participation by employee representatives in an inspection and the interference cannot be resolved by the CSHO, the resistance shall be construed as a refusal to permit the inspection and the Branch Manager shall be contacted.

### **E. Release for Entry.**

1. CSHOs shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.
2. CSHOs may obtain a pass or sign a visitor's register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution of liability under the Law.

### **F. Bankrupt or Out of Business.**

1. If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the CSHO shall report the facts to the Branch Manager.
2. If an employer, although bankrupt, is continuing to operate on the date of the scheduled inspection, the inspection shall proceed.
3. An employer must comply with the Law until the day the business actually ceases to operate.

### **G. Employee Responsibilities.**

1. §396-8(a) of the Law states: "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued under this chapter which are applicable to his own actions and conduct." The Law does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
2. In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Branch Manager who shall consult with the Administrator.
3. Under no circumstances are CSHOs to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with the Law. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

### **H. Strike or Labor Dispute.**

Plants or establishments may be inspected regardless of the existence of labor disputes, such as work stoppages, strikes or picketing. If the CSHO identifies an unanticipated labor dispute at a proposed inspection site, the Branch Manager shall be consulted before any contact is made.

#### **1. Programmed Inspections.**

Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two unions competing for bargaining rights in the establishment.

#### **2. Un-programmed Inspections.**

- a. Un-programmed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the credibility and veracity of any complaint shall be thoroughly assessed by the Branch Manager prior to scheduling an inspection.
- b. If there is a picket line at the establishment, CSHOs shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.
- c. During the inspection, CSHOs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.

## **I. Variances.**

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in §396-4(a)(3) of the Law.

1. An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.
2. In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.
3. In no case, shall a citation be issued for failure to comply with all of the terms of the variance only – there must be a specific violation of an applicable standard i.e. a hazard. Should the terms of the variance not be met, a memo shall be submitted to ATS Branch with the details of the failure to comply with the terms of the variance. The ATS manager, in consultation with the Administrator, may take appropriate action, including suspension or revocation of the variance.

## **V. Opening Conference.**

### **A. General.**

CSHOs shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and include any employee representatives, unless the employer objects. The opening conference should be brief so that the compliance officer may quickly proceed to the walkaround. Conditions of the worksite shall be noted upon arrival, as well as any changes that may occur during the opening conference. At the start of the opening conference, CSHOs will inform both the employer and the employee representative(s) of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace. HIOSH Publication, Employer's Bill of Rights, may be distributed.

CSHOs shall request a copy of the written certification that a hazard assessment has been performed by the employer in accordance with §1910.132(d). CSHOs should then ask the person who signed the certification about any potential worksite exposures and select appropriate personal protective equipment.

#### **1. Attendance at Opening Conference.**

- a. CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.
- b. If there is objection to a joint conference, the CSHO shall conduct separate conferences with employer and employee representatives.



## **2. Scope of Inspection.**

CSHOs shall outline in general terms the scope of the inspection, including the need for private employee interviews, physical inspection of the workplace and records, possible referrals, rights during an inspection, discrimination complaints, and the closing conference(s).

## **3. Video/Audio Recording.**

CSHOs shall inform participants that a video camera and/or an audio recorder may be used to provide a visual and/or audio record, and that the videotape and audiotape may be used in the same manner as handwritten notes and photographs in HIOSH inspections.

NOTE: If an employer clearly refuses to allow videotaping during an inspection, CSHOs shall contact the Branch Manager to determine if videotaping is critical to documenting the case. If it is, this may be treated as a denial of entry.

## **4. Immediate Abatement.**

CSHOs should explain to employers the advantages of immediate abatement, including that there are no certification requirements for violations quickly corrected during the inspection. See [Chapter 7, Post-Inspection Procedures and Abatement Verification](#).

## **5. Recordkeeping Rule**

- a. The recordkeeping regulation at §1904.40(a) [see *Chapter 52.1, HAR*] states that once a request is made, an employer must provide the required recordkeeping records within four (4) business hours. The term business hour is when the location in Hawaii is normally open for business.
- b. Although the employer has four hours to provide injury and illness records, the compliance officer is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed the compliance officer is to begin the walkaround portion of the inspection.

NOTE: 29 CFR Part 1904 [See Chapter 52.1, HAR] has new requirements for reporting work-related fatalities, hospitalizations, amputations, or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction, and on **Insert date** for workplaces under HIOSH jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 19, 2014.)

## **6. Abbreviated Opening Conference.**

An abbreviated opening conference shall be conducted whenever the CSHO believes that circumstances at the worksite dictate the walkaround begin as promptly as possible.

- a. In such cases, the opening conference shall be limited to:
  - presenting credentials;
  - stating the purpose of the visit;

- explaining employer and employee rights; and
- requesting employer and employee representatives.

All other elements shall be fully addressed during the closing conference(s).

- b. Pursuant to §396-8(c) of the Law, the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

## **B. Review of Appropriation Act Exemptions and Limitation.**

CSHOs shall determine if the employer is covered by any limitations noted in the current Appropriations Act. See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, adopted by HIOSH on July 10, 1998. If the employer is covered, the notes shall so indicate, but the inspection shall still proceed. 100% state funds must be used for such inspections.

## **C. Review Screening for Process Safety Management (PSM) Coverage.**

CSHOs shall request a list of the chemicals on-site and their respective maximum intended inventories. CSHOs shall review the list of chemicals and quantities, and determine if there are highly hazardous chemicals (HHCs) listed in §1910.119, Appendix A or flammable liquids or gases at or above the specified threshold quantity. CSHOs may ask questions, conduct interviews, and/or conduct a walkaround to confirm the information on the list of chemicals and maximum intended inventories.

1. If there is an HHC present at or above threshold quantities, CSHOs shall use the following criteria to determine if any exemptions apply:
  - a. CSHOs shall confirm that the facility is not a retail facility, oil or gas well drilling or servicing operation, or normally unoccupied remote facility (§1910.119(a)(2)). If the facility is one of these types of establishments, PSM does not apply.
  - b. If management believes that the process is exempt, CSHOs shall ask the employer to provide documentation or other information to support that claim.
2. According to §1910.119 (a)(1)(ii), a process could be exempt if the employer can demonstrate that the covered chemical(s) are:
  - a. Hydrocarbon fuels used solely for workplace consumption as a fuel (e.g., propane used for comfort heating, gasoline for vehicle refueling), if such fuels are not a part of a process containing another highly hazardous chemical covered by the standard, or
  - b. Flammable liquids with a flashpoint below 100°F (37.8°C) stored in atmospheric tanks or transferred, which are kept below their normal boiling point without the benefit of chilling or refrigeration.

NOTE: Current agency policies for applying exemptions can be found on the OSHA website. See CPL 03-00-010, *Petroleum Refinery Process Safety Management National Emphasis Program*, dated August 18, 2009, adopted by HIOSH on October 1, 2009.

## **D. Review of Voluntary Compliance Programs.**

Employers who participate in selected voluntary compliance programs may be exempted from programmed inspections. CSHOs shall determine whether the employer falls under such an exemption during the opening conference.

### **1. OSHA On-Site Consultation Visits.**

- a. In accordance with §1908.7 and Chapter VII of CSP 02-00-003, *The Consultation Policies and Procedures Manual*, CSHOs shall ascertain at the opening conference whether an OSHA-funded (21(d)) consultation visit is in progress. A consultation visit-in-progress extends from the beginning of the opening conference to the end of the correction due dates (including extensions).
- b. An on-site consultation visit-in-progress has priority over programmed inspections except for imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the Administrator. See §1908.7(b)(2).

### **2. Safety and Health Achievement Recognition Program (SHARP).**

- a. Although any SHARP and Pre-SHARP employer should have been identified by the CSHO during the inspection preparation period, should the employer claim the inspection exemption, the CSHO should verify the status by requesting a copy of the participation letter. If the employer is not able or willing to produce the letter accepting them into SHARP or Pre-SHARP, the CSHO shall contact the Branch Manager to assist in determining the actual status of the employer. Once verified, the log of SHARP participants in the HIOSH shared file shall be amended to reflect the employer's participation status, and the inspection deferred for the approved exemption period.
- b. The initial exemption period is up to two years. The renewal exemption period is up to three years, based on the recommendation of the Consultation Project Manager.

### **3. Hawaii Voluntary Protection Program (HVPP).**

Inspections at a HVPP site may be conducted in response to referrals, formal complaints, fatalities, and catastrophes.

NOTE: A Compliance Officer who was previously an HVPP on-site team member will generally not conduct an enforcement inspection at that HVPP site for the following 2 years or until the site is no longer a HVPP participant, whichever occurs first. See CSP 03-01-003, Voluntary Protection Programs (VPP): Policies and Procedures Manual, dated April 18, 2008, and adopted by HIOSH on December 27, 2014.

## **E. Disruptive Conduct.**

CSHOs may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. See §1903.8(d). If disruption or interference occurs, the CSHO shall contact the Branch Manager or designee as to whether to suspend the walkaround or take other action. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

## **F. Classified Areas.**

In areas containing information classified by an agency of the U.S. Government in the interest of national security, only persons authorized to have access to such information may accompany a CSHO on the inspection. See §12-51-8(e), HAR.

# **VI. Review of Records.**

## **A. Injury and Illness Records.**

### **1. Collection of Data.**

- a. At the start of each inspection, the CSHO shall review the employer's injury and illness records for five prior calendar years, record the information on a copy of the OSHA-300 screen, and enter the employer's data using the OIS Application on the NCR (micro). This shall be done for all general industry, construction, maritime, and agriculture inspections and investigations.
- b. CSHOs shall use these data to calculate the Days Away, Restricted, or Transferred (DART) rate and to observe trends, potential hazards, types of operations and work-related injuries
- c. If recordkeeping deficiencies or unsound employer safety incentive policies are discovered, the CSHO and the Branch Manager may request assistance from the ATS Manager, who may coordinate technical assistance from the OSHA Regional Recordkeeping Coordinator. See Richard E. Fairfax Memo, *Employer Safety Incentive and Disincentive Policies and Procedures* (March 12, 2012) at: <http://www.osha.gov/as/opa/whistleblowermemo.html>.

### **2. Information to be Obtained.**

- a. CSHOs shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees.
- b. If CSHOs have questions regarding a specific case on the log, they shall request the OSHA-301s or equivalent form for that case.
- c. CSHOs shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

NOTE: The total hours worked and the average number of employees for each year can be found on the OSHA-300A for all past years.

### **3. Automatic DART Rate Calculation.**

CSHOs will not normally need to calculate the Days Away, Restricted, or Transferred (DART) rate since it is automatically calculated when the OSHA-300 data are entered into the OIS. If one of the five years is a partial year, so indicate and the software will calculate accordingly.

### **4. Manual DART Rate Calculation.**

If it is necessary to calculate rates manually, the CSHO will need to calculate the DART Rates individually for each calendar year using the following procedures. The DART rate includes cases involving days away from work, restricted work activity, and transfers to another job.

The formula is:

**$(N/EH) \times (200,000)$**  where:

- **N** is the number of cases involving days away and/or restricted work activity and job transfers.
- **EH** is the total number of hours worked by all employees during the calendar year; and
- **200,000** is the base number of hours worked for 100 full-time equivalent employees.

**EXAMPLE 3-1:** Employees of an establishment (XYZ Company), including management, temporary and leased workers, worked 645,089 hours at XYZ company. There were 22 injury and illness cases involving days away and/or restricted work activity and/or job transfer from the OSHA-300 Log (total of column H plus column I). The DART rate would be  $(22 \div 645,089) \times (200,000) = 6.8$ .

#### **5. Construction.**

For construction inspections/investigations, only the OSHA-300 information for the prime/general contractor need be recorded where such records exist and are maintained. It will be left to the discretion of the Branch Manager or the CSHO as to whether OSHA-300 data should also be recorded for any of the subcontractors.

### **B. Recording Criteria.**

Employers must record new work-related injuries and illnesses that meet one or more of the general recording criteria or meet the recording criteria for specific types of conditions.

1. Death;
2. Days Away from Work;
3. Restricted Work;
4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in §1904.8 through §1904.11. (see Chapter 12-52.1, HAR, Recording & Reporting Occupational Injuries and Illnesses)

### **C. Recordkeeping Deficiencies.**

1. If recordkeeping deficiencies are suspected, the CSHO and the Branch Manager or designee may request assistance from the ATS Branch Manager. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.
2. Other information related to this topic:
  - a. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, dated September 3, 2004, and CPL 02-02-072, *Rules of Agency Practice and Procedure concerning OSHA Access to Employee Medical Records*

*for Policy Regarding Review of Medical and Exposure Records*, dated August 22, 2007, adopted by HIOSH on December 19, 2007.

- b. Other OSHA programs and records will be reviewed including hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary.
- c. Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.
- d. There are several types of workplace policies and practices that could discourage employee reports of injuries and could constitute a violation of section 8(e) of the HIOSH Law. These policies and practices, otherwise known as employer safety incentive and disincentive policies and practices, may also violate OSHA/HIOSH recordkeeping regulations. OSHA enumerated the most common potentially discriminatory policies in the (March 12, 2012) Memorandum from OSHA Deputy Asst. Sec. Richard E. Fairfax: Employer Safety Incentive and Disincentive Policies and Practices. (<http://www.osha.gov/as/opa/whistleblowermemo.html>)

## **VII. Walkaround Inspection.**

The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. CSHOs shall conduct the inspection in such a manner as to avoid unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent possible.

### **A. Walkaround Representatives.**

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee. At establishments where more than one employer is present or in situations where groups of employees have different representatives, it is acceptable to have a different employer/employee representative for different phases of the inspection. More than one employer and/or employee representative may accompany the CSHO throughout or during any phase of an inspection if the CSHO determines that such additional representatives will aid, and not interfere with, the inspection. See §12-51-8(a).

The importance of worker protection to an effective workplace safety and health inspection was clearly established in §396-8(c), HRS, which provides that “an opportunity shall be provided for employees and their representatives to bring possible violations to the attention of the authorized representative of the director conducting said inspection in order to aid inspections. This requirement may be fulfilled by allowing a representative of the employees and a representative of the employer to accompany the director's authorized representative during the physical inspection of the workplace, or in absence of the employees' representative, there shall be a consultation with a reasonable number of employees.”

However, §12-51-8(e), HAR, states that “Safety and health compliance officers are authorized to deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection,” which includes any activity not directly related to conducting an effective and thorough physical inspection of the workplace.

**1. Employees Represented by a Certified or Recognized Bargaining Agent.**

During the opening conference, the highest ranking union official or union employee representative on-site shall designate who will participate in the walkaround. HIOSH administrative rule §12-51-8(b) gives the CSHO the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. Section 12-51-8(c), HAR, states that the representative authorized by the employees should be an employee of the employer. If in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany CSHOs during the inspection. It is HIOSH's view that representatives are "reasonably necessary", when they make a positive contribution to a thorough and effective inspection.

**2. No Certified or Recognized Bargaining Agent.**

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for HIOSH inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround.

If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

In some cases, workers without a certified or recognized bargaining agent may authorize third party organizations and/or individuals to be their representatives during an inspection. As with non-employee representatives authorized by workers with a recognized bargaining agent, allowing this category of third party representative to accompany HIOSH compliance officers on an inspection is appropriate if the representative will help achieve an effective and thorough health and safety inspection. The purpose of a walkaround representative is to assist the inspection by helping the compliance officer receive valuable health and safety information from workers who may not be able or willing to provide such information absent the third party participants.

**3. Safety Committee or Employees at Large.**

Employee members of an established plant safety committee or employees at large may designate an employee representative for HIOSH inspection purposes.

**B. Evaluation of Safety and Health Management System.**

The employer's compliance with Hawaii's safety and health program requirement shall be evaluated to determine compliance with the law, to determine good faith for the purposes of penalty calculation, as well as to assist the employer in improving their overall injury and illness prevention program. [See Chapter 6, Penalties and Debt Collection.](#)

### **C. Record All Facts Pertinent to a Violation.**

1. Safety and health violations shall be brought to the attention of employer and employee representatives at the time they are documented.
2. CSHOs shall record, at a minimum, the identity of the exposed employee(s), the hazard to which the employee was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, the manner in which important measurements were obtained, and how long the condition has existed.
3. CSHOs will document interview statements in a thorough and accurate manner; including names, dates, times, locations, type of materials, positions of pertinent articles, witnesses, etc.

NOTE: If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed. See [Chapter 4, Violations](#) and [Chapter 5, Case File Preparation and Documentation](#).

### **D. Testifying in Hearings.**

CSHOs may be required to testify in hearings on HIOSH's behalf, and shall be mindful of this fact when recording observations during inspections. The case file shall reflect conditions observed in the workplace as accurately and detailed as possible.

### **E. Trade Secrets.**

A trade secret, as referenced in Section 396-13 of the Law, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

#### **1. Policy.**

It is essential to the effective enforcement of the Law that CSHOs and HIOSH personnel preserve the confidentiality of all information and investigations which might reveal a trade secret.

#### **2. Restriction and Controls.**

At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the CSHO has no clear reason to question such identification, information obtained in such areas, including all negatives, photographs, videotapes, environmental samples and HIOSH documentation forms, shall be labeled:

"CONFIDENTIAL - TRADE SECRET"

- a. Under Section 396-13 of the Law, all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other HIOSH officials concerned with the enforcement of the Law or, when relevant, in any proceeding under the Law.



- b. Trade secret materials shall not be labeled as "Top Secret," or "Secret," nor shall these security classification designations be used in conjunction with other words unless the trade secrets are also classified by an agency of the U.S. Government in the interest of national security.
3. If the employer objects to the taking of photographs and/or video-tapes because trade secrets would or may be disclosed, CSHOs should advise the employer of the protection against such disclosure afforded by Section 396-13 of the Law and §12-51-9, HAR. If the employer still objects, CSHOs shall contact the Branch Manager or Administrator.

#### **F. Collecting Samples.**

1. CSHOs shall determine early in the inspection whether sampling such as, but not limited to, air sampling and surface sampling is required, by utilizing the information collected during the walk around and from the pre-inspection review.
2. Summaries of sampling results shall be provided on request to the appropriate employees (including those exposed or likely to be exposed to a hazard), to employer representatives and to employee representatives.

#### **G. Photographs and Videotapes.**

1. Photographs and/or videotapes, shall be taken whenever CSHOs determine there is a need.
  - a. Photographs that support violations shall be properly labeled, and may be attached to the appropriate *Violation (OSHA-1B)*.
  - b. CSHOs shall ensure that any photographs relating to confidential trade secret information are identified as such and are kept separate from other evidence.
2. All film and photographs or videotape shall be retained in the case file. If lack of storage space does not permit retaining the film, photographs or videotapes with the file, they may be stored elsewhere with a reference to the corresponding inspection. Videotapes shall be properly labeled. For more information regarding guidelines for case file documentation with video, audio and digital media, see OSHA Instruction CPL 2-98 (02-00-098), *Guidelines for Case File Documentation for Use with Videotapes and Audiotapes*, dated October 12, 1993, adopted by HIOSH on December 20, 1993, [and any other directives related to photograph and videotape retention.]

#### **H. Violations of Other Laws.**

If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency via the Administrator's office.

#### **I. Interviews of Non-Managerial Employees.**

A free and open exchange of information between CSHOs and employees is essential to an effective inspection. Interviews provide an opportunity for employees to supply valuable factual information concerning hazardous conditions, including information on how long workplace conditions have existed, the number and extent of employee exposure(s) to a hazardous condition, and the actions of management regarding correction of a hazardous condition.

## **1. Background.**

- a. Section 396-4(b)(5), HRS authorizes CSHOs to question **any employee privately** during regular working hours or at other reasonable times during the course of a HIOSH inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is HIOSH's right.
- b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.
- c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards.
- d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Branch Manager or Administrator, in determining the need for the statement.

## **2. Employee Right of Complaint.**

CSHOs may consult with any employee who desires to discuss a potential violation. Upon receipt of such information, CSHOs shall investigate the alleged hazard, where possible, and record the findings.

## **3. Time and Location of Interview.**

CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround, but may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. CSHOs should consult with the Branch Manager if an interview is to be conducted someplace other than the workplace. Where appropriate, HIOSH has the authority to subpoena an employee to appear at the Office for an interview.

Interviews should not be conducted at the employee's home. If the interview of a particular employee who is unable to leave his or her home is determined to be critical to the inspection/investigation, another CSHO should be present to ensure safety of the inspection team.

## **4. Conducting Interviews of Non-Managerial Employees in Private.**

CSHOs shall inform employers that interviews of non-managerial employees will be conducted in private. CSHOs are entitled to question such employees in private regardless of employer preference. If an employer interferes with a CSHOs ability to do so, the CSHO should request that the Branch Manager consult with DAG to determine appropriate legal action. Interference with a CSHO's ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.

## **5. Conducting Employee Interviews.**

a. General Protocols.

- At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials, and provide the employee with a business card. This allows employees to contact CSHOs if they have further information at a later time.
- CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If an interpreter is needed, the Branch Manager should be consulted. If the Branch Manager agrees that the employee's information is critical, he/she shall arrange for an interpreter.
- Every employee should be asked to provide his or her name, home address and phone number. CSHOs should request identification and make clear the reason for asking for this information, i.e. should there be a need to obtain additional information or a need to testify. CSHOs should advise the employee that the division will make every attempt to keep their names and statements confidential and should there be a need to appear at a hearing, they would be asked for their consent.
- CSHOs shall inform employees that OSHA has the right to interview them in private and of the protections afforded under Section 396-8(e) of the Law.
- In the event an employee requests that a representative of the union be present, CSHOs shall make a reasonable effort to honor the request.
- If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Branch Manager for guidance.
- Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Branch Manager, who will contact DAG.

b. Interview Statements.

Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations. Interviews shall normally be reduced to writing and written in the first person in the language of the individual. Employees shall be encouraged to sign and date the statement.

- Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.

- Statements shall include the words, “I request that my statement be held confidential to the extent allowed by law” and end with the following; “I have read the above, and it is true to the best of my knowledge.”
  - If the person making the declaration refuses to sign, the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and noted in the case file.
  - A transcription of any recorded statement shall be made when necessary to the case.
  - Upon request, if an employee (management or otherwise) requests a copy of his/her interview statement, one shall be given to them.
- c. The Informant Privilege.

- The informant privilege allows the State to withhold the **identity** of individuals who provide information about the violation of laws, including HIOSH rules and regulations. See §396-8(f), *HRS*. CSHOs shall inform employees that their statements will remain confidential to the extent permitted by law. However, each employee giving a statement should be informed that disclosure of his or her identity may be necessary in connection with enforcement or court actions.

NOTE: Whenever CSHOs make an assurance of confidentiality as part of an investigation (i.e. informs the person giving the statement that their identity will be protected), the pledge shall be reduced to writing and included in the case file.

- The privilege also protects the contents of statements to the extent that disclosure may reveal the witness’s identity. Where the contents of a statement will not disclose the identity of the informant (i.e., does 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. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that they provided information to HIOSH. Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the division’s ability to invoke the privilege.

## **J. Multi-Employer Worksites.**

On multi-employer worksites (in all industry sectors), more than one employer may be cited for a hazardous condition that violates a HIOSH/OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited. [See Chapter 12, Specialized Inspection Procedures, Section I, Multi-Employer Workplace/Worksite](#) for details on the two-step process and definitions.

## **K. Administrative Subpoena.**

Whenever there is a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing an inspection scheduled in accordance with any current and approved inspection scheduling system or an investigation of any matter properly falling within the statutory authority of the

agency, the Administrator or Branch Manager, if designated, may issue an administrative subpoena. [See Chapter 15, Legal Issues.](#)

#### **L. Employer Abatement Assistance.**

##### **1. Policy.**

CSHOs shall offer appropriate abatement assistance during the walkaround as to how workplace hazards might be eliminated. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. CSHOs shall not imply HIOSH/OSHA endorsement of any product through use of specific product names when recommending abatement measures. The issuance of citations shall not be delayed.

##### **2. Disclaimers.**

The employer shall be informed that:

- a. The employer is not limited to the abatement methods suggested by HIOSH;
- b. The methods explained are general and may not be effective in all cases; and
- c. The employer is responsible for selecting and carrying out an effective abatement method, and maintaining the appropriate documentation.

### **VIII. Closing Conference.**

#### **A. Participants.**

At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. While the closing conference should be conducted on-site occasionally a telephone closing conference may be appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the *Narrative (OSHA-1A)* and the case shall be processed as if a closing conference had been held.

NOTE: When conducting separate closing conferences for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), CSHOs shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.

#### **B. Discussion Items.**

1. CSHOs shall discuss the apparent violations and other pertinent issues found during the inspection and note relevant comments on the *Violation (OSHA-1B)*, including input for establishing correction dates.
2. CSHOs shall give employers the handout HIOSH-10, "After the Inspection," which explains the responsibilities and courses of action available to the employer if a citation is issued. They shall then briefly discuss the information in the handout and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.

3. Whether proposing citations of Hawaii's safety and health program requirement or not, CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health system and any other applicable programs, and advise the employer of the benefits of an effective program(s) and provide information, such as, OSHA's website, describing program elements.
4. Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.
5. Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person.
6. CSHOs shall advise employee representatives that:
  - a. Under §396-11(j), HRS, if an employer contests a citation, the affected employees or representatives of affected employees have a right to elect "party status" before the Hawaii Labor Relations Board;
  - b. The employer should notify them if a notice of contest or a petition for modification of abatement date is filed;
  - c. They have Section 8(e) rights; and
  - d. They have a right to contest the abatement date. Such contests must be in writing and must be postmarked within 20 calendar days after the citation has been posted (§396-11(d), HRS).

### **C. Advice to Attendees.**

1. The CSHO shall advise those attending the closing conference that a request for an informal conference with the Branch Manager is encouraged as it provides an opportunity to:
  - a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;
  - b. Obtain a more complete understanding of the specific safety or health standards which apply;
  - c. Discuss ways to correct the violations;
  - d. Discuss issues concerning proposed penalties;
  - e. Discuss proposed abatement dates;
  - f. Discuss issues regarding employee safety and health practices; and
  - g. Learn more of other HIOSH programs and services available.
2. If a citation is issued, an informal conference or the request for one does not extend the 20 calendar-day period in which the employer or employee representatives may contest.
3. Oral disagreement or expression(s) during an informal conference, of intent to contest a citation, penalty or abatement date does not replace the requirement that the employer's Notice of Contest be in writing.

4. Employee representatives have the right to participate in informal conferences or negotiations between the Branch Manager and the employer in accordance with the guidelines given in [Chapter 7, Section II., Informal Conferences.](#)

#### **D. Penalties.**

CSHOs shall explain that penalties must be paid within 20 calendar days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the date that the citation/notification of penalty becomes a final order.

#### **E. Feasible Administrative, Work Practice and Engineering Controls.**

Where appropriate, CSHOs will discuss control methodology with the employer during the closing conference.

##### **1. Definitions.**

- a. Engineering Controls: Consist of substitution, isolation, ventilation and equipment modification.
- b. Administrative Controls: Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is not considered a means of administrative control.
- c. Work Practice Controls: Methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job, in order to reduce or eliminate employee exposure to the hazard.
- d. Feasibility: Abatement measures required to correct a citation item are feasible when they are capable of being done. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.
- e. Technical Feasibility: The existence of technical know-how as to materials and methods available or adaptable to specific circumstances, which can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced.
- f. Economic Feasibility: This means that the employer is financially able to undertake the measures necessary to abate the citations received. While additional time may be granted to abate the citations, economic feasibility is not considered as to whether the employer is required to correct cited hazards. §12-50-2, HAR defines "infeasible" as "it is impossible to perform the work using all available means and practices or that it is technologically impossible to use safety equipment or safe practices." Employee protection is required regardless of the employer's financial situation.

##### **2. Documenting Claims of Infeasibility.**

- a. CSHOs shall document the underlying facts that may support an employer's claim of infeasibility.

- b. When economic infeasibility is claimed, the CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it may be considered in determining the abatement period. Further, that they should request an informal conference to discuss alternative abatement methods as well as possible penalty reductions and/or installment payment plans.

## **F. Reducing Employee Exposure.**

Employers shall be advised that, whenever feasible, engineering, administrative or work practice controls must be instituted, even if they are not sufficient to eliminate the hazard (or to reduce exposure to or below the permissible exposure limit). They are required in conjunction with personal protective equipment to further reduce exposure to the lowest practical level.

## **G. Abatement Verification.**

During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements. See Chapter 7, *Post Inspection Procedures and Abatement Verification*.

### **1. Abatement Certification.**

Abatement certification is required for all citation item(s) that the employer receives, except those identified as “Corrected During Inspection.”

### **2. Corrected During Inspection (CDI).**

The violation(s) that will reflect on-site abatement and will be identified in the citations as “Corrected During Inspection” shall be reviewed at the closing conference.

### **3. Abatement Documentation.**

Abatement documentation, the employer’s physical proof of abatement, is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed.

### **4. Placement of Danger or Warning Tags on Movable Equipment**

The required placement of warning tags on the citation must also be discussed at the closing conference. Danger tags attached by the CSHO should also be explained both during the walkaround portion and during the closing conference. See §12-51-22(j), HAR.

### **5. Requirements for Extended Abatement Periods.**

Where extended abatement periods are involved, the requirements for abatement plans and progress reports shall be discussed.

## **H. Employee Discrimination.**

The CSHO shall emphasize that the Law prohibits employers from discharging or discriminating in any way against an employee who has exercised any right under the Law, including the right to make safety or health complaints or to request a HIOSH/OSHA inspection.



## **IX. Special Inspection Procedures.**

### **A. Follow-up and Monitoring Inspections.**

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been appropriately corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These type of inspections will not normally be conducted when evidence of abatement is provided by the employer or employee representative(s).

Note: The evidence of abatement must be of a quality that the division can be assured that the completed corrective action has satisfactorily met all applicable requirements for employee protection, e.g. a copy of an invoice submitted as evidence of installing a guardrail is not sufficient to determine whether the guardrail meets the requirements of the applicable standard.

#### **1. Failure to Abate.**

- a. A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed, or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.
- b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the DAG shall be consulted for further guidance.

NOTE: If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered in accordance with [Chapter 7, Section III, Petition for Modification of Abatement \(PMA\)](#).

- c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.

#### **2. Reports.**

- a. For any items found to be abated, a copy of the previous *Violation (OSHA-1B)*, *Violation (OSHA-1B-IH)*, or citation can be notated as "corrected", along with a brief explanation of the abatement measures taken. This information may alternately be included in the narrative of the investigative file.
- b. In the event that any item has not been abated, complete documentation shall be included on a *Violation (OSHA-1B)*.

#### **3. Follow-up Files.**

Follow-up inspection reports shall be included with the original (parent) case file.

## **B. Construction Inspections.**

### **1. Standards Applicability.**

The Hawaii standards published as Title 12, Subtitle 8, Part 3, Construction Standards, apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction. Differences exist between Hawaii and OSHA standards for construction work and the CSHO is expected to be able to explain the differences to the employer. Major differences affect safety and health program obligations, jobsite inspection requirements, bloodborne pathogens, traffic control signs and devices, steel erection and in the use of cranes and derricks.

### **2. Definition.**

The term "construction work" as defined by §12-50-2, HAR, means work for construction, alteration, and/or repair, including painting and decorating, erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of the existing transmission and distribution lines and equipment. These terms are also discussed in §12-110-1, HAR. If any question arises as to whether an activity is deemed to be construction for purposes of the Law, the Administrator shall be consulted.

### **3. Employer Worksite.**

Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the building site, the dam site). Where the construction site extends over a large geographical area (e.g., road building), the entire job will be considered a single worksite.

### **4. Upon Entering the Workplace.**

- a. CSHOs shall ascertain whether there is a representative of a federal contracting agency at the worksite. If so, they shall contact the representative, advise him/her of the inspection and request that they attend the opening conference.
- b. If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished to the general contractor and any affected sub-contractors.

### **5. Closing Conference.**

Upon completion of the inspection, the CSHO shall confer with the general contractor(s) and all appropriate subcontractors or their representatives, together or separately, and advise each one of all the apparent violations disclosed by the inspection to which each one's employees were exposed, or violations which the employer created or controlled. Employee representatives participating in the inspection shall also be afforded the right to participate in the closing conference(s).

## Chapter 4

### VIOLATIONS

#### I. Basis of Violations.

##### A. Standards and Regulations.

1. Section 396-6(a), HRS states that each employer has a responsibility to comply with occupational safety and health standards promulgated under the Law, which includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2 – 1969, “Vehicle Mounted Elevating and Rotating Work Platforms,” including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions, i.e., those containing the word “shall” or other mandatory language of standards incorporated by reference, are adopted as standards under the Law. In Hawaii, where a Hawaii standard or rule states that a particular national consensus standard “shall” be complied with, the whole standard is presumed to be adopted as standards under the law.
2. The specific standards and administrative rules are found in Title 12. Subtitle 8 of the Hawaii Administrative Rules (HAR). As Hawaii has adopted much of the OSHA standards via incorporation, the OSHA subdivision naming convention below would apply. Standards are subdivided as follows per OIS Application. For example, 1910.305(j)(6)(ii)(A)(2) would be entered as follows:

OSHA Subdivision Naming Convention	Example
Title	29
Part	1910
Section	305
Paragraph	(j)
Subparagraph	(6)
Item	(ii)
Subitem	(A)
Subitem 2	(2)

*NOTE: The most specific provision of a standard shall be used for citing violations.*

When citing a specific Hawaii standard, the naming convention is as follows:

<b>HIOSH Chapter Naming Convention</b>	<b>Example</b>
Chapter	51
Section	2
Paragraph	(c)
Subparagraph	(6)
Item	(A)
Sub-item	(ii)

3. Definition and Application of Vertical and Horizontal Standards.

Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations. Horizontal standards are other (more general) standards applicable to multiple industries. See §1910.5(c).

4. Application of Horizontal and Vertical Standards.

If a CSHO is uncertain whether to cite under a horizontal or a vertical standard when both may be applicable, the supervisor or the Branch Manager shall be consulted. The following guidelines shall be considered:

- a. When a hazard in a particular industry is covered by both a vertical (e.g., 29 CFR 1915) and a horizontal (e.g., 29 CFR 1910) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.
- b. In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two standards must be performed. For the horizontal standard to apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

**EXAMPLE 4-1:** When employees are connecting structural steel, §1926.501(b)(15) may not be cited for fall hazards above 6 feet since that specific situation is covered by §1926.760(b)(1) for fall distances of more than 10 feet.

- c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.
- d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.

- e. Hazards found in construction work that are not covered by a specific 29 CFR 1926 standard shall not normally be cited under 29 CFR 1910 unless that standard has been identified as being applicable to construction. See Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 FR 35076 (June 30, 1993).
  - f. If a question arises as to whether an activity is deemed “construction” for purposes of the Law, the CSHO shall consult with the Occupational Safety (OS) Branch Manager. The OS Branch Manager should consult with the Administrator if some doubt still remains.
5. Violation of Variances.
- The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Section 396-4(a)(3) of the Law, and Chapter 12-53, HAR.
- a. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.
  - b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Branch Manager or Administrator shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition may be issued.

## **B. Employee Exposure.**

A hazardous condition that violates a HIOSH standard or the general duty standard shall be cited only when employee exposure can be documented. The exposure(s) must have occurred within the six months immediately preceding the opening conference AND must have a reasonable likelihood of recurrence, i.e., the employer has not identified the hazard and taken steps to prevent its recurrence. Where the employer has concealed the violative condition or misled HIOSH, the citation must be issued within six months from the date when HIOSH learns, or should have known, of the condition.

Citations may be issued for past hazardous conditions even when the hazard has been addressed by the employer prior to the inspection. Circumstances such as repeated occurrences of the hazard; corrective actions only as a result of the threat of complaints or other actions by employees or their representatives; or other similar factors that may indicate deficiencies in the employer's safety and health management system should be considered when determining whether to cite in such situations. In addition, where the hazard has resulted in employee exposure to a hazardous substance with the potential for illness or impairment in the future, a citation may document the exposure for future obligations by the employer.

### **1. Determination of Employer/Employee Relationship.**

Whether or not exposed persons are employees or under the direction and/or control of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. For cases where determination of the employer/employee

relationship is complex, the Branch Manager shall seek the advice of the DAG.

**2. Proximity to the Hazard.**

The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented. (i.e., photos, measurements, employee interviews).

**3. Observed Exposure.**

- a. Employee exposure is established if CSHOs witness, observe, or monitor the proximity or access of an employee to the hazard or potentially hazardous condition.
- b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

**4. Unobserved Exposure.**

Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

a. Past Exposure.

In fatality/catastrophe (or other “accident/incident”) investigations, prior employee exposure(s) may be established if CSHOs establish, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. Additionally, prior exposures may serve as the basis for a violation when:

- The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
- It is reasonably predictable that employee exposure to a hazardous condition could recur when:
  - The employee exposure has occurred in the previous six months;
  - The hazardous condition is an integral part of an employer’s normal operations, and
  - The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. Potential Exposure.

Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:

- When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
- When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could

come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area; or

- When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; *however*
  - If the inspection reveals an adequately communicated *and* effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition. See above for discussion of when citations may still be issued.
- c. Documenting Employee Exposure.

CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This includes:

- Statements by the exposed employees, the employer (particularly the immediate supervisor of the exposed employee), other witnesses (other employees who have observed exposure to the hazardous condition), union representatives, engineering personnel, management, or members of the exposed employee's family;
- Recorded statements or signed written statements;
- Photographs, videotapes, and/or measurements; and
- All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA-300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies, etc.).

## **C. Regulatory Requirements.**

Violations of 29 CFR Part 1903 (see *Chapter 12-51, HAR*) and Part 1904 (see *Chapter 52.1, HAR*) shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided by agency policy. See also CPL 02-00-111, *Citation Policy for Paperwork and Written Program Violations*, dated November 27, 1995, adopted by HIOSH on January 19, 1996.

NOTE: If prior to the lapse of the 8-hour reporting period, the Branch Manager becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, there is no violation for failure to report.

NOTE: 29 CFR Part 1904 (see *Chapter 52.1, HAR*) has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA/HIOSH record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction, and on [Insert date] for workplaces under HIOSH jurisdiction. (See 79 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

## **D. Hazard Communication.**

Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See CPL 02-02-079, *Inspection Procedures for the Hazard Communication Standard (HCS 2012)*, dated July 9, 2015, adopted by HIOSH on [Insert date].

## **E. Employer/Employee Responsibilities.**

### **1. Employer Responsibilities.**

Section 396-6(a) of the Law states: “Every employer shall furnish to each of the employer’s employees employment and a place of employment which are safe as well as free from recognized hazards.” This section also states “No employer shall require or direct or permit to suffer any employee to go or be in any employment or place of employment which is not free from recognized hazards that are causing or likely to cause death or serious physical harm to employees or which does not comply with occupational safety and health standards, rules, regulations, citations, or orders made pursuant to this chapter except for the specific purpose of abating said hazard.”

Unlike OSHA Law, HIOSH Law holds any employer responsible for protecting workers from recognized hazards. It need not be his/her own employees that are exposed to recognized hazards. See §396-3, HRS.

### **2. Employee Responsibilities.**

- a. Section 396-8(a) of the Law states: “Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued under this chapter which are applicable to the employee’s own actions and conduct.” The Law (see §396-10, HRS) does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
- b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Branch Manager who shall consult with the Administrator.
- c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Law. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

### **3. Affirmative Defenses.**

An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs shall preliminarily gather evidence to rebut an employer’s potential argument supporting any such defenses. See [Chapter 5, Section VI, Affirmative Defenses](#), for additional information.



#### 4. Multi-Employer Worksites.

On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates a HIOSH standard. For specific and detailed guidance, see the multi-employer policy contained in [Chapter 12, Specialized Inspection Procedures](#).

## II. Serious Violations.

### A. Definition.

Section 396-3, HRS defines a “serious violation” as “a violation that carries with it a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use, in a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, have known of the presence of the violation.”

### B. Establishing Serious Violations.

1. CSHOs shall consider four factors in determining whether a violation is to be classified as serious. The first three factors address whether there is a substantial probability that death or serious physical harm could result from an accident/incident or exposure relating to the violative condition. The **probability** that an incident or illness will occur is not to be considered in determining whether a violation is serious, but is considered in determining the relative gravity of the violation. The fourth factor addresses whether the employer knew or could have known of the violative condition.
2. The classification of a violation need not be completed for each instance. It should be done once for each citation or, if violation items are grouped in a citation, once for the group.
3. If the citation consists of multiple instances or grouped violations, the overall classification shall normally be based on the most serious item.
4. The four-factor analysis outlined below shall be followed in making the determination whether a violation is serious. Potential violations of the general duty standard shall also be evaluated on the basis of these steps to establish whether they may cause death or serious physical harm.

### C. Four Steps to be Documented.

#### 1. Type of Hazardous Exposure(s).

The first step is to identify the type of potential exposures to a hazard that the violated standard or the general duty standard is designed to prevent. CSHOs should review the Preamble to the standard, if any, for help in identifying the hazards that standard is designed to prevent.

- a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness **resulting** from a potential accident or hazardous exposure.
- b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the

most severe injury or illness and shall base the classification of the violation on that hazard.

- c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

**EXAMPLE 4-2:** Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1). The regulation requires that the edge of the open-sided floor be guarded by standard guardrail systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

**EXAMPLE 4-3:** Employees are observed working in an area in which debris is located in apparent violation of §1915.91(b). The type of hazard the standard is designed to prevent here is employees tripping on debris.

**EXAMPLE 4-4:** An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

## 2. The Type of Injury or Illness.

The second step is to identify the most serious injury or illness that could reasonably be expected to result from the potential hazardous exposure identified in Step 1.

- a. In making this determination, CSHOs shall consider all factors that would affect the severity of the injury or illness that could reasonably result from the exposure to the hazard. CSHOs shall **not** give consideration at this point to factors relating to the **probability** that an injury or illness will occur.
- b. The following are examples of types of injuries that could reasonably be predicted to result from exposure to a particular hazard:

**EXAMPLE 4-5:** If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

**EXAMPLE 4-6:** If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing.

- c. For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. CPL 02-02-043, *The Chemical Information Manual*, dated July 1, 1991, shall be used to determine both toxicological properties of substances listed and a Health Code Number.
- d. In order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled

exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:

- The nature of the operation from which the exposure results;
  - Whether the exposure is regular and on-going or is of limited frequency and duration;
  - How long employees have worked at the operation in the past;
  - Whether employees are performing functions which can be expected to continue; and
  - Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.
- e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are some examples of illnesses that could reasonably result from exposure to a health hazard:

**EXAMPLE 4-7:** If an employee is exposed regularly to methylene chloride above 25 ppm, it is reasonable to predict that cancer could result.

**EXAMPLE 4-8:** If an employee is exposed regularly to acetic acid above 10 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

### 3. Potential for Death or Serious Physical Harm.

The third step is to determine whether the type of injury or illness identified in Step 2 could include death or a form of serious physical harm. In making this determination, the CSHO shall utilize the following definition of “serious physical harm:”

*Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.*

- a. Injuries that constitute serious physical harm include, but are not limited, to:
- Amputations (loss of all or part of a bodily appendage);
  - Concussion;
  - Crushing (internal, even though skin surface may be intact);
  - Fractures (simple or compound);
  - Burns or scalds, including electric and chemical burns;
  - Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;

- Sprains and strains; and
  - Musculoskeletal disorders.
- b. Illnesses that constitute serious physical harm include, but are not limited, to:
- Cancer;
  - Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
  - Hearing impairment;
  - Central nervous system impairment;
  - Visual impairment; and
  - Poisoning.
- c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

**EXAMPLE 4-9:** An employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor. This injury would be classified as serious.

**EXAMPLE 4-10:** An employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, and the use of the hand is substantially reduced. This injury would be classified as serious.

**EXAMPLE 4-11:** An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 mg/m<sup>3</sup>, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

**NOTE:** The key determination is the likelihood that death or serious harm will result if an accident or exposure occurs. **The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.**

**NOTE:** Although the definition of “serious violation” includes the term “substantial probability”, by following the above steps, it is apparent that “substantial” is not a numerical exercise, e.g. 51% of the time, or “more likely than not”, but rather more of whether the probability of death or serious physical harm is significant, i.e. unacceptable.

#### **4. Knowledge of Hazardous Condition.**

The fourth step is to determine whether the employer knew or, with the exercise of reasonable diligence, could have known, of the presence of the **hazardous condition**.

- a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation.

Examples include the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was

previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

- b. If it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement may be established if there is evidence that the employer could have known of it through the exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include:
  - The violation/hazard was in plain view and obvious;
  - The duration of the hazardous condition was not brief;
  - The employer failed to regularly inspect the workplace for readily identifiable hazards; and
  - The employer failed to train and supervise employees regarding the particular hazard.
- c. The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge. In cases where the employer contends that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine whether the supervisor violated an established work rule, and the extent to which the supervisor was trained in the rule and supervised regarding compliance to prevent such conduct.

### **III. General Duty Requirements.**

Section 396-6(a), HRS requires that “Every employer shall furnish to each of the employer’s employees employment and a place of employment which are safe as well as free from recognized hazards.” Unlike OSHA, Hawaii has a specific standard that addresses the “general duty” of employers: “Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards.” Therefore §12-60-2(a)(3), *HAR* and §12-110-2(a)(3), *HAR* are HIOSH’s general duty requirements for general industry and construction, respectively.

#### **A. Evaluation of General Duty Requirements.**

In general, Hawaii Labor Relations Board (HLRB) and court precedent have established that the following elements are necessary to prove a violation of the general duty standard:

1. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
2. The hazard was recognized;
3. The hazard was causing or was likely to cause death or serious physical harm; and
4. There was a feasible and useful method to correct the hazard.

A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer’s **own** employees.

## **B. Elements of a General Duty Requirement Violation.**

### **1. Definition of a Hazard.**

- a. The hazard in a §12-60-2(a)(3) or §12-110-2(a)(3) citation is a *workplace condition* or practice to which employees are exposed, creating the *potential for death or serious physical harm* to employees. While Hawaii Law and standard does not limit the obligation to only serious violations which create the potential for death or serious physical harm to employees, in practice, the use of the general duty standard is reserved for serious violations.
- b. These conditions or practices must be **clearly stated in a citation** so as to apprise employers of their obligations regarding the hazard. The hazard must therefore be defined in terms of the **presence of hazardous conditions or practice** that presents a particular danger to employees. Also, the hazard must be a condition or practice than can reasonably be abated by the employer.

### **2. Do Not Cite the Lack of a Particular Abatement Method.**

- a. General duty standard citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures but rather addresses the failure to prevent or remove a particular hazard. §12-60-2(a)(3) or §12-110-2(a)(3) therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to utilize. However, the standard does indicate that the employer is obligated to pursue a systematic examination of hazard controls with preference for hazard elimination.
- b. In situations where a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Branch Manager shall consult with the Administrator, or DAG for assistance in correctly identifying the hazard.

**EXAMPLE 4-12:** Employees are conducting sanding operations that create sparks in the proximity of magnesium dust (workplace condition or practice) exposing them to the serious injury of burns from a fire (potential for physical harm). One proposed method of abatement may be engineering controls such as adequate ventilation. The “hazard” is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

**EXAMPLE 4-13:** Employees are operating tools that generate sparks in the presence of an ignitable gas (workplace condition) exposing them to the danger of an explosion (physical harm). The hazard is use of tools that create sparks in a volatile atmosphere that may cause an explosion capable of seriously injuring employees, not the lack of approved equipment.

**EXAMPLE 4-14:** In a workplace situation involving high- pressure machinery that vents gases next to a work area where the employer has not installed proper high-pressure equipment, has improperly installed the equipment that is in place, and does not have adequate work rules

addressing the dangers of high pressure gas, there are three abatement measures the employer has failed to take. However, there is only one hazard (i.e., employee exposure to the venting of high-pressure gases into a work area that may cause serious burns from steam discharges).

**3. The Hazard is Not a Particular Accident/Incident.**

The occurrence of an accident/incident does not necessarily mean that the employer has violated §12-60-2(a)(3) or §12-110-2(a)(3), although the accident/incident may be evidence of a hazard. In some cases, a §12-60-2(a)(3) or §12-110-2(a)(3) violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the **hazard in the workplace that existed prior to the accident/incident**, not the particular facts that led to the occurrence of the accident/incident.

**EXAMPLE 4-15:** A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must address the underlying workplace fire hazard, not the accident/incident involving the employee.

**4. The Hazard Must be Reasonably Foreseeable.**

The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.

**EXAMPLE 4-16:** If sufficient quantities of combustible gas and oxygen are present in a confined area to cause an explosion if ignited, but no ignition source is present or could be present, no §12-60-2(a)(3) or §12-110-2(a)(3) violation would exist. However, if the employer has not taken sufficient safety precautions to preclude the presence or use of ignition sources in the confined area, then a foreseeable hazard may exist.

**NOTE:** It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.

**EXAMPLE 4-17:** A titanium dust fire spreads from one room to another because an open can of gasoline was in the second room. An employee who usually worked in both rooms is burned in the second room as a result of the gasoline igniting. The presence of gasoline in the second room may be a rare occurrence. However, it is not necessary to demonstrate that a fire in both rooms could reasonably occur, but only that a fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

**5. The Hazard Must Affect the Cited Employer's Employees.**

- a. The employees exposed to the §12-60-2(a)(3) or §12-110-2(a)(3) hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be

cited for a general duty violation if his own employees are not exposed to the hazard.

- b. In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Branch Manager shall consult with the Administrator and the DAG to determine the sufficiency of the evidence regarding the employment relationship.
- c. The fact that an employer denies that exposed workers are his/her employees does not necessarily determinative the employment relationship issue. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays employees in and of itself may not be the determining factor to establish a relationship.

#### **6. The Hazard Must Be Recognized.**

Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition. The use of common sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by the following evidence and adequate documentation in the file:

- Employer Recognition.
  - A recognized hazard can be established by evidence of actual employer knowledge of a hazardous condition or practice. Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the HIOSH inspection.
  - Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.
  - Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.
  - Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
  - An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

NOTE: CSHOs are to gather as many of these facts as possible to support establishing a §12-60-2(a)(3) or §12-110-2(a)(3) violation.



- Industry Recognition.
  - A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a §12-60-2(a)(3) or §12-110-2(a)(3) violation. Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Branch Manager shall consult with the Administrator on this issue. Industry recognition of a hazard can be established in several ways:
    - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);
    - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
    - Manufacturers' warnings on equipment or in literature that are relevant to the hazard;
    - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;
    - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
    - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended; and/or
    - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards **cannot** be enforced as HIOSH standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.
  - In cases where State and local government agencies have codes or regulations covering hazards not addressed by HIOSH standards, the Branch Manager, upon consultation with the Administrator, shall determine whether the hazard is to be cited under §12-60-2(a)(3) or §12-110-2(a)(3) or referred to the appropriate local agency for enforcement.

**EXAMPLE 4-18:** A safety hazard on a personnel elevator in a factory is documented during an inspection. It is determined that the hazard may not be cited under §12-60-2(a)(3) or §12-110-2(a)(3), but there is a local code that addresses this hazard and a local agency actively enforces the code, including issuing appropriate penalties or equivalent sanctions. The situation normally shall be referred to the local enforcement agency in lieu of citing §12-60-2(a)(3) or §12-110-2(a)(3).

- References that may be used to supplement other evidence to help demonstrate industry recognition include the following:
  - NIOSH criteria documents.
  - EPA publications.
  - National Cancer Institute and other agency publications.
  - OSHA Hazard Alerts.
  - OSHA Technical Manual.

- Common Sense Recognition.

If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), hazard recognition can still be established if a hazardous condition is so obvious that any reasonable person would have recognized it. This form of recognition should only be used in flagrant or obvious cases.

**EXAMPLE 4-19:** In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees worked. In construction, §12-110-2(a)(3) could not be cited in this situation because §1926.252 or §1926.852 applies. In the context of a chemical processing plant, common sense recognition was established where hazardous substances were being vented into a work area.

**7. The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm.**

- a. This element of a §12-60-2(a)(3) or §12-110-2(a)(3) violation is virtually identical to the substantial probability element of a serious violation. Serious physical harm is defined in Paragraph II.C.3. of this chapter.
- b. This element of a §12-60-2(a)(3) or §12-110-2(a)(3) violation can be established by showing that:
  - An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
  - If an accident/incident occurred, there is a substantial probability that death or serious physical harm could result.

**EXAMPLE 4-20:** An employee is standing at the edge of an unguarded floor 25 feet above the ground. If a fall occurred, death or serious physical harm (e.g., broken bones) could result.

- c. In the health context, establishing serious physical harm at the cited levels may be challenging if the potential for illness/harm requires the passage of a substantial period of time. In such cases, expert testimony is crucial to establish there is probability that long-term serious physical harm will occur. It will generally be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death or serious physical harm when such illness or death will occur only after the passage of time:
  - Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;
  - An illness reasonably could result from such regular and continuing employee exposures; and
  - If illness does occur, its likely result is death or serious physical harm.

**8. The Hazard May be Corrected by a Feasible and Useful Method.**

- a. To establish a §12-60-2(a)(3) or §12-110-2(a)(3) violation, the division must also identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard. Evidence regarding feasible abatement measures shall indicate that the recognized hazard, rather than a particular accident/incident, is preventable.
- b. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a §12-60-2(a)(3) or §12-110-2(a)(3) citation may be issued. A citation will not be issued merely because the division is aware of an abatement method different from that of the employer, if the proposed method would not reduce the hazard significantly more than the employer's method. In some cases, only a series of abatement methods will materially reduce a hazard and then all potential abatement methods shall be listed. For example, an abatement note shall be included on the OSHA-1b and -2 such as "Among other methods, one feasible and acceptable means of abatement would be to \_\_\_\_." (Fill in the blank with the specified abatement recommendation.)
- c. Examples of such feasible and acceptable means of abatement include, but are not limited, to:
  - The employer's own abatement method, which existed prior to the inspection but was not implemented;
  - The implementation of feasible abatement measures by the employer after the accident/incident or inspection;
  - The implementation of abatement measures by other employers/companies; and
  - Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as suggested abatement methods contained in trade journals, national consensus standards and individual employer work rules. National consensus standards shall not solely be relied on to mandate specific abatement methods.

**EXAMPLE 4-21:** An ANSI standard addresses the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials that create the gas and the provision of ventilation. The ANSI standard may be used as general evidence of the existence of feasible abatement measures.

In this example, the citation shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to base the citation on the employer's failure to prevent the buildup of materials that could create the gas and to provide a ventilation system as both of these are abatement methods, not recognized hazards.

- d. Evidence provided by expert witnesses may be used to demonstrate feasibility of abatement methods. In addition, although it is not necessary to establish that an industry recognizes a particular abatement measure, such evidence may be used if available.

### **C. Use of the General Duty Standard.**

1. The general duty standard shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. See §1910.5(f).

**EXAMPLE 4-22:** A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in wall, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty standard.

**EXAMPLE 4-23:** The powered industrial truck standard at §1910.178 does not address all potential hazards associated with forklift use. For instance, while that standard deals with the hazards associated with a forklift operator leaving his vehicle unattended or dismounting the vehicle and working in its vicinity, it does not contain requirements for the use of operator restraint systems. An employer's failure to address the hazard of a tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty standard. See CPL 02-01-028, *Compliance Assistance for the Powered Industrial Truck Operator Training Standards*, dated November 30, 2000, adopted by HIOSH on February 7, 2001, for additional guidance.

2. The general duty standard may also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.).
  - a. Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an assessment of hazards that may be encountered, providing appropriate

protective equipment, and any training, instruction, or necessary equipment.

- b. An employer, who has failed to take such steps and allows its employees to be exposed to a hazard, may be cited under the general duty standard.

#### **D. Limitations of Use of the General Duty Standard.**

§12-60-2(a)(3) or §12-110-2(a)(3) is to be used only within the guidelines given in this chapter.

##### **1. The General Duty Standard Shall Not be Used When a Standard Applies to a Hazard.**

As discussed above, §12-60-2(a)(3) or §12-110-2(a)(3) may not be cited if a HIOSH standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Branch Manager shall consult with the Administrator. The DAG will assist the Administrator in determining the applicability of a standard prior to the issuance of a citation.

**EXAMPLE 4-24:** §12-60-2(a)(3) or §12-110-2(a)(3) shall not be cited for electrical hazards as §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical harm to employees.

##### **2. The General Duty Standard Shall Normally Not be Used to Impose a Stricter Requirement than that Required by the Standard.**

When an existing standard is inadequate to protect worker safety and health, a general duty standard citation may be considered. All of the elements discussed above must be satisfied, AND there must be actual employer knowledge that the standard was inadequate to protect employees from death or serious physical harm. See *Int'l Union UAW v. Gen. Dynamics Land Sys. Div.*, 815 F 2d 1570 (D.C. Cir. 1987). **Branch Managers shall contact the DAG early in the investigation of these types of cases, which will also be subject to pre-citation review by the Administrator.**

**EXAMPLE 4-25:** A standard provides for a permissible exposure limit (PEL) of 5 ppm, and a recognized Occupational Exposure Limit (OEL) – such as an ACGIH® Threshold Limit Value (TLV®) or NIOSH Recommended Exposure Limit (REL) – is 3 ppm. A General Duty Standard violation may only be considered for exposures between the OEL and the PEL if the data establishes that exposures at the measured level are likely to cause death or serious physical harm **and** the employer has actual knowledge that the PEL is inadequate to protect its employees.

##### **3. The General Duty Standard Shall Normally Not be Used to Require Additional Abatement Methods Not Set Forth in an Existing Standard.**

If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, §12-60-2(a)(3) or §12-110-2(a)(3) shall not be cited to additionally require medical surveillance. Branch Managers shall evaluate the circumstances of special situations in accord with guidelines stated herein and consult with the Administrator to determine whether a general duty standard citation can be issued in those special cases.

##### **4. Alternative Standards.**

The following standards shall be considered carefully before issuing a §12-60-2(a)(3) or §12-110-2(a)(3) citation for a health hazard.

- a. There are a number of general standards that shall be considered rather than §12-60-2(a)(3) or §12-110-2(a)(3) in situations where the hazard is not covered by a particular standard. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.
- b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in §1910.1000 in general industry and in §1926.55 for construction.
- c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.
- d. Violations of §1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

#### **E. Classification of Violations Cited Under the General Duty Standard.**

Only hazards presenting serious physical harm or death may be cited under the general duty standard (including willful and/or repeated violations that would otherwise qualify as serious violations). Other-than-serious citations shall not be issued for general duty standard violations.

#### **F. Procedures for Implementation of General Duty Standard Enforcement.**

To ensure that citations of the general duty standard are defensible, the following procedures shall be followed:

##### **1. Gathering Evidence and Preparing the File.**

- a. The evidence necessary to establish each element of a §12-60-2(a)(3) or §12-110-2(a)(3) violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.
- b. If copies of documents relied on to establish the various §12-60-2(a)(3) or §12-110-2(a)(3) elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.

- c. If experts are necessary to establish any element(s) of a §12-60-2(a)(3) or §12-110-2(a)(3) violation, such experts and DAG shall be consulted **prior to the citation being issued** and their opinions noted in the file.

## **2. Pre-Citation Review.**

The Branch Manager shall review and approve all proposed §12-60-2(a)(3) or §12-110-2(a)(3) citations. These citations shall undergo additional pre-citation review as follows:

- a. The Administrator and DAG shall be consulted prior to the issuance of all §12-60-2(a)(3) or §12-110-2(a)(3) citations where complex issues or exceptions to the outlined procedures are involved; and
- b. If a standard does not apply and all criteria for issuing a §12-60-2(a)(3) or §12-110-2(a)(3) citation are not met, yet the Branch Manager determines that the hazard warrants some type of notification, a Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

## **IV. Other-than-Serious Violations.**

This type of violation shall be cited in situations where the accident/incident or illness that would be most likely result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

## **V. Willful Violations.**

A willful violation exists under the Law where an employer has demonstrated either an intentional disregard for the requirements of the Law or a plain indifference to any standard, rule, citation, or order issued under the authority of the HIOSH Law. Branch Managers are encouraged to consult with DAG when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

### **A. Intentional Disregard Violations.**

An employer commits an intentional and knowing violation if:

1. An employer was aware of the requirements of the Law or of an applicable standard or regulation and was also aware of a condition or practice in violation of those requirements, but did not abate the hazard; or
2. An employer was not aware of the requirements of the Law or standards, but had knowledge of a comparable legal requirement (e.g., state or local law) and was also aware of a condition or practice in violation of that requirement.

NOTE: Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Branch Manager if a willful classification is under consideration.

3. A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised March 1, 1996

**EXAMPLE 4-26:** The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

**B. Plain Indifference Violations.**

1. An employer commits a violation with plain indifference to employee safety and health where:
  - a. Management officials were aware of an OSHA or HIOSH requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.
  - b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

**EXAMPLE 4-27:** The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past and does nothing to abate the hazard.

- c. An employer was not aware of any legal requirement, but knows that a condition or practice in the workplace is a serious hazard to the safety or health of employees and makes little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, or complaints of employees or their representatives.

NOTE: As Hawaii requires that periodic inspections be conducted at every establishment in accordance with the requirements for a safety and health program (See §12-60-2 and §12-110-2, HAR), employer self-audits that assess workplace safety and health conditions may be used as a basis of a willful violation. If the employer's self-audit identifies a hazardous condition, the employer must promptly take appropriate measures to correct a violative condition and provide interim employee protection.

- d. Willfulness may also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

**EXAMPLE 4-28:** An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.
3. CSHOs shall develop and record on the *Violation (OSHA-1B)* all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:



- a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;
- b. Any precautions taken by the employer to limit the hazardous conditions;
- c. The employer's awareness of the Law and of its responsibility to provide safe and healthful working conditions; and
- d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from HIOSH, OSHA, or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

NOTE: This includes prior citations or warnings from OSHA or other State Plan officials.

4. Also, include facts showing that even if the employer was not consciously violating the Law, it was aware that the violative condition existed and made no reasonable effort to eliminate it.

## **VI. Criminal/Willful Violations.**

Section 396-10(g), HRS provides that: "Any employer convicted of wilful or repeated violations of any standard, rule, citation, or order issued under the authority of this chapter resulting in the death of an employee shall be punished by a fine of not more than \$77,000 or by imprisonment for not more than six months, or both..." Note that unlike OSHA, this provision of the Law may apply to §12-60-2(a)(3) or §12-110-2(a)(3) violations classified as willful, however, the burden of establishing a criminal violation is higher than the administrative burden. See Chapter 6, Section XIII, *Penalties and Debt Collection*, regarding criminal penalties.

### **A. Branch Manager Coordination.**

The Branch Manager, in coordination with the DAG, shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of Section 396-10(g), HRS. Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions between the CSHO, the Branch Manager, the Administrator, and the DAG in developing all evidence when there is a potential Section 396-10(g) violation.

### **B. Criteria for Investigating Possible Criminal/Willful Violations**

The following criteria shall be considered in investigating possible criminal/willful violations:

1. While HIOSH does not have the legal authority to issue a citation under §396-10(g), the Administrator may refer the matter for criminal prosecution to the DAG, who in turn will consult with the county Prosecuting Attorney's Office. If the county Prosecutor believes that a violation of criminal law has occurred, he will take the case forward. In order to provide as much information as possible for the criminal prosecution, HIOSH must show that:
  - a. The employer violated an OSHA/HIOSH standard. A criminal/willful violation may be based on violation of the general duty standard but the burden would be higher.
  - b. The violation was willful in nature.

- c. The violation of the standard caused the death of an employee. In order to prove that the violation caused the death of an employee, there must be evidence which clearly demonstrates that the violation of the standard was the direct cause of, or a contributing factor to, an employee's death.
2. If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral to the appropriate county's Prosecuting Attorney's Office.
3. During the investigation, if the CSHO believes that a potential criminal case should be considered, he shall promptly notify the Branch Manager who shall, in turn, notify the Administrator. The Administrator shall request the assistance of the DAG to help prepare the case and assure that any potential criminal case will not be compromised.

Regardless of whether the County Prosecutor decides to pursue criminal prosecution or not, the administrative case shall proceed as usual. A citation for willful violation(s) shall be issued. In addition, if correction of the hazardous condition is at issue, it shall be noted that in most cases prosecution of a criminal/ willful case stays the resolution of the civil case and its abatement requirements.

### **C. Willful Violations Related to a Fatality**

Where a willful violation is related to a fatality and a decision is made not to recommend a criminal referral, the Branch Manager shall ensure the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case unsuitable for referral.

## **VII. Repeated Violations.**

### **A. Federal and State Plan Violations.**

1. An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard **and the citation has become a final order**. A citation may become a final order by operation of law when an employer does not contest the citation, or pursuant to court decision or settlement. The underlying citation which the repeated violation will be based on must have become a final order before the occurrence or observation of the second substantially similar violation.
2. Prior citations by OSHA or other State Plan States cannot be used as a basis for HIOSH repeated violations, except where OSHA has issued a citation to an employer that would normally be within HIOSH jurisdiction, such as during a temporary operational agreement. Prior citations by OSHA or other State Plan States may be used only to establish employer knowledge. Only violations that have become final orders may be considered.

### **B. Identical Standards.**

Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions.

**EXAMPLE 4-29:** A citation was previously issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hardhats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar and therefore a repeated violation would not be appropriate.

### **C. Different Standards.**

In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

**EXAMPLE 4-30:** A citation was previously issued for a violation of §1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same employer reveals a violation of §1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar, and therefore a repeated violation would be appropriate.

NOTE: There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.

### **D. Obtaining Inspection History.**

For purposes of determining whether a violation is repeated, the following criteria shall apply:

#### **1. High Gravity Serious Violations.**

- a. When high gravity serious violations are to be cited, the CSHO shall obtain a history of citations previously issued to this employer at all of its identified establishments statewide, within the same two-digit Standard Industrial Classification (SIC) or three-digit North American Industry Classification System (NAICS) code.
- b. If these violations have been previously cited within the time limitations (described in Paragraph VII.E. of this chapter) and have become final orders, a repeated citation may be issued.
- c. Citations from previous inspections upon which a proposed repeated citation will be based must have become a final order before the initiation of the second inspection.
- d. Under special circumstances, the Branch Manager, in consultation with the DAG, may also issue citations for repeated violations without regard for the SIC code.

#### **2. Violations of Lesser Gravity.**

When violations are of lesser gravity than high gravity serious, CSHOs should obtain a statewide inspection history whenever the circumstances of the current inspection would result in multiple serious, repeat, or willful citations. This is particularly essential if the employer is known to have establishments statewide and has been subject to a significant case in other areas or at other mobile worksites.

### E. Time Limitations.

1. Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.

A citation will be issued as a repeated violation if:

- a. The citation is issued within five (5) years of the final order date of the previous citation or within five (5) years of the final abatement date, whichever is later, or
  - b. The previous citation was contested, within five (5) years of the Hawaii Labor Relations Board's decision and order filing date plus 30 days or the last appellate court's decision filing date plus 30 days.
2. When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty, if a willful violation could not be substantiated.

**EXAMPLE 4-31:** An inspection is conducted in an establishment and a violation of §1910.217(c)(1)(i) is found. That citation is not contested by the employer and becomes a final order on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeated.

3. In cases of multiple prior repeated citations, the Administrator shall be consulted for guidance.

### F. Repeated v. Failure to Abate.

A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (i.e., the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation.

### G. Branch Manager Responsibilities.

After the CSHO makes a recommendation that a violation should be cited as repeated, the Branch Manager shall:

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section.
2. Ensure that the case file includes a copy of the citation for the prior violation, the *Violations (OSHA-1Bs)* describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file. The file shall also include all documents showing that the citation is a final order and on what date it became final, as follows: if the case was not contested, the **certified mail card** (final 20 calendar days from employer's receipt of the citation) and the **signed Informal Settlement** (on the date of the last signature of both parties as long as the contest period has not expired); or

if contested, the **Formal Settlement Agreements** (final 30 days after date filed); or **Court's Decision** (final 30 days after date filed).

3. OIS information shall not be used as the sole means to establish that a prior violation has been issued.
4. In circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Administrator before issuing a repeated citation.
5. If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation by notation in the Alleged Violation Description (AVD) portion of the citation. For example, following the AVD state appropriate language such as:

[Employer Name or Establishment Name] was previously cited for a violation of this Hawaii Occupational Safety and Health Standard [insert previously cited standard], which was contained in OSHA inspection number\_\_\_\_\_, citation number\_\_\_\_\_, item number\_\_\_\_\_ and was affirmed as a final order on [insert date], with respect to a workplace located at\_\_\_\_\_.

OR

[Employer Name or Establishment Name] was previously cited for a violation of an equivalent Hawaii Occupational Safety and Health Standard [insert previously cited standard], which was contained in OSHA inspection number\_\_\_\_\_, citation number\_\_\_\_\_, item number\_\_\_\_\_ and was affirmed as a final order on [insert date], with respect to a workplace located at\_\_\_\_\_.

## **VIII. De Minimis Conditions.**

De minimis conditions are those where an employer has implemented a measure different than one specified in a standard, that has no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented on the field 1-B with the reasons why the CSHO determined that the situation did not rise to a safety and health violation. A diagonal slash shall be made across the Field 1-B to indicate that no citation is being proposed.

### **A. Examples.**

The following are some examples where the employed may not have complied with the letter of the standard but has provided for effective worker health and safety:

1. An employer complies with the intent of the standard, yet deviates from its particular requirements in a manner that has no direct or immediate impact on employee safety or health. These deviations may involve, for example, distance specifications, construction material requirements, use of incorrect color, and minor variations from recordkeeping, testing, or inspection regulations.

**EXAMPLE 4-32:** §1910.27(b)(1)(ii) allows 12 inches as the maximum distance between ladder rungs. Where the rungs are 13 inches apart, the condition is de minimis.

**EXAMPLE 4-33:** §1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

2. An employer complies with a proposed OSHA standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection.
3. An employer complies with a written interpretation issued by HIOSH or the OSHA National Office.
4. An employer's workplace protections are "state of the art" and technically more enhanced than the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

### **B. Professional Judgment.**

Professional judgment should be exercised in determining whether noncompliance with a standard does not adversely impact worker health and safety.

### **C. Branch Manager Responsibilities.**

Branch Managers shall ensure that such non-hazardous non-compliant situations are appropriately documented in the case file.

## **IX. Citing in the Alternative.**

In rare cases, the same factual situation may present a possible violation of more than one standard.

**EXAMPLE 4-34:** The facts which support a violation of §1910.28(a)(1) may also support a violation of §1910.132(a), if no scaffolding is provided and the use of safety belts is not required by the employer.

Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "in the alternative." A reference in the citation to each of the standards involved shall be accompanied by a separate Alleged Violation Description (AVD) that clearly alleges all of the necessary elements of a violation of that standard. Only one penalty shall be proposed for the violative condition.

## **X. Combining and Grouping Violations.**

### **A. Combining.**

Separate violations of a single standard, for example §1910.212(a)(3)(ii), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the Standard Alleged Violation Elements (SAVEs) of the

same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation.

NOTE: Except for standards which deal with multiple hazards (e.g., Tables Z-1, Z-2 and Z-3 cited under §1910.1000 (a), (b), or (c)), the same standard may not normally be cited more than once on a single citation. However, the same standard may be cited on different citations based on separate classifications and facts on the same inspection.

## **B. Grouping.**

When a source of a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single violation. The following situations normally call for grouping violations:

### **1. Grouping Related Violations.**

If violations classified either as serious or other than serious are so closely related they may constitute a single hazardous condition, such violations shall be grouped and the overall classification shall normally be based on the most serious item.

NOTE: Violations involving the same equipment do not necessarily constitute a single hazardous condition. For example, §1910.215(a)(4) requires work rests on abrasive grinding wheels to be adjusted to within 1/8" of the wheel to prevent wheel breakage. §1910.215(b)(9), requires a top guard to be adjusted to within 1/4" of the wheel, the purpose of which is not to prevent wheel breakage, but rather to protect the worker should the wheel shatter.

Similarly, a violation of the labeling requirement of the Hazard Communication Standard, §1910.1200(f), and a violation of the requirement to maintain safety data sheets, §1910.1200(g)(8), are not a single hazardous condition and therefore are not to be grouped. While both are triggered by the potential exposure to a hazardous chemical, the conditions differ in that one requires labels to warn employees of the potential hazard, and the other provides further information to help the employee protect themselves as well as their families from the potential hazard.

### **2. Grouping Other-than-Serious Violation Where Grouping Results in a Serious Violation.**

When two or more violations are found which, if considered individually, represent other than serious violations, but together create a substantial probability of death or serious physical harm, the violations shall be grouped as a serious violation.

### **3. Where Grouping Results in High Gravity Other-than-Serious Violation.**

Where the CSHO finds, during the course of the inspection, that a number of other-than-serious violations are present, the violations shall be considered in relation to each other to determine the overall gravity of possible injury resulting from an accident or incident involving the hazardous condition.

### **4. Penalties for Grouped Violations.**

If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the *Citation and Notification of Penalty (OSHA-2)*.

### **C. When Not to Group or Combine.**

#### **1. Multiple Inspections.**

Violations discovered during multiple inspections of a single establishment or worksite may not be grouped. Where only one *Inspection (OSHA-1)* has been completed, an inspection at the same establishment or worksite shall be considered a single inspection even if it continues for a period of more than one day, or is discontinued with the intention of later resuming it.

#### **2. Separate Establishments of the Same Employer.**

The employer shall be issued separate citations for each establishment or worksite where inspections are conducted, either simultaneously or at different times. If CSHOs conduct inspections at two establishments belonging to the same employer and instances of the same violation are discovered during each inspection, the violations shall not be grouped.

#### **3. General Duty Standard.**

Because a §12-60-2(a)(3) or §12-110-2(a)(3) citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate general duty standard violations. This policy, however, does not prohibit grouping a general duty standard violation with a related violation of a specific standard.

#### **4. Egregious Violations.**

Violations, which are proposed as instance-by-instance citations, shall not normally be combined or grouped. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994 and revised on March 1, 1996.

## **XI. Health Standard Violations.**

### **A. Citation of Ventilation Standards.**

In cases where a citation of a ventilation standard is appropriate, consideration shall be given to standards intended to control exposure to hazardous levels of air contaminants, prevent fire or explosions, or regulate operations that may involve confined spaces or specific hazardous conditions. In such cases, the following guidelines shall be observed:

#### **1. Health-Related Ventilation Standards.**

- a. Where an over-exposure to an airborne contaminant is present, the appropriate air contaminant engineering control requirement shall be cited; e.g., §1910.1000(e). Citations of this standard shall not be issued to require specific volumes of air to reduce such exposures.
- b. Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

#### **2. Fire and Explosion-Related Ventilation Standards.**

Although not normally considered health violations, the following guidelines shall be observed when citing fire and explosion related ventilation standards:



a. Adequate Ventilation.

An operation is considered to have **adequate** ventilation when **both** of the following criteria are present:

- The requirement(s) of the specific standard has been met.
- The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

**EXCEPTION:** Some maritime standards require that levels be kept to 10 percent of the LEL (e.g., §1915.36(a)).

b. Citation Policy.

If 25 percent (10 percent when specified for maritime operations) of the LEL has been exceeded and:

- The standard's requirements have not been met, violations of the applicable ventilation standard normally shall be cited as serious.
- If there is no applicable ventilation standard, §12-60-2(a)(3) or §12-110-2(a)(3) shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

**B. Violations of the Noise Standard.**

Current enforcement policy regarding §1910.95(b)(1) does not allow employers to rely on personal protective equipment and a hearing conservation program, rather than engineering and/or administrative controls, when exposures exceed the levels listed in Table G-16 (See Tables G-16 or G-16a of the standard). Hawaii's policy is different from that of OSHA.

1. Citations for violations of §1910.95(b)(1) shall be issued when technologically feasible engineering and/or administrative controls have not been implemented; and employee exposure levels exceed those specified in Tables G-16 or G-16a of the standard. Such citations shall normally be classified as "serious".
2. Violations of hearing conservation elements shall be issued as a separate citation from that of a §1910.95(b)(1) violation (Engineering and administrative controls) and may be classified as serious when employees are exposed to noise levels above the limits of Table G-16 and:
  - a. Hearing protection is not utilized or is not adequate to prevent overexposures; or
  - b. There is no audiometric testing program to determine if hearing protection is being properly used.
3. Where an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dBA, a citation for each of the discrete elements of a hearing conservation program shall be issued:
  - a. §1910.95(d) Monitoring;
  - b. §1910.95(g), Audiometric Testing Program;
  - c. §1910.95(i), Hearing Protectors

- d. §1910.95(k), Training Program;
- e. §1910.95(l), Access to Information and Training Materials; and
- f. §1910.95(m), Recordkeeping.

These discrete elements shall not normally be grouped as they do not meet the grouping requirements of a single hazardous condition. While the hazard is the same, exposure to high noise levels, the conditions differ in that the employer must engage in different actions to provide full worker protection to the hazard.

The citation may be worded as follows:

“A hearing conservation program was not implemented when employee exposures equaled or exceeded an 8-hour time-weighted average (TWA) of 85 dBA; i.e., employee TWA noise levels measured \_\_\_\_ dBA.

Citation 2, item 1: §1910.95(d) (refer to §12-60-50, HAR) An employee noise monitoring program was not developed and implemented.

Citation 2, item 2: §1910.95(g) (refer to §12-60-50, HAR) An audiometric testing program was not established and maintained by making audiometric testing available to all employees whose exposures equaled or exceeded an 9-hour time-weighted average of 85 decibels.

Etc.”

- 4. Where an employer has instituted a hearing conservation program and a violation of one or more elements is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dBA.

Violations of related conditions shall normally be grouped, e.g., violations of §1910.95(d) Monitoring, §1910.95(e), Employee Notification of Monitoring Results, and §1910.95(f), Observation of Monitoring all relate to the same condition of failure to adequately monitor employee noise exposures.

- 5. No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented an effective hearing conservation program.

Note: An effective hearing conservation program means one that is current and has ALL the elements of a hearing conservation program as described in §1910.95(d) through (o).

## **XII. Violations of the Respiratory Protection Standard (§1910.134).**

If an inspection reveals the presence of potential respirator violations, CPL 02-00-158, *Inspection Procedures for the Respiratory Protection Standard*, dated June 26, 2014 and adopted by HIOSH on [Insert date], shall be followed.

### **XIII. Violations of Air Contaminant Standards (§1910.1000).**

#### **A. Requirements under the standard:**

1. Exhibits A and B of §12-60-50, HAR provides ceiling values, short-term exposure limits, and 8-hour time-weighted averages applicable to employee exposure to air contaminants.
2. Section 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, personal protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.
3. Section §1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used.
4. There may be cases where workplace conditions require that employers provide engineering controls as well as administrative controls (including work practice controls) **and** personal protective equipment. Section 1910.1000(e) allows employers to implement feasible engineering controls and/or administrative and work practice controls in any combination, provided the selected abatement means eliminates the overexposure.
5. Where engineering and/or administrative controls are feasible but do not, or would not, reduce air contaminant levels below applicable ceiling values or threshold limit values, an employer must nevertheless institute such controls to reduce the exposure levels. In cases where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels, employers must additionally provide personal protective equipment to reduce exposures.

#### **B. Classification of Violations of Air Contaminant Standards.**

Where employees are exposed to a toxic substance in excess of the PEL established by HIOSH standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or other-than-serious on the criteria set forth in the Chemical Sampling Information web page and based on whether respirators are being properly used. Classification of these violations is dependent upon the determination that an illness is reasonably predictable at the measured exposure level.

##### **1. Classification Considerations.**

Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described in Paragraph II.C.3. of this chapter.

- a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered serious at levels where only mild, temporary effects would be expected to occur.

- b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.
- c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where serious a health effect(s) could be expected to occur.
- d. For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no HIOSH PEL, a citation for exposure in excess of the recommended value may be considered under §12-60-2(a)(3) or §12-110-2(a)(3). Prior to citing a general duty standard violation under these circumstances, it is essential that CSHOs document that a *hazardous exposure* is occurring or has occurred at the workplace, not just that a recognized occupational exposure recommendation has been exceeded. See instructions in Section III of this chapter, [General Duty Requirements](#).
- e. If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.  
*NOTE: An exception to this may apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his workers against the specific hazard it is intended to address.*
- f. For a substance having an 8-hour PEL with no ceiling PEL but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Administrator in accordance with [Paragraph III.D.2.](#) of this chapter. If no citation is issued, CSHO shall advise employers that a ceiling value is recommended.

## **2. Additive and Synergistic Effects.**

- a. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination with each other shall be evaluated using the formula found in §1910.1000(d)(2). Use of this formula requires that exposures have an additive effect on the **same** body organ or system.
- b. If CSHOs suspect that synergistic effects are possible they shall consult with their supervisor, who shall then refer the question to the Administrator. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to accurately reflect severity and/or penalty.

## **XIV. Citing Improper Personal Hygiene Practices.**

The following guidelines apply when citing personal hygiene violations:

### **A. Ingestion Hazards.**

A citation under §1910.141(g)(2) and (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

1. For citations under §1910.141(g)(2) and (4), wipe sampling results shall be taken to establish the potential for a serious hazard.
2. Where, for any substance, a serious hazard is determined to exist due to potential for ingestion or absorption for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under §12-60-2(a)(3) or §12-110-2(a)(3).

### **B. Absorption Hazards.**

A citation for exposure to materials that may be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary, but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, a §1910.1000(a)(b), as amended by §12-60-50(d)(2), HAR, citation may be considered. Engineering or administrative (including work practice) controls may be required in these cases to prevent the hazard. See §1910.132(a).

### **C. Wipe Sampling.**

In general, wipe samples, not measurements for air concentrations, will be necessary to establish the presence of a toxic substance posing a potential absorption or ingestion hazard. (See TED 01-00-015, *OSHA Technical Manual*, dated January 20, 1999, Section II, Chapter 2-V for sampling procedures.)

### **D. Citation Policy.**

The following criteria should be considered prior to issuing a citation for ingestion or absorption hazards:

1. A health risk exists as demonstrated by one of the following:
  - a. A potential for an illness, such as dermatitis, and/or
  - b. The presence of a toxic substance that may be potentially ingested or absorbed through the skin. (See the Chemical Sampling Information\_web page.)
2. The potential for employee exposure by ingestion or absorption may be established by taking both qualitative and quantitative wipe samples. The substance must be present on surfaces that employees contact (such as lunch tables, water fountains, work areas etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption.
3. The sampling results must reveal that the substance has properties and exists in quantities that pose a serious hazard.

## **XV. Biological Monitoring.**

If an employer has been conducting biological monitoring, CSHOs shall evaluate the results of such testing. These results may assist in determining whether a significant quantity of the toxic substance is being ingested or absorbed through the skin.

## **Chapter 5**

### **CASE FILE PREPARATION AND DOCUMENTATION**

#### **I. Introduction.**

These instructions are provided to assist CSHOs in determining the minimum level of written documentation necessary in preparation of an inspection case file. All necessary information relative to documentation of violations shall be obtained during the inspection, (including but not limited to notes, audio/video-tapes, photographs, employer and employee interviews and employer maintained records). CSHOs shall develop detailed information for the case file to establish the specific elements of each violation.

CSHOs and Branch Managers shall follow all Administrator consultation procedures, including those established by the DAG's Office, when an inspection involves important or novel facts or presents potentially complex litigation issues. If consultation is necessary, it shall be conducted at the earliest possible stage of the inspection.

#### **II. Inspection Conducted, Citations Being Issued.**

All case files must include the following forms and documents.

##### **A. Inspection (OSHA-1).**

The CSHO shall obtain available information to complete the OSHA-1 and other appropriate forms.

##### **B. Narrative (OSHA-1A).**

The OSHA-1A shall list the following:

1. Establishment Name;
2. Inspection Number;
3. Additional Citation Mailing Addresses;
4. Names and Addresses of all Organized Employee Groups;
5. Names, Addresses and Phone Numbers of Authorized Representatives of Employees;
6. Employer Representatives contacted and the extent of their participation in the inspection;
7. CSHO's evaluation of the Employer's Safety and Health System, and if applicable, a discussion of any penalty reduction for good faith;
8. A written narrative containing accurate and concise information about the employer and the worksite;
9. Date the closing conference(s) was held and description of any unusual circumstances encountered;
10. Any other relevant comments/information CSHOs believe may be helpful, based on his/her professional judgment;

11. Names, Addresses and Phone Numbers of other persons contacted during the inspection, such as the police, coroner, attorney, etc.;
12. Names and Job Titles of any individuals who accompanied the CSHO on the inspection;
13. Calculation of the DART rate (at least three full calendar years and the current year);
14. Discussion clearly addressing all items on the Complaint or Referral;
15. Type of Legal Entity [Indicate whether the employer is a corporation, partnership, sole proprietorship, etc. (Do not use the word “owner.”) If the employer named is a subsidiary of another firm, indicate that.]; and
16. Coverage Information.

**C. Violation (OSHA-1B).**

1. A separate *Violation (OSHA-1B)* should normally be completed for each alleged violation. Describe the observed hazardous conditions or practices, including all relevant facts, and all information pertaining to how and/or why a standard is violated. Specifically identify the hazard to which employees have been or could be exposed. Describe the type of injury or illness which the violated standard was designed to prevent in this situation, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been, or could be potentially exposed. If employee exposure was not actually observed during the inspection, state the facts on which the determination was made (i.e., tools left inside an unprotected trench) that an employee has been or could have been exposed to a safety or health hazard.
2. The following information shall be documented:
  - a. Explanation of the hazard(s) or hazardous condition(s);
  - b. Identification of the machinery or equipment (such as equipment type, manufacturer, model number, serial number);
  - c. Specific location of the hazard and employee exposure to the hazard;
  - d. Injury or illness likely to result from exposure to the hazard;
  - e. Employee proximity to the hazard and specific measurements taken, (describe how measurements were taken, identify the measuring techniques and equipment used, identify those who were present and observed the measurements being made, include calibration dates of equipment used);
  - f. For contaminants and physical agents, any additional facts that clarify the nature of employee exposure. A representative number of Safety Data Sheets should be collected for hazardous chemicals that employees may potentially be exposed to;
  - g. Names, addresses, phone numbers, and job titles for exposed employees;
  - h. Approximate duration of time the hazard has existed and frequency of exposure to the hazard;
  - i. Employer knowledge;

- j. Any and all facts which establish that the employer actually knew of the hazardous condition, or what reasonable steps the employer failed to take (including regular inspections of the worksite) that could have revealed the presence of the hazardous condition. The mere presence of the employer in the workplace is not sufficient evidence of knowledge. There must be evidence that demonstrates why the employer reasonably could have recognized the presence of the hazardous condition. Avoid relying on conclusory statements such as “reasonable diligence” to establish employer knowledge. See [Chapter 4, Paragraph II.C.4., \*Knowledge of the Hazardous Condition\*](#), for additional information.
- In order to establish that a violation may be potentially classified as willful, facts shall be documented to show either that the employer knew of the applicable legal requirements and intentionally violated them or that the employer showed plain indifference to employee safety or health (See Section V of Chapter 4, *Willful Violations*). For example, document facts that the employer knew that the condition existed and that the employer was required to take additional steps to abate the hazard. Such evidence could include prior HIOSH/OSHA citations, previous warnings by a CSHO, insurance company or city/state inspector regarding the requirements of the standard(s), the employer’s familiarity with the standard(s), contract specifications requiring compliance with applicable standards, or warnings by employees or employee safety representatives of the presence of a hazardous condition and what protections are required by HIOSH standards.
  - Also include facts showing that even if the employer was not consciously or intentionally violating the Law, the employer acted with such plain indifference for employee safety that had the employer known of the standard, it probably would not have complied anyway. This type of evidence would include instances where an employer was aware of an employee exposure to an obviously hazardous condition(s) and made no reason-able effort to eliminate it.
  - Any relevant comments made by the employer or employee during the walkaround or closing conference, including any employer comments regarding why it violated the standard, which may be characterized as admissions of the specific violations described; and
  - Include any other facts, which may assist in evaluating the situation or in reconstructing the total inspection picture in preparation for testimony in possible legal actions.
- k. Appropriate and consistent abatement dates should be assigned and documented for abatement periods longer than 30 days. The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the violation. An abatement period should be indicated in the citation as a specific date, not a number of days. When abatement is witnessed by the CSHO during an inspection, the abatement period shall be listed on the citation as “Corrected During Inspection.”
- l. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO. Abatement



periods exceeding 30 days shall not normally be offered, particularly for simple safety violations. Situations may arise, however, especially for complex health or program violations, where abatement cannot be completed within 30 days (e.g., ventilation equipment needs to be installed, new parts or equipment need to be ordered, delivered and installed or a process hazard analysis needs to be performed as part of a PSM program). When an initial abatement date is granted that is in excess of 30 calendar days, the reason should be documented in the case file.

3. Records obtained during the course of the inspection which the CSHO determines are necessary to support the violations.
4. For violations classified as repeated, the file shall include a copy of the previous citation(s) on which the repeat classification is based and documentation of the final order date of the original citation.

### **III. Inspection Conducted But No Citations Issued.**

For inspections that do not result in citations being issued, a lesser amount of documentation may be included in the case file. At a minimum, the case file shall include the *Inspection (OSHA-1)*, the *Narrative (OSHA-1A)*, and a general narrative/statement that at the time of the inspection no conditions were observed in violation of any standard, and a complaint/referral response letter, if appropriate, shall clearly address all of the item(s).

### **IV. No Inspection.**

For “No Inspections,” the CSHO shall include in the case file an *Inspection (OSHA-1)*, which indicates the reason why no inspection was conducted. If there was a denial of entry, the information necessary to obtain a warrant or an explanation of why a warrant is not being sought shall be included. The case file shall also include a complaint/referral response letter, which explains why an inspection was not conducted.

## **V. Health Inspections**

### **A. Document Potential Exposure.**

In addition to the documentation indicated above, CSHOs shall document all relevant information concerning potential exposure(s) to chemical substances or physical agents (including, as appropriate, collection and evaluation of applicable MSDSs/SDSs), such as symptoms experienced by employees, duration and frequency of exposures to the hazard, employee interviews, sources of potential health hazards, types of engineering or administrative controls implemented by the employer, and personal protective equipment being provided by the employer and used by employees.

### **B. Employer’s Occupational Safety and Health System.**

CSHOs shall request and evaluate information on the following aspects of the employer’s occupational safety and health system as it relates to the scope of the inspection:

1. **Monitoring.**

The employer's system for monitoring safety and health hazards in the establishment must include a program for self-inspection. CSHOs shall discuss the employer's maintenance schedules and inspection records. Additional information shall be obtained concerning activities such as sampling and calibration procedures, ventilation measurements, preventive maintenance procedures for engineering controls, and laboratory services. Compliance with the monitoring requirements of any applicable substance-specific health standards shall be determined.

**2. Medical.**

CSHOs shall determine whether the employer provides the employees with pre-placement and periodic medical examinations. The medical examination protocol shall be requested to determine the extent of the medical examinations and, if applicable, compliance with the medical surveillance requirements of any applicable substance-specific health standards.

**3. Records Program.**

CSHOs shall determine the extent of the employer's records program, such as whether records pertaining to employee exposure and medical records are being maintained in accordance with §1910.1020.

**4. Engineering Controls.**

CSHOs shall identify any engineering controls present, including substitution, isolation, general dilution and local exhaust ventilation, and equipment modification.

**5. Work Practice and Administrative Controls.**

CSHOs shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, employee training and education. Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.

*NOTE: Employee rotation is not permitted as a control under some standards.*

**6. Personal Protective Equipment.**

An effective personal protective equipment program should exist in the plant. A detailed evaluation of the program shall be documented to determine compliance with specific standards, such as, §§1910.95, 1910.134, and 1910.132.

**7. Regulated Areas.**

CSHOs shall investigate compliance with the requirements for regulated areas as specified by certain standards. Regulated areas must be clearly identified and known to all appropriate employees. The regulated area designation must be maintained according to the prescribed criteria of the applicable standard.

**8. Emergency Action Plan.**

CSHOs shall evaluate the employer's emergency action plan when such a plan is required by a specific standard.\* When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, CSHOs' evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are

explained to employees and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

\*§1910.157(a) states “Where extinguishers are provided but are not intended for employee use and the employer has an emergency action plan and a fire prevention plan that meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39 respectively, then only the requirements of paragraphs (e) and (f) of this section apply.” So while there are very few, if any, standards that require an emergency action plan, failure to have one will trigger the requirement for fire extinguishers in accordance with §1910.157.

CSHOs should provide the employer a choice of either providing fire extinguishers or meeting the other requirements which include an emergency action plan. A citation based on their choice should then be issued. See CPL 02-01-037, Compliance Policy for Emergency Action Plans & Fire Prevention Plans, July 9, 2002 [Not adopted by HIOSH, for reference only]

## **VI. Affirmative Defenses.**

An affirmative defense is a claim which, if established by the employer and found to exist by the CSHO, will excuse the employer from a citation that has otherwise been documented.

### **A. Burden of Proof.**

Although employers have the burden of proving any affirmative defenses at the time of a hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. CSHOs shall keep in mind all potential affirmative defenses and attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s). CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Branch Manager or designee.

### **B. Explanations.**

The following are explanations of common affirmative defenses.

#### **1. Unpreventable Employee or Supervisory Misconduct or “Isolated Event.”**

- a. To establish this defense, employers must show all the following elements:
  - A work rule adequate to prevent the violation;
  - Effective communication of the rule to employees;
  - Methods for discovering violations of work rules; and
  - Effective enforcement of rules when violations are discovered.
- b. CSHOs shall document whether these elements are present, including if the work rule at issue tracks the requirements of the standard addressing the hazardous condition.

**EXAMPLE 5-1:** An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts to be documented include:

- Who removed the guard and why?
- Did the employer know that the guard had been removed?
- How long or how often had the saw been used without the guard?
- Were there any supervisors in the area while the saw was operated without a guard?
- Did the employer have a work rule that the saw only be operated with the guard on?
- How was the work rule communicated to employees?
- Did the employer monitor compliance with the rule?
- How was the work rule enforced by the employer when it found noncompliance?

## 2. Impossibility/Infeasibility of Compliance.

Compliance with the requirements of a standard is impossible or would prevent performance of required work **and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available.**

**EXAMPLE 5-2:** An unguarded table saw is observed. The employer states that a guard would interfere with the nature of the work. Facts to be documented include:

- Would a guard make performance of the work impossible or merely more difficult?
- Could a guard be used some of the time or for some of the operations?
- Has the employer attempted to use a guard?
- Has the employer considered any alternative means of avoiding or reducing the hazard?

NOTE: A variance should have been requested if the employer believed that compliance with the standard is impossible or infeasible to get the work done and used reasonable alternative steps. Another question to ask would be:

- Why didn't you request a variance from the standard?

## 3. Greater Hazard.

Compliance with a standard would result in a greater hazard(s) to employees than would noncompliance **and** the employer took reasonable alternative protective measures, or there are no alternative means of employee protection. Additionally, an application for a variance would be inappropriate; i.e., the reasonable alternative protective measures would not provide equal or greater protection.

**EXAMPLE 5-3:** The employer indicates that a saw guard had been removed because it caused the operator to be struck in the face by particles thrown from the saw. Facts to be documented include:

- Was the guard initially properly installed and used?
- Would a different type of guard eliminate the problem?
- How often was the operator struck by particles and what kind of injuries resulted?
- Would personal protective equipment such as safety glasses or a face shield worn by the employee solve the problem?

- Was the operator's work practice causing the problem and did the employer attempt to correct the problem?
- Was a variance requested?

## **VII. Interview Statements.**

### **A. Generally**

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. Statements shall normally be in writing and the individual shall be encouraged to sign and date the statement. During management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes whenever possible as these tend to be more credible than later general recollections.

### **B. CSHOs shall obtain written statements when:**

1. There is an actual or potential controversy as to any material facts concerning a violation;
2. A conflict or difference among employee statements as to the facts arises;
3. There is a potential willful or repeated violation; and
4. In accident investigations when attempting to determine if potential violations existed at the time of the accident.

### **C. Language and Wording of Statement.**

Interview statements shall normally be written in the first person and in the language of the individual when feasible. (Statements taken in a language other than English shall be subsequently translated.) The wording of the statement shall be understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections to the statement; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end with the wording: "I have read the above, or the statement has been read to me, and it is true to the best of my knowledge." Where appropriate, the statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." Only the individual interviewed may later waive the confidentiality of the statement. The individual shall sign and date the interview statement and the CSHO shall sign it as a witness.

### **D. Refusal to Sign Statement.**

If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement. A note to this effect shall be documented in the case file. Recorded statements shall be transcribed whenever possible.

### **E. Video and Audiotaped Statements.**

Interview statements may be videotaped or audiotaped, with the consent of the person being interviewed. The statement shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases so that it may be signed. CSHOs are encouraged to produce the written statement for correction and signature as soon as possible, and identify the transcriber.

## **F. Administrative Depositions.**

When necessary to document or develop investigative facts, a management official or other individual may be administratively deposed.

*NOTE: See [Chapter 3, Paragraph VII.I.4., Interviews of Non-Managerial Employees](#), for additional guidance regarding interviews of non-managerial employees.*

## **VIII. Paperwork and Written Program Requirements.**

In certain cases, violations of standards requiring employers to have a written program to address a hazard or make a written certification (e. g., hazard communication, personal protective equipment, permit required confined spaces and others) are considered paperwork deficiencies. However, in some circumstances, violations of such standards may have an adverse impact on employee safety and health. See CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*, adopted by HIOSH on January 19, 1996 and adopted by HIOSH on January 19, 1996.

## **IX. Guidelines for Case File Documentation for Use With Videotapes and Audiotapes.**

The use of videotaping as a method of documenting violations and of gathering evidence for inspection case files is encouraged. Certain types of inspections, such as fatalities, imminent danger and ergonomics shall include videotaping. Other methods of documentation, such as handwritten notes, audiotapes, and photographs, continue to be acceptable and are encouraged to be used whenever they add to the quality of the evidence and whenever videotaping equipment is not available. See CPL 02-00-098, *Guidelines for Case File Documentation for use with Videotapes and Audiotapes*, dated October 12, 1993, adopted by HIOSH on December 20, 1993.

## **X. Case File Activity Sheet.**

All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file. Diary entries should be clear, concise and legible and should be dated in chronological order to reflect a timeline of the case development. Information provided should include, at a minimum, the date of the action or event, a brief description of the action or event and the initials of the person making the entry. When a case file is completed, the CSHO must ensure that it is properly organized:

### **ORDER OF FILING**

<b>LEFT SIDE</b>	<b>RIGHT SIDE (File in order indicated)</b>
Case Diary Sheet	<u><b>Follow-up</b> Inspection documents</u> to match order of initial inspection documents.
Inspection Activity Log	<u><b>Initial</b> Inspection Documents</u> as follows:
Payment Log	OSHA-2, Citation and Notification of Penalty
[All other material is to be filed in REVERSE CHRONOLOGICAL ORDER]	OSHA-1, Inspection

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Penalty information: letters requesting payment, other related correspondence	OSHA-1A, Narrative
Abatement information: Abatement letters, 5-day letters, PMA requests and correspondence, Invoices, etc	Forms or other material used to collect data for OSHA-1, and/or used in opening conference.
Informal Conference: ISAs, Notices to union, Documents obtained during informal conference, Informal Conference Summary if no ISA, AND anything given by employer during informal.	HIOSH-10, After the Inspection, and any supporting forms used in closing conference
Contest documents: Notice of contest, transmittal forms, hearing notices, STIPs, Decisions and Orders,	OSHA-36. Fatality/Catastrophe Report
Fatality related information: Next-of-kin letter, Letter to Victim's family following investigation results, etc.	OSHA-170, Investigation Summary
Informal documentation:	OSHA-7, Notice of Alleged Safety or Health Hazards, incl related complaint letters
Memoranda to file,	OSHA-90, Referral (incl any supporting docs)
Other miscellaneous notes	Accident Report (see Guideline on HIOSH Accident Investigations, dated December 27, 2011).
	OSHA 1B/1B(IH) worksheet and related docs
	Supporting Photos
	Sampling forms: OSHA-91, 93, 92, etc
	Field Notes, including Field 1Bs and photos <u>not</u> resulting in citation
	Witness or Employee statements
	Technical information: WC-1s, OSHA-300, Safety Data Sheets, Equipment Manuals, Employer's Safety & Health Program, Audiograms, First aid training list, Employer's Handbook, etc.
	OSHA-168, Inspection Assignment

## **XI. Citations.**

Section 396-10(l), HRS addresses the form and issuance of citations.

Section 10(l)) provides: "... the department shall issue a written citation, order or notice thereof.... The citation, order or notice thereof shall include the abatement requirements and within a reasonable time the employer shall be advised of the proposed sanctions, including proposed penalties."

Section 12-51-14(b), HAR states "Any citation shall describe with particularity the nature of the alleged violation including a reference to law, standard, rule, or order alleged to have been violated. Any citation shall also fix a reasonable time for the correction of the alleged violation."

### **A. Statute of Limitations.**

Section 10(l) provides that any citation, order, or notice shall be “promptly” issued. HIOSH is not limited by statute to the six months following the occurrence of any violation for the issuance of citations, however, past practice indicates that HIOSH will endeavor to issue citations within six months of the opening conference date. Where the actions or omissions of the employer concealed the existence of the violation, or served to delay the gathering of evidence/documentation necessary to support the violation, the six months may be extended to account for the concealment or delay.

The CSHO should keep in mind that employees may continue to be exposed to the hazard until the employer has eliminated or abated the hazard and the employer is not required to eliminate or abate the hazard until a citation has been made a final order. Therefore, it is vital that citations for serious violations be issued as promptly as possible, without sacrificing the quality of the documentation needed to establish the violation.

Branch managers have the responsibility to track the timely issuance of citations and ensure that citations are issued with reasonable promptness.

### **B. Issuing Citations.**

1. Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service, may be used **in addition** to certified mail if it is believed that these methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The circumstances of delivery shall be documented in the diary sheet.
2. Citations shall be mailed to employee representatives at least one working day after the citation was mailed to the employer. Citations shall also be mailed to any employee upon request and without the need to make a written request under the [Hawaii Uniform Information Practices Act](#). In the case of a fatality, the family of the victim shall be provided with a copy of the citations without charge or the need to make a written request.

### **C. Amending/Withdrawing Citations and Notification of Penalties.**

#### **1. Amendment Justification.**

Amendments to, or withdrawal of, a citation shall be made when information is presented to the division, which indicates a need for such action and may include administrative or technical errors such as:

- a. Citation of an incorrect standard;
- b. Incorrect or incomplete description of the alleged violation;
- c. Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;
- d. Additional facts not available to the CSHO at the time of the inspection establish that there was no employee exposure to the hazard; or
- e. Additional facts establish a need for modification of the abatement date or the penalty, or reclassification of citation items.

#### **2. When Amendment is not Appropriate.**



Amendments to, or withdrawal of, a citation shall not be made by the division for any of the following:

- a. Timely Notice of Contest received;
- b. The 20 calendar days for filing a Notice of Contest has expired and the citation has become a Final Order; or
- c. Employee representatives were not given the opportunity to present their views (unless the revision involves only an administrative or technical error).

#### **D. Procedures for Amending or Withdrawing Citations.**

The following procedures apply whenever amending or withdrawing citations.

NOTE: The instructions contained in this section, with appropriate modifications, are also applicable to the amendment of the *Notification of Failure to Abate Alleged Violation (OSHA-2B)*.

1. Withdrawal of, or modifications to, the citation and notification of penalty, shall normally be accomplished by means of [Informal](#) or [Formal Settlement Agreements](#).
2. In exceptional circumstances, the Branch Manager or designee may initiate a change to a *Citation and Notification of Penalty (OSHA-2)* without an informal conference. If proposed amendments to citation items (individual violations) change the original classification of the items, such as willful to repeated, the original items shall be withdrawn and the new, appropriate items will be issued. The amended *Citation and Notification of Penalty Form (OSHA-2)* shall clearly indicate that the employer is obligated under the Law to post the amendment to the citation along with the original citation, until the amended violation has been corrected, or for three working days, whichever is longer.
3. The 20 calendar day contest period for the amended portions of the citation will begin on the day following the day of receipt of the amended *Citation and Notification of Penalty (OSHA-2)*.
4. The contest period is not extended for the unamended portions of the original citation. A copy of the original citation shall be attached to the amended *Citation and Notification of Penalty (OSHA-2)* when the amended form is forwarded to the employer.
5. When circumstances warrant, the Branch Manager may withdraw a *Citation and Notification of Penalty (OSHA-2)* in its entirety. Justification for the withdrawal must be noted in the case file. A letter withdrawing the *Citation and Notification of Penalty (OSHA-2)* shall be sent to the employer. The letter, signed by the Branch Manager, shall refer to the original *Citation and Notification of Penalty (OSHA-2)*, state that they are withdrawn and direct that the employer posts the letter for three working days in the same location(s) where the original citation was posted. When applicable, a copy of the letter shall also be sent to the employee representative(s) and/or complainant.

## **XII. Inspection Records.**

### **A. Generally.**

1. Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty.

2. All official forms and notes constituting the basic documentation of a case must be part of the case file. All original field notes are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, videotapes, DVDs and audiotapes. Inspection records are the property of the State of Hawaii Government and not the property of the CSHO and are not to be retained or used for any private purpose.

## **B. Release of Inspection Information.**

The information obtained during inspections may be confidential, and may be disclosable or nondisclosable based on criteria established in the Hawaii Uniform Information Practices Act. Requests for release of inspection information shall be directed to the ATS Branch Manager. See [Chapter 16, Disclosure Under the Uniform Information Practices Act \(UIPA\), State of Hawaii](#).

## **C. Classified and Trade Secret Information.**

1. Any classified or trade secret information and/or personal knowledge of such information by division personnel shall be handled in accordance with HIOSH Law. Trade Secrets are matters that are not of public or general knowledge. A trade secret, as referenced in Section 396-13, HRS, includes information concerning or related to processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. See 18 USC 1905. The collection of such information and the number of personnel with access to it shall be limited to the minimum necessary for the conduct of investigative activities. CSHOs shall specifically identify any classified and trade secret information in the case file.
2. It is essential to the effective enforcement of the Law that CSHOs and all HIOSH personnel preserve the confidentiality of all information and investigations which might reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such (unless, after following proper procedures, including consulting with the DAG's Office, the division determines that the matter is not a trade secret). Information obtained in such areas, including all negatives, photographs, videotapes and documentation forms shall be labeled:

“CONFIDENTIAL - TRADE SECRET INFORMATION”

3. Under Section 396-13, HRS all information reported to or obtained by CSHOs in connection with any inspection or other activity which contains or may reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other HIOSH officials concerned with the enforcement of the Law or, when relevant, in any proceeding under the Law.
4. While HIOSH Law does not specifically contain a provision for sanctions against State personnel who violate the Trade Secret provision, the Administrator shall ensure that the matter is properly investigated and appropriate recommendations and/or actions be implemented, which may result in disciplinary action up to and including termination from employment.
5. Trade secret materials shall not be labeled as “Top Secret,” or “Secret,” nor shall these security classification designations be used in conjunction with

other words, unless the trade secrets are also classified by an agency of the U. S. Government in the interest of national security.

6. If the employer objects to the taking of photographs and/or video-tapes because trade secrets would or may be disclosed, CSHOs should advise employers of the protection against such disclosure afforded by Section 396-13, HRS and §12-51-9, HAR. If the employer still objects, CSHOs shall contact the DAGs office, Branch Manager or Administrator for guidance.

## Chapter 6

### PENALTIES AND DEBT COLLECTION

#### I. General Penalty Policy.

The penalty structure in Section 396-10 of the HIOSH Law is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers. While penalties are not designed as punishment for violations, the Legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.

Proposed penalties, therefore, serve the public policy purpose intended under the Law; and criteria approved for such penalties by the Administrator are based on effectuating this purpose.

The penalty structure described in this chapter is part of HIOSH's general enforcement policy and shall normally be applied as set forth below. If, in a specific case, the Branch Manager determines that it is warranted to depart from the general policy in order to achieve the appropriate deterrent effect, the extent of the departure and the reasons for doing so should be fully explained in the case file.

#### II. Civil Penalties.

##### A. Statutory Authority for Civil Penalties.

Section 396-10, HRS, provides the Director with the statutory authority to assess civil penalties for violations of the Law. Civil penalties advance the purposes of the Law by encouraging compliance and deterring violations.

**Proposed penalties** are the penalty amounts HIOSH issues with citation(s).

1. Section 10(f) of the Law provides that any employer who willfully or repeatedly violates the Law, rule, citation, or order shall be assessed a civil penalty of not more than \$77,000 for each violation, but not less than \$5,500 for each violation [*interpreted to apply only to willful violations*].
2. Section 10(b) provides that any employer who has received an order or citation for a serious violation shall be assessed a civil penalty of up to \$7,700 for each violation.
3. Section 10(c) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of up to \$7,700 may be assessed for each violation.
4. Section 10(d) provides that each day a violation continues shall constitute a separate violation except during the abatement period.
5. Section 10(e) provides that, when a violation of a posting requirement is cited, a civil penalty of up to \$7,700 shall be assessed for each violation.

NOTE: Penalties are considered "proposed" until the penalty has been made a final order.

##### B. Appropriation Act Restrictions.

In providing funding for OSHA and the State Plans such as Hawaii, Congress has placed restrictions on enforcement activities regarding two categories of

employers: small farming operations and small employers in low-hazard industries. The Appropriations Act contains limits for OSH Act activities on a year-by-year basis.

While the Appropriations Act forbids the use of OSHA funds under the 23(g) grant for such activities, HIOSH Law contains no such restrictions. Enforcement activity must continue, however, time spent must be charged to 100% state Code (756).

NOTE: See CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, issued May 28, 1998 and adopted by Hawaii on July 10, 1998, for additional information. Appendix A of that directive contains the list of low-hazard industries, which is updated annually.

### **C. Minimum Penalties.**

The following policies apply:

1. The proposed penalty for any willful violation shall not be less than \$5,500. The \$5,500 penalty is a statutory minimum and not subject to administrative discretion. This minimum penalty applies to all willful violations, whether serious or other-than-serious.
2. When the proposed penalty for a serious violation (citation item) would amount to less than \$500, a \$500 penalty shall be proposed for that violation.
3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than \$200, no penalty shall be proposed for that violation.
4. When the proposed penalty for a posting violation (citation item) would amount to less than \$250, a \$250 penalty shall be proposed for that violation, if the company was previously provided a poster by HIOSH/OSHA.

### **D. Maximum Penalties.**

The civil penalty amounts included in Section 10 are generally maximum amounts before any permissible reductions are taken.

Table 6-1 below summarizes the maximum amounts for proposed civil penalties:

**Table 6-1: Maximum Amounts for Civil Penalties**

Type of Violation	Penalty Maximum
Serious	\$7,700 per violation
Other-Than-Serious	\$7,700 per violation
Willful or Repeated	\$77,000 per violation
Posting Requirements	\$7,700 per violation
Failure to Abate	\$7,700 per day unabated beyond the abatement date [generally limited to 30 days' maximum]

### III. **Penalty Factors.**

Section 10(j) of the Law provides that penalties shall be assessed giving due consideration to four factors:

- ▶ The **gravity** of the violation;
- ▶ **Size** of the employer's business;
- ▶ The **good faith** of the employer; and
- ▶ The employer's **history** of previous violations.

#### **A. Gravity of Violation.**

The gravity of the violation is the **primary consideration** in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

- The **severity** of the injury or illness which could result from the alleged violation.
  - The **probability** of an accident or incident that could result in an injury or illness as a result of the alleged violation.
1. **Severity Assessment.** The classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness. The following categories shall be considered in assessing the severity of potential injuries or illnesses:
    - a. **For Serious:**
      - **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.
      - **Medium Severity:** Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.
      - **Low Severity:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.
    - b. **For Other-Than-Serious:**
      - **Minimal Severity:** Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium or high severity and would not cause death or serious physical harm.

To classify the alleged violation, the MOST serious potential injury or illness which could reasonably result from the exposure to the hazard (alleged violation) is used. While a wide range of injuries or illnesses could result from a particular accident/event, i.e. fall from heights, the CSHO is to use the most serious potential injury.

- 2. Probability Assessment.** The probability that an injury or illness could result from a hazard has no role in determining the initial classification of a violation, but does affect the amount of the proposed penalty.

a. Probability shall be categorized either as greater or as lesser.

- **Greater Probability:** Results when the likelihood that the incident or accident which could cause the injury or illness is judged to be relatively high.
- **Lesser Probability:** Results when the likelihood that the incident or accident which could cause the injury or illness is judged to be relatively low.

b. How to Determine Probability.

The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

- Number of employees exposed;
- Frequency of exposure or duration of employee over-exposure to contaminants;
- Employee proximity to the hazardous conditions;
- Use of appropriate personal protective equipment;
- Medical surveillance program;
- Youth and inexperience of employees, especially those under 18 years old; and
- Other pertinent working conditions.

**EXAMPLE 6-1:** Greater probability may include an employee exposed to the identified hazard for four hours a day, five days a week. Lesser probability may be present when an employee is performing a non-routine task with two previous exposures within the previous year and no injuries or illnesses are associated with the identified hazard.

c. **Final Probability Assessment.**

All of the factors outlined above shall be considered in determining a final probability assessment.

When adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the assessment may be adjusted at the discretion of the Branch Manager as appropriate. Such decisions shall be fully explained in the case file.

**3. Gravity-Based Penalty (GBP).**

- a. The gravity-based penalty (GBP) for each violation shall be determined by combining the severity assessment and the final probability assessment.
- b. GBP is an unreduced penalty and is calculated in accordance with the procedures below.

NOTE: Throughout the FOM when the term “unreduced penalty” is used, it is the same as GBP.

**4. Serious Violation & GBP.**

- a. The gravity of a violation is defined by the GBP:
  - A **high gravity** violation is one with a GBP of \$7,000 or greater.
  - A **moderate gravity** violation is one with a GBP of \$4,000, \$5,000 or \$6,000.
  - A **low gravity** violation is one with a GBP of \$3,000.
- b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness.
- c. If the Branch Manager determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be pro-posed instead of \$5,000. Such discretion should be exercised based on the facts of the case. The reasons for this determination shall be fully explained in the case file.
- d. For serious violations, the GBP shall be assigned on the basis of the following scale in Table 6-2:

**Severity + Probability = GBP**

**Table 6-2: Serious Violations**

<b>Severity</b>	<b>Probability</b>	<b>GBP</b>	<b>Gravity</b>	<b>IMIS Code</b>
High	Greater	\$7,000 (or \$7,700)	High	10
Medium	Greater	\$6,000	Moderate	5
Low	Greater	\$5,000	Moderate	5
High	Lesser	\$5,000	Moderate	5
Medium	Lesser	\$4,000	Moderate	5
Low	Lesser	\$3,000	Low	1

**5. Other-Than-Serious Violations & GBP.**

- a. For other-than-serious safety and health violations, there is only minimal severity.
- b. If the Branch Manager determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,700 may be proposed. Such discretion should be exercised based on the facts of the specific case. The reasons for this determination shall be fully explained in the case file.



**Table 6-3: Other-Than-Serious Violations**

Severity	Probability	GBP
Minimal	Greater	\$1,100 - \$7,700
Minimal	Lesser	\$0

**6. Exception to GBP Calculations.**

For some cases, a GBP may be assigned without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for doing so shall be fully explained in the case file.

**7. Egregious Cases.**

In egregious cases, violation-by-violation penalties are applied. Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990 and adopted by HIOSH on October 5, 1994, revised on March 1, 1996. Penalties calculated under this policy shall not be proposed without the concurrence of the Administrator and the DAG.

**8. Gravity Calculations for Combined or Grouped Violations.**

Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

NOTE: Multiple violations of a single standard may be **combined** into one citation item. When a hazard is identified which involves interrelated violations of different standards, the violations may be **grouped** into a single item.

**a. Combined Violations.**

The severity and probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

**b. Grouped Violations.**

The following shall be adhered to:

- **Grouped Severity Assessment**

There are two considerations for calculating the severity of grouped violations:

- The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; AND
- If the injury or illness that is reasonably predictable from the grouped items is more serious than that from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

- **Grouped Probability Assessment**

There are two factors for calculating the probability of grouped violations:

- The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness; AND
- If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

## **B. Penalty Adjustment Factors.**

### **1. General.**

- a. Penalty adjustments will vary depending upon the employer's "size" (number of employees), "good faith," and "history of previous violations."
  - A 10 percent reduction may be given for **history**
  - A maximum of 25 percent reduction is permitted for **good faith**; and
  - A maximum of 60 percent reduction is permitted for **size**;
- b. Since these reduction factors are based on the general character of an employer's safety and health performance, they shall be calculated only once for each employer.
- c. After the classification (as serious or other-than-serious) and the gravity-based penalty have been determined for each violation, the penalty reduction factors (for size, good faith, history) shall be applied subject to the following limitations:
  - Penalties proposed for violations classified as **repeated** shall be reduced **only for size**.
  - Penalties proposed for violations classified as **willful**, shall be reduced **only for size and history**.
  - Penalties proposed for **serious** violations classified as high severity/greater probability shall be reduced **only for size and history**.

### **2. History Reduction.**

- a. Allowable Percent Reduction

A reduction of 10 percent shall be given to employers who have been inspected by OSHA nationwide, or by any State Plan State and the employers were found to be in compliance or were not issued serious violations in the previous five years.

- b. Allowable Percent Increase

An increase of 10 percent shall be applied to employers who have been issued high gravity serious, willful, repeat, or failure to abate citations that have become a **final order**. The penalty shall not exceed the statutory maximum.

- c. No Reduction or Increase.

- To employers being cited under abatement verification for any §12-51-22, HAR violations (OSHA §1903.19)
- To employers who have not been inspected by Federal OSHA nationwide or by any State Plan State within the last five years.
- To employers who have been issued citations that have become a final order for serious violations within the last five years that were not classified as high gravity.

NOTE: In summary, an employer who has been inspected by OSHA (or by any State Plan State) within the previous five years and has no serious, willful, repeat or failure-to-abate violations will receive a 10% reduction for history.

d. Time Limitation and Final Order.

The five-year history of no prior citations (both Federal and State) shall be calculated from the opening conference date of the current inspection. Only citations that have become a final order within the five years before the opening conference date shall be considered.

3. **Good Faith Reduction.**

A penalty reduction is permitted in recognition of an employer's effort to implement and maintain an effective safety and health management system in the workplace. The following apply to reductions for good faith:

a. Reduction Not Permitted.

- No reduction shall be given for **high gravity serious violations**.
- No reduction shall be given if a **willful violation** is found. Additionally, where a willful violation has been documented, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given for **repeated violations**. If a repeated violation is found, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given if a **failure to abate violation** is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.
- No reduction shall be given to employers being cited under abatement verification for any §12-51-22, HAR (OSHA §1903.19) violations.
- No reduction shall be given if the employer has **no safety and health management system**, or if there are **major deficiencies** in the program.

b. Twenty-Five Percent Reduction.

A 25 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, CSHOs may recommend a full 25 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but has not documented it in writing.

To qualify for this reduction, the employer's safety and health management system must meet the requirements of the safety and health program standard (§12-60-2(b) or §12-110-2(b)) and provide for:

- Appropriate management commitment and employee involvement, including mechanisms to hold supervisors accountable for safety and health responsibilities;
- Worksite analysis for the purpose of hazard identification, including monitoring for health hazards and investigation of near-miss incidents;
- Hazard prevention and control measures, which includes an equipment maintenance program and recordkeeping;
- Periodic program evaluation and improvement; and
- Where **young persons** (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.
- Where **persons who speak limited or no English** are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

c. Fifteen Percent Reduction.

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

**EXAMPLE 6-2:** An acceptable program should include minutes of employee safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

4. **Size Reduction.**

a. The rationale for this adjustment is twofold:

- Smaller employers would not have the same access to resources that larger employers would have. Larger employers usually have corporate offices with persons dedicated to compliance with laws or implementing the company's safety and health program. Small employers may have to assign persons with "collateral" duties to implement their safety and health program, and
- A small penalty amount for small employers would serve as a comparable deterrent to larger penalties for larger employers.

b. A maximum penalty reduction of 60 percent is permitted for small employers. "Size" of an employer shall be calculated on the basis of the maximum number of employees of an employer at **all** workplaces

nationwide, including State Plan States, at any one time during the previous 12 months.

- c. The rates of reduction to be applied are as follows.

**Table 6-4, Size Reduction**

Employees	Percent reduction
1-25	60
26-100	30
101-250	10
251 or more	None

- d. When an employer with 250 or less employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial reduction in penalty shall be permitted for size. If the Branch Manager approves the partial reduction, the justification is to be fully explained in the case file.

NOTE: For violations that are not serious willful, use Table 6-4.

#### 5. Penalty Adjustment Application.

The penalty adjustment will be applied serially for each factor. The penalty adjustment factors shall be applied serially as follows: History, Good Faith, and Size. The penalty adjustment factors will be applied serially to the GBP (e.g., 10%, then 40% etc., instead of 50%). The OSHA Information System will process the calculations automatically upon entering the adjustment factors. The total reduction will normally be the sum of the reductions for each factor.

**Table 6-5: Sample of Moderate Gravity Penalty Comparison  
Summed versus Serial Calculation**

Sample Data	Summed	Serially*
High/Lesser	\$5,000	\$5,000
History (10%)		\$5,000 – 10% = \$4,500
Good Faith (15%)		\$4,500 – 15% = \$3,825
Size (30%)	10% + 15% + 30% = 55%	\$3,825 -30% = \$2,677.50
Result	\$2,250	\$2,677

\*Drop cents, i.e., round down to nearest dollar.

#### **IV. Effect on Penalties if Employer Immediately Corrects.**

Hawaii has not adopted OSHA's Quick-Fix Penalty Reduction. Prompt correction of hazards is evaluated during the informal conference and may result in penalty reductions as part of an Informal Conference Settlement (ISA)

#### **V. Repeated Violations.**

##### **A. General.**

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.
2. A Gravity-Based Penalty (GBP) shall then be calculated for repeated violations based on facts noted during the current inspection.
3. Only the reduction factor for size, appropriate to the facts at the time of the reinspection, shall be applied.

NOTE: Section 10(f) of the Law provides that an employer who repeatedly violates the Law may be assessed a civil penalty of not more than \$77,000 for each violation.

##### **B. Penalty Increase Factors.**

The amount of any increase to a proposed penalty for repeated violations shall be determined by the employer's number of employees.

###### **1. Small Employers.**

For employers with 250 or fewer employees nationwide, the GBP shall be multiplied by a factor of **2** for the first repeated violation and multiplied by **5** for the second repeated violation. The GBP may be multiplied by **10** in cases where the Branch Manager determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file.

###### **2. Large Employers.**

For employers with more than 250 employees nationwide, the GBP shall be multiplied by a factor of **5** for the first repeated violation and, by **10** for the second repeated violation.

##### **C. Other-than-Serious, No Initial Penalty.**

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$250 shall be proposed for the first repeated violation, \$600 for the second repeated violation, and \$1,500 for a third repetition.

NOTE: *These penalties shall not be subject to the Penalty Increase factors as discussed in [Paragraph V.B.](#) of this chapter.*

##### **D. Regulatory Violations.**

1. For calculating the GBP for regulatory violations, see [Paragraph III.A.5.](#) and [Section X.](#)

2. For repeated instances of regulatory violations, the initial penalty (of current inspection) shall be multiplied by 2 for the first repeated violation and multiplied by 5 for the second repeated violation. If the Branch Manager determines that it is necessary to achieve the proper deterrent effect, the initial penalty may be multiplied by 10.

## **VI. Willful Violations.**

Section 10(f) of the Law provides that an employer who willfully violates the Law may be assessed a civil penalty of not more than \$77,000 for each violation, but not less than \$5,500 for each violation. See [Minimum Penalties at Paragraph II.C.](#) of this chapter.

### **A. General.**

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no reduction for good faith.
3. In no case shall the proposed penalty for a willful violation (serious or other-than-serious) after reductions be less than \$5,500.

### **B. Serious Willful Penalty Reductions.**

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 50 or fewer employees. However, in no case shall the proposed penalty be less than the statutory minimum, i.e., \$5,500 for these employers.

NOTE: For violations that are not serious willful, use Table 6-4

**Table 6-7: Serious Willful Penalty Reductions**

<b>Employees</b>	<b>Percent reduction</b>
10 or fewer	80
11-20	60
21-30	50
31-40	40
41-50	30
51-100	20
101-250	10
251 or more	0

- The reduction factor for history shall be applied.
- The proposed penalty shall then be determined from Table 6-8

**Table 6-8: Penalties to be Proposed for Serious Willful Violations**

<b>Total percent reduction for size and/or history</b>	<b>High Gravity</b>	<b>Moderate Gravity</b>	<b>Low Gravity</b>
0%	\$77,000	\$61,000	\$45,000
10%	\$69,300	\$54,900	\$40,500
20%	\$61,600	\$48,800	\$36,000
30%	\$53,900	\$42,700	\$31,500
40%	\$46,200	\$36,600	\$27,000
50%	\$38,500	\$30,500	\$22,500
60%	\$30,800	\$24,400	\$18,000
70%	\$23,100	\$18,300	\$13,500
80%	\$15,400	\$12,200	\$9,000
90%	\$7,700	\$6,100	\$5,500

**C. Willful Regulatory Violations.**

1. For calculating the GBP for regulatory violations, see [Paragraph III.A.5.](#) and [Section X](#) for other-than-serious violations.
2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$5,500.

**VII. Penalties for Failure to Abate.****A. General.**

1. Failure to Abate penalties shall be proposed when:
  - a. A previous citation issued to an employer has become a final order; and
  - b. The condition, hazard or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous).
2. The citation must have become a final order. Citations become a final order when the abatement date for that item passes, provided that the employer has not filed a notice of contest prior to that abatement date.
3. See [Chapter 15, Legal Issues](#), for information on determining final dates of uncontested citations, settlements and Hawaii Labor Relations Board decisions.

**B. Calculation of Additional Penalties.****1. Unabated Violations.**

A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.



- a. EXCEPTION: When the CSHO believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective reasonable belief that it was fully abated, the Branch Manager may reduce or eliminate the daily proposed penalty.
- b. For egregious cases see CPL 02-00-080, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

**2. No Initial Proposed Penalty.**

In instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Branch Manager. In no case shall the GBP be less than \$1,100 per day.

**3. Size Only Permissible Reduction Factor.**

Only the reduction factor for size based upon the circumstances noted during the reinspection shall be applied to arrive at the daily proposed penalty.

**4. Daily Penalty Multiplier.**

The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

- a. The number of days unabated shall be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of re-inspection.
- b. Normally the maximum total proposed penalty for failure to abate a particular violation shall not exceed **30** times the amount of the daily proposed penalty.
- c. At the discretion of the Branch Manager, a lesser penalty may be proposed. The reasoning for the lesser penalty shall be fully explained in the case file (e.g., achievement of an appropriate deterrent effect).
- d. If a penalty in excess of the normal maximum amount of **30** times the amount of the daily proposed penalty is deemed necessary by the Branch Manager to deter continued non-abatement, the case shall be treated pursuant to the violation-by-violation (egregious) penalty procedures established in CPL 02-00-080, Handling of Cases to be Proposed for Violation-By-Violation Penalties, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

**C. Partial Abatement.**

1. When a citation has been partially abated, the Branch Manager may authorize a reduction of 25 to 75 percent to the amount of the proposed penalty calculated as outlined above.
2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

**EXAMPLE 6-3:** Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

## **VIII. Violation-by-Violation (Egregious) Penalty Policy.**

### **A. Penalty Procedure.**

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

### **B. Case Handling.**

Such cases shall be handled in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

### **C. Calculation of Penalties.**

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Administrator.

## **IX. Significant Enforcement Actions**

### **A. Definition.**

A significant enforcement action (aka significant case) is one which results from an investigation in which the total proposed penalty is greater than or equal to \$50,000 or involves novel enforcement issues, regardless of penalty.

### **B. Multi-employer Worksites.**

Several related inspections involving the same employer, or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, may also be considered to be a significant enforcement action if the total aggregate penalty is \$50,000 or more.

### **C. Administrator Concurrence.**

The Administrator's concurrence is normally required for issuing citations in significant enforcement cases.

## **X. Penalty and Citation Policy for Chapter 51, HAR and 1904 Regulatory Requirements.**

Section 10(e) of the Law provides that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to \$7,700 for each violation (this includes recordkeeping violations). The following policy and procedure document must also be consulted for an in-depth review of these policies: CPL 02-00-111, *Citation Policy for Paperwork and Written Program Requirement Violations*, issued November 27, 1995 adopted by HIOSH on January 19, 1996. Gravity-Based Penalties (GBPs) for regulatory violations, including posting requirements, shall be reduced for size and history (excluding willful violations, see [Chapter 4, Section V, Willful Violations](#)).

### **A. Posting Requirements Under Chapter 51, HAR.**

Penalties for violation of posting requirements shall be proposed as follows:

#### **1. Failure to Post the OSHA Notice (Poster) – §12-51-2.**

A citation for failure to post the HIOSH/OSHA Notice is warranted if:

- a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the Hawaii Occupational Safety and Health Law; AND
- b. Interviews show that employees are unaware of their rights under the Law; OR
- c. The employer has been previously cited or advised by HIOSH/OSHA of the posting requirement.

If the criteria above are met and the employer has not displayed (posted) the notice furnished by HIOSH as prescribed in §12-51-2(a), an other-than-serious citation shall normally be issued. The GBP for this alleged violation shall be \$1,100.

**2. Failure to Post a Citation - §12-51-16.**

- a. If an employer received a citation that was not posted as prescribed in §12-51-16, HAR, an other-than-serious citation shall normally be issued. The GBP shall be \$3,300.
- b. For information regarding the *OSHA-300A form*, see CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, December 30, 2004, adopted by HIOSH on [Insert date].

**B. Advance Notice of Inspection – §12-51-6**

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by §12-51-6(b), HAR, an other-than-serious citation shall be issued. The violation shall have a GBP of \$2,200.

**C. Abatement Verification Regulation Violations – §12-51-22**

**1. General.**

- a. The penalty provisions of Section 10 of the HIOSH Law apply to all citations issued under this regulation.
- b. No "Good Faith" or "History" reduction shall be given to employers when proposing penalties for any §12-51-22 violations. Only the reduction factor for "Size" shall apply.
- c. See [Chapter 7, Post-Citation Inspection Procedures and Abatement Verification](#), for detailed guidance.

**2. Penalty for Failing to Certify Abatement.**

- a. A penalty for failing to submit abatement certification documents, §1903.19(c)(1), shall be \$1,100, reduced only for size.
- b. A penalty for failure to submit abatement verification documents will not exceed the penalty for the entire original citation.

**3. Penalty for Failing to Notify and Tagging.**

Penalties for not notifying employees and tagging movable equipment §12-51-22 [paragraphs (h)(1), (h)(2), (h)(4), (j)(1), (j)(3), (j)(4), (j)(6) and (j)(7)] will follow the same penalty structure (GBP of \$3,300) as for Failure to Post a Citation.

## **D. Injury and Illness Records and Reporting under Part 1904.**

1. Part 1904 violations are always other-than-serious.
2. Repeated and Willful penalty policies in paragraphs IV.D. and V.C., respectively, of this Chapter, may be applied to recordkeeping violations.
3. OSHA's egregious penalty policy may be applied to recordkeeping violations. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.
4. See CPL 02-00-135, *Recordkeeping Policies and Procedures Manual*, dated December 30, 2004, adopted by HIOSH on [Insert date]; specifically, Chapter 2, Section II, *Inspection and Citation Procedures*.

NOTE: 29 CFR Part 1904 (Chapter 12-52.1, HAR) has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of any eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015 for workplaces under federal OSHA jurisdiction and on [Insert date] for workplaces under HIOSH jurisdiction. (See 70 FR 56129, Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, September 18, 2014.)

## **XI. Failure to Provide Access to Medical and Exposure Records – §1910.1020.**

### **A. Proposed Penalties.**

If an employer is cited for failing to provide access to records as required under §1910.1020 for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of \$1,100 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP of \$7,700 may be proposed for such violations. See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, adopted by HIOSH on December 19, 2007.

**EXAMPLE 6-4:** If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of §1910.1020, with a GBP of \$6,600.

### **B. Use of Violation-by-Violation Penalties.**

The above policy does not preclude the use of violation-by-violation or per employee penalties where higher penalties are appropriate. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990, adopted by HIOSH on October 5, 1994, revised on March 1, 1996.

## **XII. Criminal Penalties.**

### **A. HIOSH Law and Hawaii Penal Code.**

The Law provides for criminal penalties in the following cases:

1. Willful violation of an HIOSH standard, rule, or order causing the death of an employee; Section 10(g);
2. Giving unauthorized advance notice; Section 10(i);
3. Knowingly giving false information; Section 10(m); and
4. Committing criminal offenses against any employee of the State while engaged in the performance of investigative, inspection or law enforcement functions; Section 10(n).

**B. Courts.**

Criminal penalties are imposed by the courts after trials and not HIOSH or the Hawaii Labor Relations Board.

**XIII. Handling Monies Received from Employers**

**A. Responsibility of the Branch Manager.**

Pursuant to its statutory authority, it is HIOSH policy to collect all penalties owed to the government. The Branch Manager is responsible for:

1. Informing employers of HIOSH's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Tracking cases where penalties are past due, and sending reminder letters or making telephone calls.
4. Offering a reasonable installment payment plan, where appropriate;
5. Referring cases with uncollected penalties to the DAG; and
6. Noting and retaining bankruptcy documents for possible action by the DAG.

**B. Receiving Payments.**

The Branch Manager shall be guided by the following with regard to penalty payments:

**1. Methods of Payment.**

Employers assessed penalties shall remit the total payment to the HIOSH Office by certified check, personal check, company check, postal money order, bank draft or bank money order, payable to the **Director of Finance**. Payment in cash shall not be accepted. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments.

**2. Transmitting Payment to ATS.**

The Branch is responsible for locating the case file and determining if the penalty is paid in full or a partial payment was made. If payment was made in full, the check or other payment instrument must be attached to the case file and forwarded to ATS.

If payment was only partial, and the employer had not contested the citation item or penalty and there was no request for installment payment, the branch shall notify the employer that the full amount is due and payable within 20 calendar days. If the employer indicates that a notice of contest will be filed for the remaining items, he shall be reminded of the 20 calendar day

requirement for timely contest notices and a notation shall be made in the Case Diary log. The transmittal to ATS will indicate for which citation items, the check or other payment instrument was for.

### **3. ATS Responsibility.**

ATS responsibilities include:

- a. Entering the payment information correctly and timely into IMIS;
- b. Ensuring that the payment instrument is valid; and
- c. Transmitting checks or other payment instruments to ASO/Fiscal on a weekly basis.

The following adjustments shall be made prior to transmitting the payment instrument to the ASO/Fiscal.

- 1) If the payment instrument is not dated, the date received shall be entered as the date of payment.
  - 2) If the written amount is obviously incorrect or differs from the amount referenced in the accompanying correspondence, the payment instrument shall be returned to the employer with a request for a new check, using certified mail. Before returning the check, void the existing check by crossing through it. If feasible, contact the employer by email or phone prior to sending.
  - 3) If the payment instrument includes the notation, "Payment in Full", whether or not the notation is incorrect, the payment shall be transmitted.
  - 4) If the payment instrument is unsigned, the payment shall be transmitted.
  - 5) If an employer mistakenly makes the payment payable to an official of HIOSH by name or to other than "Director of Finance", it shall be transmitted:
- d. A copy of the penalty payment instrument shall be included in the case file. Additional accounting records shall also be included in the case file in accordance with current procedures.

### **4. Incorrect, Unhonored, or Foreign Payments.**

- a. Incorrectly dated payments shall be handled as follows:
  - If the payment instrument is dated 10 days or more after the date of receipt, it is to be returned to the employer.
  - If the payment instrument is dated less than 10 but more than 3 days after the date of receipt, it is to be held for transmittal on the day it is dated.
  - Payment instruments dated 3 or fewer days after the date of receipt are to be transmitted.
  - If the payment instrument is dated more than six months prior to the current date, it is to be returned to the employer via certified mail.
- b. Payment instruments which have been returned to ASO/Fiscal without payment, due to insufficient funds, shall be forwarded to the HIOSH Office for collection efforts.

- c. Payments drawn on non-U.S. banks are to be transmitted.

### **C. Refunds.**

In cases of later penalty modifications by HIOSH or by the Board or a court, refunds to the employer shall be made by HIOSH through ASO/Fiscal. The Branch Manager shall prepare a memo detailing the reasons for the refund and attach copies of decisions and orders, or amendments to the Citation and Notification of Penalty in accordance with current instructions.

## **XIV. Debt Collection Procedures.**

### **A. Policy.**

At this time, HIOSH does not assess any interest on past due penalties. As such, installment payments are to be offered any employer who indicates that they would not be able to pay the full amount within the 20 calendar days.

Hawaii Rules of Civil Procedure allow the division to collect fees only such as sheriff's fees and court filing fees. Attorney's fees cannot be assessed at this time.

### **B. Time Allowed for Payment of Penalties.**

The date when penalties become due and payable depends on whether or not the employer contests.

#### **1. Uncontested Penalties.**

When citations and/or proposed penalties are uncontested, the penalties are due and payable 20 calendar days following the employer's receipt of the *Citation and Notification of Penalty (OSHA-2)* or, in the case of Informal Settlement Agreements, 20 calendar days after the date of the last signature unless a later due date for payment of penalties is agreed upon in the settlement.

#### **2. Contested Penalties.**

When citations and/or proposed penalties are contested, the date penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, a Board decision, or a court judgment. See [Chapter 15, Section XIII., Citation Final Order Dates](#), for additional information.)

#### **3. Partially Contested Penalties.**

When only part of a citation and/or a proposed penalty is contested, the due date for payment as stated in paragraph [XIII.B.1., Uncontested Penalties](#), shall be used for the uncontested items and the due date stated in [Paragraph XIII.B.2., Contested Penalties](#), for the contested items.

NOTE: This provision notwithstanding, formal debt collection procedures will not be initiated in partially contested cases until a final order for the outstanding citation item(s) has been issued.

### **C. Notification Procedures.**

Once the penalty payment has become past due and payable (See B. above), it is HIOSH policy to notify employers that debts are payable and due, and to inform them of HIOSH's debt collection procedures whereby additional collection fees may be assessed. (See [A. above](#) on fees that may be collected.) The payment

past due letter is to be sent via certified mail with return receipt and signed by the Branch Manager and is to include a contact telephone number. This past due letter is to be retained in the case file.

#### **D. Installment Payment Plans.**

Installment payment plans may be offered where the Branch Manager believes that the HIOSH policy of appropriate deterrence for non-compliance with safety and health obligations can still be met.

**1. The Installment Agreement Plan must be in writing and signed by the employer.**

The document must contain the following:

- The total amount that is due and payable;
- The agreed upon monthly payment, which must not be less than \$200 per month;
- The date the first payment is due, and the date of the month each subsequent payment is due;
- The total number of payments to be made which shall not exceed 36 (3 years);
- The amount of any balloon or last payment due;
- The consequences for untimely payments, i.e., the entire remaining amount becomes due and payable within 20 calendar days of notification that the installment payment was past due; and
- Signature and date signed by the Employer.

**2. Execution of the Installment Agreement Plan,**

The Plan must be signed, dated and returned by the Employer within 20 calendar days of agreeing to the terms.

**3. Government Agencies.**

State and county agencies may sometimes have to secure legislative funding to pay the assessed penalty. Therefore, for state and county agencies, it may be necessary to craft a payment plan that defers the payment to the next fiscal year following legislative or county council approval. While such agreements should normally be discussed during the informal conference, the Branch Manager may only be made aware of the situation after the 20 days for informal conferences has passed.

#### **E. Referral to DAG for collection.**

1. If any portion of the payment remains unpaid after 20 calendar days from the time the past due notice was sent to the employer, the Branch Manager shall refer the case to the DAG for collection.
2. A memo to the Supervising DAG for Labor shall be sent with the following copies of documents:
  - a. Citation and Notification of Penalty;
  - b. Copy of Certified/Return Receipt from Employer
  - c. Case File Diary notations referring to telephone calls and correspondence regarding collection;
  - d. Contest letter showing what is being contested (If case is not being contested or contest is resolved, state “not in contest” in memo.



- e. Contest transmittal letter, summarizing contested items.
  - f. Informal Settlement agreement
  - g. Past due notice, including return receipt;
  - h. Installment Payment Agreement;
  - i. Installment payment log showing dates and amounts of any partial payments
  - j. Information from DCCA regarding company officers.
3. After a case has been referred to the DAG for collection, the Branch Manager has no further responsibilities with regard to penalty collection related to that case.
  4. If, after a case has been referred to the DAG, the employer mistakenly sends a payment to the Office, or new information regarding the debt or employer is obtained, the Branch Manager shall contact the DAG immediately.
  5. The responsibility for closing the case remains with the Branch Manager. Once final collection action has been completed, the case may be closed as long as all violative items have been appropriately abated.

#### **F. Uncollectible Penalties.**

There may be cases where a penalty cannot be collected, regardless of any action that has been or may be undertaken. Examples might be when a past due letter is not deliverable, a company is no longer in business and has no successor, or the employer is bankrupt. In such cases, the Branch Manager **shall notify** the DAG by phone or email prior to requesting permission to write-off the debt. The DAG will then advise what further collection action, if any is appropriate. If the DAG agrees to the write-off, complete the write-off checklist forms and submit to the appropriate office as follows:

Amount of Debt	Form	Submit to:
Less than \$50	Short-Form	ASO
\$50 to \$500	Short-Form	DAG
More than \$500	Write Off – Over \$500	DAG

See Appendix 6A for sample forms

The database shall be updated following current OIS procedures to reflect the most recent action.

In bankruptcy cases, the Branch Manager may also seek the advice of the DAG to determine whether to file as a creditor under Hawaii Bankruptcy Law.

DAVID Y. IGE  
GOVERNOR  
  
SHAN S. TSUTSUI  
LT. GOVERNOR



STATE OF HAWAII

LINDA CHU  
DIRECTOR  
  
LEONARD HOSHIJO  
DEPUTY DIRECTOR  
  
DOREEN MIYAKI  
ACTING HIOSH ADMINISTRATOR

IN REPLY REFER TO  
(Insert Insp. No)

Date:

**Write Off Form for (a box below must be checked in order to process):**

- ☐ **Accounts Less Than \$50 to ASO only**  
☐ **Accounts Up to \$500 to AG's**

Dept/Div/Branch/Unit: DLIR, HIOSH, XXX Branch		Program:
Contact Person/Title [Name], Branch Manager	Phone: (808) 123-4567	Project ID:

Name of Debtor:	Debtor ID Number:
Date Account Outstanding	Outstanding Dollar Amount:
Date Tenant Last Contacted	Method of Contact (phone, letter, etc.): Collection Letter, Phone
Result of Contact Efforts:	

Approved by:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name and Title

DAVID Y. IGE  
GOVERNOR  
  
SHAN S. TSUTSUI  
LT. GOVERNOR



STATE OF HAWAII

LINDA CHU  
DIRECTOR  
  
LEONARD HOSHIJO  
DEPUTY DIRECTOR  
  
DOREEN MIYAKI  
ACTING HIOSH ADMINISTRATOR

IN REPLY REFER TO  
(Insert Insp. No)

Date:

## DELINQUENT ACCOUNT(S) WRITE-OFF CHECKLIST ACCOUNTS Over \$500

Dept/Div/Branch/Unit: DLIR, HIOSH, XXX Branch		Program:
Contact Person/Title Name, Branch Manager	Phone: (808) 123-4567	Project ID:
<b>Guarantor(s) and others who may be liable (ex. Parental liability) (hereinafter collectively "debtor")</b>		

Debtors(s):	Tenant ID: n/a
-------------	----------------

Acct No(s).	Type of debt (salary overpayment, loan, services, lease rent, etc.)	Amount
	Penalty under §396-10, HRS	
(attach additional sheets if necessary) TOTAL:		
	Yes	No
	Not Applicable	
1) Is/Are account(s) delinquent for at least 2 years?	<input type="checkbox"/>	<input type="checkbox"/>
2) Is debtor known?	<input type="checkbox"/>	<input type="checkbox"/>
3) Is debtor within the State?	<input type="checkbox"/>	Unknown
4) Can debtor be located?	<input type="checkbox"/>	<input type="checkbox"/>
5) Has debtor filed bankruptcy?	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, has Proof of Claim been filed?	<input type="checkbox"/>	<input type="checkbox"/>

Debtors(s):		Tenant ID: n/a		
b) Status:				
		Yes	No	Not Applicable
6) Is debtor deceased?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) Has claim been timely filed with the estate (§560:3-803, HRS)?			<input type="checkbox"/>	<input type="checkbox"/>
b) Status:				
7) Is this account deemed by you to be uneconomical or impractical to collect?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If Yes, why?				
8) Has debtor been placed on tax intercept pursuant to §235.51 et.seq. HRS?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, result:				
b) If no, why not?				
9) Is debtor a State employee?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10) Is debtor a former State employee?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11) Is debtor a retired State or County employee?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12) If debtor is a State employee, has debtor been placed on §78-12, HRS, salary withholding?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes result:				
b) If no, why not?				
13) Is debtor a corporation?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, list the officers, their addresses and telephone numbers:				
Name(s)	Office(s) Held	Address(es)		Phone No.(s)
14) Are there others who may be liable for the debt (herein collectively "debtor", ex. Piercing the corporate veil, guarantor(s); parents; guardians, etc.)		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes list names, their addresses and telephone:				

Debtors(s):			Tenant ID: n/a		
Name(s)	Relationship	Address(es)	Phone No. (s)		
			Yes	No	Not Applicable
15) Have you attempted to contact debtor by telephone <u>and mail</u> ?			<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes who and the response or statements?					
b) If no, why not?					
16) Have you attempted to negotiate settlement or payment plan?			<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, results:					
b) If no, why not?					
17) Have you referred the account(s) to a collection agency?			<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
a) If yes, results:					
b) If no, why not?					

Debtors(s):		Tenant ID: n/a		
18) What other efforts have been made to collect? None				
		Yes	No	Not Applicable
19) Is debtor receiving other State benefits (money, loans, leases, permits, contracts, retirement)?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, what?				
20) Is debtor sitting on any State or county boards or commissions?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, what?				
21) Does debtor have any miscellaneous cases pending (ex. Workers' compensation, criminal or civil lawsuits)?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a) If yes, please provide explanation:				
22) How can your department improve its collection efforts?				
23) Additional comments, if any:				

Approved by:

\_\_\_\_\_  
Signature\_\_\_\_\_  
Date\_\_\_\_\_  
Print Name and Title

## Chapter 7

### POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

#### **I. Contesting Citations, Notifications of Penalty or Abatement Dates.**

CSHOs shall advise the employer that the citation, the penalty and/or the abatement date may be contested in cases where the employer does not agree to the citation, penalty or abatement date or any combination of these.

##### **A. Notice of Contest.**

CSHOs shall inform employers that if they intend to contest, the notice must be in writing and must be received or postmarked no later than the 20<sup>th</sup> calendar day after receipt of the *Citation and Notification of Penalty (OSHA-2)*, unless the 20<sup>th</sup> day falls on a Sunday, in which case the following Monday receipt or postmark date is acceptable, otherwise the citation becomes a final order of the Director. See §12-51-18, HAR. HIOSH has no authority to modify the contest period. HIOSH does not accept notices of contest sent electronically via email. It shall also be emphasized that oral notices of contest do not satisfy the requirement to give written notification.

Note: Upon receipt of all electronic notices of contest, or faxed copies of contest letters, the Branch Manager shall immediately attempt to notify the employer that the HIOSH law (§12-51-19, HAR) requires that the notice of contest be an original and served in person or via mail. The employer shall be afforded an opportunity to send in an original letter of contest which must be postmarked or received by midnight of the 20<sup>th</sup> calendar day following receipt of the citation. This conversation or e-mail must be noted in the Case Diary Log. Copies of correspondence are to be maintained in the case file.

1. An employer's Notice of Contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these is being objected to. CSHOs shall ask the employer to read the "Employer Rights and Responsibilities Following a HIOSH Inspection" pamphlet accompanying the citation for additional details.
  - a. If the employer only requests a later abatement date and there are valid grounds to consider the request, the Branch Manager should be contacted. The Branch Manager may issue an amended citation changing an abatement date prior to the expiration of the 20 calendar day period.
  - b. If the employer contests only the penalty or some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 20 days of notification.
2. CSHOs shall inform the employer that the Law provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

##### **B. Contest Process.**

The CSHO shall explain that when a Notice of Contest is properly filed (i.e., received in the Office and/or postmarked as described in §12-51-19, the Branch

Manager is required to forward the case to an independent adjudicatory agency, (Hawaii Labor Relations Board) at which time the case is considered to be in litigation.

1. HIOSH will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the DAG.
2. Upon receipt of the Notice of Contest, the Hawaii Labor Relations Board docket the case and schedules an Initial/Settlement Conference date.

## **II. Informal Conferences.**

### **A. General.**

1. Pursuant to §12-51-21, HAR, the employer, any affected employee, or the employee representative may request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.
2. The informal conference will be conducted within the 20 calendar day contest period. The conference or any request for such a conference shall not operate as a stay of the 20 calendar day contest period.
3. If the employer has submitted a written notice of contest and has also requested an informal conference, the Branch Manager or designated representative will contact the employer to clarify the intent – go to contest OR have an informal conference. If the intent is to have an informal conference, the contest letter must be withdrawn prior to any discussions of the case.  
  
No discussions about the citations, penalties, abatement, etc. may proceed until the withdrawal letter has been received.
4. Informal conferences may be held by any means practical, but meeting in person is preferred.

### **B. Assistance of Counsel.**

In the event that an employer is bringing its attorney to an informal conference, the Branch Manager or his or her designee may contact the DAG's Office and ask for the assistance of counsel.

### **C. Opportunity to Participate.**

1. If an informal conference is requested by the employer, an affected employee or his representative shall be afforded the opportunity to participate. If the conference is requested by an employee or an employee representative, the employer shall be afforded an opportunity to participate.
2. If the affected employee or employee representative chooses not to participate in the informal conference, an attempt will be made to contact that party and to solicit their input prior to the informal conference. Attempts to contact the party should be noted in the case file.

NOTE: In the event of a settlement, it is not necessary to have the employee representative sign the informal settlement agreement.



3. If any party objects to the attendance of another party or the Branch Manager believes that a joint informal conference would not be productive, separate informal conferences may be held.
4. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests.

**D. Notice of Informal Conferences.**

Branch Manager shall document in the case file notification to the parties of the date, time and location of the informal conference. In addition, the Case File Diary Sheet shall indicate the date of the informal conference.

**E. Posting Requirement.**

1. The Branch Manager will ask the employer at the beginning of the informal conference whether the form in the citation package indicating the date, time, and location of the conference has been posted as required.
2. If the employer has not posted the form, the Branch Manager may postpone the informal conference until such action is taken.

**F. Conduct of the Informal Conference.**

The informal conference will be conducted in accordance with the following guidelines:

1. There shall be at least two (2) employees of the division participating in the informal conference to ensure that the informal conference is conducted properly, to corroborate any statements or actions, and to provide assistance should emotions become high. The second HIOSH participant should be the CSHO for the case or if he is not available, someone familiar with the case.
2. **Conference Subjects.**
  - a. Purpose of the informal conference;
  - b. Rights of participants;
  - c. Contest rights and time constraints;
  - d. Limitations, if any;
  - e. Potential for settlements of citations; and
  - f. Other relevant information (e.g., if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.).
3. **Subjects Not to be Addressed.**
  - a. No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.
  - b. There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the county Prosecuting Attorney for criminal prosecution under the Law.
4. **Closing Remarks.**
  - a. At the conclusion of the conference, all main issues and potential courses of action will be orally summarized and documented in either an Informal Settlement Agreement (ISA) or Informal Conference Summary (ICS).
  - b. Occasionally, a party may submit information to be considered that would need to either be researched or verified. Such research or verification

must be completed within the 20 calendar day contest period. The oral summary shall state that the decision is pending this action, and that the parties will be contacted when the determination is made. The ICS or ISA will include the findings of the research and/or verification.

- c. A copy of the summary, together with any other relevant notes of the discussion made by the Branch Manager, will be placed in the case file.
- d. If either party requests a copy of the ICS, it shall be mailed to them as soon as possible

### **III. Petition for Modification of Abatement Date.**

An employer may file a petition for modification of abatement date when it has made a good faith effort to comply with abatement requirements, but such abatement has not been completed due to circumstances beyond its control. See §12-51-17(a).

#### **A. Filing.**

A PMA must be filed in writing with the Branch Manager who issued the citation no later than the close of the next working day following the date on which abatement was originally required.

1. If a PMA is submitted orally, the employer shall be informed that HIOSH cannot accept an oral PMA and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements below for late filing of the petition.
2. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

#### **B. Where Filing Requirements Are Not Met.**

If the employer's written PMA does not meet all the requirements of §12-51-17(c)(1) - (5), the employer shall be contacted as soon as possible, but by no later than 10 calendar days, and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact.

1. If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed that if it fails to respond in a timely or adequate manner, the PMA will not be granted and the employer may be found to not have abated.
2. If the employer responds satisfactorily by telephone and the Branch Manager determines that the requirements for a PMA have been met, that finding shall be documented in the case file. The employer shall be reminded to amend his written PMA and post the document and, where appropriate, provide a copy to the employee representative(s).
3. Although HIOSH policy is to handle PMAs as expeditiously as possible, there may be cases where the Branch Manager's decision may be delayed because of deficiencies in the PMA, the need to conduct a monitoring inspection and/or a request for Administrator involvement. The Administrator may grant a Branch Manager additional time, which shall normally be no more than 30 calendar days, to reach a decision. The request must be in writing and explain the reasons necessary for the additional time. The Administrator's

decision must be in writing to the Branch Manager, with a simultaneous notification to the employer and the employee representatives.

### **C. Approval of PMA.**

The Branch Manager shall approve or deny the PMA within 10 calendar days unless additional time has been requested from the Administrator. The following action shall be taken:

1. If the PMA requests an abatement date that is two years or less from the issuance date of the citation, the Branch Manager has the authority to approve or object to the petition.
2. Any PMA requesting an abatement date that is more than two years from the issuance date of the citation requires the approval of the Administrator as well as the Branch Manager.
3. If the PMA is approved, the Branch Manager shall notify the employer and the employee representatives by letter of the interim approval (pending any written objection by affected employees or their representatives). The letter shall inform the employer that the interim approval of the PMA must be posted in the same manner and location as the PMA and the citation and notification of penalty.
4. The Branch Manager or Administrator (as appropriate), shall deny the PMA where the evidence supports non-approval (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith). In such cases, the denial letter shall be mailed to the employer via certified mail with return receipt requested stating the reasons for the denial and affording the employer the opportunity to file a notice of contest. Employee representatives shall be also notified of this action by certified letter with return receipt requested.

### **D. Objection to PMA.**

Affected employees or their representatives may file a written objection to an employer's PMA with the Branch Manager within 10 calendar days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.

1. Failure to file such a written objection with the 10 calendar day period constitutes a waiver of any further right to object to the PMA. (See §12-51-18(b), HAR)
2. If an employee or an employee representative objects to the extension of the abatement date, all relevant documentation shall be sent to the Hawaii Labor Relations Board.

## **IV. HIOSH's Abatement Verification Regulation, §12-51-22, HAR**

### **A. Important Terms and Concepts.**

#### **1. Abatement.**

- a. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by HIOSH during an inspection.

- b. For each inspection, except follow-up inspections, HIOSH shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until HIOSH is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons in the case file and enter the proper code in the OIS.
- c. Employers are required to verify in writing that they have abated cited conditions, in accordance with §12-51-22, HAR.

**2. Abatement Verification.**

Abatement verification includes abatement certification, documents, plans, and progress reports.

**3. Abatement Certification.**

Employers must certify that abatement is complete for each cited violation. The written certification must include: the employer's name and address; the inspection number; the citation and item numbers; a statement that the information submitted is accurate; signature of the employer or employer's authorized representative; the date and method of abatement for each cited violation; and a statement that affected employees and their representatives have been informed of the abatement.

**4. Abatement Documents.**

Documentation submitted must establish that abatement has been completed, and include evidence such as the purchase or repair of equipment, photographic or video evidence of abatement or other written records verifying correction of the violative condition.

**5. Affected Employee.**

Affected employee means those employees who are exposed to the hazards(s) identified as violations(s) in a citation.

**6. Final Order Dates.**

**a. Uncontested Citation Item.**

For an uncontested citation item, the final order date is the day following the twentieth calendar day after the employer's receipt of the citation.

**b. Contested Citation Item.**

For a contested citation item, the final order date is as follows:

- The thirtieth day after the date on which a decision and order of the Hawaii Labor Relations Board has been filed, or
- The file on date where the Board has approved a formal settlement agreement, or
- The thirtieth day after the date on which the final State appellate court files its decision and order affirming the violation.

**c. Informal Settlement Dates.**

The final order date is when, within the 20 calendar days to contest a citation, the ISA is signed by **both** parties. See also [Chapter 15, Section XIII, Citation Final Order Dates.](#)

**7. Abatement Dates.**

**a. Uncontested Citations.**

For uncontested citations, the abatement date is the later of the following dates:

- The abatement date identified in the citation;
- The extended date established as a result of an employer's filing for a Petition for Modification of Abatement (PMA);
- The abatement date has been extended due to an amended citation; or
- The date established by an informal settlement agreement.

**b. Contested Citations.**

For contested citations for which the Board has issued a final order, the abatement date is the later of the following dates:

- The date identified in the final order for abatement;
- Where there has been a contest of a violation or abatement date (not penalty), the date computed by adding the period allowed in the citation for abatement to the final order date; or
- The date established by a formal settlement agreement.

**c. Contested Penalty Only.**

Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest. The abatement period is subject to the time periods set forth above.

**8. Movable Equipment.**

- a. Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is capable of being moved within or between worksites.
- b. Hand-held equipment is equipment that is hand-held when operated and can generally be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.

**9. Worksite.**

- a. For the purpose of enforcing the Abatement Verification regulation, the worksite is the physical location specified within the "Alleged Violation Description" of the citation.
- b. If no location is specified, the worksite shall be the inspection site where the cited violation occurred.

**B. Written Certification.**

The Abatement Verification Regulation, §12-51-22, requires those employers who have received a citation(s) for violation(s) of the Law to certify in writing that they have abated the hazardous condition for which they were cited and to inform affected employees of their abatement actions.

### **C. Verification Procedures.**

The verification procedures to be followed by an employer depend on the nature of the violation(s) identified and the employer's abatement actions. The abatement verification regulation establishes requirements for the following:

1. Abatement Certification
2. Abatement Documentation
3. Abatement Plans
4. Progress Reports
5. Tagging for Movable Equipment

### **D. Supplemental Procedures.**

Where necessary, HIOSH supplements these procedures with follow-up inspections and onsite monitoring inspections. For additional information see Section XII of this chapter, [On-Site Visits: Procedures for Abatement Verification and Monitoring.](#)

### **E. Requirements**

Except for the application of warning tags or citations on movable equipment (§12-51-22(j), HAR), the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order. For moveable hand-held equipment, the warning tag or citation must be attached immediately after the employer receives the citation for medium or low gravity violations. For high gravity violations involving movable equipment, the CSHO attaches a danger tag to the equipment.

In addition, the employer must assure that the tag (danger or warning) or citation is not altered, defaced, or covered by other material. For danger tags which are attached to the equipment by the HIOSH inspector, the employer must further not remove the tag nor use or operate the equipment. Only a HIOSH inspector or authorized representative may remove the danger tag.

## **V. Abatement Certification.**

### **A. Minimum Level.**

Abatement certification is the minimum level of abatement verification and is required for all violations once they become final orders. An exception exists where the CSHO observed abatement during the onsite portion of the inspection and the violation is listed on the citation as "Corrected During Inspection (CDI)." See Paragraph VI.D. of this chapter, [CSHO Observed Abatement.](#)

### **B. Certification Requirements.**

The employer's written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement;
2. The employer's name and address;
3. The inspection number to which the submission relates;
4. The citation and item numbers to which the submission relates;
5. A statement that the information submitted is accurate; and
6. The signature of the employer or the employer's authorized representative.

A non-mandatory example of an abatement certification letter is available in Appendix A of the Abatement Verification Regulation (§12-51-22, HAR).

### **C. Certification Timeframe.**

1. All citation items which have become final orders, regardless of their characterizations, require written abatement certification within 5 calendar days of the abatement date.
2. A PMA received and processed in accordance with the guidance of the FOM will suspend the 5-day time period for receipt of the abatement certification for the item for which the PMA is requested.
  - a. Thus, no citation will be issued for failure to submit the certification within 5 days of the abatement date.
  - b. If the PMA is denied, the 5-day time period for submission to OSHA begins on the day the employer receives notice of the denial.

## **VI. Abatement Documentation.**

More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to certifying abatement, the employer must submit documents demonstrating that abatement is complete.

### **A. Required Abatement Documentation.**

Pursuant to §12-51-22(e), HAR, documentation of abatement is required for the following:

1. Willful violations;
2. Repeat violations; and
3. Serious violations where HIOSH determines that such documentation is necessary as indicated on the citation. For further information, see Paragraph VI.C. of this chapter, [Abatement Documentation for Serious Violations](#).

### **B. Adequacy of Abatement Documentation.**

1. Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Branch Manager.
2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.
3. The adequacy of the abatement documentation submitted by the employer will be assessed by HIOSH using the information available in the citation and the Agency's knowledge of the employer's workplace and history.
4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:
  - a. Photographic or video evidence of abatement;
  - b. Evidence of the purchase or repair of equipment;
  - c. Evidence of actions taken to abate;
  - d. Bills from repair services;
  - e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;

- f. Documentation from the manufacturer that the article repaired is within the manufacturer's specifications;
  - g. Records of training completed by employees if the citation is related to inadequate employee training; and
  - h. A copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.
5. Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with the Case File Order as detailed in [Chapter 5, Item X, Case File Activity Diary Sheet](#).

### **C. Abatement Documentation for Serious Violations.**

#### **1. High Gravity Serious Violations.**

- a. HIOSH policy is generally that all high gravity serious violations will require abatement documentation.
- b. Where, in the opinion of the Branch Manager, abatement documentation is not required for a high gravity serious violation, the reasons for this must be set forth in the case file.

#### **2. Medium or Low Gravity Serious Violations.**

Moderate or low gravity serious violations should not normally require abatement documentation, except that the Branch Manager will require evidence of abatement for moderate and low gravity serious violations under the following circumstances:

- a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become final order in the previous three years; or
- b. If the employer has any history of a violation that resulted in a fatality or an OSHA-300 log entry indicating serious physical harm to an employee in the past three years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

### **D. CSHO Observed Abatement.**

1. Employers are not required to certify abatement for violations which they promptly abate (within 24 hours) during the onsite portion of the inspection and observed by the CSHO.
  - a. Branch Managers may use their discretion in extending the "24-hour" time limit to document abated conditions during the inspection.
  - b. Observed abatement will be documented on the *Violation (OSHA-1B and/or OSHA-1B(IH))*, for each violation and must include the date and method of abatement.
2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO may use photographs or video evidence. For additional information regarding adequacy of abatement documentation, see Paragraph VI.B. of this chapter, [Adequacy of Abatement Documentation](#).



3. When the abatement has been witnessed and documented by the CSHO, a notation reading “Corrected During Inspection” shall be made on the citation.
4. 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 that may be subject to a summary enforcement order under Section 396-4(d)(7) of the Law (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting widespread violations of the same or similar standards at other establishments or construction worksites).

## **VII. Monitoring Information for Abatement Periods Greater than 90 Days**

### **A. Abatement Periods Greater than 90 Days.**

For abatement periods greater than 90 calendar days, the regulation allows the Branch Manager flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated to the citation item to which they relate.
2. Progress reports may not be required unless abatement plans are specifically required.
3. Note that Paragraphs (f) and (g) of §12-51-22, HAR have limits: the Branch Manager is not allowed to require an abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.
4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. See §12-51-22, HAR, Non-Mandatory Appendix B, for a sample of an Abatement Plan and Progress Report.

### **B. Abatement Plans.**

1. The Branch Manager may require an employer to submit an abatement plan for each qualifying cited violation.
  - a. The requirement for an abatement plan must be indicated in the citation.
  - b. The citation may also call for the abatement plan to include interim measures.
2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting employees from exposure to the hazardous conditions in the interim until the abatement is complete (§12-51-22(f)(2)).
3. In cases where the employer cannot prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

### **C. Progress Reports.**

1. An employer that is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:
  - a. That periodic progress reports are required and the citation items for which they are required;
  - b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after the submission of an abatement plan;
  - c. Whether additional progress reports are required; and
  - d. The date(s) on which additional progress reports must be submitted.
2. For each violation, the progress report must identify in a single sentence if possible, the action taken to achieve abatement and the date the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

### **D. Special Requirements for Long-Term Abatement.**

1. Long-term abatement is abatement which will be completed more than one year from the citation issuance date.
2. The Branch Manager must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.
3. Progress reports are mandatory and must be required at a minimum every six months. More frequent reporting may be required at the discretion of the Branch Manager.

## **VIII. Employer Failure to Submit Required Abatement Certification.**

### **A. Actions Preceding Citation for Failure to Certify Abatement.**

1. If abatement certification, or any required documentation, is not received within 8 calendar days after the abatement date (the regulation requires filing within 5 calendar days after the abatement date; and another 3 calendar days is added for mailing), the following procedures should be followed:
  - a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within 7 calendar days after the telephone call.
  - b. During the conversation with the employer, determine why it has not complied and document all communication efforts in the case file. Discuss HIOSH's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.
  - c. Issue a follow-up letter to the employer the same day as the telephone call.
  - d. The employer may be allowed to respond via fax or email where appropriate.

2. If the certification and/or documentation are not received within the next 7 calendar days, a single other-than-serious citation will be issued.
3. Normally a citation for failure to submit abatement certification in accordance with §12-51-22(d) shall not be issued until the above procedures have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans or progress reports are not received within 8 days of the due date.

## **B. Citation for Failure to Certify.**

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) can be issued without formal follow-up activities by following the procedures identified below.
2. A single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.
  - a. This “other” citation will be issued under the same inspection number which contained the original violations cited.
  - b. The abatement date for this citation shall be set 10 days from the date of issuance.
  - c. The penalty shall be assessed at \$1,100 for each certification and/or abatement documentation not submitted. Penalty reduction for size only is permitted, however, the penalty will not exceed the penalty for the entire original citation, but shall not be less than \$200.

NOTE: Each violation of §12-51-22(d), (e), (f), or (g) with respect to each original citation item is a separate item.

3. For those situations where the abatement date falls within the 20-day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.
4. For those rare instances where the reminder letter is returned to the HIOSH Office by the Post Office as undeliverable and telephone contact efforts fail, the Branch Manager has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.

## **C. Certification Omissions.**

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a de minimis condition of the regulation.
2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the HIOSH Office can serve as the date on the document.
3. A certification with an omitted signature should be returned to the employer to be signed.

### **D. Penalty Assessment for Failure to Certify.**

The penalty provisions of Section 10 of the HIOSH Law apply to all citations issued under this regulation. See Chapter 6, [Penalties and Debt Collection](#), for additional information.

## **IX. Tagging for Movable Equipment.**

### **A. Tag-Related Citations.**

Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag cited movable equipment.

1. See §12-51-22, Non-mandatory Appendix C, for a sample warning tag. HIOSH must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation).
2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using §12-51-22(j)(6), HAR.

### **B. Equipment Which is Capable of Being Moved.**

Tags are intended to provide an interim form of protection to employees through notification for those who may not know of the citation or the hazardous condition.

1. For high gravity violations, CSHOs shall attach a danger tag to the operating controls or to the cited component of the equipment that is capable of being moved, whether within the worksite or between worksites. (See §12-51-22(j)(1), HAR)
2. For both hand-held and non-hand-held equipment where the associated violation is other than high gravity, employers must attach a warning tag or copy of the citation *immediately* after the employer's receipt of the citation. Failure to attach the warning tag or copy of the citation to the equipment shall be considered a posting violation, even if a copy of the citation was posted in the workplace or worksite.

## **X. Failure to Notify Employees by Posting.**

### **A. Evidence.**

Like tag-related citations, CSHOs shall investigate an employer's failure to notify employees by posting.

### **B. Location of Posting.**

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (§12-51-22(h)(2), HAR) the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

### **C. Other Communication.**

The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.

## **XI. Abatement Verification for Special Enforcement Situations.**

### **A. Construction Activity Considerations.**

1. Construction activities pose situations requiring special consideration.
  - a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where the CSHO verifies the site closure/completion and where closure/completion effectively abates the condition cited.
  - b. In all other circumstances, the employer must certify to HIOSH that the hazards have been abated by the submission of an abatement certification. In rare cases the verification may have to cease and the abatement action closed through cessation of work or verification with the general contractor of the site to verify abatement.
2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons, etc.) violations *will always* require employer certification of abatement regardless of construction site closure.
3. Where the violation specified in a citation is the employer's general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.
4. Where site closure results in the employer having no physical presence in the state of Hawaii, the general contractor should be contacted for forwarding contact information. A copy of the communication to the cited employer should be forwarded to the OSHA Area office for appropriate referral.

### **B. Field Sanitation and Temporary Labor Camps.**

HIOSH retains jurisdiction for enforcement of the field sanitation and temporary labor camp standards. Therefore, this subsection is not applicable.

### **C. Follow-Up Policy for Employer Failure to Verify Abatement under §12-51-22, HAR**

Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see CPL 02-00-149, *Severe Violator Enforcement Program (SVEP) Directive*, dated June 18, 2010, adopted by HIOSH on May 1, 2016.

*NOTE: For further information on extended abatement periods, see [Section VII, Monitoring Information for Abatement Periods Greater than 90 Days](#), and [Section XIII, Monitoring Inspections](#), both of this chapter.*

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Branch Manager has discretion to conduct a follow-up inspection.
2. Submission of inadequate documents may also be the basis for a follow-up inspection.
3. This inspection should not generally occur before the end of the original 20-day contest period except in unusual circumstances.

## **XII. Onsite Visits: Procedures for Abatement Verification and Monitoring.**

### **A. Follow-Up Inspections.**

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected.

### **B. Severe Violator Enforcement Program (SVEP) Follow-Up.**

1. For any inspection opened after May 1, 2016, which results in an SVEP case, a follow-up inspection will normally be conducted even if abatement of the cited violations has been verified. The primary purpose of follow-up inspections is to assess both whether the cited violation(s) were abated and whether the employer is committing similar violations.
2. If there is a compelling reason not to conduct a follow-up inspection, the reason must be documented in the file. The Manager shall also report these cases to the Administrator, along with the reason why a follow-up was not initiated.
3. Grouped and combined violations from the original inspection will be counted as one violation for SVEP purposes.
4. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, see CPL 02-00-149, *Severe Violator Enforcement Program (SVEP) Directive*, dated June 18, 2010, adopted by HIOSH on May 1, 2016 for more information on the Severe Violator Enforcement Program.

### **C. Initial Follow-Up.**

1. The initial follow-up is the first follow-up inspection after issuance of the citation.
2. If a violation is found not to have been abated, the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed additional daily penalties while such failure or violation continues.
3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and other technology was available which would have brought the process into compliance, a Notification of Failure to Abate Alleged Violation normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances may be considered.

5. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.
6. For danger or warning tags on equipment capable of being moved, if the CSHO determines that the equipment was used with the danger tag still attached, the CSHO must first determine whether the hazard has been corrected or abated.
  - a. If the equipment has been repaired or modified such that the hazard classification is reduced and the failure-to-abate violation is to be classified according to the current conditions.
  - b. If no repair or modification has been made, the CSHO should consider whether a willful violation should be proposed.
  - c. If the danger tag was removed prior to the equipment being used, the CSHO must inquire as to reasons why the tag was removed. As §12-51-22(j)(7), HAR, also allows an authorized representative to remove the tag, the CSHO must determine whether the employer had a reasonable belief that a HIOSH “authorized representative” allowed the tag’s removal.

#### **D. Second Follow-Up.**

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.
  - a. After the Notification of Failure to Abate Alleged Violation has been issued, the Branch Manager shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.
  - b. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.
2. If a second follow-up inspection reveals the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Branch Manager believes it to be appropriate.
3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer’s flagrant disregard of a citation or an item on a citation, the Branch Manager shall immediately notify the Administrator, in memo form, detailing the circumstances so the matter can be referred to the DAG for appropriate action.

#### **E. §396-4(d)(7), HRS [Similar to OSH Act Section 11(b)]**

There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation or other factors, it will be apparent that traditional enforcement actions would be inappropriate or ineffective. In such cases, a summary enforcement action shall be initiated under Section 396-4(d)(7) of the

Law. The Branch Manager shall notify the Administrator, in memo form, of all the particular circumstances of the case for referral to the DAG.

#### **F. Follow-Up Inspection Reports.**

1. Follow-up inspection reports shall be included with the original initial inspection case file. The applicable identification and description sections of the *Violation (OSHA-1B/1B(IH))* shall be used for documenting correction of willful, repeated, and serious violations and failure to correct items during follow-up inspections.
2. If Serious, Willful, or Repeat violation items were appropriately grouped in the *Violation (OSHA-1B/1B(IH))* in the original case file, they may be grouped on the follow-up *Violation (OSHA-1B)*; otherwise, individual *Violation (OSHA-1B/1B(IH))* shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.
3. Documentation of Hazard Abatement by Employer.
  - a. The hazard abatement observed by the CSHO shall be specifically described in the *Violation (OSHA-1B/1B(IH))*, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.
  - b. Brief terms such as “corrected” or “in compliance” will not be accepted as proper documentation for violations having been corrected.
  - c. When appropriate, this written description shall be supplemented by a photograph and/or a videotape to illustrate correction circumstances.
  - d. Only the item description and identification blocks need be completed on the follow-up *Violation (OSHA-1B/1B(IH))* with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.
4. Sampling.
  - a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short-term sampling, or full-shift sampling).
  - b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, full-shift sampling is required to verify exposure limits based on an 8-hour time-weighted average.
5. Narrative.

The CSHO must include in the narrative the findings pursuant to the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all the pertinent factors available in an organized manner.
6. Failure to Abate.

In the event that any item has not been abated, complete documentation shall be included on a *Violation (OSHA-1B)*.



### **XIII. Monitoring Inspections.**

#### **A. General.**

Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections may be scheduled, among other reasons, as a result of:

1. Abatement dates in excess of one year.
2. A petition for modification of abatement date (PMA).
3. To ensure that terms of a permanent variance are being carried out.
4. At the request of an employer requesting technical assistance granted by the Branch Manager.

#### **B. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).**

Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- Determine the progress an employer is making toward final correction.
- Ensure that the target dates of a multi-step abatement plan are being met.
- Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- Ensure that the employees are being properly protected until final controls are implemented.
- Ensure that the terms of a permanent variance are being carried out.
- Provide abatement assistance for items under citation.

#### **C. Abatement Dates in Excess of One Year.**

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.
2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.
  - a. If the case has been contested, the final order date shall be used as a starting point, instead of the citation date.
  - b. A settlement agreement may specify an alternative monitoring schedule.
3. If the employer is submitting satisfactory quarterly progress reports and the Branch Manager agrees after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every twelve months.
4. Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

#### **D. Monitoring Abatement Efforts.**

1. The Branch Manager shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
2. Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
3. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from OSHA, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
4. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA.
5. CSHOs shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent; i.e., spot sampling, short-term sampling, or full-shift sampling.
6. CSHOs shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The factors to be considered may include, but are not limited to the following:
  - a. Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.
  - b. The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants, and/or the employer's insurance agency.
  - c. Other documentation collected by HIOSH Office personnel including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.
  - d. Employer and employee interviews.
  - e. Specific reasons for requesting additional time including specific plans for controlling exposure and specific calendar dates.
  - f. Personal protective equipment.
  - g. Medical programs.
  - h. Emergency action plans.

#### **E. Monitoring Corporate-Wide Settlement Agreements.**

Hawaii did not adopt the OSHA Corporate-Wide Settlement Agreement directive. If Hawaii believes participation in an OSHA CWSA is beneficial to Hawaii's workers and the program, HIOSH will contact the employer located in Hawaii directly.

## **XIV. Notification of Failure to Abate.**

### **A. Violation.**

A Notification of Failure to Abate an Alleged Violation (OSHA-2B) shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

### **B. Penalties.**

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order.

### **C. Calculation of Additional Penalties.**

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.
2. Detailed information on calculating failure to abate (FTA) penalties is included in [Chapter 6, Penalties and Debt Collection](#).

## **XV. Case File Management.**

### **A. Closing of Case File Without Abatement Certification.**

The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Branch Manager or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.

### **B. Review of Employer-Submitted Abatement.**

Branch Managers or his/her designee are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than 20 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

### **C. Whether to Keep Abatement Documentation.**

Abatement documentation (photos, employer programs, etc.) shall be retained in the case file (or at the location referenced in the case file) for as long as the case file is kept.

## **XVI. Abatement Services Available to Employers.**

Employers requesting abatement assistance shall be informed that HIOSH is willing to work with them even after citations have been issued and provides incentives for immediate onsite abatement of certain types of violations. For further information, see [Chapter 8, Section I.A.2 and 3](#), modification of penalties when justified.

## **Chapter 8**

### **SETTLEMENTS**

#### **I. Settlement of Cases by Branch Managers.**

Branch Managers are granted settlement authority and shall follow these instructions when negotiating settlement agreements.

##### **A. General.**

1. Except for egregious cases, or cases that affect other jurisdictions, Branch Managers may enter into Informal Settlement Agreements with employers prior to the employer filing a written notice of contest.

NOTE: After the employer has filed a written notice of contest, the DAG may proceed toward a Formal Settlement Agreement with the concurrence and participation of the Branch Manager.

2. Branch Managers should review the case as well as the employer's inspection history prior to the informal conference, identifying potential issues of concern as well as possible areas of settlement.
3. Branch Managers may amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), and modify or withdraw a penalty, a citation, or a citation item, within limits established by the Administrator, where evidence establishes during the informal conference that the changes are justified.
4. Branch Managers may actively negotiate the amount of proposed penalties, within limits established by the Administrator, depending on the circumstances of the case and the particular improvements in employee safety and health that can be obtained.
5. Employers shall be informed that they are required by §396-6, HRS to post copies of all amendments or changes to citations resulting from informal conferences. Employee representatives must also be provided with copies of any agreements.

##### **B. Pre-Contest Settlement (Informal Settlement Agreement).**

Pre-contest settlement discussions will generally occur during or immediately following the informal conference and prior to the expiration of the 20 calendar day contest period.

1. In the event that an employer is bringing an attorney to an informal conference, Branch Managers or their designees are encouraged to contact the DAG and ask for the assistance of counsel.
2. Informal Conference Guidance:
  - a. Provide the attendee information regarding the purpose of an informal conference, why the inspection was conducted, and a brief summary of what the attendee can expect during the conference. This will include the following:
    - That the purpose of an informal conference is to answer any questions the employer(s) may have regarding the inspection and citation process, discuss how individual cited items may be abated, provide

information on resources available to the employer on preventing future citations and reducing workers' injury and illness rates and costs, and potentially arrive at a settlement agreement on any issues concerning the employer.

- Why the inspection was conducted. Explicitly, the reason why establishment was selected under a programmed inspection, e.g., “your establishment was randomly selected for inspection because the industry you belong to has higher than average rates of worker injury and illnesses”; or if un-programmed, what circumstances triggered the inspection, e.g. complaint, referral, accident, etc. For example, “HIOSH conducted an un-programmed inspection of your facility because one of your employees filed a formal complaint alleging blocked exit routes.”
  - The rights of the employer(s). Specifically, the Branch Manager will inform the employer(s) of their contest rights. The Branch Manager will provide the employer(s) an overview of the contest procedures. Furthermore, the Branch Manager should indicate that if the employer(s) decide to contest the citation(s), any past settlement offer made during the informal conference will no longer be available to the employer. Once a case is contested, the Branch Manager should explain that the case is transferred to the Hawaii Labor Relations Board for adjudication.
  - The Branch Manager should inform the employer that (for settlement purposes) he/she has the authority to change the citation's classification and adjust the total proposed penalty. However, the Branch Manager should clarify that this can only be accomplished if employers show that they have abated all cited violations, or have or are in the process of exceeding the HIOSH requirements for an effective safety and health program. Examples of proactive initiatives may include implementation of a behavior based safety program involving all levels of employees, implementing work rules that exceed HIOSH standards, e.g. guardrails for scaffolds at less than 10 feet.
  - Potential for settlement of citation(s). The Branch Manager should inform the employer that if an agreement is reached, the employer(s) forfeit their right to contest the citation(s).
- b. Once the employers understand why the inspection was conducted and the procedures of the informal conference are explained, the Branch Manager should ask the employer(s) (or the employee/employee representative if they requested the informal conference) how they want to proceed, e.g. specific citation items, or item by item?
- c. As the citation(s) are discussed, the Branch Manager must thoroughly document what was stated by all parties (employers, employee representatives, and the Branch Manager). Photos supporting the violation should be shared with the conference participants as appropriate. Furthermore, if the alleged violation was not corrected during the inspection and the abatement certification has not been received, the Branch Manager should ask for both the signed abatement certification and abatement documentation (if required). For example, the employer(s) should provide abatement verification that clearly proves the facilities' exit

routes are unobstructed. Abatement verification can include photographs (time/date stamped) of the corrected violative condition. This process should be followed for any additional items and/or citations under discussion.

- d. Often the employer will offer explanations as to why the hazardous condition had existed, e.g. employee misconduct, abatement is not feasible. The Branch Manager shall explain the OSHA/HIOSH position (often based on the law and/or case law). For example, that the employer has the burden of proof with regard to affirmative defenses of employee misconduct or infeasibility and explain the conditions under which that burden is met.
  - e. Once the discussion of the citation(s)/item(s) is concluded, the Branch Manager shall evaluate all the information provided for potential settlement. Information to be considered would include the extent of the safety and health efforts by the employer(s), giving more weight to programmatic changes that substantially improve workplace conditions for workers, as well as efforts to correct and/or prevent hazards. If warranted, the Branch Manager shall offer a penalty reduction and/or re-classification, as well as possibly vacating the citation where the evidence is clear that the citation was not warranted.
  - f. There will be occasions where employers will ask for a payment plan. The Branch Manager shall follow the guidelines in the FOM, Chapter 6, pertaining to collecting payments.
  - g. Employers may ask for additional time to correct a specific violation. The Branch Manager will ask specific questions in accordance with procedures on petition to modify abatement (PMA) to ensure that granting additional time will not adversely affect the safety and health of employees. Such amending of abatement dates may be included in the ISA, or if the only change resulting from the informal conference is amending the abatement date(s), the employer will be asked to submit a petition to modify abatement (PMA), which must adhere to the posting requirements for all items affecting the Citation and Notification of Penalty.
  - h. The Branch Manager will advise the employer of the HIOSH Law on whistleblower protections prohibiting the employer from discharging or in any manner retaliating or discriminating against any employee who files a complaint or participates in any right under the Law.
3. If a settlement is reached during the informal conference, an Informal Settlement Agreement (ISA) shall be prepared and the employer will be asked to sign it. It will be effective upon signature of both the employer and the Branch Manager, provided the contest period has not expired. Both parties will date the documents on the day of actual signature.
  4. If the employer is not present to sign the ISA, the Branch Manager shall send the agreement to the employer for signature. After signing, the employer must return the agreement to the Branch Manager by and delivery or via facsimile within the 20-day contest period.
    - a. One of the items of the ISA shall state that the citation will become final and unreviewable at the end of the contest period, unless the employer signs the proposed agreement or files a written notice of contest.

- b. The employer may not amend or modify the Informal Settlement Agreement on his/her own. Any changes to the text of the agreement, must be agreed to by the Branch Manager:
  - If the changes proposed by the employer are acceptable to the Branch Manager, the exact language written into the agreement shall be mutually agreed upon. HIOSH shall amend the original agreement, send the Employer the original to sign, along with a facsimile copy to review and shall instruct the Employer to return the signed agreement by hand delivery or the signed facsimile prior to the expiration of the 20-day contest period.
  - Employers should be advised that failure to submit the signed agreement within the contest period will invalidate the agreement and the original citation and penalties will become a final order.
- c. Upon receipt of the ISA signed by the employer, the Branch Manager will ensure that there were no alterations or modifications to the agreement.
  - The citation record will then be updated in OIS in accordance with current procedures.
  - If changes made by the employer substantially alter the original terms, the agreement signed by the employer, if an original and not a facsimile or electronic copy, will be treated as a notice of contest and handled accordingly. The employer will be informed of this as soon as possible.
  - If the substantially altered ISA is a facsimile or an electronic copy, the employer shall be notified that the changes are unacceptable, and that if he/she wishes to file a contest, the letter must be a signed original.
- d. A reasonable time will be allowed for return of the agreement from the employer.

If an agreement is not received within the 20-day contest period, the Branch Manager will presume the employer did not sign the agreement, and the citation will be treated as a final order.
- 5. If settlement efforts are unsuccessful and the employer contests the citation, the Branch Manager will state the terms of the final settlement offer as part of the Informal Conference Summary.

### **C. Procedures for Preparing the Informal Settlement Agreement.**

The ISA shall be prepared and processed in accordance with current HIOSH policies and practices. Once an informal conference is scheduled, the ATS Branch shall have a draft ISA prepared and saved in the shared file. Using the document as a template, the final ISA shall be prepared as agreed upon during the informal conference. If an installment payment agreement is also agreed upon, it shall be attached to the ISA.

## **II. Post Contest Settlement (Formal Settlement Agreement)**

Formal settlement agreements will normally occur after the contest is filed with HIOSH and before the Hawaii Labor Relations Board (HLRB).

1. The Hawaii Labor Relations Board (“the Board”) encourages parties to settle contested cases as expeditiously as possible. The Board normally schedules an initial/settlement conference within 75 days after receipt and docketing of the contested case. The Board assumes that both parties have met to discuss terms of settlement before the Board conference. Therefore, if there appears to be room for settlement, the Branch Manager should convey the terms of the potential settlement in the transmittal memo to the DAG so that the assigned DAG can contact the employer as soon as possible. Possible cases in this category would be when discussions regarding potential settlement were ongoing but could not be completed before the 20<sup>th</sup> calendar day for filing a notice of contest.
2. If the employer requests a settlement after the case has been contested, the Branch Manager will instruct the employer to contact the assigned DAG.
3. After discussion and concurrence with HIOSH, the DAG will then draft and execute the agreement in accordance with current DLIR procedures.



## Chapter 9

### COMPLAINT AND REFERRAL PROCESSING

#### I. Safety and Health Complaints and Referrals.

##### A. Definitions.

###### 1. Complaint.

Notice of an alleged safety or health hazard (over which HIOSH has jurisdiction), or a violation of the Law. There are two types; formal and non-formal.

###### a. Formal Complaint.

Complaint made by a current employee or a representative of employees that meets all of the following requirements:

- Asserts that an imminent danger, a violation of the Law, or a violation of a HIOSH standard exposes employees to a potential physical or health harm in the workplace;
- Is reduced to writing or submitted on an OSHA-7 form; and
- Is signed by at least one current employee or employee representative.

###### b. Non-formal Complaint.

Any complaint alleging safety or health violations that does not meet all of the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

###### 2. Inspection.

An onsite examination of an employer's worksite conducted by a HIOSH compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in [Section C, Criteria Warranting an Inspection](#), below.

###### 3. Inquiry.

A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria as listed in Section C. It does not involve an onsite inspection of the work-place, but rather the employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter if necessary. The employer is then requested to provide a response, and HIOSH will notify the complainant of that response via appropriate means.

###### 4. Electronic Complaint.

A complaint submitted via OSHA's public website, or to HIOSH's e-mail. All complaints submitted via OSHA's public website and referred to HIOSH are initially considered non-formal. See Chapter 9 Section I.E.5., to determine when electronic complaints are to be considered formal.

###### 5. Permanently Disabling Injury or Illness.

An injury or illness that has resulted in permanent disability or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

**6. Referral.**

An allegation of a potential workplace hazard or violation received from one of the sources listed below.

- a. **CSHO referral** – information based on the direct observation of a CSHO.
- b. **Safety and health agency referral** – from sources including, but not limited to: NIOSH, state programs, consultation, and state or local health departments, as well as safety and/or health professionals in Federal agencies.
- c. **Discrimination complaint referral** – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, or engaging in other activities related to occupational safety or health.
- d. **Other government agency referral** – made by other Federal, State, or local government agencies or their employees, including local police and fire departments.
- e. **Media report** – either news items reported in the media or information reported directly to HIOSH by a media source.
- f. **Employer report** - of accidents other than fatalities and catastrophes.

**7. Representative of Employees.**

Any of the following:

- a. An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization.
- b. An attorney acting for an employee.
- c. Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

NOTE: The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.

**B. Classifying as a Complaint or a Referral.**

Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if **at least one** of the conditions in Section C, [\*Criteria Warranting an Inspection\*](#) is met.

### C. Criteria Warranting an Inspection.

An inspection is normally warranted if **at least one** of the conditions below is met (but see also Paragraph I.D. of this chapter, [Scheduling an Inspection of an Employer in an Exempt Industry](#)):

1. A valid formal complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on a *Complaint (OSHA-7)*, be signed by a current employee or representative of employees, and state the reason for the inspection request with reasonable particularity. Additionally, there must be reasonable grounds to believe either that a violation of the Law or HIOSH standard that potentially exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists, as provided in Section 396-8(b), HRS.
2. The information received in a signed, written complaint from a current employee or employee representative that alleges a record-keeping deficiency that indicates the existence of a potentially serious safety or health violation.
3. The information alleges that a permanently disabling injury or illness has occurred as a result of the complained of hazard(s), and there is reason to believe that the hazard or related hazards still exist.
4. The information alleges that an imminent danger situation exists.
5. The information concerns an establishment and an alleged hazard covered by a local, regional, or national emphasis program, or the Inspection Scheduling System Plan.
6. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s). The evidence must be descriptive of current, on-going or recurring hazardous conditions.
7. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within HIOSH's jurisdiction during the past three years, or is an establishment or related establishment in the Severe Violators Enforcement Program (SVEP). However, if the employer has previously submitted adequate documentation for these violations demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, the Branch Manager will normally determine that an inspection is not necessary.
8. A whistleblower investigator or OSHA Regional Supervisory Investigator requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
9. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled via inquiry is received, that complaint or referral may, at the Branch Manager's discretion, be incorporated into the scheduled or ongoing inspection. If such a complaint is formal, the complainant must receive a written response addressing the complaint items.

10. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, an onsite inspection will be initiated if the information relates to construction, manufacturing, agriculture, or other industries as determined by the Branch Manager. Limitations in funding of HIOSH's activities in agriculture by Appropriations Act provisions will be observed. See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, and adopted by HIOSH on July 10, 1998. A referral to the Wage Standards Division (WSD) should also be initiated.

NOTE: The information does not need to allege that a child labor law has been violated.

#### **D. Scheduling an Inspection of an Employer in an Exempt Industry.**

In order to charge an inspection of an employer in an exempt industry classification as specified by Appropriations Act provisions to normal inspection activity coding; i.e., 50/50 Fed/State:

NOTE: See CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, and adopted by HIOSH on July 10, 1998.

1. The information must come directly from a current employee; OR
2. It must be determined and documented in the case file that the information came from a representative of the employee (see Paragraph I.A.7. of this chapter, *Representative of Employees*), with the employee's knowledge of the representative's intended action.

#### **E. Electronic Complaints Received via the OSHA Public Website or the HIOSH email.**

1. Electronic complaints submitted via the OSHA public website are automatically forwarded via email to the designed Area office in the appropriate state. That Office then forwards the electronic complaints to the appropriate State office e-mail.
2. For HIOSH, that e-mail box is monitored by the division secretary on a daily basis, and referred to the appropriate branch for action.
3. The Branch Manager is then responsible to evaluate the complaint for appropriate action, i.e., one of the criteria listed in [C. Criteria Warranting an Inspection](#) above.
  - a. If the Branch Manager determines that the complaint is obviously not within HIOSH jurisdiction, e.g., another agency, an appropriate referral should be made'
  - b. If further information is necessary, the Branch Manager should make every effort to contact the complainant via e-mail or telephone. If immediate contact could not be made via telephone or e-mail, a reasonable period, e.g., five (5) calendar days should be set for a response.
  - c. If no timely response is received, the appropriate notation should be made on the complaint log, and no further action taken.

4. If the information indicates that employees may be exposed to a potential safety and/or health hazard, a *Complaint (OSHA-7)* is to be completed. Enter the following code in the Optional Information field:

**N-11-LOGXXXXXX**

- Where N-11 indicates that the complaint was filed electronically; and
  - The digits following LOG are the unique complaint ID/log numbers assigned to the electronic complaint when processed by the Salt Lake Technical Center. The log number may vary and does not have to be exactly six digits. In entering the code, there is no space between the word LOG and the digits that follow.
5. Electronic complaints where a current employee has provided their name **and** checked the “*This constitutes my electronic signature*” box shall be considered as a formal complaint and processed accordingly.
  6. If the electronic complaint is not signed, the Branch Manager must actively follow up on information received electronically in order to provide the employee with the opportunity to formalize the complaint. The employee can send or fax a signed copy of the information, request that an OSHA-7 form be sent, or sign the information in person at the division Office. Normally a complainant has five working days to formalize an electronic complaint.
  7. All complaint-related material received electronically should be printed and date stamped with the date the material was submitted and received. When these dates are not the same, the Branch Manager will determine the appropriate date for the incoming material.

**F. Information Received by Telephone.**

1. While speaking with the caller, HIOSH staff will attempt to obtain the following information:
  - a. Whether the caller is a current employee or an employee representative.
  - b. The exact nature of the alleged hazard(s) and the basis of the caller’s knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of HIOSH standards or the HIOSH Law.
  - c. The employer’s name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.
  - d. The name, address, telephone number, and email address of any union and/or employee representative at the worksite.
2. As appropriate, HIOSH will provide the caller with the following information:
  - a. Describe the complaint process, and if appropriate, the concepts of “inquiry” and “inspection,” as well as the relative advantages of each.
  - b. If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint. These rights and protections include:
    - The right to request an onsite inspection.

- Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists.
  - The right to obtain review of a decision not to inspect by submitting a request for review in writing.
3. Information received by telephone from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can send or fax a signed copy of the information, request that an OSHA-7 form be sent, or sign the information in person at the HIOSH Office. Normally a complainant has five working days to formalize an electronic complaint.
  4. If appropriate, inform the complainant of rights to confidentiality in accordance with Section 8(f)(1) of the Law. Whether confidentiality is requested or the complainant attempts to waive the confidentiality, the identity of the complainant shall be protected in accordance with the Law.
  5. Explain Section 8(e) (discrimination) rights.

#### **G. Procedures for an Inspection.**

1. Upon receipt of a complaint or referral, the Branch will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.
  - a. If necessary, reasonable attempts will be made to contact the individual who provided the information in order to obtain additional details or to clarify issues raised in the complaint or referral. See the [Complaint Questionnaire](#) beginning on page 9-14.
  - b. The Branch Manager may determine not to inspect a facility if he/she has a substantial reason to believe that the condition complained of is being or has been abated.
2. Despite the existence of a complaint, if the Branch Manager, believes there is no reasonable grounds that a violation or hazard exists, no inspection or inquiry will be conducted.
  - a. Where a formal complaint has been submitted, the complainant will be notified in writing of HIOSH's intent not to conduct an inspection, the reasoning behind the determination, and the right to have the determination reviewed under §12-51-12, HAR. The justification for not inspecting will be noted in the case file.
  - b. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of HIOSH's intent not to conduct an inquiry or inspection. The justification for not inspecting or conducting an inquiry will be noted in the case file.
3. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in Paragraph I.C. of this chapter, [Criteria Warranting an Inspection](#), and there are reasonable grounds to believe that a violation or hazard exists, the Branch is authorized to conduct an inspection.
  - a. If appropriate, the Branch will inform the individual providing the information that an inspection will be scheduled and that he or she will be advised of the results.

- b. If a joint (safety and health) inspection is warranted, the receiving Branch Manager shall coordinate a joint inspection with the other discipline Branch Manager. Joint inspections may be warranted when:
  - The complaint also alleges violations of the other discipline that allege an imminent danger situation or serious hazards; or
  - The employer is on the Inspection Scheduling System for the other discipline, or the information provided addresses an alleged hazard covered by an emphasis program adopted by HIOSH for the other discipline.
- c. After the inspection, the Branch will send the individual a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.
4. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within five working days of formalizing.

#### **H. Procedures for an Inquiry.**

1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, an inquiry will be conducted. The Branch Manager will promptly contact the employer to notify it of the complaint or referral and its allegation(s), and fax or email a confirming letter.
2. If a non-formal complaint is submitted by a current employee or a representative of employees that does not meet any of the inspection criteria, the complainant may be given five working days to make the complaint formal.
  - a. The complainant may come into the HIOSH Office and sign the complaint, or mail or fax a signed complaint letter. Additionally, a *Complaint (OSHA-7)* can be mailed or faxed to the complainant, if appropriate.
  - b. If the complaint is not made formal after five working days, after making a reasonable attempt to inform the complainant of the decision, HIOSH will proceed with the inquiry process.
3. The employer will be advised of what information is needed to answer the inquiry and encouraged to respond by fax or email. Employers are encouraged to do the following:
  - a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.
  - b. Advise the Branch Manager either in writing or via email within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Branch Manager, the response time may be longer or shorter than five working days, depending on the circumstances. Additionally, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during that time, but is encouraged to do so.
  - c. Provide the Branch Manager with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the employer believes would be helpful, as well as a description of any corrective action the employer has taken or is in the process of taking.



- d. Post a copy of the letter from HIOSH where it is readily accessible for review by all employees.
  - e. Return a copy of the signed Certificate of Posting to the HIOSH Office.
  - f. If there is a recognized employee union or safety and health committee in the facility, provide it with a copy of HIOSH's letter and the employer's response.
4. As soon as possible after contacting the employer, a notification letter will be faxed to the employer, or mailed where no fax is available. Sample letters to complainants and employers are provided on the NCR. If email is an acceptable means of responding, this should be indicated in the notification letter and the proper email address should be provided.
  5. If no employer response or an inadequate employer response is received after the allotted five working days, additional contact with the employer may be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if HIOSH determines from other information that the condition has not been or is not being corrected, an inspection will be scheduled.
  6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response, and if the alleged hazard persists, of the right to request an inspection. When HIOSH receives an adequate response from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.
  7. If the complainant is a current employee or a representative of employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.
    - a. If the employee disagreement takes the form of a written and signed formal complaint, see [Paragraph I.G.](#) of this chapter, [Procedures for an Inspection](#).
    - b. If the employee disagreement does not take the form of a written and signed formal complaint, some discretion is allowed in situations where the information does not justify an onsite inspection. In such situations, the complainant will be notified of HIOSH's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.
  8. If a signed complaint is received after the complaint inquiry process has begun, the Branch Manager will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the inquiry has begun and that the complainant retains the right to request an onsite inspection if he/she disputes the results and believes the hazard still exists.
  9. The complaint must not be closed until HIOSH verifies that the hazard has been abated.
  10. The justification for not conducting an inquiry will be noted in the case file.

## **I. Complainant Protection.**

### **1. Identity of the Complainant.**



The complainant's identity will be withheld from the employer in accordance with Section 396-8(f) of the Law. No information will be given to the employer that would allow the employer to identify the complainant.

## **2. Whistleblower Protection.**

- a. Section 8(e) of the Law provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that he or she has been discharged or otherwise retaliated against by any person as a result of engaging in such activities may file a whistleblower complaint. The complaint must be filed within sixty days of the discharge or other retaliation.
- b. Complainants should always be advised of their Section 8(e) rights and protections upon initial contact with HIOSH and whenever appropriate in subsequent communications.

## **J. Recording in OIS.**

Information about complaint inspections or inquiries must be recorded in OMIS following the current instructions outlined in the FOM. Referrals reported by the employer will be recorded in OIS following the guidance provided in the Memorandum entitled, "*Interim Enforcement Procedures for New Reporting Requirements under 29 C.F.R. 1904.39*", dated December 24, 2014, or unless superseded by future agency-approved correspondence.

# **II. Whistleblower Complaints.**

## **A. HIOSH Enforcement.**

OSHA allows HIOSH to enforce the whistleblower or anti-retaliation provisions of the OSH Act. HIOSH does so under Section 396-8(e) of the Law. The Law provides that employers may not discharge or otherwise retaliate against an employee because the employee has reported an alleged violation related to the statute to an employer or a government agency, or otherwise exercised any rights provided to employees by the Law.

See CPL 02-03-003, Whistleblower Investigations Manual, dated September 20, 2011, and adopted by HIOSH on [Insert date].

## **B. Other Whistleblower Statutes (enforced by OSHA)**

When a retaliation complaint is made under any of the other sixteen federal whistleblower statutes enforced by OSHA other than the OSH Act, the complainant should be referred promptly to the OSHA Honolulu Area Office because the requirements for filing complaints under those statutes vary from those of the OSH Act. They should also be advised that there are statutory deadlines for filing these complaints.

## **C. CSHOs and Consultants Responsibilities.**

In the context of an OSHA enforcement action or a consultation activity, the complainant will be advised of the protection against retaliation afforded by §396-8(e), HRS. A Section 8(e) complaint may be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that he has suffered an adverse action because of activity protected under Section 8(e), CSHOs will

record that person's identifying information and the date and time of this initial contact on an OSHA-87 form and forward it to the HIOSH Supervisory Investigator (currently the OH Manager) for processing.

#### **D. State Plan States**

In State Plan States, employees may file occupational safety and health retaliation complaints with Federal OSHA, the State, or both. Federal OSHA normally refers such complaints to the State Plan States for investigation. OSHA's Whistleblower Manual outlines OSHA's referral/deferral policies for such complaints.

### **III. Decision Trees.**

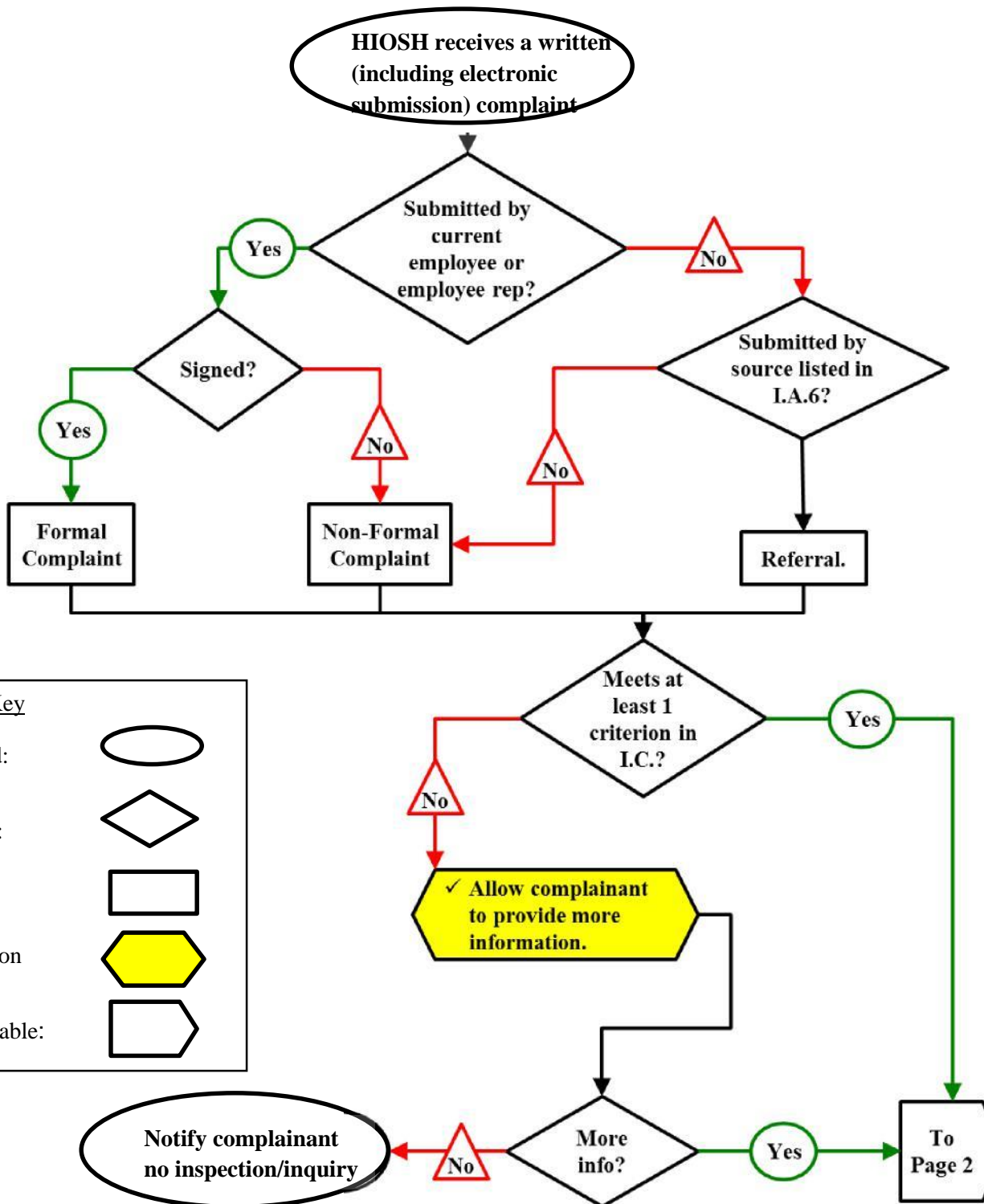
#### **A. Decision Tree for when Information is Obtained in Writing.**

See tree on page [9-11](#) for OSHA enforcement action or consultation activity when information is obtained in writing.

#### **B. Decision Tree for when Information is Obtained Orally.**

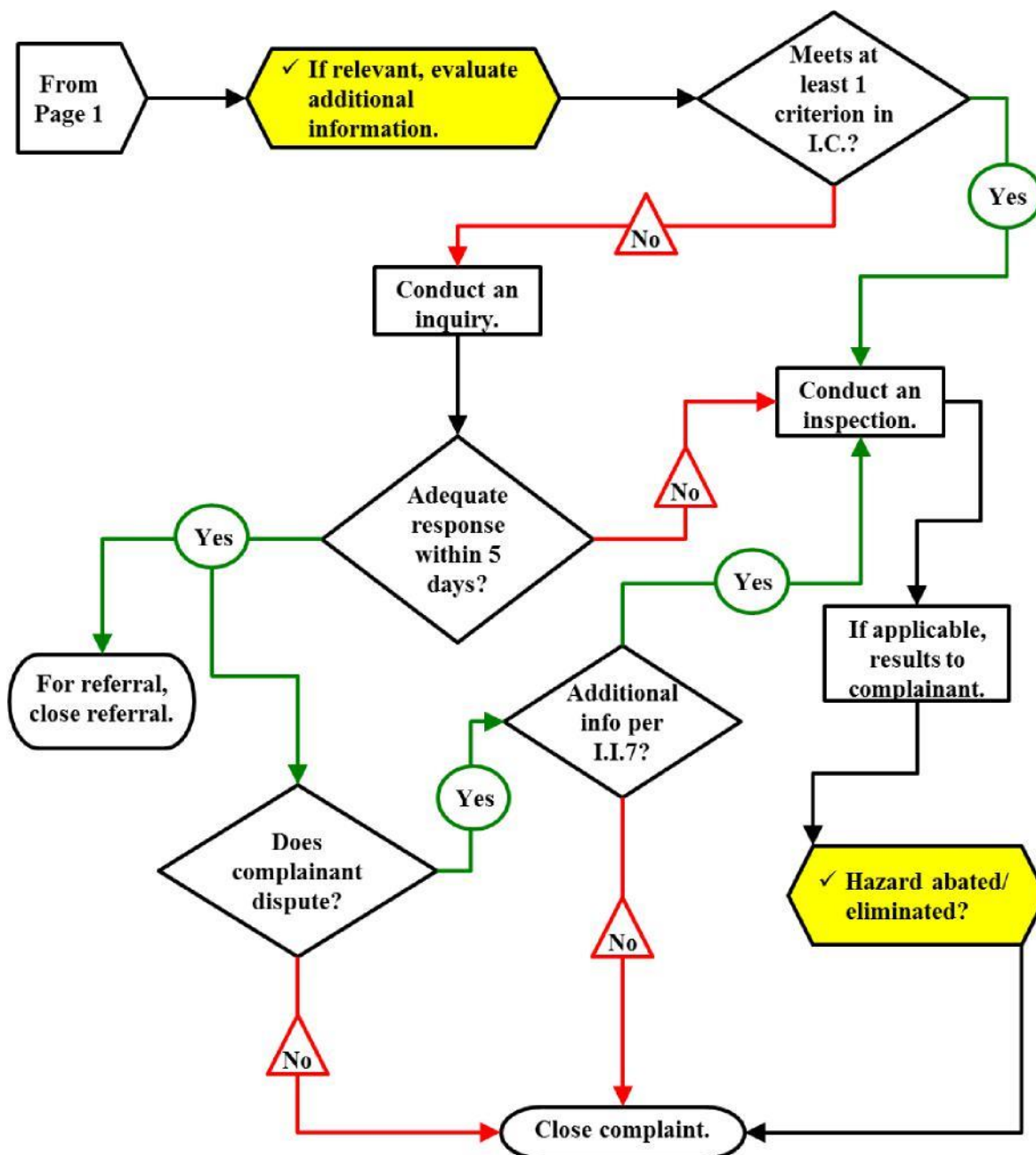
See tree on page [9-13](#) for OSHA enforcement action or consultation activity when information is obtained orally.

# Written Complaint Processing



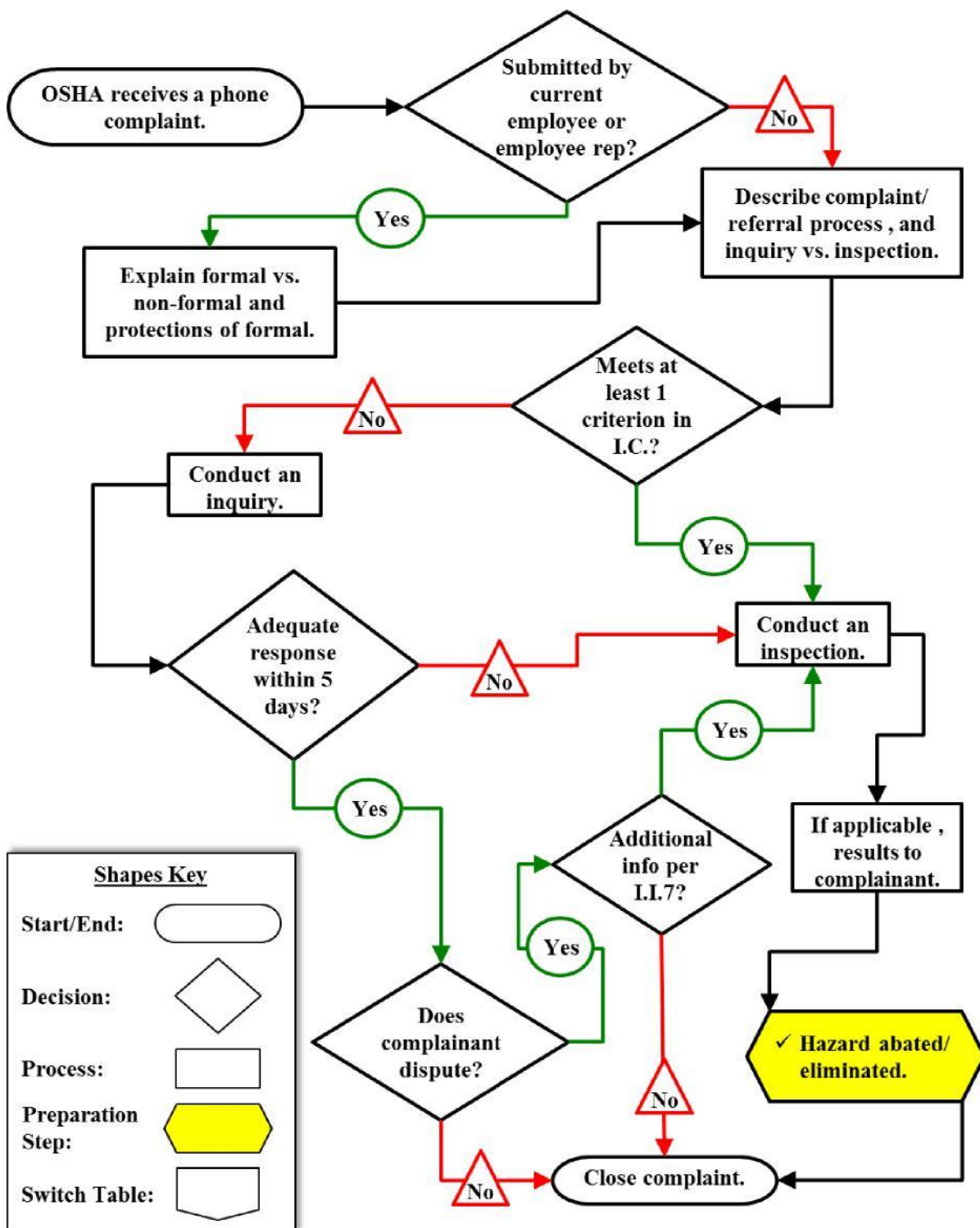
# Written Complaint Processing

Page 2



"Additional Info per I.I.7" should be "Additional Info per I.H.7."

# Telephone Complaint Processing



### Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

**For All Complaints:**

1. What is the specific safety or health hazard?

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2. Has the hazardous condition been brought to the employer's attention? If so, when?  
How?

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3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.

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4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or accidents?

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5. With what frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?

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6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?

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7. What personal protective equipment (e.g., hearing protection, gloves or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.

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8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?

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9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

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**For Health Hazards**

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

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11. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which may reduce exposure to the hazard?

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12. What administrative or work practice controls has the employer put in place?

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13. Do any employees have any symptoms that may have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work-related disease or condition? What was it?

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14. Have there been any “near-miss” incidents?

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15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?

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16. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by the employees?

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17. Do employees receive audiograms on a regular basis?

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**For Safety Hazards:**

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and “other” probability factors.

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19. Have any employees been injured as a result of this hazardous condition? Have there been any “near-miss” incidents?

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## Chapter 10

### INDUSTRY SECTORS

#### I. Agriculture.

##### A. Introduction.

Special situations arising in the agriculture industry, which is regulated under 29 CFR Part 1928 and the General Duty Standard, are discussed in this section. Part 1928 covers “agricultural operations,” which include, but are not limited to, egg farms, poultry farms, livestock grain and feed lot operations, dairy farms, horse farms, hog farms, fish farms, and fur-bearing animal farms. OSHA has very few standards that are applicable to this industry. Part 1928 sets forth a few standards in full and lists particular Part 1910 standards which apply to agricultural operations. Part 1910 standards not listed do not apply. The General Duty Standard may be used to address hazards not covered by these standards.

##### B. Definitions.

###### 1. Agricultural Operations.

This term is not defined in 29 CFR Part 1928. Generally, agricultural operations would include any activities involved in the growing and harvesting of crops, plants, vines, fruit trees, nut trees, ornamental plants, egg production, the raising of livestock (including poultry and fish), as well as livestock products. The Occupational Safety and Health Review Commission has ruled that activities integrally related to these core “agricultural operations” are also included within that term. *Darragh Company*, 9 BNA OSHC 1205, (Nos. 77-2555, 77-3074, and 77-3075, 1980) (delivery of feed to chicken farmer by integrator of poultry products is agricultural operation); *Marion Stevens dba Chapman & Stephens Company*, 5 BNA OSHC 1395 (No. 13535, 1977) (removal of pipe to maintain irrigation system in citrus grove is agricultural operation). Post-harvest activities not on a farm, such as receiving, cleaning, sorting, sizing, weighing, inspecting, stacking, packaging and shipping produce, are not “agricultural operations.” *J. C. Watson Company*, 22 BNA OSHC 1235 (Nos. 05-0175 and 05-0176, 2008) (employer’s onion packing shed was not an agricultural operation); *J. C. Watson Company v. Solis*, DC Cir. 08-1230 (April 17, 2009).

###### 2. Agricultural Employee.

OSHA regulation §1975.4(b)(2) states that members of the immediate family of the farm employer **are not** regarded as employees.

###### 3. Farming Operation.

This term is used in OSHA’s Appropriations Act, and has been defined in CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, to mean any operation involved in the growing or harvesting of crops, the raising of livestock

or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.

These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 and three digit North American Industry Classification System (NAICS) of 111 (Agricultural Production - Crops); SIC 02 and NAICS 112 (Agricultural Production - Livestock and Animal Specialties); four digit SIC 0711 and six digit NAICS 115112 (Soil Preparation Services); SIC 0721 and NAICS 115112 (Crop Planting, Cultivating, and Protecting); SIC 0722 and NAICS 115113 (Crop Harvesting, Primarily by Machine); SIC 0761 and NAICS 115115 (Farm Labor Contractors and Crew Leaders); and SIC 0762 and NAICS 115116 (Farm Management Services).

**4. Post-Harvesting Processing.**

This is a term that is used in CPL 02-00-051, *Enforcement Exemptions and Limitations under the Appropriations Act*, dated May 28, 1998, in discussing enforcement guidance for small farming operations. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider or sauces, etc.) or a higher degree of packaging versus field sorting in a shed for size.

**C. Appropriations Act Exemptions for Farming Operations.**

See [page 2-5, IV.D., Enforcement Exemptions & Limitations for how the Appropriations Act](#) affects HIOSH enforcement. The term “exempt” below means that matching federal funds may not be used for enforcement.

**1. Exempt Farming Operations.**

10 or fewer employees **and** have had no temporary labor camp (TLC) activity within the prior 12 months.

**2. Non-Exempt Farming Operations.**

A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months **is not** exempt from inspection.

**3. State Plans States.**

States with OSHA-approved State Plans may enforce on small farms and provide consultation or training, provided that 100% state funds are used and the state has an accounting system in place to assure that no federal or matching state funds are expended on these activities.

**4. Enforcement Guidance for Small Farming Operations.**

OSHA’s Appropriations Act exempts qualifying small farming operations from enforcement or administration of **all** rules, regulations, standards or orders under the Occupational Safety and Health Act, including rules affecting consultation and technical assistance or education and training services.

Table 10-1, below, provides an at-a-glance reference to HIOSH activities under OSHA funding legislation.

**Table 10-1: OSHA's Appropriations Act Exemptions for Farming Operations**

Activity	Farming operations with 10 or fewer employees (EEs) and no TLC activity within 12 months.	Farming operations with more than 10 EEs or a farming operation with an active TLC within 12 months.
Programmed Safety Inspections	Exempt	Non-Exempt
Programmed Health Inspections	Exempt	Non-Exempt
Employee Complaint	Exempt	Non-Exempt
Fatality and/or two or more Hospitalizations (Reporting Note)	Exempt	Non-Exempt
Imminent Danger	Exempt	Non-Exempt
8(e) (whistleblower investigation)	Exempt	Non-Exempt
Consultation & Technical Assistance	Exempt	Non-Exempt
Education & Training	Exempt	Non-Exempt
Conduct Surveys & Studies	Exempt	Non-Exempt

NOTE: See CPL 02-00-051, Enforcement Exemptions and Limitations under the Appropriations Act, May 28, 1998, for additional information.

## **D. Standards Applicable to Agriculture.**

HIOSH/OSHA has very few standards that apply to employers engaged in agricultural operations. Activities that take place after harvesting are considered general industry operations and are covered by HIOSH's general industry standards.

### **1. Agricultural Standards (Part 1928).**

- a. Roll-over Protective Structures (ROPS) for Tractors (§§1928.51, 1928.52, and 1928.53).
- b. Guarding of Moving Machinery Parts of Farm Field Equipment, Farmstead Equipment, and Cotton Gins (§1928.57).
- c. Field Sanitation (§1928.110). See Paragraph I.F. of this chapter, *Wage & Hour/OSHA Shared Authority under Secretary's Order*, regarding Wage & Hour authority. OSHA has no authority to issue any citations under this standard.

### **2. General Industry Standards (Part 1910).**

- a. Temporary Labor Camps (§1910.142). See Chapter 12, Section II, Temporary Labor Camps.
- b. Storage and Handling of Anhydrous Ammonia (§1910.111(a) and (b)).
- c. Logging Operations (§1910.266).
- d. Specifications for Accident Prevention Signs and Tags – Slow-Moving Vehicle Emblem (§1910.145(d)(10)).
- e. Hazard Communication (§1910.1200).

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- f. Cadmium (§1910.1027).
- g. Retention of Department of Transportation Markings, Placards and Labels (§1910.1201).

Except to the extent specified above, the standards contained in subparts B through T and subpart Z of Part 1910 of Title 29 do not apply to agricultural operations.

### 3. General Duty Standard.

As in any situation where no standard is applicable, §12-60-2(a)(3) or §12-110-2(a)(3) of the HIOSH administrative rules (standards) may be used; all the elements for a general duty standard citation must be met. See Chapter 4, Section III, *General Duty Standard*.

## E. Pesticides.

### 1. Coverage.

- a. Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Environmental Protection Agency (EPA) has jurisdiction over employee protection relating to pesticides (which also includes herbicides, fungicides and rodenticides). The EPA Worker Protection Standard (WPS) protects employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides. The WPS includes provisions for personal protective equipment, labeling, employee notification, safety training, safety posters, decontamination supplies, emergency assistance, and restricted field entry. See 40 CFR Part 170, Worker Protection Standard.
- b. The regulation covers two types of employees:
  - Pesticide Handlers. Those who mix, load, or apply agricultural pesticides; clean or repair pesticide application equipment; or assist with the application of pesticides in any way.
  - Agricultural Workers. Those who perform tasks related to the cultivation and harvesting of plants on farms or in greenhouses, nurseries, or forests – such as carrying nursery stock, repotting plants, or watering – related to the production of agricultural plants on an agricultural establishment.
- c. For all pesticide use, including uses not covered by 40 CFR Part 170, it is a violation of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. Thus, OSHA (and therefore, HIOSH) has no authority to issue any citations related to pesticide exposures, pursuant to Section 4(b)(1) of the OSH Act, unless HIOSH enters into an OSHA approved Memorandum of Agreement (MOA) with the state enforcement agency, i.e., state Department of Agriculture, Pesticides Branch. In the event that a CSHO should encounter any cases of pesticide exposure or the lack of an appropriate pesticide label on containers, a referral shall be made to the Department of Agriculture, Pesticides Branch, responsible for enforcing FIFRA in Hawaii.

- d. EPA also has jurisdiction in non-agriculture situations where pesticides are being applied by pest control companies. This would include, but not be limited to, applications in and around factories, warehouses, office buildings, and personal residences. HIOSH may not cite its Hazard Communication standard in such situations.

## **2. OSHA's Hazard Communication Standard.**

Although HIOSH will not cite employers covered under EPA's WPS with regard to hazard communication requirements for pesticides, agricultural employers otherwise covered by HIOSH are still responsible for having a hazard communication program for all hazardous chemicals that are not considered pesticides.

## **F. Wage & Hour/OSHA Shared authority under Secretary's Order.**

Since 1997, the Wage & Hour Division (WHD) of the Employment Standards Administration (ESA) has had shared authority with OSHA over two standards: the Field Sanitation standard ([1928.110](#)), and the Temporary Labor Camp standard ([1910.142](#)). See Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration (*Federal Register*, January 2, 1997 ([62 FR 107](#))) and Secretary's Order 5-2002: Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, *Federal Register*, October 22, 2002 ([67 FR 65007](#)).

### **1. Field Sanitation Standard.**

- a. HIOSH has enforcement authority for this standard within the state of Hawaii.
- b. The provisions of the Field Sanitation standard are also applicable to reforestation activities involving "hand-labor operations" as defined by the standard. This position regarding reforestation activities was developed through extensive intra-agency discussions and was intended to provide, in the absence of a clear and unambiguous exemption of this activity from the provisions of the standard, the broadest possible coverage for these employees.

### **2. Temporary Labor Camp (TLC) Standard.**

HIOSH has enforcement authority for this standard in the state of Hawaii. See [Chapter 12, Section II, Temporary Labor Camps](#), for a detailed discussion on Temporary Labor Camps.

### **3. Compliance Interpretation Authority.**

HIOSH has sole interpretation authority for both the Field Sanitation and the Temporary Labor Camp standards for workplaces within the state of Hawaii

### **4. State Plan States**

- a. Eight of the twenty-two jurisdictions (21 states and Puerto Rico) that have OSHA-approved state plans covering private sector employment elected not to enforce the Field Sanitation standard in agriculture and the Temporary Labor Camp standard, except with

respect to egg, poultry, red meat production, and post-harvesting processing of agricultural and horticultural commodities. Thus, WHD enforces these standards, except as noted above, in the following states: Alaska, Indiana, Iowa, Kentucky, Minnesota, South Carolina, Utah and Wyoming.

- b. The 14 other jurisdictions with OSHA-approved state plans covering private sector employment have retained enforcement authority for the Field Sanitation and Temporary Labor Camp standards in agriculture. They are Arizona, California, Hawaii, Maryland, Michigan, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, Tennessee, Vermont, Virginia and Washington.

## **II. Construction [Reserved].**

## **III. Maritime.**

The maritime industry includes shipyard employment (shipbuilding, ship repair, shipbreaking, and related employments), marine cargo handling (longshoring and marine terminals), and other marine activities. OSHA has not always had a clear definition of what is considered “maritime” and what is not. In the past it was determined based on activity and sometimes based on location from navigable waters. The following examples are illustrative:

- Construction of a pier on the water is maritime. The nearby storage of materials and equipment for the pier construction, although not on the water would also be maritime.
- Shipbuilding on land and on water is maritime. Ship repair activities, including repairs to the ship’s engine, and other mechanical parts are also maritime – even if they occur well away from the water. While most such businesses only perform work related to ships and boats, some may also do repairs to other types of mechanical equipment, thus parts of the premises may be maritime and parts not.
- Construction of a building unrelated to maritime where the jobsite is within 50 yards of the ocean may be considered to be maritime by OSHA.
- Tourist attractions on the water, such as submarine tours, sunset cruises or whale-watching cruises may involve jurisdictions of the U.S. Coast Guard (vessel on navigable waters), OSHA (maritime activities related to maintenance and repair of the vessel), and HIOSH (retail operations, even if located on the piers).
- Commercial diving activities such as for aquaculture located within Hawaiian waters is Hawaii’s jurisdiction.

Under the Hawaii State plan agreement with OSHA, OSHA retains jurisdiction over private sector maritime activities. However, since OSHA does not cover public employees, any public sector workers engaged in maritime activities are within Hawaii’s jurisdiction. This may include workers in the State Departments of Transportation, Agriculture and Health. County workers may include firefighters on fire boats.

Rather than risk losing a case for a questionable jurisdiction issue (which leaves workers at risk), the Branch Manager should contact the Honolulu Area Office before sending a CSHO out, if possible. If the Honolulu Area Office cannot be contacted immediately or is uncertain of the jurisdiction, CSHOs should proceed with the inspection. If it is later determined to be OSHA jurisdiction, the case file would be turned over to OSHA.

## **A. Maritime Industry Primary Resources.**

### **1. Directives.**

- a. CPL 02-00-157 – Shipyard Employment “Tool Bag” Directive, April 1, 2014, adopted by HIOSH on [Insert date].
- b. CPL 02-01-055 – Maritime Cargo Gear Standards and 29 CFR Part 1919 Certification, September, 30, 2013.
- c. CPL 02-00-154 – Longshoring and Marine Terminals “Tool Shed” Directive, July 31, 2012, adopted by HIOSH on August 31, 2012.
- d. CPL 02-00-151 – 29 CFR Part 1910, Subpart T – Commercial Diving Operations, June 13, 2011, adopted by HIOSH on September 26, 2011.
- e. CPL 02-01-042 – 29 CFR Part 1915, Subpart B, Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment, May 20, 2011, adopted by HIOSH on September 20, 2011.
- f. CPL 03-00-012 - OSHA’s National Emphasis Program (NEP) on Shipbreaking, November 4, 2010, not adopted by HIOSH
- g. CPL 02-01-049 - 29 CFR Part 1915, Subpart I, Enforcement Guidance for Personal Protective Equipment (PPE) in Shipyard Employment, November 4, 2010, adopted by HIOSH on September 20, 2011.
- h. CPL 02-01-047 - OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), February 22, 2010, Resource only

### **2. Standards.**

- a. 29 CFR Part 1915 - Shipyard Employment. Including the Shipyard Industry Standards “Brown Book,” OSHA Publication 2268-03R (2009).
- b. 29 CFR Part 1917 - Marine Terminals. Including the Longshoring Industry “Green Book,” OSHA Publication 2232 (2001).
- c. 29 CFR Part 1918 - Longshoring. Including the Longshoring Industry “Green Book,” OSHA Publication 2232 (2001).
- d. 29 CFR Part 1919 – Gear Certification. (See also 1915.115(a), 1917.50, 1918.11, and 1918.66(a)(1)).

### **3. Guidance Documents.**

- a. Shipyard Employment Industry
  - Guidance Documents
    - Safe Work Practices for Marine Hanging Staging. OSHA Guidance Document (April 2005); also available as a PDF.

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- Safe Work Practices for Shipbreaking. OSHA Publication 3375-03 (March 2010).
- Abrasive Blasting Hazards in Shipyard Employment. OSHA Guidance Document (December 2006).
- Ventilation in Shipyard Employment. OSHA Publication 3639-04 (2013)
- Safety and Health Injury Prevention Sheets (SHIPS)
  - Control of Hazardous Energy Lockout/Tags-Plus. (April 2014)
  - Shipboard Electrical. (December 2013)
  - Rigging. (April 2011)
  - Shiplifting. (August 2008)
  - Hot Work – Welding, Cutting, and Brazing. OSHA Safety and Health Injury Prevention Sheets.
- Fact Sheets
  - Safe Lighting Practices in the Shipyard Industry. OSHA Publication FS 3677 (November 2013)
  - Shipbreaking. OSHA Fact Sheet (2001). English PDF. Spanish PDF.
  - Guidelines for Safely Entering and Cleaning Vessel Sewage Tanks. OSHA Publication FS 3587 (March 2013).
  - Safely Performing Hot Work on Hollow or Enclosed Structures in Shipyards. OSHA Publication FS 3586 (March 2013)
  - General Working Conditions in Shipyard Employment: Motor-Vehicle Safety Equipment, Operation and Maintenance.
  - General Working Conditions in Shipyard Employment: Sanitation.
  - General Working Conditions in Shipyard Employment: Lockout/Tags-plus Coordination.
  - Spud Barge Safety. OSHA Publication FS 3358 (January 2009).
  - Eye Protection against Radiant Energy during Welding and Cutting in Shipyard Employment. OSHA Publication FS 3499 (January 2012). English PDF. Spanish PDF.
  - Safety While Working Alone in Shipyards. OSHA Publication FS 3591 (March 2013)
- Quick Cards.
  - Fire Watch Safety during Hot Work in Shipyards. OSHA Publication 3494.
  - Hot Work Safety on Hollow or Enclosed Structures in Shipyards. OSHA Publication 3585 (March 2013).
  - Aerial Lift Protection Over Water. OSHA Publication 3452 (September 2011). English PDF. Spanish PDF
- Additional Guidance.



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- Deck Barge Safety. OSHA Guidance Document, Publication 3358-01N (January 2009).
  - Ergonomics for the Prevention of Musculoskeletal Disorders: Guidelines for Shipyards. OSHA Guidance Document, Publication 3341-03N (March 2008).
  - Shipyard Fire Protection Frequently Asked Questions (FAQs). OSHA (March 2006); also available as a PDF.
  - Hanging Staging (Marine). OSHA eTool.
  - Fire Protection in Shipyard Employment. OSHA Slide Presentation (March 2005).
- b. Marine Cargo Handling Industry.
- Fact Sheets.
    - Working Safely While Repairing Intermodal Containers in Marine Terminals. OSHA Publication FS 3626 (April 2013).
    - Freeing Inoperable Semi-Automatic Twist Locks (SATLs) in Longshoring. OSHA Publication FS 3583 (December 2012)
    - Traffic Lanes and Personnel Safety Zones. OSHA Publication FS 3540 (May 2012).
    - Radio Communication Can Assist Container Gantry Crane Operators in Marine Terminals. OSHA Publication FS 3267 (June 2007); also available as a PDF.
    - Marine Terminal Fall Protection for Personnel Platforms. OSHA Fact Sheet (June 2006); also available as a PDF.
  - Quick Cards.
    - First Aid in Marine Cargo Handling, OSHA Publication 3368 (December 2009). English and Spanish PDF.
    - Lifesaving Facilities in Marine Cargo Handling, OSHA Publication 3367 (December 2009), English and Spanish PDF.
    - Safe Plugging and Unplugging Reefer Units in Longshoring and Marine Terminals. OSHA Publication 3652 (June 2013)
    - Top/Side Handler Safety in Marine Terminals. OSHA Publication 3621 (April 2013)
    - Servicing Multi-Piece and Single-Piece Rim Wheels. OSHA Publication 3584 (March 2013)
    - Safe Operation of Semi-tractors in Marine Terminals. OSHA Publication 3653 (May 2013).
    - Safely Operating and Working Around Cargo Handling Equipment during Marine Terminal Operations. OSHA Publication 3640 (May 2013)
    - Mechanics Working in “the Yard” on Powered Equipment during Marine Terminal Operations. OSHA Publication 3562 (July 2012).

- Working Safely on the Apron or Highline during Marine Terminal Operations. OSHA Publication 3539 (May 2012)
- Gangway Safety in Marine Cargo Handling, OSHA Publication 3369 (December 2009). English and Spanish PDF.

**4. OSHA Agreements with other Agencies and Organizations.**

- a. Settlement Agreement concerning Powered Industrial Truck Operator Training Standard between the National Maritime Safety Association (NMSA) and the Occupational Safety and Health Administration, U.S. Department of Labor, July 14, 2000
- b. *Memorandum of Agreement on Interagency Coordination for Ship Scrapping (i.e., shipbreaking) between DOD/DOT/EPA/DOL-OSHA*, November 16, 1999.
- c. *Memoranda of Understanding between the U.S. Coast Guard and OSHA located in CPL 02-01-047 – OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010, concerning:
  - The Health and Safety of Seamen on Inspected Vessels (see Appendix D of the Instruction); and
  - Occupational Safety and Health on the Outer Continental Shelf (OCS) (see Appendix E of the Instruction).

**5. eTools, Expert Advisors, eMatrix.**

- a. eTools are “stand-alone,” interactive, web-based training tools that provide highly illustrated information and guidance on occupational safety and health topics. Some also use expert system modules, which enable users to answer questions and receive reliable advice on how OSHA standards apply to their worksite(s).
- b. Shipyard Employment eTools were developed by OSHA in conjunction with the shipyard employment industry for ship repair, shipbuilding, shipbreaking, and barge cleaning activities. The eTools provide comprehensive information, in an electronic format with photos and illustrations, regarding the applicability of safety and health standards. They are excellent overall training tools and good for safety briefs of specific standards.

**6. Public Maritime Webpage.**

OSHA’s public maritime webpage (Maritime Internet) provides access to maritime directives, standards, guidance documents and eTools, as well as:

- a. Shipyard employment fatality videos – presents 16 computer- generated animated scenarios based on actual shipyard fatalities. Each scenario includes a review of the factors that contributed to the accident and how to avoid them;
- b. Longshoring and Marine Terminals: Fatal Facts – presents 42 written scenarios based on actual marine cargo handling fatalities;
- c. Maritime Outreach Training Programs – includes OSHA’s Maritime “Train-the-trainer” (course #5400), and OSHA’s 10- hour and 30-hour Maritime Industry courses;

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- d. MACOSH (Maritime Advisory Committee for OSH) – includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH Federal Register notices;
- e. Federal Registers pertaining to the maritime industry;
- f. SHIPS - Safety and Health Injury Prevention Sheets developed by OSHA in conjunction with the shipyard industry to provide specific guidance and “Do’s and Don’ts” with accompanying photographs for various shipyard processes;
- g. Maritime crane accreditation and certification program information including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program;
- h. Shipyard Employment Industry “Flyer.” OSHA Products, Information and Guidance (November 2007); also available as a PDF;
- i. Longshoring and Marine Terminal Industries “Flyer.” OSHA Products, Information and Guidance (November 2007); also available as a PDF; and
- j. Office of Maritime Enforcement (OME). One of five offices within the Directorate of Enforcement Programs (DEP). OME provides support for maritime employment through the development of standards interpretations, management and administration of the 29 CFR Part 1919 maritime gear certification program (including the web-based Maritime Crane database for OSHA-71 and -72 forms) and coordination of the activities of the Agency’s Maritime Steering Committee. CSHOs who need standards interpretations, have questions or require access to the 1919 Maritime Crane database (requires training and a password) should contact OME at 202-693- 2399.

### 7. CSHO Maritime Webpage.

OSHA’s maritime (Intranet) webpage provides CSHOs with the following information:

- a. Shipyard Listing – a list of all shipyards by OSHA Region and State (Excel format);
- b. Boatyard Listing - a list of all boatyards by OSHA Region and State (Excel format);
- c. Sea Bag - provides e-links to industry resources to search and verify a corporation’s name, address, and ownership by state; and
- d. SAVES (Standard Alleged Violation Elements) for the maritime industry standards. SAVES and associated AVDs (Alleged Violation Elements) are available on the Intranet for all enforceable Part 1915, Part 1917 and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVES.

## B. Shipyard Employment (Part 1915).

### 1. Coverage.

- a. Shipyard employment includes the building, repairing, and breaking (scrapping, disposal, recycling) of vessels, or a section of a vessel, without regard to geographical location, and is covered by 29 CFR Part 1915 for

Shipyard Employment (see 29 CFR 1910.11(b)). Examples of vessels include, but are not limited to: ships, barges, fishing boats, work boats, cruise liners, and floating oil drilling rigs (i.e., mobile offshore drilling units). The Area Office should consult with the Regional Solicitor's Office with respect to citing violations involving shipyard employment not on U.S. navigable waters in the Third, Fifth, Ninth, and Eleventh Circuits. However, the Area Office need not do so for violations of Subpart B (confined spaces), Subpart I (PPE), and Subpart P (fire protection) since these subparts have provisions expressly applying these subparts regardless of geographical location.

- b. Shipyard employment involves work activities aboard floating vessels as well as vessel-related work activities on the land, docks, piers, etc., of a shipyard. Although 29 CFR Part 1915 covers many hazards in shipyard employment, it does not cover all such hazards. Therefore, some of the 29 CFR Part 1910 General Industry Standards are also applicable in shipyard employment. (See Appendix A of CPL 02-00-157, *Shipyard Employment "Tool Bag" Directive*, April 1, 2014)

NOTE: Not all activities within a shipyard are considered shipyard employment covered by 29 CFR Part 1915. For example, erection of a new building, roadway construction, demolition activities (including the dismantling of cranes), and the installation of water pipes are covered by Construction Standards, 29 CFR Part 1926.

## **2. Shipyard Authority.**

### **a. U.S. Coast Guard.**

- OSHA and the U.S. Coast Guard each have authority over shipyard employment activities. The U.S. Coast Guard regulates working conditions for seamen (crew members) on inspected vessels through 46 CFR 90.05- 1. OSHA has authority to cite shipyard employment activities on inspected vessels if the work is performed by shipyard employees (non-crew members).

NOTE: An inspected vessel is any ship, boat, barge, etc., that has or is required to have a Certificate of Inspection (COI) issued by the U.S. Coast Guard.

- On uninspected vessels, OSHA has authority to cite shipyard employers for all working conditions. OSHA also can cite the owners or operators of uninspected vessels for violations involving shipbuilding, shipbreaking, and ship repair operations regardless of whether the work is performed by seamen (crew members) or by non-crew members unless the hazards are covered by U.S. Coast Guard regulations. (See Section XIV.B.1. in CPL 02-01-047 – *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)
- CSHOs should contact the vessel owner, master or captain to obtain the vessel identification or official number (VIN or ON) and contact the nearest U.S. Coast Guard Sector (<http://homeport.uscg.mil> or USCG 2013 Phonebook) to determine whether the vessel is inspected or uninspected.

### **b. U.S. Navy.**

OSHA has authority under the OSH Act over shipyard employment aboard U.S. Navy vessels and within a U.S. Navy shipyard when the work is performed by a contractor. U.S. Navy civilian personnel are covered under Presidential Executive Order 12196, implemented by 29 CFR Part 1960. There are no geographic limitations of OSHA's coverage for Executive Branch federal civilian employees who are not performing uniquely military operations as defined in 29 CFR 1960.2(i). Therefore, OSHA's authority extends to all federal civil service mariners (CIVMARs) in the U.S. Navy's Military Sealift Command (MSC).

However, OSHA does not have coverage over any Armed Forces personnel (uniformed military) such as: U.S. Navy (including MSC military department (MILDEPT)), U.S. Army, U.S. Air Force, U.S. Marine Corps, and U.S. Coast Guard, both active duty and reserve.

c. State Plans.

- Private Sector Employees.

States that operate their own OSHA-approved State Plans may elect to exercise authority over private sector maritime employees. States that have authority to exercise safety and health standards over private sector, land-side shipyard employment activities are: California, Minnesota, Vermont, and Washington. (See the State Plan standards in 29 CFR Part 1952 of these States for specific areas of authority.) However, OSHA retains authority in these four States on U.S. navigable waters. In the remaining States, OSHA has authority over all shipyard employees whether working land-side or on U.S. navigable waters.

NOTE: U.S. navigable waters include graving-docks, dry-docks, lifting-docks, and marine railways (i.e., federal jurisdiction).

- Public Sector Employees.

State Plan States have authority over employees of State and local governments, (e.g., port authorities, cities, counties, etc.), on both the land-side areas and aboard vessels. OSHA has no authority over "...any State or political subdivisions of a State." Section 3(5) of the OSH Act, 29 U.S.C. 625(5).

**3. Shipyard Inspections.**

a. Inspection Scheduling.

A programmed inspection under maritime may occur as part of the programmed inspection for the particular state/county agency. CSHOs should review the OSHA-300 for potentially hazardous working conditions and if occurring in maritime situations, should include these sites in their inspection

b. CSHO Training.

Branch Managers are responsible for ensuring that CSHOs are qualified to inspect/intervene in shipyard employment establishments. Although CSHOs should have completed the OTI Course #2090, Shipyard Processes and Standards, or have received equivalent training and/or experience prior to conducting shipyard inspections for their own safety

within shipyards, the nature of the work performed by public sector employees within shipyards would not normally require such training.

c. CSHO Preparation.

In addition to normal inspection preparation procedures, CSHOs must be properly equipped and attired. All necessary personal protective equipment (PPE) must be available for use and in proper operating condition. CSHOs must be trained in the uses and limitations of PPE before beginning the inspection. At the opening conference, the CSHO will request a copy of the employer's certification of hazard assessment prepared in accordance with 29 CFR 1915.152(b) in order to be aware of the necessary PPE. The suggested minimum PPE for a CSHO is: a hard hat, safety shoes, gloves, eye protection, hearing protection, a personal flotation device (PFD) if working over or near water, and a high-visibility/retro-reflective vest. Additional PPE may be required, such as a respirator, if conditions warrant. All testing and monitoring equipment must be calibrated (if necessary) and in good condition. It may be advisable for a CSHO to carry a multi-gas meter when conducting a vessel inspection to test for O<sub>2</sub>, H<sub>2</sub>S, CO, and/or LEL.

d. Safety and Health Rules at Shipyards.

HIOSH Policy requires CSHOs to comply with all site safety and health rules and practices at a shipyard or on a vessel, and to wear or use the safety clothing or protective equipment required by HIOSH standards or by the employer for the protection of employees.

e. Multi-employer Worksites.

Public sector employees may be exposed to hazards created, controlled by or where abatement is the responsibility of other employers. Regardless, the public sector employer has the responsibility for protection of its own workers and must exercise reasonable diligence. If a multi-employer worksite condition is encountered, a referral should be made to the Area Office to cover the employers not under Hawaii's jurisdiction.

The process which must be followed in determining whether more than one employer is potentially liable for employee safety and health conditions can be found in OSHA Instruction CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999. CSHOs are to include as much information as possible to help OSHA determine whether an inspection is warranted.

**4. Applicable Standards.**

a. 29 CFR Part 1915 – Shipyard Employment Standards.

Apply to all ship repairing, shipbuilding, shipbreaking and related employments.

b. 29 CFR Part 1910 – General Industry Standards.

For a list of general industry standards that do or do not apply in shipyard employment, refer to *Appendix A: Application of 29 CFR Part 1910 Standards to 29 CFR Part 1915 Shipyard Employment*, in the Shipyard "Tool Bag" Directive.

c. 29 CFR Part 1926 – Construction Standards.

Apply when:

- Construction activities occur on shipyards; or
- Construction materials, equipment and supplies in support of a construction project are unloaded, moved, or handled into, in, on, or out of any vessel, from shore- to-vessel, from vessel-to-shore, or from vessel-to- vessel. (See STD 03-13-002, 29 CFR 1926.605(a)(1) as Applied to Maritime Construction; July 15, 1982.)

NOTE: Incidental maintenance or normal upkeep performed on floating equipment during actual construction operations is not covered by 29 CFR 1915.115(a), but major overhauls of floating equipment when equipment is taken out of service and is not being used for construction operations are covered by 29 CFR 1915.115(a). (See STD 03-13-002, 29 CFR 1926.605(a)(1) as Applied to Maritime Construction; July 15, 1982.)

d. 29 CFR Part 1919 – Gear Certification

Provides guidance for the approval of OSHA-accredited agencies and criteria for Part 1919 agencies to evaluate and issue a certificate (OSHA Form-71 and -72) for certain cranes in shipyards. The 29 CFR Part 1919 standards may not be cited by CSHOs. They shall use the appropriate 29 CFR Part 1915 standards to cite hazards. (See 1915.115(a)).

**5. Shipyard References.**

There are a number of resources available to assist CSHOs in conducting shipyard employment inspections; however, there are three principle references.

a. Shipyard Employment “Tool Bag” Directive.

The Shipyard “Tool Bag” Directive is the primary source of information for all aspects of shipyard employment inspections. All maritime industry primary resources that have relevance in the shipyard employment industry can be accessed through the “Tool Bag” directive via e-Links. The “Tool Bag” directive “One Stop Shopping” concept is designed to provide comprehensive information about inspection scheduling, conduct of shipyard inspections, shipyard alliances, training sources, etc. Appendix A of the directive is very useful because it contains guidance about which General Industry Standards (29 CFR Part 1910) can be used in shipyard employment, and equally important, which general industry standards are applicable aboard a vessel. The “Tool Bag” directive also consolidates all OSHA interpretations related to shipyard employment into a question-and-answer appendix.

b. Public Maritime Webpage.

OSHA’s public maritime webpage (Maritime Internet) provides access to shipyard employment directives, standards, guidance documents and eTools, as well as:

- Shipyard employment fatality videos – presents 16 computer-generated animated scenarios based on actual shipyard fatalities. Each scenario includes a review of the factors that contributed to the accident and how to avoid them;

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- Maritime Outreach Training Programs – includes OSHA’s Maritime “Train-the-trainer” (course #5400), and OSHA’s 10-hour and 30-hour Maritime Industry courses;
  - MACOSH (Maritime Advisory Committee for OSH) – includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH Federal Register notices;
  - Federal Registers pertaining to the maritime industry;
  - SHIPS - Safety and Health Injury Prevention Sheets developed by OSHA in conjunction with the shipyard industry to provide specific guidance and “Do’s and Don’ts” with accompanying photographs for various shipyard processes;
  - Maritime crane accreditation and certification program information including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program; and
  - Shipyard Employment Industry “Flyer.” OSHA Products, Information and Guidance (November 2007); also available as a PDF.
- c. CSHO Maritime Webpage.

OSHA’s maritime (Intranet) webpage provides CSHOs with the following relevant information:

- Shipyard Listing – a list of all shipyards by OSHA Region and State (Excel format);
- Boatyard Listing - a list of all boatyards by OSHA Region and State (Excel format);
- Sea Bag – provides e-links to industry resources to search and verify a corporation’s name, address, and ownership by state; and
- SAVEs (Standard Alleged Violation Elements) for the maritime industry standards. SAVEs and associated AVDs (Alleged Violation Descriptions) are available on the Intranet for all enforceable Part 1915, Part 1917 and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVEs.

### **C. Marine Cargo Handling Industry (Parts 1917 & 1918).**

#### **1. Coverage.**

The marine cargo handling industry includes:

- a. Longshoring and related employment aboard a vessel. Longshoring is the loading, unloading, moving or handling of cargo, ship’s stores, gear, or any other materials into, in, on, or out of any vessel. Related employment is any employment performed incidental to or in conjunction with longshoring, including securing cargo, rigging, and employment as a porter, clerk, checker, or security officer (see 29 CFR 1918.2); and
- b. Marine terminal (on shore) employment, as defined in 29 CFR 1917.1, includes the loading, unloading, movement or other handling of cargo, ship’s stores, or gear within the terminal or into or out of any land carrier, holding or consolidation area, and any other activity within and associated



with the overall operations and functions of the terminal, except as noted in the standards. It includes all cargo transfers using shore-based material handling devices. (See Longshoring and Marine Terminals “Tool Shed” Directive, CPL 02-00-139, May 23, 2006.)

## **2. Marine Cargo Handling Authority.**

### **a. U.S. Coast Guard.**

OSHA has authority to cite employers engaged in longshoring and marine terminal operations except for state and local government; U.S. Coast Guard regulations do not preempt OSHA from citing such employers. On inspected vessels, OSHA has no authority to cite the owner or operator of the vessel with respect to any working conditions of seamen (crew members), regardless of the work they are performing. On uninspected vessels OSHA may cite the owner or operator of the vessel for any violation of working conditions affecting seamen or non-seamen, unless the hazards are covered by U.S. Coast Guard regulations. (See CPL 02-01-047 – OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS), February 22, 2010.)

### **b. U.S. Navy.**

OSHA has authority under the OSH Act over longshoring operations aboard U.S. Navy vessels and within a marine terminal at a U.S. Navy facility when the work is performed by a contractor. U.S. Navy civilian personnel are covered under Presidential Executive Order 12196, implemented by 29 CFR Part 1960. There are no geographic limitations of OSHA’s coverage for Executive Branch federal civilian employees who are not performing uniquely military operations as defined in 29 CFR 1960.2(i). Therefore, OSHA’s authority extends to all federal civil service mariners (CIVMARs) in the U.S. Navy’s Military Sealift Command (MSC).

However, OSHA does not have coverage over any Armed Forces personnel (uniformed military) such as: U.S. Navy (including MSC military department (MILDEPT)), U.S. Army, U.S. Air Force, U.S. Marine Corps, and U.S. Coast Guard, both active duty and reserve.

### **c. State Plans.**

- **Private Sector Employees.**

States that operate their own OSHA-approved State Plans may elect to exercise authority over private sector maritime employees. States that have authority to exercise safety and health standards over private sector, land-side marine terminal employment activities are: California, Minnesota, Vermont, and Washington. (See the State Plan standards in 29 CFR Part 1952 of these States for specific areas of authority.) However, OSHA retains authority in these four States on U.S. navigable waters (i.e., longshoring employment). In the remaining States, OSHA has authority over all marine cargo handling employees whether working land-side or on U.S. navigable waters.

- **Public Sector Employees.**

State Plan States have authority over employees of State and local governments, e.g., port authorities, cities, counties, etc., on both the

land-side areas and aboard vessels. OSHA has no authority over “...any State or political subdivisions of a State.” Section 3(5) of the OSH Act, 29 U.S.C. 625(5).

### **3. Marine Cargo Handling Inspections.**

#### **a. Inspection Scheduling.**

A programmed inspection under marine cargo handling operations may occur as part of the programmed inspection for the particular state/county agency. CSHOs should review the OSHA-300 for potentially hazardous working conditions and if occurring in maritime situations, should include these sites in their inspection.

#### **b. CSHO Training.**

Branch Managers are responsible for ensuring that CSHOs are qualified to inspect/intervene in marine cargo handling establishments. Although CSHOs should have completed the OTI Course #2060, Longshoring and Marine Terminal Processes and Standards, or have received equivalent training and/or experience for prior to conducting marine cargo handling industry inspections for their own safety and health, the nature of the work performed by public sector employees would not normally require such training.

#### **c. CSHO Preparation.**

In addition to normal inspection preparation procedures, CSHOs must be properly equipped and attired. All necessary personal protective equipment (PPE) must be available for use and in proper operating condition. CSHOs must be trained in the uses and limitations of PPE before beginning the inspection. The suggested minimum PPE for a CSHO is: a hard hat, safety shoes, gloves, eye protection, hearing protection, a personal flotation device (PFD) if working over or near water, and a high- visibility/retro-reflective vest. Additional PPE may be required, such as a respirator, if conditions warrant. All testing and monitoring equipment must be calibrated (if necessary) and in good condition. It may be advisable for a CSHO to carry a multi-gas meter when conducting a vessel inspection to test for O<sub>2</sub>, H<sub>2</sub>S, CO, and/or LEL.

#### **d. Safety and Health Rules at a Marine Cargo Handling Facility.**

HIOSH policy requires CSHOs to comply with all site safety and health rules and practices at marine cargo handling facility or vessel, and to wear or use the safety clothing or protective equipment required by OSHA standards or by the employer for the protection of employees.

#### **e. Inspection Procedures.**

- A CSHO shall gain access to a marine terminal by following local security measures (see also paragraph E. Security Procedures for more information). When a longshoring operation inspection only involves a stevedoring company (i.e., a company that hires longshoring employees) and does not involve the marine terminal operator, the CSHO shall go directly to the vessel to initiate the inspection. The employer's representative (such as a superintendent, crew leader, supervisor or hatch boss) and a union representative (if applicable) will be contacted, and the opening conference held. The

inspection will usually be limited to the vessel being worked by the stevedore. When the stevedore and the terminal operator are the same, an inspection of both the terminal and vessel will typically be conducted when Federal OSHA has authority.

- A CSHO shall always notify the master of the vessel (i.e., captain) or have the stevedore's representative notify the master prior to performing the walk-around portion of the inspection on a vessel.
- f. Multi-employer Worksites.

Public sector employees may be exposed to hazards created, controlled by or where abatement is the responsibility of other employers. Regardless, the public sector employer has the responsibility for protection of its own workers and must exercise reasonable diligence. If a multi-employer worksite condition is encountered, a referral should be made to the Area Office to cover the employers not under Hawaii's jurisdiction.

The process which must be followed in determining whether more than one employer is potentially liable for employee safety and health conditions can be found in OSHA Instruction CPL 02-00-124, *Multi-Employer Citation Policy*, December 10, 1999. CSHOs are to include as much information as possible to help OSHA determine whether an inspection is warranted.

#### 4. Applicable Standards.

- a. There are separate standards for the two components of marine cargo handling.

- Marine Terminal Standards.

Material handling activities that occur on piers, docks, wharves, and other shore-side locations are covered by 29 CFR Part 1917, Marine Terminals Standards. (See also the Longshoring Industry "Green Book," OSHA Publication 2232 (2001)).

- Longshoring Standards.

Material handling activities occurring on a vessel are covered by 29 CFR Part 1918, Longshoring Standards. (See also the Longshoring Industry "Green Book," OSHA Publication 2232 (2001)).

- b. General Criteria for Standard Application.

There are often uncertainties as to which part applies. The following are some basic "rule-of-thumb" criteria for making a determination concerning standard applicability.

- Lifting Devices.

- Use 29 CFR Part 1917 for cranes, derricks, hoists, spouts, etc., located on the marine terminal.
- Use 29 CFR Part 1918 for cranes, derricks, hoists, etc., located on the vessel.

NOTE: See CPL 02-01-055, *Maritime Cargo Gear Standards and 29 CFR Part 1919 Certification*, September 30, 2013. (Reference only)

NOTE: See the third bullet under III.C.4.c, below, if cranes, derricks, or hoists are involved in construction activities.

- Work Location.

- 29 CFR Part 1917 applies if the work occurs within a marine terminal (i.e., on the land-side), including all piers, docks and wharves.
- 29 CFR Part 1918 applies if the work occurs on a vessel (i.e., on the water), including the gangway.

NOTE: See the third bullet under III.C.4.c, below, if cranes, derricks, or hoists are involved in construction activities.

c. Other Applicable Standards.

- Gear Certification – 29 CFR Part 1919.

Provides guidance for the approval of OSHA-accredited agencies and criteria for Part 1919 agencies to evaluate and issue a certificate (OSHA Form-71 and -72) for cargo handling gear onboard vessels and at marine terminals. The 29 CFR Part 1919 standards may not be cited by CSHOs. They shall use the appropriate 29 CFR Part 1917 or 1918 standards to cite hazards. (See 1917.50, 1918.11, and 1918.66.)

- General Industry Standards – 29 CFR Part 1910.

The only 29 CFR Part 1910 General Industry Standards that are applicable to marine terminals and longshoring operations are identified in the Scope and Applicability sections of each part. (See 1917.1(a)(2) and 1918.1(b)).

- Construction Standards – 29 CFR Part 1926.

Apply when:

- Construction activities occur on marine terminals; or
- Construction materials, equipment and supplies in support of a construction project are unloaded, moved, or handled into, in, on, or out of any vessel, from shore-to-vessel, from vessel-to-shore, or from vessel-to-vessel. (See STD 03-13-002, 29 CFR 1926.605(a)(1) as Applied to Maritime Construction; July 15, 1982.)

- Shipyard Employment Standards – 29 CFR Part 1915.

When vessels located at marine terminals are repaired, 29 CFR Part 1915 Shipyard Employment Standards apply.

**1. Marine Cargo Handling References.**

There are a number of resources available to assist CSHOs in conducting marine cargo handling industry inspections; however, there are three principle references.

a. Longshoring and Marine Terminal “Tool Shed” Directive.

The Longshoring and Marine Terminal “Tool Shed” Directive is the primary source of information for all aspects of marine cargo handling industry inspections. All maritime industry primary resources that have relevance

in the marine cargo handling industry can be accessed through the “Tool Shed” directive via e-Links. The “Tool Shed” directive “One Stop Shopping” concept is designed to provide comprehensive information about inspection scheduling, conduct of marine cargo handling inspections, alliances, training sources, etc. Appendices are provided which cross-reference similar 29 CFR Part 1917 and Part 1918 standards and include a question-and-answer section about the longshoring and marine terminal standards.

b. Public Maritime Webpage.

OSHA’s public maritime webpage (Maritime Internet) provides access to marine cargo handling directives, standards, guidance documents and eTools, as well as:

- Longshoring and Marine Terminals: Fatal Facts – presents 42 written scenarios based on actual marine cargo handling fatalities;
- Maritime Outreach Training Programs – includes OSHA’s Maritime “Train-the-trainer” (course #5400), and OSHA’s 10-hour and 30-hour Maritime Industry courses;
- MACOSH (Maritime Advisory Committee for OSH) – includes upcoming/recent events, background and history, current membership, meeting minutes, and MACOSH Federal Register notices;
- Federal Registers pertaining to the maritime industry;
- Maritime crane accreditation and certification program information including: an explanation of the program, instructions for the use of the OSHA-71 and -72 forms, and a list of agencies accredited under the 29 CFR Part 1919 program; and
- Longshoring and Marine Terminal Industries “Flyer.” OSHA Products, Information and Guidance (November 2007); also available as a PDF.

c. CSHO Maritime Webpage.

OSHA’s maritime (Intranet) webpage provides CSHOs with the following relevant information:

- Sea Bag – Provides an all-inclusive list of enforcement resources and tools for Compliance Officers to effectively use when conducting safety and health inspections within the Maritime Industry; and
- SAVEs (Standard Alleged Violation Elements) for the maritime industries. SAVEs and associated AVDs (Alleged Violation Descriptions) are available on the Intranet for all enforceable Part 1915, Part 1917 and Part 1918 standards. The Office of Maritime Enforcement is responsible for maintaining the maritime SAVEs.

**D. Other Marine Activities.**

There are a number of other activities that occur on, above, or in water. Although these other activities involve water, there are no separate 29 CFR parts that specifically deal with them. Rather, the activities are covered by either general industry or construction standards.

1. **Commercial Diving – 29 CFR Part 1910, Subpart T.** (See CPL 02-00-151, *29 CFR Part 1910, Subpart T – Commercial Diving Operations*, June 13, 2011, adopted by HIOSH on September 26, 2011)

Diving activities related to shipyard employment are covered by 29 CFR 1915.6 and diving activities related to construction activities are covered by 29 CFR Part 1926, Subpart Y. Both standards reference 29 CFR Part 1910, Subpart T.

NOTE: Diving is classified as NAICS code 561990.

2. **Commercial Fishing – 29 CFR Part 1910.** (See CPL 02-01-047, *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

Shipyard employment activities for fishing vessels are covered by 29 CFR Part 1915; marine cargo handling activities for fishing vessels are covered by 29 CFR Parts 1917 and 1918.

Commercial fishing is classified as NAICS codes:

- 114111 Finfish Fishing (SIC code 0912 – Finfish);
- 114112 Shellfish Fishing (SIC code 0913 – Shellfish); and
- 114119 Other Marine Fishing (SIC code 09190919 – Miscellaneous Marine Products (Except plant aquaculture, cultured pearl production, and catching sea urchins)).

3. **Marine Construction – 29 CFR Part 1926.** (See in particular 29 CFR 1926.605 and 29 CFR 1926.106.)

Construction activities (e.g., bridge and pier construction, bulkhead construction, installation of sewage outfalls) occurring from a vessel are considered marine construction and are covered under the 29 CFR Part 1926 Construction Standards.

4. **Towboats/Tugboats – 29 CFR Part 1910.** (See CPL 02-01-047 – *OSHA Authority over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, February 22, 2010.)

Unless a ship repair or cargo transfer activity is involved with work in the above industries, the Shipyard Standards (29 CFR Part 1915), Marine Terminals Standards (29 CFR Part 1917), and Longshoring Standards (29 CFR Part 1918) do not apply. Normal towboat and tugboat operations are covered by the 29 CFR Part 1910 General Industry Standards.

On August 9, 2004, Congress gave the U.S. Coast Guard authority to regulate all towing vessels as inspected vessels under 46 U.S.C. 3301; as a general rule, such vessels were previously classified as *uninspected* vessels. The U.S. Coast Guard has not yet exercised this authority; thus, towing vessels, remain uninspected vessels. Therefore, OSHA will continue to provide safety and health coverage of employees on uninspected towing vessels until the U.S. Coast Guard issues inspected vessel regulations for these vessels.

NOTE: The U.S. Coast Guard is required by 46 CFR 4.07-1 to conduct an investigation of all marine casualties or accidents, as defined in 46 CFR 4.03-1, to ascertain the cause of the casualty or accident. The mere fact that the U.S. Coast Guard is authorized to investigate a marine casualty or accident,

or investigates one, does not mean that OSHA is preempted from exercising its authority pertaining to occupational safety and health.

5. **Training Marine Oil Spill Response Workers** Under OSHA's Hazardous Waste Operations and Emergency Response Standard, OSHA Publication 3172 (2010).

Training needed for marine oil spill response employees is covered under 29 CFR 1910.120 – Hazardous waste operations and emergency response (HAZWOPER) and explained in OSHA Publication 3172.

OSHA's website, *Keeping Workers Safe During Oil Spill Response and Cleanup Operations*, compiles safety and health information for workers conducting such operations including: multi-lingual fact sheets and guidance documents, oil spill training materials, national response system information, and many other additional resources relating to oil spills and cleanup operations.

6. **Other Regulatory Agencies.**

During a maritime inspection, CSHOs may encounter other regulatory agencies such as, but not limited to, the: Department of Homeland Security (DHS), including the U.S. Coast Guard (USCG) and the Transportation Security Administration (TSA); U.S. Army Corps of Engineers (USACE); Department of Transportation (DOT); Environmental Protection Agency (EPA); Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE); Nuclear Regulatory Commission (NRC); and Federal Grain Inspection Service (FGIS). CSHOs should contact the Office of Maritime Enforcement for any questions regarding coordination and/or jurisdiction with other agencies.

## **E. Security Procedures.**

1. **Transportation Worker Identification Card (TWIC).**

The TWIC program is a Transportation Security Administration (TSA) and U.S. Coast Guard initiative. The TWIC program provides a tamper-resistant biometric credential to: maritime workers requiring unescorted access to secure areas of port facilities, outer continental shelf facilities, and vessels regulated under the Maritime Transportation Security Act (MTSA); and all U.S. Coast Guard credentialed merchant mariners. An estimated 750,000 individuals require TWICs.

Question: Do OSHA compliance officers (federal and State) require a TWIC to gain access to maritime facilities?

Answer: No, a CSHO's credentials and government identification card are equivalent to a TWIC for the purposes of access to and escorting non-TWIC holders on maritime facilities (see *Redefining Secure Areas and Acceptable Access Control*, January 7, 2008 and *TWIC & Law Enforcement Officials & Other Regulatory Agencies*, November 21, 2007). Should problems arise, the CSHO should contact the local U.S. Coast Guard office (<http://homeport.uscg.mil> or USCG Phonebook) to obtain resolution and access. Difficulties in obtaining access to maritime facilities using CSHO credentials and a government identification card should be reported via the Regional Administrator to the Directorate of Enforcement Programs, Office of Maritime Enforcement at 202-693-2399.

## **2. Photography and Security at U.S. Navy Worksites.**

Area Directors should establish a photography and security policy agreement with an installation prior to conducting inspections.

The U.S. Navy has advised its shore and afloat (ship) activities that permission is granted for Federal OSHA compliance officials to conduct safety and health inspections and investigations of U.S. Navy civilian and contractor workplaces. CSHOs will be required to present appropriate identifying credentials and a government identification card; also, for entry into nuclear, explosive and other security sensitive areas, a security clearance may be required.

CSHOs shall be required to possess appropriate security clearances for entry into areas where the workplace is located.

The current U.S. Navy policy prohibits OSHA compliance officials from taking photographs. CSHOs may request that photographs of safety and health conditions to be taken by U.S. Navy personnel. Any photographs taken by the U.S. Navy will initially be classified CONFIDENTIAL, and shall not be delivered to OSHA compliance officials until all film, negatives, and photographs have been fully screened and censored, as appropriate, in the interest of national security. Also, any design or system performance data (e.g., recordings of noise sound level profiles and light level readings) shall be screened by the U.S. Navy prior to release to OSHA. This process is normally completed within a period of 15 working days from the receipt of material by the Naval Sea Systems Command (NAVSEASYSCOM). If photos and/or data are not received by the Area Office within 30 working days of submission, the Area Office should contact the Office of Maritime Enforcement via their Regional Administrator.

Representatives of the U.S. Navy will normally accompany CSHOs at all times during the physical inspection of U.S. Navy civilian or contractor workplaces. A representative of the contractor(s) and a representative of the employee(s) also may accompany the CSHO during the inspection. If there is no authorized employee representative, CSHOs may consult with a reasonable number of employees (contractors or U.S. Navy civilians) concerning matters of safety and health in the pertinent workplace. CSHOs may privately question the contractor(s), contractor employee(s), U.S. Navy civilian employee(s), or their authorized representative(s). (See chapter 11 in OPNAVINST 5100.23G – Navy Safety and Occupational Health (SOH) Program Manual, December 30, 2005.)



## **Chapter 11**

### **IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE**

#### **I. Imminent Danger Situations.**

##### **A. General.**

###### **1. Definition of Imminent Danger.**

Section 12-51-13 of the Law defines imminent danger as "...any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

###### **2. Conditions of Imminent Danger.**

The following conditions must be present in order for a hazard to be considered an imminent danger:

- a. Death or serious harm must be threatened; AND
- b. It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life or be immediately dangerous to life and health (IDLH) or cause substantial reduction in physical or mental efficiency or health, even though the resulting harm may not manifest itself immediately.

##### **B. Pre-Inspection Procedures.**

###### **1. Imminent Danger Report Received by the Field.**

- a. After the Branch Manager receives a report of imminent danger, he or she will evaluate the inspection requirements and assign a CSHO to conduct the inspection.
- b. Every effort will be made to conduct the imminent danger inspection on the same day that the report is received. In any case, the inspection will be conducted no later than the day after the report is received.
- c. When an immediate inspection cannot be made, the Branch Manager will contact the employer immediately, obtain as many pertinent details as possible about the situation, and attempt to have any employee(s) affected by the imminent danger voluntarily removed, if necessary.
  - A record of what steps, if any, the employer intends to take in order to eliminate the danger will be included in the case file.

- This notification is considered an advance notice of inspection to be handled in accordance with the advance notice procedures described below.

**2. Advance Notice.**

- a. §12-51-6, HAR authorizes advance notice of an inspection of potential imminent danger situations in order to encourage employers to eliminate dangerous conditions as quickly as possible.
- b. Where an immediate inspection cannot be made after HIOSH is alerted to an imminent danger condition and advance notice will speed the elimination of the hazard, the CSHO, at the direction of the Branch Manager, will give notice of an impending inspection to the employer.
- c. Where advance notice of an inspection is given to an employer, it shall also be given to the authorized employee representative, if present. If the inspection is in response to a formal Section 8(b) complaint, the complainant will be informed of the inspection unless this will cause a delay in speeding the elimination of the hazard.

**C. Imminent Danger Inspection Procedures.**

All alleged imminent danger situations brought to the attention of or discovered by CSHOs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

**1. Scope of Inspection.**

CSHOs may consider expanding the scope of an imminent danger inspection based on additional hazards discovered or brought to their attention during the inspection.

**2. Procedures for Inspection.**

- a. Every imminent danger inspection will be conducted as expeditiously as possible.
- b. CSHOs will offer the employer and employee representatives the opportunity to participate in the worksite inspection, unless the immediacy of the hazard makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.
- c. As soon as reasonably practicable after discovery of existing conditions or practices constituting an imminent danger, the employer shall be informed of such hazards. The employer shall be asked to notify affected employees and to remove them from exposure to the imminent danger hazard. The employer should be encouraged to voluntarily take appropriate abatement measures to promptly eliminate the danger.

**D. Elimination of the Imminent Danger.**

**1. Voluntary Elimination of the Imminent Danger.**

- a. How to Voluntarily Eliminate a Hazard.
  - Voluntary elimination of the hazard has been accomplished when the employer:

- Immediately removes affected employees from the danger area;
- Immediately removes or abates the hazardous condition; and
- Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.
- Satisfactory assurance can be evidenced by:
  - After removing the affected employees, immediate corrective action is initiated, designed to bring the dangerous condition, practice, means or method of operation, or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or
  - A good faith representation by the employer that permanent corrective action will be taken as soon as possible, **and** that affected employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or
  - A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

NOTE: Through onsite observations, CSHOs shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.

b. Where a Hazard is Voluntarily Eliminated.

If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

- No imminent danger legal proceeding shall be instituted;
- The *Notice of an Alleged Imminent Danger (OSHA-8)*, does not need to be completed;
- An appropriate citation(s) and notice(s) of penalty will be proposed for issuance with an appropriate notation on the Violation (*OSHA-1B*) to document corrective actions; and
- CSHOs will inform the affected employees or their authorized representative(s) that, although an imminent danger had existed, danger has been eliminated. They will also be informed of any steps taken by the employer to eliminate the hazardous condition.

**2. Refusal to Eliminate an Imminent Danger.**

- a. If the employer does not or cannot voluntarily eliminate the hazard or remove affected employees from the exposure and the danger is immediate, CSHOs will immediately consult with the Branch Manager or designee and obtain permission to post a *Notice of an Alleged Imminent Danger (OSHA-8)*.
- b. Branch Managers will then contact the Administrator and determine whether to consult with the DAG to obtain a Temporary Restraining Order (TRO) as per §396-4(d)(4), HRS.

NOTE: The division has no authority to order the closing of a worksite or to order affected employees to leave the area of the imminent danger or the workplace. However, CSHOs can place “Danger” tags on movable equipment.

- c. CSHOs will notify affected employees and the employee representative that a *Notice of an Alleged Imminent Danger (OSHA-8)* has been posted and will advise them of the Section 8(e) discrimination protections under the HIOSH Law. Employees will be advised that they have the right to refuse to perform work in the area where the imminent danger exists.
- d. The Branch Manager and the Administrator, in consultation with the DAG, will assess the situation and, if warranted, make arrangements for the expedited initiation of court action, or instruct the CSHO to remove the *Notice of an Alleged Imminent Danger (OSHA-8)*.

**3. When Harm Will Occur Before Abatement is Required.**

- a. If CSHOs have clear evidence that harm will occur before abatement is required (i.e., before a final order of the Board in a contested case or before a TRO can be obtained), they will confer with the Branch Manager or Administrator to determine a course of action.

NOTE: In some cases, the evidence may not support the finding of an imminent danger at the time of the physical inspection, but rather after further evaluation of the case file or presence of additional evidence.

- b. As appropriate, an imminent danger notice may be posted at the time citations are delivered or even after the notice of contest is filed.

## **II. Fatality and Catastrophe Investigations.**

### **A. Definitions.**

**1. Fatality.**

An employee death resulting from a work-related incident or exposure; in general, from an accident or an illness caused by or related to a workplace hazard.

**2. Catastrophe.**

The hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an accident or an illness caused by a workplace hazard.

NOTE: HIOSH may use the OSHA Memorandum entitled, “*Interim Enforcement Procedures for New Reporting Requirements under 29 C.F.R. 1904.39*”, dated December 24, 2014, or unless superseded by future agency-approved correspondence, for help in determining the inspection priority of a catastrophe.

**3. Hospitalization.**

In-patient hospitalization is the formal admission to the inpatient service of a hospital or clinic for care or treatment. It excludes admission for diagnostic testing or observation only.

**4. Property Damage in Excess of \$25,000**

See HIOSH amendment to 29 CFR 1904.9(a)

**5. Incident Requiring a Coordinated Response.**

An incident involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or one that presents potential employee injury and generates widespread media interest.

NOTE: 29CFR Part 1904 has new requirements for reporting work-related fatalities, hospitalizations, amputations or losses of an eye. The new rule, which also updates the list of employers partially exempt from OSHA record-keeping requirements, went into effect on January 1, 2015, for workplaces under federal OSHA jurisdiction, and on [Insert date] for workplaces under HIOSH jurisdiction.

**B. Initial Report.**

1. The *Fatality/Catastrophe Report Form (OSHA-36)* is a pre-inspection form that must be completed for all fatalities or catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. The purpose of the *FAT/CAT (OSHA-36)* is to provide HIOSH with enough information to determine whether or not to investigate the event. It is also used as a research tool by OSHA and other agencies.
2. If, after the initial report, the Branch becomes aware of information that affects the decision to investigate, the *FAT/CAT (OSHA-36)* should be updated. If the additional information does not affect the decision to investigate, or the investigation has been initiated or completed, the *FAT/CAT (OSHA-36)* need not be updated. After updating the *FAT/CAT (OSHA-36)*, it should be resubmitted to the National Office.
3. See additional details on completing the OSHA-36 in Paragraph II.I. of this chapter, [Recording and Tracking for Fatality/Catastrophe Inspections](#).

**C. Investigation Procedures.**

1. All fatalities and catastrophes will be thoroughly investigated in an attempt to determine the cause of the event, whether a violation of HIOSH safety and health standards, regulations, or the general duty standard occurred, and any effect the violation had on the accident. HIOSH Guideline on Conducting Accident Investigations, dated December 27, 2011, provides guidance on efficiently conducting fatality and other accident investigations.
2. The guideline establishes three categories, which differ in investigative scope, procedures, and post-citation actions:
  - a. Fatality Accident Investigations:
    - 1) Fatality of one or more employees; and
    - 2) Cause is likely to be related to condition in the workplace, e.g., fall from height, electrical contact, struck by materials/equipment/machinery
  - b. Accident Investigation:
    - 1) Not a fatality -- hospitalization or property damage in excess of \$25,000

- 2) Related to fatal four in construction (Fall from elevation; Electrical; Struck-by (crane, load, flying or falling object); caught in or between (trench collapse, LOTO); or
  - 3) Potentially catastrophic incident, such as chemical release or spill incident, e.g. ammonia, chlorine, sulfuric acid, hydrogen sulfide, or
  - 4) Related to any other Emphasis program, local or national; e.g. PSM, Combustible dust, Hexavalent chromium, etc.
- c. Fatality Inquiry:
- Incidents which are not usually preventable by employer:
- 1) Traffic accident, where vehicle did not have any maintenance or safety issues;
  - 2) Homicide, other than late night retail, or healthcare, social service industry; or
  - 3) Heart attack or stroke – with no known exposure to chemicals or heat.
3. The investigation should be initiated as soon as possible after receiving an initial report of the incident, ideally within one working day, by an appropriately trained and experienced compliance officer assigned by the Branch Manager. The Branch Manager determines the scope of the fatality/ catastrophe investigation. All investigations must be completed in an expeditious manner. See Guideline on Conducting Accident Investigations, dated December 27, 2011.
  4. Inspections following fatalities or catastrophes should include videotaping as a method of documentation and gathering evidence when appropriate. The use of photography is also encouraged in documenting and evidence gathering.
  5. As in all inspections, under no circumstances should HIOSH personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. HIOSH 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.

## **D. Interview Procedures.**

### **1. Identify and Interview Persons.**

- a. 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. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.
- b. 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.
- c. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to HIOSH.
- d. When interviewing:
  - Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.

- 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.
  - Advise interviewee of HIOSH whistleblower protections.
- e. See [Chapter 3, Inspection Procedures](#), for additional information on conducting interviews.

## **2. 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 HIOSH rules and regulations. The identity of witnesses will remain confidential to the extent possible. CSHOs should inform each witness that disclosure of his/her identity may be necessary in connection with enforcement or court actions.
- b. The informer's privilege and §396-8(f), HRS 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 provision 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 nonthreatening 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 \$11,000 or six months in jail, or both.

## **E. 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. Autopsy Report/Report from First Responders**

Where possible, reports from first responders such as fire, police, and EMTs should be obtained, as well as autopsy reports from the medical examiner. However, in no case shall the investigation be delayed while awaiting such reports. Where necessary subpoenas should be issued. Such reports are to be treated as personal health information and must be protected from disclosure accordingly.

### **4. 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.

### **5. 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).

### **6. 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?

### **7. 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.

### **8. Records Request.**

Potential records include: Disciplinary Records; Training Records; and Next of Kin information. For accident investigations involving fatalities, subpoenas should be issued even if the employer appears to be cooperating with any records request.

NOTE: Next of kin information should be gathered as soon as possible to ensure that condolence letters can be sent in a timely manner.

## **F. Potential Criminal Penalties in Fatality and Catastrophe Cases.**

### **1. Criminal Penalties.**

- a. Section 396-10(g) of the Law provides criminal penalties for an employer who is convicted of having willfully violated a HIOSH standard, rule, citation, or order when the violation results in the death of an employee. Section 10(g) could apply to violations of the general duty standard, especially if a citation was previously issued under the general duty standard, unlike section 17(e) of the OSHA Act. Hawaii added "citations" to the list of what must be willfully violated, and did not restrict the violation



to only those promulgated pursuant to Section 6 of the OSH Act. When there are violations of a HIOSH standard, rule, citation, or order, or a violation of the general duty standard, criminal provisions relating to false statements and obstruction of justice may also be relevant.

- b. The circumstances surrounding all occupationally-related fatalities will be evaluated to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. The evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.
- c. Early in the investigation, the Branch Manager or designee, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation. The decision will be based on consideration of the following:
  - A fatality has occurred.
  - There is evidence that a HIOSH standard has been violated and that the violation contributed to the death.
  - There is reason to believe that the employer was aware of the requirements of the standard and knew it was in violation of the standard, or that the employer was plainly indifferent to employee safety.
  - If the Administrator agrees with the Branch Manager's assessment of the case, the Administrator will request that a DAG be assigned to assist with the case.
  - When there is a potential criminal referral to the County Prosecutor in a case, it is essential that the Administrator and/or the Branch Manager involve the DAG's Office in the early stages of the investigation during the evidence gathering process.

## **2. Procedures for Criminal Referral.**

If the DAG assigned to the case believes that evidence is sufficient for a criminal referral to the County Prosecutor, he/she will make the referral and direct HIOSH on what information is to be included.

## **G. Families of Victims.**

### **1. Contacting Family Members.**

Family members of employees involved in fatal or catastrophic occupational accidents or illnesses shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the accident or illness. OSHA staff contacting family members must exercise tact and good judgment in their discussions.

See CPL 02-00-153, Communicating OSHA Fatality Inspection Procedures to a Victim's Family, dated April 17, 2012, and adopted by HIOSH on October 1, 2012.

### **2. Information Letter.**

The standard information letter, to be signed by the Director, will normally be sent to the individual(s) listed as the emergency contact on the victim's employment records (if available) and/or the otherwise determined next of kin

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 or do not send the letter, as appropriate.

**3. Transmittal of draft letter for Director's signature.**

The draft next-of-kin letter is to be transmitted for the director's signature via memo. The memo is to include a brief two to three sentence of the incident that resulted in the fatality.

**4. 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 contact 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 Hawaii Labor Relations Board (HLRB) 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.

The next of kin may also be advised that §396-11(j), HRS, provides for the election of party status by affected employee representatives (next-of-kin) during any HIOSH proceedings before the Hawaii Labor Relations Board

- c. The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed, provided there is no pending civil case (see §396-14, HRS). If a contest is filed, the case file will not be made available until after the litigation is completed. Additionally, if a criminal referral is under consideration or has been made, the case file may not be released to the family. Notify the family of these policies and inform them that this is necessary so that any potential litigation is not compromised.

**5. Post-Inspection Communications [With Next of Kin]**

After the inspection, HIOSH will make every effort to contact the next of kin via telephone to explain the findings, address any questions and give the family an opportunity to provide input. Depending on the case, HIOSH may issue a press release. If a press release is planned, HIOSH will make every attempt to notify the family by telephone before the information is released to the public. HIOSH will also provide a copy of the press release to the family.

**H. Public Information Policy.**

HIOSH's public information policy regarding response to fatalities and catastrophes is to explain HIOSH presence to the news media. It is not to issue periodic updates on the progress of the investigation. The Administrator will

normally handle response to media inquiries in accordance with current DLIR policy.

## **I. Recording and Tracking for Fatality/Catastrophe Investigations.**

### **1. Fatality/Catastrophe Report Form (OSHA-36).**

The *FAT/CAT (OSHA-36)* is a pre-inspection form that must be completed for all fatalities and catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. Processing of the *FAT/CAT (OSHA-36)* shall be as follows:

- a. The Branch will complete and enter into OIS a *FAT/CAT (OSHA-36)* for all fatalities and catastrophes as soon as possible after learning of the event. As much information as is known at the time of the initial report should be provided; however, all items on the *FAT/CAT (OSHA-36)* need not be completed at the time of this initial report. Wherever possible, the age of the victim(s) should be provided, because this information is used for research by OSHA and other agencies.
- b. If additional information relating to the event becomes available that affects the decision to investigate, the *FAT/CAT (OSHA-36)* is to be updated.
- c. In addition, the Administrator will contact the OSHA Area Director to ensure prompt notification of the National Office of major events, such as those likely to generate significant public or congressional interest.

### **2. Investigation Summary Report (OSHA-170).**

- a. The *Investigation (OSHA-170)* is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, hospitalizations of two or more days, have generated significant publicity, and/or have resulted in significant property damage. An *Investigation (OSHA-170)* must be opened, logged into OIS, and saved as final as soon as the division becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of the data fields are left blank. The information on this form enables OSHA to track fatalities and summarizes circumstances surrounding the event.

NOTE: The two-day hospitalization criterion is a cutoff to preclude completing an Investigation (OSHA-170) for events that may not be serious. There is no relationship between this criterion and the definition of hospitalization in [Section II. A. of this chapter, Definitions](#).

- b. For fatality/catastrophe investigations, the *Investigation (OSHA-170)* will be:
  - Opened in OIS at the beginning of the investigation and saved as *final*, even if most of the data fields are left blank, so that HIOSH can track fatality/catastrophe investigations in a close to “real time” fashion.
  - Modified as needed during the investigation to account for updated information.
  - Updated with all data fields completely and accurately completed at the conclusion of the investigation, including a thorough narrative description of the incident.

- c. The *Investigation (OSHA-170)* narrative should **not** be a copy of the summary provided on the *FAT/CAT (OSHA-36)* pre-inspection form. The narrative must comprehensively describe the characteristics of the work-site; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.
- d. In addition, a single fatality or catastrophe event shall normally result in only one fatality [catastrophe] inspection of the deceased employee(s) [injured employees], but one event at a multi-employer work site may possibly lead to one or more unprogrammed-related inspection(s) of other involved employers. The exception to this would occur if an event involves multiple fatalities of workers of two or more employers, resulting in more than one fatality inspection.

**EXAMPLE 11-1:** A fatality occurs in employer's facility in August. Both a safety and health inspection are initiated. One *Investigation (OSHA-170)* should be filed to summarize the results of the inspections that resulted from the August fatality. However, in September, while the employer's facility is still undergoing the inspections, a second fatality occurs. In this case, a second *Investigation (OSHA-170)* should be submitted for the second fatality and an additional inspection should be opened.

**3. Immigrant Language Questionnaire (IMMLANG).**

HIOSH has elected not to participate in the IMMLANG Questionnaire. However, CSHOs shall indicate on the Inspection (OSHA-1) (N-10, Optional Information Code), whether language issues may have had a role in the fatality by entering "IMMLANG-Y."

**4. Related Event Code (REC).**

The *Violation (OSHA-1B)* provides specific supplemental information documenting hazards and violations. If any item cited is directly related to the occurrence of the fatality or catastrophe, select FAT/CAT Accident. If multiple related event codes apply, the only code that has priority over relation to a fatality/catastrophe is imminent danger.

**J. Pre-Citation Review.**

1. Because cases involving a fatality may result in civil or criminal enforcement actions, the Branch Manager is responsible for thoroughly and timely reviewing all fatality and catastrophe investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here.
2. The Branch Manager is responsible for ensuring that an *Investigation (OSHA-170)* is reported to OIS for each incident (see Paragraph II.1.2. of this chapter, *Investigation (OSHA-170)*).
3. Review all proposed violation-by-violation penalties in accordance with CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990, adopted by HIOSH on October 5, 1994, and revised on March 1, 1996.

4. In addition, the Administrator will also review all cases involving a fatality to ensure that each fatality is thoroughly investigated and processed in accordance with established policy. See Guideline on Conducting Accident Investigations, dated December 27, 2011.

#### **K. Post-Citation Procedures/Abatement Verification.**

The regulation governing abatement verification is found at §12-51-22, HAR and HIOSH's enforcement policies and procedures for this regulation are out-lined in Chapter 7, Post-Citation Procedures and Abatement Verification.

1. Due to the transient nature of many of the worksites where fatalities occur and because the worksite may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. In such cases, the Branch Manager should obtain abatement verification from the employer, along with an assurance that appropriate safety and health programs have been implemented to prevent the hazard(s) from recurring.
2. While site closure due to the completion of the cited project is an acceptable method of abatement, it can only be accepted as abatement without certification where a CSHO directly verifies that closure; otherwise, certification by the employer is required. Follow-up inspections need not be conducted if the CSHO has verified abatement during the inspection or if the employer has provided other proof of abatement.
3. Where the worksite continues to exist, HIOSH will normally conduct a follow-up inspection if serious citations have been issued.
4. Include abatement language and safety and health system implementation language in any subsequent settlement agreement.
5. If there is a violation that requires abatement verification, field 22 on the *Violation (OSHA 1-B)* must be completed with the date of abatement verified.
6. If the case is a Severe Violator Enforcement Program (SVEP) case, follow-up inspections will be conducted in accordance with OSHA Instruction CPL 02-00-149, *Severe Violator Enforcement Program (SVEP) Directive*, June 18, 2010, adopted by HIOSH on May 1, 2016. Follow-up inspections will normally be conducted even if abatement of cited violations have been verified through abatement verification.

#### **L. Audit Procedures.**

The following procedures will be implemented to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures:

The Administration and Technical Support Branch (ATS) will incorporate the review and analysis of fatality/catastrophe files into their audit functions and include their findings in the regular audit reports to the Administrator. The review and analysis will address the following:

1. Inspection Findings.  
Ensure that hazards have been appropriately addressed and violations have been properly classified. Also ensure that criminal referrals are made when appropriate.
2. Documentation.

Ensure that the *Investigation (OSHA-170)* narrative and data fields and the *Violation (OSHA-1B)* narrative have been completed accurately and detailed enough to allow for analysis at the national level of the circumstances of fatal incidents.

3. Settlement Terms.

Ensure that settlement terms are appropriate, including violation reclassification, penalty reductions, and additional abatement language.

4. Abatement Verification.

Ensure that abatement verification has been obtained.

5. Timely Investigation

Ensure that the investigation was promptly investigated in accordance with the Guideline on Conducting Accident Investigations, dated December 27, 2011.

6. Accident trends.

Determine whether there appears to be any trends or areas requiring additional actions by HIOSH to prevent similar occurrences in the future.

**M. Relationship of Fatality and Catastrophe Investigations to Other Programs and Activities.**

**1. Homeland Security.**

OSHA's *National Emergency Management Plan (NEMP)*, as contained in HSO 01-00-001, dated December 18, 2003, clarifies the procedures and policies for OSHA's National Office and Regional Offices during responses to incidents of national significance. Generally, OSHA will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health, and HIOSH will assist as appropriate. When the President makes an emergency declaration under the Stafford Act, the National Response Framework (NRF) is activated. The NEMP can then be activated by the Assistant Secretary, the Deputy Assistant Secretary, or by request from a Regional Administrator. Whether OSHA will conduct a formal fatality or catastrophe investigation in such a situation will be determined on a case-by-case basis.

**2. Severe Violator Enforcement Program.**

a. Inspections that result in citations being issued for at least one of the following are considered Severe Violator Enforcement Program (SVEP) cases:

- A fatality/catastrophe inspection in which HIOSH finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations;
- An inspection in which HIOSH finds two or more willful or repeated violations or failure-to-abate notices (or combination of these violations/notices), based on high gravity serious violations related to High-Emphasis Hazard as defined in Section XII. Of OSHA Instruction CPL 02-00-149, Severe Violator Enforcement Program (SVEP), June 18, 2010, and adopted by HIOSH on May 1, 2016.

- An inspection in which HIOSH finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards due to the potential release of highly hazardous chemical, as defined in the PSM standard; or
  - All egregious (e.g., per-instance citations) enforcement actions.
- b. In such cases, the instructions outlined in CPL 02-00-149, *Severe Violator Enforcement Program (SVEP)*, dated June 18, 2010, adopted by HIOSH on May 1, 2016, shall be followed to ensure that the proper measures are taken regarding classification, coding and treatment of the case.

### **3. Significant Enforcement Cases.**

- a. Significant enforcement cases are defined as inspection cases with initial proposed penalties over \$50,000, or which involve novel enforcement cases. An inspection resulting from an employee fatality or a workplace catastrophe may well be a significant enforcement case and, therefore, particularly thorough documentation is necessary to sustain legal sufficiency.
- b. Significant enforcement cases require the approval of the Administrator before the citations are issued. In addition, the OSHA Area Director should be notified in order to be prepared to assist where necessary.

### **4. Special Emphasis Programs.**

If a fatality or catastrophe investigation arises with respect to an establishment that is also in the current inspection cycle to receive a programmed inspection under any Site-Specific Targeting program (emphasis programs), the investigation and the inspection may be conducted either concurrently or separately.

### **5. Cooperative Programs.**

If a fatality or catastrophe occurs at a Hawaii Voluntary Protection Program (HVPP), HIOSH Strategic Partnership Program (HSPP) site, or HIOSH's Safety and Health Achievement Recognition Program (SHARP), the HVPP Manager and/or Consultation and Training Manager is to be notified. When enforcement activity has concluded, the HVPP Manager (for HVPP and HSPP sites) and/or the Consultation and Training Manager (for SHARPs) is to be informed so that the site can be reviewed for program issues.

## **N. Special Issues Related to Workplace Fatalities.**

### **1. Death by Natural Causes.**

Workplace fatalities caused by natural causes, including heart attacks, must be reported by the employer. The Branch Manager will then decide whether to investigate the incident.

### **2. Workplace Violence.**

As with heart attacks, fatalities caused by incidents of workplace violence must be reported to HIOSH by the employer. The Branch Manager will determine whether or not the incident will be investigated.

### **3. Motor Vehicle Accidents.**

- a. HIOSH does not have jurisdiction over motor vehicle accidents that occur on public roads or highways, unless the accident involves a state or county employee. Moreover, OSHA does not require reporting injuries including motor vehicles that occur on public roads or highways, unless the incident occurs in a construction work zone.
- b. Although employers who are required to keep records must record vehicle accidents in their OSHA-300 Log of Work-Related Injuries and Illnesses, HIOSH does not normally investigate such accidents. See §1904.39(b)(3) [§12-51.1, HAR]

The county police usually conduct investigations on public roads or highways and the state Department of Transportation has jurisdiction for transportation safety on public roads or highways. There may be some issue with regard to public sector workers on public roads or highways if the employee files a complaint

### **III. Rescue Operations and Emergency Response.**

#### **A. HIOSH's Authority to Direct Rescue Operations.**

##### **1. Direction of Rescue Operations.**

HIOSH has no authority to direct rescue operations. These are the responsibility of the employer and/or county or state agencies.

##### **2. Monitoring and Inspecting Working Conditions of Rescue Operations.**

HIOSH may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

#### **B. Voluntary Rescue Operations Performed by Employees.**

HIOSH recognizes that an employee may choose to place himself/herself at risk to save the life of another person. The following provides guidance on HIOSH citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

##### **1. Imminent Danger.**

Section 1903.14(f) provides that no citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger [i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated] unless:

- a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations,

**AND**

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;

or

- b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties,



**AND**

the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment;

or

- c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water;

**AND**

such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual;

**AND**

the employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

**2. Citation for Voluntary Actions.**

If an employer has trained his or her employees in accordance with §1903.14, no citation will be issued for an employee's voluntary rescue actions, regardless of whether they are successful.

**C. Emergency Response.**

**1. Role in Emergency Operations.**

While it is HIOSH's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, the division does not have authority to direct emergency operations.

**2. Response to Catastrophic Events (Note: these are *not* HIOSH Law requirements).**

HIOSH responds to catastrophic events promptly and acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

**3. HIOSH's Role.**

- a. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where HIOSH is acting under the National Emergency Management Plan (NEMP), the Administrator will determine the overall role that HIOSH will play. See CPL 02-02-073, *Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases*, dated August 27, 2007, and adopted by HIOSH on December 11, 2007.

- b. During an event that is covered by the NEMP, OSHA has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the Federal on-scene coordinator. HIOSH may provide assistance as needed.
- c. For details on HIOSH's response to occupationally-related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest. See CPL 02-00-094, *OSHA's Response to Significant Events of Potentially Catastrophic Consequences*, dated July 22, 1991, adopted by HIOSH on October 6, 1994.

#### **4. Incidents of National Significance.**

For detailed procedures on how to proceed during incidents of national significance when OSHA has been designated as the primary Federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, and the Assistant Secretary has activated the National Emergency Response Plan, see HSO 01-00-001 *National Emergency Management Plan*, dated December 18, 2003, and the National Response Framework (Worker Safety and Health Support Annex). HIOSH will assist when requested to do so.

Note: These documents apply when activated.

## CHAPTER 12

### SPECIALIZED INSPECTION PROCEDURES

#### I. Multi-Employer Workplace/Worksite.

##### A. Multi-Employer Worksites.

On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates a HIOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. **Step One.** The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs 2 – 5 below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph X). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employer can be cited for General Duty Standard violations).
2. **Step Two.** If the employer falls into one of these categories, it has obligations with respect to HIOSH requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

NOTE: For Hawaii, an employer includes “every person having direction, management, control, or custody of any employment, place of employment, or any employee”. Employers are not limited to only those who provide salary/wages.

##### B. The Creating Employer

1. **Step 1: Definition:** The employer that caused a hazardous condition that violates a HIOSH standard.
2. **Step 2: Actions Taken:** Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

**Example 12-1:** Employer Host operates a factory. It contracts with Company S to service machinery. Host fails to cover drums of a chemical despite S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the Permissible Exposure Limit.

**Analysis: Step 1:** Host is a creating employer because it caused employees of S to be exposed to the air contaminant above the PEL.

**Step 2:** Host failed to implement measures to prevent the accumulation of the air contaminant. It could have met its obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Host is citable for the hazard.

**Example 12-2:** Employer M hoists materials onto Floor 8, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

**Analysis: Step 1:** Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails. **Step 2:** While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

### C. The Exposing Employer

1. **Step 1: Definition:** An employer whose own employees are exposed to the hazard. See Chapter 4, section (I)(B) for a discussion of what constitutes exposure.
2. **Step 2: Actions Taken:** If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect its employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

**Example 12-3:** Employer Sub S is responsible for inspecting and cleaning a work area in Plant P around a large, permanent hole at the end of each day. An OSHA standard requires guardrails. There are no guardrails around the hole and Sub S employees do not use personal fall protection, although it would be feasible to do so. Sub S has no authority to install guardrails. However, it did ask Employer P, which operates the plant, to install them. P refused to install guardrails.

**Analysis: Step 1:** Sub S is an exposing employer because its employees are exposed to the fall hazard. **Step 2:** While Sub S has no authority to install guardrails, it is required to comply with OSHA requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - Employer P - to correct it. Although Sub S asked for guardrails, since the hazard was not corrected, Sub S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Sub S is citable for the violation.

**Example 12-4:** Unprotected rebar on either side of an access ramp presents an impalement hazard. Sub E, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Sub E asked the general contractor, Employer GC, to cover the rebar. In the meantime, Sub E instructed its employees to use a different access route that avoided most of

the uncovered rebar and required them to keep as far from the rebar as possible.

**Analysis: Step 1:** Since Sub E employees were still exposed to some unprotected rebar, Sub E is an exposing employer. **Step 2:** Sub E made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Sub E is not citable for the rebar hazard.

## D. The Correcting Employer

3. **Step 1: Definition:** An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.
4. **Step 2: Actions taken:** The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

**Example 12-5:** Employer C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to C. C repairs damaged guardrails immediately after finding them and immediately after they are reported. On this project few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of Floor 6, workers moving equipment accidentally damage a guardrail in one area. No one tells C of the damage and C has not seen it. An OSHA inspection occurs at the beginning of the next day, prior to the morning inspection of Floor 6. None of C's own employees are exposed to the hazard, but other employees are exposed.

**Analysis: Step 1:** C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment. **Step 2:** The steps C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

## E. The Controlling Employer

1. **Step 1: Definition:** An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.
2. **Step 2: Actions Taken:** A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable

care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

3. **Factors Relating to Reasonable Care Standard.** Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:
  - a. The scale of the project;
  - b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;
  - c. How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.
  - d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history.
  - e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.
4. **Evaluating Reasonable Care.** In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:
  - a. Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed in [E.3.](#));
  - b. Implemented an effective system for promptly correcting hazards;
  - c. Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.
5. **Types of Controlling Employers**
  - a. **Control Established by Contract.** In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.  
**Example 12-6:** Employer GH contracts with Employer S to do sandblasting at GH's plant. Some of the work is regularly scheduled

maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires S to comply with safety and health requirements. Under the contract GH has the right to take various actions against S for failing to meet contract requirements, including the right to have non-compliance corrected by using other workers and back-charging for that work. S is one of two employers under contract with GH at the work site, where a total of five employees work. All work is done within an existing building. The number and types of hazards involved in S's work do not significantly change as the work progresses. Further, GH has worked with S over the course of several years. S provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. S has consistently had a high level of compliance at its previous jobs and at this site. GH monitors S by a combination of weekly inspections, telephone discussions and a weekly review of S's own inspection reports. GH has a system of graduated enforcement that it has applied to S for the few safety and health violations that had been committed by S in the past few years. Further, due to respirator equipment problems S violates respiratory protection requirements two days before GH's next scheduled inspection of S. The next day there is an OSHA inspection. There is no notation of the equipment problems in S's inspection reports to GH and S made no mention of it in its telephone discussions.

**Analysis: Step 1:** GH is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations. **Step 2:** GH has taken reasonable steps to try to make sure that S meets safety and health requirements. Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, GH's knowledge of S's history of compliance and its effective safety and health efforts on this job. GH has exercised reasonable care and is not citable for this condition.

**Example 12-7:** Employer GC contracts with Employer P to do painting work. GC has the same contract authority over P as Employer GH had in Example 6. GC has never before worked with P. GC conducts inspections that are sufficiently frequent in light of the factors listed above in (E)(3). Further, during a number of its inspections, GC finds that P has violated fall protection requirements. It points the violations out to P during each inspection but takes no further actions.

**Analysis: Step 1:** GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over P. **Step 2:** GC took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require P to correct hazards since it lacked a graduated system of enforcement. A citation to GC for the fall protection violations is appropriate.

**Example 12-8:** Employer GC contracts with Sub E, an electrical subcontractor. GC has full contract authority over Sub E, as in Example 6. Sub E installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as

required under the contract. It fails to connect a grounding wire inside the box to one of the outlets. This incomplete ground is not apparent from a visual inspection. Further, GC inspects the site with a frequency appropriate for the site in light of the factors discussed above in (E)(3). It saw the panel box but did not test the outlets to determine if they were all grounded because Sub E represents that it is doing all of the required tests on all receptacles. GC knows that Sub E has implemented an effective safety and health program. From previous experience it also knows Sub E is familiar with the applicable safety requirements and is technically competent. GC had asked Sub E if the electrical equipment is OK for use and was assured that it is.

**Analysis: Step 1:** GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Sub E. **Step 2:** GC exercised reasonable care. It had determined that Sub E had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment. Under these circumstances GC was not obligated to test the outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

- b. Control Established by a Combination of Other Contract Rights: 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. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety. (NOTE: citations should only be issued in this type of case after consulting with the DAG).

**Example 12-9:** Construction manager M is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between subcontractors, direct work and make purchasing decisions, which affect safety. However, the contract states that M does not have a right to require compliance with safety and health requirements. Further, Subcontractor S asks M to alter the schedule so that S would not have to start work until Subcontractor G has completed installing guardrails. M is contractually responsible for deciding whether to approve S's request.

**Analysis: Step 1:** Even though its contract states that M does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of M to direct actions that necessarily affect safety. For example, M's contractual obligation to determine whether to approve S's request to alter the schedule has direct safety implications. M's decision relates directly to whether S's employees will be protected from a fall hazard. M is a controlling employer. **Step 2:** In this example, if M refused to alter the schedule, it would be citable for the fall hazard violation.



**Example 12-10:** Employer ML's contractual authority is limited to reporting on subcontractors' contract compliance to owner/developer O and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to O, ML does not exercise any control over safety at the site.

**Analysis: Step 1:** ML is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and ML did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety. **Step 2:** Since it is not a controlling employer it had no duty under the HIOSH Law to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

- c. Architects and Engineers: Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

**Example 12-11:** Architect A contracts with owner O to prepare contract drawings and specifications, inspect the work, report to O on contract compliance, and to certify completion of work. A has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

**Analysis: Step 1:** A's responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to O. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer. NOTE: In a circumstance such as this it is likely that broad control over the project rests with another entity. **Step 2:** Since A is not a controlling employer it had no duty under the HIOSH Law to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

**Example 12-12:** Engineering firm E has the same contract authority and functions as in Example 12-9.

**Analysis: Step 1:** Under the facts in Example 9, E would be considered a controlling employer. **Step 2:** The same type of analysis described in Example 9 for Step 2 would apply here to determine if E should be cited.

- d. Control Without Explicit Contractual Authority . Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9). NOTE: Citations should only be issued in this type of case after consulting with the DAG.

**Example 12-13:** Construction manager MM does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors' work anyway, including aspects that relate to safety.

**Analysis: Step 1:** MM would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects. **Step 2:** The same type of analysis on reasonable care described in the examples in (E)(5)(a) would apply to determine if a citation should be issued to this type of controlling employer.

## **F. Multiple Roles**

1. A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.
2. Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.

## **II. Temporary Labor Camps.**

### **A. Introduction.**

29 CFR 1910.142, the Temporary Labor Camp standard, is applicable to both agricultural and non-agricultural workplaces.

### **B. Definitions.**

NOTE: Section 1910.142 does not contain a definition section. The following definitions reflect OSHA's interpretation of the standard.

#### **1. Temporary.**

The term *temporary* in §1910.142 refers to employees who enter into an employment relationship for a discrete or defined time period. As a result, the term *temporary* refers to the length of employment, and not to the physical structures housing employees.

#### **2. Temporary Labor Camp Housing.**

Temporary labor camp housing is required employer-provided housing that, due to company policy or practice, necessarily renders such housing a term or condition of employment. See *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325 (11<sup>th</sup> Cir. 1983).

#### **3. New Construction.**

All agriculture housing construction started on or after April 3, 1980, including totally new structures and additions to existing structures, will be considered new construction. Cosmetic remodeling work on pre-1980 structures will not be considered new construction and should be treated as existing housing.

### **C. Enforcement of Temporary Labor Camp Standards for Agriculture.**

#### **1. 29 CFR 1910.142 (TLC Standard)**

§1910.142 is the applicable standard for temporary labor camps. Any directive referencing 29 CFR Part 654 (US Wage and Hour standard) is to be disregarded, as not applicable to Hawaii.

**2. Agriculture Worksites under HIOSH Responsibility.**

For agriculture worksites that HIOSH has responsibility for, §1928.21 lists which Part 1910 standards apply.

**D. HIOSH Enforcement for Non-Agriculture Worksites.**

1. For non-agriculture worksites other Part 1910 standards may be cited for hazards which are not covered under §1910.142. For non-agriculture worksites, the TLC standard has no provisions that specifically apply to fire protection, so those standards are not explicitly pre-empted by the TLC standard. The same is true for §§1910.36 and 37 (exit routes). However, §1910.38 (emergency action plans) applies only where an emergency action plan is required by a particular HIOSH standard, so it cannot be used with TLCs.
2. Examples of temporary labor camp housing for non-agriculture worksites would be for the construction industry, oil and gas industry, and garment industry in the Pacific territories. Such housing for these industries may also be found in large cities and rural areas.

**E. Employee Occupied Housing.**

Generally, inspections shall be conducted when housing facilities are occupied and as soon as feasible so that any hazards identified may be corrected early in the work season.

1. Since employees may not speak English, or may only speak English as a second language, every effort shall be made to send a bilingual CSHO on the inspection or have a bi-lingual person accompany the CSHO to translate conversations with employees.
2. CSHOs shall conduct inspections in a way that minimizes disruptions to those living in the housing facilities. If an occupant of a dwelling unit refuses entry for inspection purposes, CSHOs shall not insist on entry and shall continue the rest of the inspection unless the lack of access to the dwelling unit involved would substantially reduce the effectiveness of the inspection. In that case, valid consent should be obtained from the owner of the unit. If the owner also refuses entry, the procedures for refusal of entry shall be followed. See [Chapter 15, Legal Issues](#). The same shall apply in cases where employers refuse entry to the housing facility and/or to the entire worksite.
3. During inspections, CSHOs shall encourage employers to correct hazards as quickly as possible. Particular attention shall be paid to identifying instances of failure to abate and repeated violations from season to season or past occupancy. These violations shall be cited in accordance with normal procedures.

**F. Primary Concerns.**

When conducting a housing inspection, CSHOs shall be primarily concerned with those facilities or conditions that most directly relate to employee safety and health. Accordingly, all housing inspections shall address at least the following:

1. Site.

- a. Review the location of the site for adequate drainage in relation to periodic flooding, swamps, pools, sinkholes, and other surfaces where water may collect and remain for extended periods.
- b. Determine whether the site is adequate in size to prevent overcrowding and whether it is located near (within 500 feet of) livestock.
- c. Evaluate the site for cleanliness and sanitation; i.e., free from rubbish, debris, wastepaper, garbage, and other refuse.

2. Shelter.

- a. Determine whether the shelter provides protection against the elements; has the proper floor elevation and floor space; whether rooms are used for combined purposes of sleeping, cooking and eating; and whether all rooms have proper ventilation and screening.
- b. Determine which rooms are used for sleeping purposes, the number of occupants, size of the rooms, and whether beds, cots, or bunks and lockers are provided.
- c. Determine what kind of cooking arrangements or facilities are provided, and whether all heating, cooking and water heating equipment are installed in accordance with state and local codes.

3. Water Supply.

Determine whether the water supply for drinking, cooking, bathing and laundry is adequate and convenient, and has been approved by the appropriate local health authority.

4. Toilet Facilities.

Determine the type, number, location, lighting, and sanitary conditions of toilet facilities.

5. Sewage Disposal.

Determine, in camps where public sewers are available, whether all sewer lines and floor drains are connected.

6. Laundry, Handwashing and Bathing Facilities.

- a. Determine the number, kind, locations and conditions of these facilities, and whether there is an adequate supply of hot and cold running water.
- b. Determine also whether such facilities have appropriate floors, walls, partitions and drains.

7. Lighting.

- a. Determine whether electric service is available, and if so, if appropriate light levels, number of ceiling-type light fixtures, and separate floor- or wall-type convenience outlets are provided.
- b. Determine also whether the light fixtures, floor and wall outlets are properly grounded and covered.

8. Refuse Disposal and Insect and Rodent Control.

Determine the type, number, locations and conditions of refuse disposal containers, and whether there are any infestations of animal or insect vectors or pests.

9. First-Aid Facilities.

Determine whether adequate first-aid facilities are available and maintained for emergency treatment.

**G. Dimensions.**

The relevant dimensions and ratios specified in §1910.142 are mandatory; however, CSHOs may exercise discretion to not cite minor variations from specific dimensions and ratios when such violations do not have an immediate or direct effect on safety and health. In those cases, in which the standard itself does not make reference to specific dimensions or ratios but instead uses adequacy as the test for the cited conditions and facilities, the Branch Manager shall make the determination as to whether a violation exists on a case-by-case basis considering all relevant factors.

**H. Documentation for Housing Inspections.**

The following facts shall be carefully documented:

1. The age of the dwelling unit, including any additions. For recently built housing, date the construction was started.
2. Number of dwelling units, number of occupants in each unit.
3. Approximate size of area in which the housing is located and the distance between dwelling units and water supply, toilets, livestock and service building.

**I. Condition of Employment.**

The Law covers only housing that is a term and condition of employment. Factors in determining whether housing is a term and condition of employment include situations where:

1. Employers require employees to live in the housing.
2. The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.
3. Additional factors to consider in determining whether the housing is a term and condition of employment include, but are not limited to:
  - a. Cost of the housing to the employee – is it provided free or at a low rent?
  - b. Ownership or control of the housing – is the housing owned or controlled or provided by the employer?
  - c. Distance to the worksite from the camp, distance to the work-site from other non-camp residences – is alternative housing reasonably accessible (distance, travel, cost, etc.) to the worksite?
  - d. Benefit to the employer -- does the employer make the camp available in order to ensure that the business is provided with an adequate supply of labor?
  - e. Relationship of the camp occupants to the employer – are those living in the camp required to work for the employer upon demand?

### **III. Home-Based Worksites (CPL 02-00-125, February 25, 2000)**

#### **A. Background.**

The Hawaii Department of Labor and Industrial Relations strongly supports telecommuting and telework. Family-friendly, flexible and fair work arrangements, including telecommuting, benefit individual employees and their families, employers, and society as a whole.

The purpose of the Hawaii Occupational Safety and Health Law is to “assure so far as possible every working man and woman in the State safe and healthful working conditions.” (§396-2, HRS). The HIOSH Law applies to both private and public employers who have any employees doing work in a workplace in the state. It requires these employers to provide employment and a place of employment that are free from recognized, serious hazards, and to comply with HIOSH standards, rules, regulations, citations, or orders. (§396-6(a), HRS). By law, HIOSH does not cover individuals who, in their own residences, employ persons for the purpose of performing domestic household tasks.

HIOSH respects the privacy of the home and has rarely conducted inspections of home offices. While respecting the privacy of the home, it should be kept in mind that certain types of work at home can be dangerous/hazardous. Examples of such work from OSHA’s past inspections include: assembly of electronics; casting lead head jigs for fishing lures; use of unguarded crimping machines; and handling adhesives without protective gloves.

#### **B. Policy for Home Offices**

HIOSH will not conduct inspections of employee’s home offices.

HIOSH will not normally hold employer’s liable for employees’ home offices, and does not expect employers to inspect the home offices of their employees. Employers may require employees to inspect their own home offices.

However, employers are still responsible for providing all employees safety and health training.

If HIOSH receives a complaint about a home office, the complainant will be advised of HIOSH’s policy. If an employee makes a specific request, HIOSH may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

#### **C. Policy for Other Home-Based Worksites.**

HIOSH will only conduct inspections of other home-based worksites, such as home manufacturing operations, when HIOSH receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.

The scope of the inspection in an employee’s home will be limited to the employee’s work activities.

Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.

If a complaint or referral is received about hazards in an employee's home-based worksite, the policies and procedures for conducting inspections and responding to complaints in Chapter 9, Complaint and Referral Processing, will be followed, except as modified by this Section.

#### **D. Other Requirements**

Employers who are required, because of their size or industry classification by the HIOSH Law to keep records of work-related injuries and illnesses, will continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the criteria of Chapter 52.1, HAR.

Other than clarifying the policy on inspections and procedures concerning home-based worksites, this section does not alter or change employers' obligations to employees.

## **Chapter 13**

### **FEDERAL AGENCY FIELD ACTIVITIES**

#### **I. Federal Agency Programs [Not applicable to HIOSH]**



## **Chapter 14**

### **HEALTH INSPECTION ENFORCEMENT PROGRAMS**

#### **I. Health Enforcement Programs [Reserved]**

## Chapter 15

### LEGAL ISSUES

#### I. Administrative Subpoenas.

##### A. When to Issue.

An Administrative Subpoena may be issued whenever there is a need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within HIOSH's authority.

1. The Administrator has the authority to issue subpoenas, and may also delegate the authority to Branch Managers for routine administrative subpoenas.
2. The issuance of an administrative subpoena requires the signature of the individual authorized to issue such subpoenas.

##### B. Two Types of Subpoenas.

There are two types of subpoenas used to obtain evidence during a HIOSH investigation:

1. A Subpoena Duces Tecum is used to obtain documents. It orders a person or organization to appear at a specified time and place and produce certain documents, and to testify to their authenticity. Employers are not required to create a new record in order to respond to these types of subpoenas.
2. A Subpoena Ad Testificandum commands a named individual or corporation to appear at a specified time and place, such as the HIOSH Office, to provide testimony under oath. A written statement is made to document testimony.

HIOSH would normally issue only a Subpoena Duces Tecum to specify which documents are being requested as well as order specific persons to testify not only as to the authenticity of the documents, but to provide additional testimony under oath.

##### C. Branch Manager Delegated Authority to Issue Administrative Subpoenas.

Although authority to issue subpoenas is reserved to the Administrator, branch managers may be authorized to issue routine administrative subpoenas.

1. Branch managers may be delegated authority to issue administrative subpoenas for any record or document relevant to an inspection or investigation under the Law, including:
  - a. Injury and illness records such as the OSHA-301 and the OSHA-300 See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, and 29 CFR 1913.10(b)(6);
  - b. Autopsy/medical examiner reports;
  - c. Police and/or emergency responder reports;
  - d. Hazard communication program;
  - e. Lockout/tagout program; and
  - f. Safety and Health Program.

NOTE: The Branch Manager maintains responsibility for the protection of medical records, regardless of whether an MAO (Medical Access Order) was issued.

2. Information shall be requested from the employer or holder of records, documents, or other information-containing materials.
  - a. If this person/entity refuses to provide requested information or evidence, the HIOSH representative serving the subpoena shall explain the reason for the request.
  - b. If there is still a refusal to produce the information or evidence requested, the HIOSH representative shall inform the person/entity that the division may take further legal action.
3. The official issuing the subpoena is responsible for evaluating the circumstances and deciding whether to issue a subpoena. In cases with potential national implications or involving extraordinary circumstances, the Administrator shall be contacted for concurrence or to determine whether the subpoena should be issued by the Administrator.

#### **D. Administrator Authority to Issue Administrative Subpoenas.**

1. The Administrator has independent authority to issue subpoenas for any appropriate purpose. Unless delegated to a Branch Manager, the following authority shall be reserved to the Administrator:
  - a. Issuance of a *Subpoena Ad Testificandum* to require the testimony of any company official, employee, or other witness;
  - b. Issuance of a subpoena for the production of personally identifiable medical records for which a medical access order has been obtained See CPL 02-02-072, *Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, and adopted by HIOSH on December 19, 2007; and §1913.10(b)(6); and
  - c. Issuance of a subpoena for the production of physical evidence, such as samples of materials.
2. Although this authority may not routinely be delegated to branch managers, in a few cases such delegation may be appropriate.

#### **E. Administrative Subpoena Content and Service.**

1. Model administrative subpoenas are provided at the end of this chapter. If the Branch Manager believes that there is reason for any departure from the models due to circumstances of the case, the Administrator and DAG shall be consulted.
2. The subpoena shall be prepared for the appropriate party and will normally be served by personal service (delivery to the party named in person). Leaving a copy at a place of business or residence is not personal service.
  - a. In exceptional circumstances, service may be by certified mail with return receipt requested.
  - b. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

3. Examples of language for a routine *Subpoena Duces Tecum* are provided below. This language should be expanded when requesting additional or more detailed information for accident, catastrophe, referral or fatality investigations.
  - a. "Copies of any and all documents, including information stored electronically, which reflect training procedures for the lockout/tagout procedures and hazard communication program in effect at the [insert site name] in [insert city, state], during the period [insert month/day/year], to present."
  - b. "Copies of the OSHA-300 and the OSHA-301 forms, for the entire site, during calendar years [insert year] and [insert year]."
  - c. "Copies of any and all documents, including information stored electronically, such as safety and health program handbooks, minutes of safety and health meetings, training certification records, audits and reprimands for violations of safety and health rules by employees of the [insert site name] in [insert city, state], that show [insert employer's name] had and enforced safety rules relating to the use of trench boxes during the period [insert month/day/year], to present."

NOTE: Where particular information is being sought, a subpoena's description should be narrow and specific in order to increase the likelihood for prompt compliance with the request.

4. The subpoena must state the date, time, and specific location for the individual to appear.
  - a. With respect to any record required to be made or kept pursuant to any statute or regulation, the subpoena shall normally allow **three calendar days** from the date of service for production of the required information although a shorter period may be appropriate.
  - b. With respect to other types of records or information, such as safety programs or incident reports, the subpoena shall normally allow at least **five working days** from the date of service for production of the required information.
  - c. Separate subpoenas for items 1 and 2 above may be necessary.
5. Since every subpoena requires the appearance of a "witness" to either provide testimony or to certify that the records produced are complete and unaltered copies, Hawaii law requires that a check to cover the witness fee and mileage to appear is to be provided at the time the subpoena is served.
  - a. The current witness fee, in accordance with Hawaii penal code, §12-621-7, HRS, is \$20
  - b. Mileage is to be computed from the location where the individual works to the appearance location and back and shall be based on the most recent Federal rate according to the State Comptroller's Office.

NOTE: §12-621-7 authorizes the State Judiciary to set mileage rates in accordance with the Hawaii Procedures Act (administrative rules), but no rules have been promulgated to date. Until rules are promulgated, calculation of mileage fees will be based on past practice

6. The branch shall prepare the subpoena for either the Administrator's signature or, if delegated, the Branch Manager's signature.

7. Secretaries preparing the subpoena should ensure that the information provided by the Branch Manager contains all required information for not only the subpoena but the check disbursement; including complete and legal names and addresses, and distance from the appearance site.
8. For especially short turnaround times, ASO (and others required to approve payments) should be notified in advance that a “RUSH” request is forthcoming.
9. When the individual is being served, a “Return of Service” must be completed, indicating:
  - a. Name of representative serving the subpoena;
  - b. Date and time of service; and
  - c. Signature of the person served, or of the authorized representative of the entity being served.
10. Copies of the subpoena, signed by the Administrator (or Branch Manager if so authorized), the witness and mileage fee check, as well as the completed *Return of Service* shall be filed in the case file.

It is the responsibility of the CSHO to track the issued administrative subpoena; to make arrangements for the logging of all documents received, pending, and not available; arrange for the appropriate facilities for the testimony to be taken; and for any other specific requirement relating to the subpoena.

#### **F. Compliance with the Subpoena.**

The person/entity served may comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.

1. If the individual is unable to appear at the time and place indicated on the subpoena due to circumstances beyond their control, allowances may be made; e.g. the HIOSH representative can go to the individual’s location, or the date to appear may be moved up. In extreme circumstances the appearance date may be delayed.
2. The individual may wish to be accompanied by his/her attorney.

#### **G. Refusal to Honor Subpoena.**

1. If the person/entity served refuses to comply with (or only partially honors) the subpoena, the compliance officer shall document all relevant facts and advise the Branch Manager before taking further action.
2. To enforce a subpoena, the Branch Manager shall refer the matter, through the Administrator, to the DAG for appropriate action.

#### **H. Anticipatory Subpoena.**

Generally, division policy is to seek voluntary production of evidence before an administrative subpoena is issued. However, a subpoena may be executed and served without making a prior request where there is reason to believe that the corporate entity and/or person from whom information is sought will not voluntarily comply, or where there is an urgent need for the information, such as for fatality investigations.

NOTE: For example, pre-inspection preparation of subpoenas for issuance at the opening conference is appropriate in cases where the employer has previously denied access to records or where complex inspections, involving extensive review of records, are planned.

## **II. Service of Subpoena on HIOSH Personnel.**

### **A. Proceedings to which the State is a Party.**

If any HIOSH personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Director or department is a party, they shall immediately contact the DAG for instructions regarding the manner in which to respond. If a CSHO is served with a subpoena, they shall notify the Branch Manager immediately who shall then refer the matter to the DAG, via the Administrator.

### **B. Proceedings to which the State is Not a Party.**

1. If any HIOSH personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Director or the department is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), they shall immediately notify the Administrator.
2. The Administrator will notify the party responsible for the subpoena that
  - a. No record or determination can be used in any civil action in accordance with §396-14, HRS, and therefore, there will be no appearance by the Custodian of Records or by the witness. The witness and mileage check shall be returned.
  - b. If the case is closed, the individual can be notified that the only documents that can be released will be the Citation and Notification of Penalty, and any adjustments to this document, e.g., Informal Settlement Agreement, Formal Settlement Agreement (Stipulation and Settlement Agreement), HLRB or appellate court decisions.
  - c. If the party responsible for the subpoena insists that the witness appear and/or the documents be produced, the DAG shall be contacted. The DAG is responsible for responding to such requests and will take appropriate steps to have the subpoena quashed or if the judge in the case still requires the appearance of the HIOSH employee, to take steps to ensure that the information in the case file is not released or made available.

## **III. Obtaining Warrants.**

### **A. Warrant Applications.**

1. Upon refusal of entry, or if there is reason to believe an employer will refuse entry, the Branch Manager shall proceed according to guidelines and procedures established by the department for warrant applications. The Branch Manager shall initiate the compulsory process based on information from the CSHO. A memo requesting the warrant shall be submitted to the DAG via the Administrator's office as soon as possible.
2. Warrant applications for establishments where consent has been denied for a limited scope inspection (i.e., complaint, referral, or accident investigation) shall

normally be limited to the specific working conditions or practices forming the basis of the inspection. However, a broad scope warrant may be sought if there is evidence of potentially pervasive violative conditions or if the establishment is on a current list of establishments targeted for a comprehensive inspection.

## **B. General Information Necessary to Obtain a Warrant.**

The Branch Manager shall inform the DAG via memo within **24 hours** after the determination is made to seek a search warrant and provide all information necessary to obtain a warrant, including:

1. Branch, telephone number, and name of Branch Manager;
2. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items or both;
3. Legal name(s) of establishment and address, including City, State and County. Include site location if different from mailing address;
4. Estimated number of employees at inspection site;
5. Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) Code and high hazard ranking for that specific industry within the State, as obtained from statistics provided by the Research and Statistics Office (R&S), or by BLS;
6. Reason for inspection, e.g. Programmed, Complaint, Accident, Referral, etc. (See C. below)
7. Summary of all facts leading to the refusal of entry or limitation of inspection, including:
  - a. Date and time of entry/attempted entry;
  - b. Date and time of denial;
  - c. Stage of denial (entry, opening conference, walkaround, etc.);
8. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:
  - a. Full name and title of the person(s) to whom CSHO presented credentials;
  - b. Full name and title of person(s) who refused entry;
  - c. Reasons stated for the denial by person(s) refusing entry;
  - d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.
9. Any information related to past inspections, including copies of previous citations.
10. Any previous requests for warrants. Attach details, if applicable.
11. All completed information related to the current inspection report, including documentation of any observations of violations in plain view discovered prior to denial.
12. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.

13. Investigative procedures that may be required during the proposed inspection, e.g., interviewing of employees/witnesses, personal sampling, photographs, audio/videotapes, examination of records, access to medical records, etc.

### **C. Specific Warrant Information Based on Inspection Type.**

Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

1. Imminent Danger.

- a. Description of alleged imminent danger situation;
- b. Date information received and source of information, e.g. current employee (exclude name and identifying information), news media, concerned citizen, etc.;
- c. Copy of original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and
- d. Whether all current imminent danger investigative procedures have been followed.

2. Fatality/Catastrophe.

The OSHA-36 Form should be completed with as much detail as possible.

3. Complaint or Referral.

- a. Copy of original complaint or referral and copy of typed complaint or referral (with name and identifying information of complainant redacted);
- b. Reasons HIOSH believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;
- c. Whether all current complaint or referral processing procedures have been followed; and
- d. Any additional information pertaining to the evaluation of the complaint or referral.

4. Programmed.

- a. Targeted safety – general industry, public sector, construction;
- b. Targeted health; and/or
- c. Special emphasis program--Special Programs, Local Emphasis Program, etc.

5. Follow-up.

- a. Date of initial inspection;
- b. Details and reasons follow-up was conducted;
- c. Copies of previous citations which served as the basis for initiating the follow-up;
- d. Copies of settlement agreements and final orders, if applicable; and/or
- e. Previous history of failure to correct, if any.

6. Monitoring.

- a. Date of original inspection;
- b. Details and reasons monitoring inspection is to be conducted;



- c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or
- d. Petition for Modification of Abatement Date (PMA) request, if applicable.

#### **D. Warrant Procedures.**

Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the Branch Manager and the DAG.

##### **1. Action Taken Upon Receipt of Warrant (Compulsory Process).**

- a. The inspection will normally begin within 24 hours of receipt of a warrant or from the date authorized by the warrant for initiating the inspection.
- b. Upon completion of the inspection, if the warrant includes a return of service space for entering inspection dates, CSHOs shall complete the return of service on the original warrant, sign and forward it to the Branch Manager for appropriate action.

##### **2. Serving a Subpoena for Production of Records.**

Where appropriate, even where the scope of an inspection is limited by a warrant or an employer's consent to specific conditions or practices, any subpoena for production of records shall be served in accordance with the section on administrative subpoenas in this chapter.

#### **E. Second Warrant.**

Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review or "plain view" observations of other potential violations discovered during a limited scope walkaround.

#### **F. Refused Entry or Interference.**

- 1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.
- 2. If the employer refuses to comply or if consent is not clearly given, CSHOs shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the Branch Manager or Administrator regarding further action.
  - a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).
  - b. Branch Managers shall then contact the Administrator and the DAG, who shall jointly decide the action to be taken.

#### **G. State Sheriff Assistance.**

In unusual circumstances, a State Sheriff may be asked to accompany a CSHO when a warrant is presented. A request for a Sheriff's assistance shall be made only by a Branch Manager after consultation with the Administrator and the DAG, and only when there is a potential for violence, harassment and/or interference with the inspection, or reason to believe that the presence of a State Sheriff will assist with compliance with the warrant.

## **IV. Equal Access to Justice Act (EAJA).**

### **A. EAJA not applicable to HIOSH**

The Equal Access to Justice Act (EAJA) provides that a party prevailing against the United States in litigation may be awarded fees payable by an agency of the United States if the agency's position in litigation was not “substantially justified” or if the agency proposed a penalty that was reduced as a result of litigation and subsequently determined to be “unreasonable.” EAJA awards are statutorily limited to certain small entity parties, generally those with a designated net worth and/or number of employees. See 28 U.S.C. § 2412(d)(2)(B). This provision is **NOT** applicable to the State.

### **B. Legislative Oversight.**

§396-11(k), HRS, requires the Director to submit an annual report to the legislature on the number of contests filed, the disposition of each, and information indicating whether the contested issue involved an employee or employees of the department who failed to act within the scope of their office, employment, or authority under this chapter. The intent is to monitor HIOSH activities to determine whether HIOSH may be abusing its authority under the Law.

The criteria for whether an employee or employees failed to act within the scope of their office, employment, or authority is whether he or they failed to follow the Field Operations Manual (FOM).

### **C. §396-11(k) Should Not Affect How the Division Operates.**

§396-11(k), HRS, should not affect the manner in which the agency operates, as citations are issued only in accordance with the FOM, i.e., after HIOSH determines that there is adequate evidence that a violation exists, and proposed penalty amounts are determined based on established statutory and administrative criteria, and facts derived during the inspection/investigation.

Employees who fail to follow the FOM, and thus fail to act within the scope of their office, employment, or authority are also not immune from liability in accordance with §396-4(b)(7), HRS.

## **V. Notice of Contest.**

The Hawaii Labor Relations Board (HLRB, or “the Board”) is an independent State agency, administratively attached to the Department, tasked with the responsibility to decide contests of citations or penalties resulting from HIOSH inspections under Chapter 396, HRS. HLRB, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions

### **A. Time Limit for Filing a Notice of Contest.**

1. The Law provides employers twenty (20) calendar days following its receipt of a notice of a citation to contest citation and/or assessment of penalty.
2. Where a notice of contest was not received or mailed, i.e., postmarked, within the 20 calendar day period allowed for contest, the Branch Manager shall follow the instructions for Late Notices of Contest. A copy of any untimely notice of contest shall be retained in the case file.

## **B. Contest of Abatement Period Only.**

If the notice of contest is submitted to HIOSH after the 20 calendar day period, but contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with PMA procedures.

## **C. Communication Where the Intent to Contest is Unclear.**

1. If a written communication is received from an employer containing an objection, criticism or other adverse comment as to a citation or proposed penalty, but which does not clearly appear to contest the citations, the Branch Manager shall contact the employer to clarify the intent of the communication.
  - a. After receipt of the communication, any clarification should be obtained within the 20 calendar day contest period, so that if a determination is made that it is a notice of contest, the file may be timely forwarded to the Hawaii Labor Relations Board. Where the employer does not respond to the request for clarification within the 20 calendar day contest period, the letter is to be treated as a contest of all items and the related penalties.
  - b. In cases where HIOSH receives a written communication from an employer requesting **an informal conference that also states an intent to contest**, the employer must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer still wants to pursue an informal conference, it must first present or send a letter expressing that intent and rescinding the contest. All documents pertaining to such communications shall be retained in the case file.
2. If a Branch Manager determines that the employer intends the document to be a notice of contest, it shall be transmitted to the HLRB. If contact with the employer reveals a desire for an informal conference, the employer shall be informed that the conference does not stay the running of the 20 calendar day contest period.

NOTE: Settlement is permitted at any stage of HLRB proceedings.

# **VI. Late Notice of Contest.**

## **A. Failure to Contest Within the 20-day calendar period.**

If the employer fails to contest a citation or penalty within twenty calendar days following the receipt of a citation, the citation and assessed penalties become final orders. However, only HLRB can make the determination as to whether the contest was timely or not.

## **B. Contest Received after the Contest Period.**

In every case where HIOSH receives an employer's notice of contest of a citation and/or assessed penalty beyond the 20 calendar day period, Branch Managers shall inform employers that HIOSH believes that the notice of contest was untimely, stating facts such as the date HIOSH believes the citation was received based on the return receipt, and the postmark date on the envelope containing the contest letter and that the first issue to be determined by the Board shall be whether the contest was timely filed. Any explanation offered by the employer shall be noted in the Case Diary Sheet. HIOSH shall still transmit the late filed notice of contest,

along with appropriate documents to the Board indicating that one of the issues is timely notice of contest.

### **C. Retention of Documents.**

1. HIOSH shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the employer's notice of contest was received, as well as any additional information pertinent to demonstrating failure to file a timely notice of contest, e.g., Return receipt, Postmarked envelope containing the contest letter.
2. Written or oral statements from the employer or its representative (if any) explaining the employer's reason for missing the filing deadline shall also be maintained (notes shall be taken to memorialize oral communications).

## **VII. Contested Case Processing Procedures.**

A copy of the notice of contest and the relevant documents and must be sent to the HLRB as soon as possible, but no later than 15 working days of receipt of the employer's notification. The DAG shall also be sent a copy of the notice of contest along with all documents related to the case file. The file shall be redacted to protect the identity of any employees that may have filed a complaint or provided statements during the course of the inspection/investigation.

### **A. Transmittal of Notice of Contest to HLRB.**

#### **1. Documents to Chair of the Hawaii Labor Relations Board.**

In most cases, the envelope sent to the HLRB Chair will contain the following three documents:

- a. Copy of the Employer's letter contesting HIOSH's action;
- b. One copy of the Citation and Notification of Penalty Form (OSHA-2) or of the Notice of Failure to Abate Form (OSHA-2B); and
- c. Transmittal Memo: Name, address, and contact information for the employer; names, addresses, and contact information for any employee representative or groups; and a summary of what is being contested, e.g. which citation items, which penalties, and whether contest timeliness is an issue.

#### **2. Notices of Contest.**

A copy of the notice of contest shall be transmitted to the Board and the original retained in the case file. The envelope containing the notice of contest shall be retained in the case file with the postmark intact.

If contest timeliness is also an issue, a copy of the return receipt or other method used to determine date employer received the citation and a copy of the envelope containing the notice of contest shall also be transmitted.

#### **3. Contested Citations and Notice of Assessed Penalty or Notice of Failure to Abate.**

A signed copy of each of these documents shall be sent to the Board and a copy retained in the case file.

## **B. Transmittal of File to Deputy Attorney General (DAG).**

As the deputy attorney general represents the division in all contested case proceedings before the Board, a copy of the appropriate documents shall also be sent simultaneous with the transmittal to the Board.

1. A transmittal memo addressed to the Supervising Deputy Attorney General for DLIR, with the same information as the transmittal to the Board;
2. A copy of the entire investigative file (including photos and videos) with witness names and identifiers redacted.

The assigned DAG will make applicable copies available to the Board and to the defendant (employer).

## **C. Notification to Other Parties**

Section 396-11(j) of the HIOSH Law provides for the opportunity for affected employees or their representatives to participate as parties to contested case hearings.

The HLRB has determined that it is their responsibility to notify employees or their representatives of the initial settlement/conference date so that they may have the opportunity to exercise their right. Thus, it is important that HIOSH provide the correct name, contact persons and addresses to the HLRB.

If the employee is deceased, the family of the accident victim may choose to participate in the hearings as an employee representative.

# **VIII. Communications while Proceedings are Pending before the Board.**

## **A. Consultation with DAG.**

1. After a notice of contest is filed, the case is within the jurisdiction of the Board, and there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations, without prior clearance from the DAG.
2. Once a notice of contest has been filed, all inquiries relating to the *Citation and Notification of Penalty (OSHA-2)* shall be referred promptly to the DAG. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other Government agencies, attorneys, and any other party.

## **B. Communications with Commission Representatives while Proceedings are Pending before the Board.**

CSHOs, Branch Managers, the Administrators, or other field personnel shall not have any direct or indirect communication relevant to the merits of any open case with the members of the Board, employees of the Board, or any of the parties or interveners. All inquiries and communications shall be handled through the DAG.

## **IX. Board Procedures.**

### **A. One Level of Adjudication at the Departmental Level**

HIOSH currently has only one level of adjudication. HIOSH Law provides for potentially two levels of adjudication, a formal de novo hearing within the department with subsequent appeal on the record before HLRB, however, no departmental adjudication procedures have yet been developed.

### **B. Rules of Procedure.**

1. HLRB has not yet promulgated any Rules of Procedure for HIOSH cases, however, in general HLRB follows the more conventional proceeding involving the use of pleadings, discovery, a hearing, and post –hearing briefs. The Chair has the discretion to determine any adjustment to its rules of procedures as appropriate to HIOSH contested cases.

#### **2. Initial/Settlement Conference.**

Upon receipt of a case by the Board, an initial/settlement conference date is set to determine the issues, urge the parties to settle, and to set the dates for the following:

1. Hearing date(s);
2. Discovery cut-off date (date by which all discovery (evidence), including any depositions or responses to interrogatories is to be obtained);
3. Evidence Production date (date by which all evidence to be used by the parties is produced, i.e. submitted to the Board and shared with all parties):
4. Live witness notification date (A list of potential witnesses to be called at the hearing); and
5. Settlement conference date.

The Board will notify all parties of the date and time of this initial/settlement conference. The employer may choose to participate via telephone conference call.

#### **3. Hearing Evidence.**

- a. Review includes a new examination of all of the evidence (de novo), usually during a hearing, as well as briefs submitted by the parties following the hearing.
- b. Upon hearing all of the evidence, the Board will issue a written decision, including both findings of fact and conclusions of law.
- c. The decision becomes final in **30 days** unless, within that period, one of the parties appeals the Board's decision to the Circuit Court.

## **X. Discovery Methods.**

Once a legal proceeding has been initiated, each party has the opportunity to “discover” evidence in the possession of an opposing party. Traditionally, discovery methods include:

- Request for Admissions,
- Interrogatories,
- Requests for Production of Documents, and

➤ Depositions.

An attorney from the DAG's Office will represent the division in responding to discovery requests. It is essential that all HIOSH personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

**A. Interrogatories.**

CSHOs shall draft and sign answers to interrogatories, with DAG assistance. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The DAG attorney shall sign any objections to the interrogatories. CSHOs should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

**B. Production of Documents.**

1. Normally any request for production of documents is served on the DAG, who would then make a copy of the appropriate documents from the redacted copy already provided by HIOSH to the DAG. If a request for production of additional documents is served on DAG and that request is forwarded to the Branch Manager or CSHO, they should immediately make all documents relevant to that discovery demand available to the DAG attorney.
2. While portions of those materials may be later withheld based on governmental privileges or the law (e.g., statements that would reveal the identity of an informer), CSHOs must not withhold any information from the DAG attorney.
3. It is DAG's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

**C. Depositions.**

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other HIOSH personnel may be required to offer testimony during a deposition. In such cases, a DAG attorney will be present with the witness.

**XI. Testifying in Hearings.**

While instructions provided by DAG attorneys take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

**A. Review Documents and Evidence.**

In consultation with DAG, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

**B. Attire.**

Wear appropriate clothing that reflects the division's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a judge to seek an administrative warrant.

### **C. Responses to Questions.**

Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

### **D. Chair's Instruction(s).**

Listen carefully to any instruction provided by the Board Chair and, unless instructed to the contrary by DAG counsel, follow the Chair's instruction.

## **XII. Board Simplified Proceedings.**

The Board may implement a form of the OSHA Simplified Proceedings where it believes that the issues are relatively simple and due process can still be assured. The Board may then choose to set expedited dates for submission of documents.

NOTE: Simplified proceedings provide fewer opportunities for the DAG to obtain information concerning the employer's positions and defenses prior to a hearing. Therefore, it is particularly important for CSHOs to promptly provide DAG with all information regarding potential affirmative defenses that an employer may raise and/or arguments the employer may use to refute a violation(s) or the propriety of a proposed penalty.

## **XIII. Citation Final Order Dates.**

### **A. Citation/Notice of Penalty Not Contested.**

The Citation/Notice of Penalty and abatement date becomes a final order **on the date the 20 calendar day contest period expires**. For purposes of computing the 20 calendar day period, the day the employer receives the citation is not counted.

**Example 15-1:** An employer receives the Citation/Notice of Penalty on Monday, August 4<sup>th</sup>. The day the employer receives the Citation/Notice of Penalty is not counted. Therefore, the final order date would be Monday, August 25<sup>h</sup>.

### **B. Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA).**

Because there is no contest of the citation, an ISA becomes final, with penalties due and payable, **on the date of the last signature of the parties**. See also Chapter 8, Paragraph I.B.2. (An ISA is effective upon signature by both the Branch Manager and the employer representative as long as the contest period has not expired).

NOTE: A later due date for payment of penalties may be set by the terms of the ISA.

### **C. Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA) or (STIP).**

The Citation/Notice of Penalty **becomes final 30 days after the filing of the Hawaii Labor Relations Board's (Board's) Order approving the parties' stipulation and settlement agreement**, assuming there is no direction for review.

### **D. Cases Resolved by HLRB Decision.**

The Board's decision **becomes a final order 30 days after its filing, unless an appeal is filed with the Circuit Court**.



If the Board's decision is unfavorable to the division, the Administrator may recommend an appeal to the appellate court, based upon either erroneous findings of fact, or incorrect conclusions of law. The final decision of whether to appeal or not is with the DAG.

#### **E. Board Decision Reviewed by Appellate Court**

Upon appeal, the appellate courts, Circuit, Intermediate Court of Appeals, or Hawaii Supreme Court will review the case based on the record created by the Hawaii Labor Relations Board. Often, briefs are filed and the hearing before the judge is a matter of orally stating why one believes the Board was incorrect in its decision and order. No witnesses are called, and no documents are submitted other than a position brief.

As a matter of policy, HIOSH does not attempt to collect civil penalties while a case is being appealed.

### **XIV. Court Enforcement under Section 4(d)(7) of the HIOSH Law.**

An employer's obligation to abate a cited violation arises when there is a final order and the citation is upheld.

#### **A. §396- 4(d)(7), HRS [Similar to OSH Act Section 11(b)]**

Section 396-4(d)(7) of the HIOSH Law authorizes HIOSH to obtain a summary enforcement order from the appropriate Circuit Court enforcing a citation final order. An employer who violates such a court order can be found in contempt of court. Potential sanctions for contempt include daily penalties and other fines, recovery of the Director's costs of bringing the action, incarceration of an individual company officer who flouts the Court's order, and any other sanction which the court deems necessary to secure compliance. Employers who ignore ordinary enforcement actions may be induced to comply by the severity of these potential contempt sanctions.

Section 4(d) (7) orders can be an effective and speedier alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowed time. They can be requested from the Court whether the final order results HLRB decision and order, a settlement agreement, or an uncontested citation.

#### **B. Selection of Cases for Section 4(d)(7) Action.**

All final orders issued in severe violator enforcement cases must be considered for Section 4(d)(7) enforcement. In addition, a petition for 4(d)(7) enforcement is to be considered in cases where final orders do not meet the severe violator enforcement case criteria but where the following factors suggest that a 4(d)(7) petition should be filed:

1. Employer's citation history and/or other indications suggest serious compliance problems, such as widespread violations of the same or similar standards at multiple establishments or construction worksites. The OSHA IMIS database should be searched for the employer's history of violations;
2. Employer statements or actions indicating reluctance or refusal to abate significant hazards, or behavior that demonstrates indifference to employee safety;

3. Repeated violations of the Law, particularly of the same standard, which continue undeterred by the traditional remedies of civil monetary penalties and HLRB orders to abate;
4. Repeated refusal to pay penalties;
5. Filing false or inadequate abatement verification reports;
6. Disregard of a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

### **C. Drafting of Citations and Settlements to Facilitate Section 11(b) Enforcement.**

Proper drafting of citations and settlement agreements can facilitate obtaining a Section 4(d) (7) order and maximize its deterrent effect.

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 that may be subject to a summary enforcement order under Section 4(d)(7) of the Law (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting widespread violations of the same or similar standards at other establishments or construction worksites).

Where possible, HIOSH should attempt to identify cases that may warrant Section 4(d) (7) enforcement at least a month before issuing the citation. When HIOSH identifies such a case, it will contact the DAG to discuss citation language that is in accord with Section 4(d) (7)) enforcement. If a case identified for potential 4(d) (7) action is being resolved through a settlement agreement, whether formal or informal, language should be sought in the agreement that commits the employer to specific ongoing abatement duties.

Language in a settlement agreement that imposes a specific duty on the employer, such as a requirement that the employer hire a consultant to develop a safety program or provide HIOSH with a list of other worksites, can be enforced under Section 4(d)(7).

### **D. Follow-up Inspections.**

The DAG shall notify HIOSH when a court has entered a Section 4(d) (7) order. HIOSH will then promptly schedule an inspection or investigation to determine whether the employer is complying with the court order. The Administrator, in consultation with the DAG, will determine the nature and extent of the inspection or investigation. The DAG will advise on the kind of “clear and convincing” evidence that would be needed to support a contempt petition in the event of the employer's noncompliance with the order of the court.

### **E. Conduct of Verification Inspections**

Whenever an enforcement order is issued by an appellate court, an inspection shall be scheduled within six months to determine whether the company is complying with the court order. If serious violations of the standard(s) subject to the enforcement order are found, the DAG shall be contacted immediately for guidance on what evidence will be needed for submission to the court.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
OCCUPATIONAL SAFETY AND HEALTH DIVISION  
STATE OF HAWAII

In the Matter of

Occupational Safety and Health

Investigation Re: **[Inspection Establishment]  
Incorporated**

SUBPOENA DUCES TECUM  
EXHIBIT "A": RETURN OF SERVICE

Inspection No.: [Inspection Number]

---

SUBPOENA DUCES TECUM

TO: **Custodian of Records**  
**[Name of Company/Corp]**  
**[Street Address]**  
**[City, State, Zip]**

YOU ARE COMMANDED to appear personally before **[CSHO Name, Title]**, of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, at the time and place indicated below to testify under penalty of perjury regarding an investigation concerning **[Inspection Establishment]** and to turn over for inspection and copying all records listed in Exhibit "A" in your care, custody and/or control:

DATE: **[Day and Date]**  
TIME: **[Time]**  
PLACE: **[Name of Place/Building]**  
**[Street Address]**  
**[City, State Zip]**

DATED: Honolulu, Hawaii, **[Date of Subpoena]**

---

**[Name of Administrator]**  
Administrator, Hawaii Occupational  
Safety and Health Division, DLIR

**EXHIBIT A**

<u>Exhibit #</u>	<u>Description</u>
1.	Any and all original asbestos and lead sampling results, including information stored electronically, conducted by Really Green Environmental Services, and Mr. John Smith of XYZ Construction, L.L.C., of the Makamaka Condominiums, 1234 Aloha Street, Honolulu, Hawaii 96855
2.	Any and all daily inspections, activity reports, and field notes, including information stored electronically, completed by Mr. Robert Pono of the work performed at the Makamaka Condominiums
3.	Any and all signed contracts between Sewer & Plumbing Services Incorporated and Really Green Environmental Services Inc. to perform occupational or environmental sampling at the Makamaka Condominiums.
4.	Any and all signed contracts between the Association of Apartment Owners (AOAO) of the Makamaka Condominiums and Sewer & Plumbing Services Incorporated to replace the cast iron sewer lines and copper freshwater lines.
5.	Any and all invoices and work orders submitted by Really Green Environmental Services, Inc. for the occupational and/or environmental sampling conducted at the Makamaka Condominiums, including any electronic communication regarding these invoices and work orders.
6.	Job description, training, and job performance records, including information stored electronically, for Mr. Robert Pono.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS  
OCCUPATIONAL SAFETY AND HEALTH DIVISION  
STATE OF HAWAII

In the Matter of

Occupational Safety and Health

Investigation Re: **Establishment Name**

Inspection No.: **Number**

SUBPOENA; RETURN OF SERVICE

SUBPOENA AD TESTIFICANDUM

TO: **Name of Witness**  
**Address**  
**City, State Zip**

YOU ARE COMMANDED to appear personally before **Inspector's Name(s), Job Title**, of the Department of Labor and Industrial Relations, Hawaii Occupational Safety and Health Division, at the time and place indicated below to testify under penalty of perjury regarding an investigation concerning **Establishment Name**:

DATE: **[Day and Date]**  
TIME: **[Time]**  
PLACE: **[Name of Place/Building]**  
**[Street Address]**  
**[City, State Zip]**

---

[Insert name]  
Administrator, Hawaii Occupational  
Safety and Health Division, DLIR

RETURN OF SERVICE

I HEREBY CERTIFY that this subpoena was duly served on the person  
named above by delivering a copy to that person on \_\_\_\_\_,  
together with a witness fee for one day's attendance and the mileage allowed by law at the  
following location: \_\_\_\_\_.

\_\_\_\_\_  
Name of Person Serving Subpoena  
Person's Job Title  
Hawaii Occupational Safety  
And Health Division

## **Chapter 16**

### **DISCLOSURE UNDER THE HAWAII UNIFORM INFORMATION PRACTICES ACT (UIPA)**

#### **I. State of Hawaii Policy and the Hawaii Uniform Information Practices Act (IUPA)**

The State of Hawaii Policy on government records disclosure is set out in Chapter 92F of the Hawaii Revised Statutes and is based on the premise that transparency in government proceedings is essential to a strong democracy. All government records are open to public inspection unless there is a compelling reason against disclosure. These exceptions are set out in law, §92F-13, HRS. An individual's reasons for requesting access to government records is not relevant, except where a waiver of fees is requested. Disclosure exemptions that may apply to HIOSH include:

- Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- Government records pertaining to the prosecution of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function; and
- Government records, which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.

Commensurate with the duty to provide access to records is the responsibility to maintain records. This means that records required to be maintained (see State Records Retention rules and/or guidelines) must also be protected from damage or disorganization, and reasonably maintained in a manner where information can be readily retrieved.

#### **A. Key Definitions**

1. Government record – information maintained by an agency in written, auditory, visual, electronic, or other physical form.
2. Personal record – any item, collection, or grouping of information about an individual (a natural person) that is maintained by agency. It includes, but is not limited to the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.
3. Clearly unwarranted invasion of personal privacy – where the privacy interests of the individual outweighs the public interest in disclosure. Examples include:
  - a. Medical and health records, including autopsy reports and photographs, where the individual to which the record relates is identified, or where a reasonable person can conclude that the record belongs to a specific individual. Such records are also protected by the Health Insurance Portability and Accountability Act (HIPAA);

- b. Residential address, residential telephone numbers, personal wireless telephone numbers, personal electrical mail addresses, social security numbers, dates of birth of an individual, except that if the individual does business out of their home that address and contact information would be disclosable.
4. Access - inspection of disclosable government records, acquisition of copies of disclosable government records, or both, when requested by any person.
5. Disclosure – to make available for public inspection and copying during regular business hours.
6. Acting in good faith – carefully examining a request for public records, reviewing the requested records in order to determine which portions if any, of the record are exempt from disclosure by law, and providing access to all requested records except for those which are clearly exempt from disclosure.

## **B. Government Records**

1. Electronic records.

See above definition of “[government record](#)”. Increasing amounts of public information are now contained in electronic format, rather than on paper. Electronic records also include e-mails when they are created or received in the transaction of public business and retained as evidence of official policies, actions, decisions, or transactions. Such messages must be identified, filed, and retained just like records in other formats.

As yet, the State of Hawaii has not received a comprehensive guide as to what e-mails must be retained, and are thus disclosable. The Office of Information Practices has issued several opinions (see <http://oip.hawaii.gov/laws-rules-opinions/>) over the years and should be consulted if an issue arises.

2. Personal records.

HIOSH does maintain personal records. Most case files contain references to an individual’s name or other personal information. However, such information is not filed and cannot be easily retrieved using individual personal identifiers, with the exception of Whistleblower cases. HIOSH records are maintained by establishment name (employer name) and inspection number.

Agencies are not required to create documents or compile information from various records in order to comply with a request for specific information, therefore, requests for personal records are normally not applicable to HIOSH *except* for Whistleblower cases, which are maintained by both employer name and complainant name.

## **II. Procedures**

UIPA sets out two paths based on whether the request was informal or formal. The differences in agency (HIOSH) response would be the requirement to provide notice (Agency’s Notice) in accordance with §2-71-14, HAR within ten business days to the requester if the request was formal, and to disclose the record, if the record is disclosable, within ten business days (with some exceptions). OIP rules state that for informal requests access must be provided in a “reasonably timely manner”. Due to perennial severe clerical staff shortages and the various constraints such as



protection of personal privacy, trade secret, and witness confidentiality among others, HIOSH policy is to respond to informal requests within 30 business days.

The following are some of the types of records requests commonly received by HIOSH:

### **A. Enforcement Inspection Case Files**

Requests to view or obtain copies of inspection case files will normally be for a specific employer. Sometimes the requester will also provide the specific inspection number. If the request is for a particular accident victim, the requester should be informed that HIOSH does not maintain files by accident victim's names and to provide further information such as the name of the employer.

1. Specific employer (Requester has named a specific employer by name)
  - a. Search osha.gov data base for inspection numbers for specific employer where inspections were conducted by HIOSH.
    - 1) Under "Data and Statistics" at top rail, click on "Establishment Search" under Inspection Data.
    - 2) Enter Establishment name as stated by the requestor. If request was informal and oral, clarify spelling with requester.
    - 3) Under State, select "Hawaii"
    - 4) Under Fed & State, select "State".
    - 5) Under OSHA Offices, select "Hawaii".
    - 6) Under Case Status, select "All"
    - 7) Under Violation Status, select "Both"
    - 8) Under Inspection Date, select the date range of the request, or select the earliest Start Date available if requester did not specify.
  - b. If search results indicates "Your Establishment search returned 0 results", inform requester using the Agency's Notice that the search returned zero results.
  - c. If search results yields several inspections with various name spellings for the employer, different SIC codes, and different addresses, the requester should be asked to provide further information to better narrow the search to the specific employer.
  - d. Similarly if the inspection number provided does not match the employer name provided, clarification must be obtained from the requester.
  - e. Case is still open
    - 1) Government record, except for those portions which were previously made public, e.g., posted within the workplace or made public as in osha.gov public database, is not disclosable under §92F-13(3), "government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function"
    - 2) The only releasable records (previously required to be posted in the workplace) are the following:
      - a) Citation and Notification of Penalty;

- b) Informal Settlement Agreement (ISA);
- c) Abatement Verification/Certification;
- d) Petition for Modification of Abatement Dates (PMA), and HIOSH response either denying or granting PMA;
- e) Hawaii Labor Relations Board (HLRB) settlements and decisions and orders.

Note: Even if the only reason for the case being still open is penalty payment, the exemption under §92F-13(3) still applies since obtaining a court order to collect may require defending the original issued penalties.

- 3) If the requester responds that they wish to be notified when the case is closed, they shall be provided the inspection number and the osha.gov website so they can make another request for additional documents when the case is closed.
- f. Case is closed.
  - 1) Determine whether there is an ongoing civil case.
    - a) Go to:  
[http://www.courts.state.hi.us/legal\\_references/records/hoohiki\\_disc\\_laimer.html](http://www.courts.state.hi.us/legal_references/records/hoohiki_disc_laimer.html)
    - b) Enter name or names of parties, e.g. business name, or victim's family name (if accident case)
    - c) If search yields current civil case, then §396-14 applies and the case file cannot be disclosed except for records that were previously required to be posted in the workplace (see above).
  - 2) If NO ongoing civil case, provide access to the redacted or segregated case file.
  - 3) Redact or segregate the following:
    - a) Names and other identifiers of complainants, and witnesses, including employees interviewed regarding potential hazards in the workplace. (§396-8(f), HRS)  
  
Note: Any information that could be used to identify the witness/complainant is to be withheld. Such information might include job title, length of employment, or sex of the individual if only one of that gender is employed in the establishment or specific area of the workplace.
    - b) Personal privacy information (see I.A.3, above)
    - c) Trade Secrets (see Section 396-13, HRS, and [Chapter 3, VII.E. on Trade Secrets](#))
    - d) Confidential attorney-client communications; e.g. memos, e-mails, summaries of telephone calls.
    - e) Supervisory notes addressing discipline or performance issues. While such notes or comments should never be filed within a specific enforcement case file, there may be instances where the

notations were inadvertently left in. They should be removed and placed in the appropriate personnel file.

- f) Working drafts of forms, correspondence and reports. While original field notes, communication summaries, etc. cannot be altered and must remain in the case file, drafts of reports, letters, and forms should be immediately removed when replaced with the final copy. If they have been left in the case file when the request was made, they must be redacted and the requester notified that such material was removed. Cite §92F-13(3), HRS for reason or non-disclosure.

Note: The requester must be informed of the specific record or parts of the record that will not be disclosed as well as the specific legal authorities under which the request for access is denied either under §92F-13, HRS or other laws. So, for example, if information was removed as confidentiality of trade secret information, then the requester must be informed that trade secret information protected under §396-13, HRS was removed.

- 4) Case File has been destroyed. HIOSH is obligated to maintain case files in accordance with State and federal retention guidelines. If a requester asks for access to a case file that has been destroyed, the Agency's Notice should so indicate
- 5) Criminal penalties. §92F-17, HRS provides criminal penalties (misdemeanor) for an officer or employee of an agency who intentionally discloses or provides a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency. Therefore, redaction and/or segregation must be performed with care.  
Persons performing redaction and/or segregation must be appropriately trained.
- 6) Section 92F-19, HRS governs limitations on disclosure of government records to other agencies. Further §92F-19(b) subjects the receiving agency to the same restrictions on disclosure of the records as the originating agency.

- 2. Records request for other than specific employer. Sometimes a requester will ask for inspection information based on other criteria such as industry, location, or date range. These types of requests are not common.
  - a. Industry. The osha.gov "Establishment Search" can be searched for a specific SIC code or industry grouping.
  - b. Location. Case files are not retrievable by location other than by county. Specific addresses, census tracts, or neighborhood data is not currently available. The requester should be informed via the Agency's Notice.
  - c. Date Range. The osha.gov "Establishment Search" can be searched for specific date ranges.
  - d. For all such requests, only Hawaii state HIOSH inspections are relevant. If the requester asks for information for federal OSHA or other jurisdictions, they should be notified to request the information from OSHA or the specific state.

- e. The same criteria for disclosing records based on whether the case is open or closed apply.

3. Fees.

- a. Search, review and segregation. §2-71-19, HAR, governs the fees that can be assessed to the requester for search, review and segregation. Briefly, the fees that can be assessed are as follows:

Search	\$2.50	15 minutes increments or fraction thereof.
Review and segregation	\$5.00	15 minute increments or fraction thereof.
The first \$30 in fees for above, shall NOT be assessed.		
For fee waivers due to public interest, the first \$60 in fees shall NOT be assessed.		

- 1) Search includes time spent accessing osha.gov database and locating case file (including returning case file).
- 2) Review and segregation time includes:
  - a) Time spent by CSHO to identify records or portions of records requiring redaction or segregation and to itemize their categories such that the Agency's Notice can be properly prepared as to the kinds of information that was redacted/segregated and the appropriate section of §92F or other law;
  - b) Time spent by clerical staff to make copies and redact information with broad permanent marker;
  - c) Time spent to by clerk to review redacted copies to ensure that the information is not still readable, and if non-disclosable items are still readable, to take further action to ensure proper redaction.
- b. Other fees.
  - 1) Photocopying: \$.05 per page
  - 2) Postage and Handling: Actual postage costs.
  - 3) HIOSH policy is not to charge for time for preparing the Agency's notice nor for preparing the requested material for mailing.
- c. Waiver of fees when public interest is served (§2-71-32, HAR)
  - 1) This is the only time when the intent of the requester is germane. The requester must have the primary intention and the actual ability to widely disseminate information from the government record to the public at large.
  - 2) The requester must include a statement of facts supporting his/her request for waiver of fees due to interest in public service, in accordance with §2-71-12, including the requester's identify.
  - 3) A waiver of fees is in the public interest when:

- a) The requested record pertains to the operation or activities of an agency (government);
  - b) The record is not readily available in the public domain; and
  - c) The primary intention is to widely disseminate the information to the public at large. Note that requester must also have the ability to do so.
- 4) The waiver of fees is for the first \$60 of review and segregation fees. Photocopying and postage may still be assessed.
- d. Pre-payment of fees. HIOSH policy is to request pre-payment (50% of fees and 100% of costs) prior to releasing the requested records. The Agency's Notice is used to notify the requester that fees must be paid in advance.
- 4. Agency's Notice, §2-71-14, HAR. Whether the request was formal or informal, the Agency's Notice is to be sent to the requester within ten business days, unless there are extenuating circumstances.
  - a. If the requester wishes to remain anonymous, they are to be notified that responding to the request would take several days. Since HIOSH has no dedicated staff to this task, it is uncertain as to when the search, review and segregation can be performed. Moreover, HIOSH does not have the ability to "hold" the requested documents aside until the requester returns, therefore, a formal request must be made.
  - b. Use HIOSH-OIP-4 (7/1/2014) for the Agency's Notice. See [Appendix 16A](#)
- 5. Request to examine records. Sometimes the requester does not want to have copies made of the entire releasable portions of the case file choosing instead to review the file and pick and choose only specific documents for photocopying.
  - a. Notify the requester, via the Agency's notice, of when and where they may come in person to review the records. They should be notified that they would be reviewing a redacted/segregated copy of the original case file.
  - b. If pre-payment of review and segregation costs is required, the requester is to be notified that upon pre-payment of the fees, a date and time for the examination will be scheduled.
  - c. If the requester requests another location other than Honolulu HIOSH office, that location must have an accessible photocopy machine, in case additional photocopies must be made. Due to high costs that would affect HIOSH's ability to carry out its mission, an off island location is not possible.
  - d. The date and time should normally provide at least a week for the requester to make arrangements to arrive and view the records.
  - e. A private room should be secured for the review, and a HIOSH employee must be present to ensure that the copy of the case file remains as presented to the requester, i.e., intact and unaltered.
  - f. The requester is to identify which pages they wish and the clerk shall invoice the requester for each page requested. There is no need to make additional copies as the unwanted pages shall be discarded.

- g. If the requester wants specific clarification about the type of information that was specifically redacted on a particular page, and is unwilling to accept the generic categories as explained on the Agency's Notice, the clerk shall contact the specific branch manager to meet with the requester, or if the branch manager is not available, take the name and contact information of the requester for a call from the manager. In this event, a photocopy of the specific page shall be made to help the manager identify the information that would have been redacted.

The manager shall describe the redacted information in broad categories of terms, such as trade secret information, private personal information, or witness and/or complaint identifiers.

6. Authentication of copies. The Hawaii Uniform Information Practices Act does not require certification or attestation regarding the copies of records provided to the requester. However, such services may be rendered by HIOSH. Certification should be signed by at least a Branch Manager or the Administrator in his/her absence and should simply state: "I certify that the attached copies of Inspection No. #####, of [Name of Employer] are true copies with the exception of redacted and segregated material required by State law."

If the requester requests additional language to authenticate the copies, they should be informed that they may subpoena the records and have a court reporter take a statement from the HIOSH Custodian of Records.

## **B. Whistleblower (Discrimination) Case Files**

Whistleblower or discrimination investigation case files under §396-8(e), HRS, are similar to enforcement inspection case files except that the complainant's name is not confidential (§396-8(f), HRS). However, the complainant is still entitled to privacy, so information such as home address, personal telephone or mobile numbers, and birth date is still to be redacted. Other witness identifiers, trade secret, medical information, etc. are also still to be redacted.

## **C. Consultation Files**

Consultation files are considered confidential per 29 CFR 1908.6(g) and (h), Consultation Agreements. The consultant's written report may be disclosed only to the employer for whom it was prepared (29 CFR 1908.6(g)(2)). Moreover, HIOSH shall not disclose information that may be used to identify employers who have requested consultation services (1908.6(h)(2)), therefore, HIOSH staff shall not even acknowledge whether an employer has requested consultation services or not.

Therefore, all information related to HIOSH consultation services is not disclosable.

## **D. Other Files**

1. Certified Safety and Health Professionals (CSHP).

As these are professional certifications, all information is releasable.

2. Certificate of Fitness (COF) holders.

As these are professional certifications, all information is releasable with the exception of the examination questions and answers.

### **III. Reports**

Report to the Hawaii Office of Information Practices (OIP), annually by state fiscal year (§2-71-3, HAR):

1. The number of requests for access to records for which fees were assessed; and
2. The number of requests for access to records which qualified for a waiver of fees pursuant to section 2-71-32, and the amount of fees waived.

**HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

**830 Punchbowl Street, Room 425**

**Honolulu, Hawaii 96813**

**(808) 586-9116**

**OPEN CASES**

**NOTICE TO REQUESTER**

(Use multiple forms if necessary)

TO: \_\_\_\_\_  
(Name of Requester)

FROM: \_\_\_\_\_  
(Division Contact Person)

Date: \_\_\_\_\_

Phone No. 808-586-9116

Date of Request: \_\_\_\_\_

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1.	
2.	
3.	
4.	

**NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:**

- ☐ Will be granted in its entirety
- ☐ Cannot be granted because:
- ☐ Agency does not maintain the records. Agency believed to maintain records: [Click here to enter text.](#)
- ☐ Agency needs a further description or clarification of the records requested. Please contact us and provide the following information: [Click here to enter text.](#)
- ☐ Request requires agency to create a summary or compilation from records not readily retrievable.
- ☐ Is denied in its entirety ☒ Will be granted only as to certain parts.  
based upon the following exemption provided in HRS §92F-13 and/or §92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

**RECORDS OR INFORMATION WITHHELD**

Open case files, w/exception of material already available publicly (Citation and related documents)

**APPLICABLE  
STATUTES**

§92F-13(3)

**AGENCY JUSTIFICATION**

Frustration of legitimate government function

**REQUESTER'S RESPONSIBILITIES:**

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed on the next page; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.



Chapter 16 – Disclosure under the Hawaii Uniform Information Practices Act (UIPA)

**Method of Disclosure:**

- ☐ Inspection at the following location: [Click here to enter text.](#)
- ☐ As requested, a copy of the record(s) will be provided in the following manner:
  - ☐ Available for pick up at the following location: 830 Punchbowl St, Room 425, Hon, HI 96813
  - ☐ Will be mailed to you.
  - ☐ Will be transmitted to you by other means requested: [Click here to enter text.](#)

**Timing of Disclosure:** All records, or first increments where applicable, will be made available or provided to you:

- ☐ On: [Click here to enter text.](#)
- ☐ After prepayment of fees and costs of \$ \_\_\_\_\_ (50% of fees + 100% of costs, as estimated below)  
Payment may be made by cash or check made payable to “Director of Budget & Finance”

**ESTIMATED FEES & COSTS:**

The agency is authorized to charge you certain fees and costs to process your request (even if no record is subsequently found to exist), but must waive the first \$30 in fees assessed for general requesters and the first \$60 in fees when the agency finds that the request is made in the public interest. See HAR §2-71-19, -31 and -32. The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. The following is the estimate of the fees and costs that the agency will charge you, with the applicable waiver amount deducted:

Fees:	Search	Estimate of time to be spent: ____ minutes (\$2.50 for each 15-minute period)	\$ _____
	Review & segregation	Estimate of time to be spent: ____ minutes (\$5.00 for each 15-minute period)	\$ _____
	Fees waived	<input type="checkbox"/> General (\$30) <input type="checkbox"/> Public interest (\$60)	<\$ 30.00>
	Total Estimated Fees:		\$ _____
Costs	Copying	Estimate of # of pages to be copied: ____ pages (@ \$.05 per page)	\$ _____
	Other	Postage	\$ _____
	Total Estimated Costs		\$ _____
Total Amount due as prepayment (50% of fees and 100% of costs)			\$ _____
Balance due (if any)			\$ _____

For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or [oiip@hawaii.gov](mailto:oiip@hawaii.gov).

**HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**  
**830 Punchbowl Street, Room 425**  
**Honolulu, Hawaii 96813**  
**(808) 586-9116**

**CLOSED CASES – No  
Civil Case Pending**

**NOTICE TO REQUESTER**

(Use multiple forms if necessary)

TO: \_\_\_\_\_  
(Name of Requester)

FROM: \_\_\_\_\_  
(Division Contact Person)

Date: \_\_\_\_\_

Phone No. 808-586-9116

Date of Request: \_\_\_\_\_

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1.	
2.	
3.	
4.	

**NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:**

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- ☐ Cannot be granted because:
- ☐ Agency does not maintain the records. Agency believed to maintain records: [Click here to enter text.](#)
  - ☐ Agency needs a further description or clarification of the records requested. Please contact us and provide the following information: [Click here to enter text.](#)
  - ☐ Request requires agency to create a summary or compilation from records not readily retrievable.
- ☐ Is denied in its entirety      ☒ Will be granted only as to certain parts.  
based upon the following exemption provided in HRS §92F-13 and/or §92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

RECORDS OR INFORMATION WITHHELD	APPLICABLE STATUTES	AGENCY JUSTIFICATION
Personal Privacy Information	§92F-13(1)	Invasion of personal privacy
Trade Secrets	§396-13	Business trade secret
Complainant's/Witness Identity/Identifiers	§396-8(f)	Law
Attorney-client communication & working drafts	§92F-(3)	Frustration of legitimate government function

In addition you should be aware that §396-14, HRS states: "No record or determination of any administrative proceeding under this chapter or any statement or any report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than for enforcement or review under this chapter.

**REQUESTER'S RESPONSIBILITIES:**

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information

FOM

Chapter 16 – Disclosure under the Hawaii Uniform Information Practices Act (UIPA)

requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

**Method of Disclosure:**

- ☐ Inspection at the following location: [Click here to enter text.](#)
- ☐ As requested, a copy of the record(s) will be provided in the following manner:
  - ☐ Available for pick up at the following location: 830 Punchbowl St, Room 425, Hon, HI 96813
  - ☐ Will be mailed to you.
  - ☐ Will be transmitted to you by other means requested: [Click here to enter text.](#)

**Timing of Disclosure:** All records, or first increments where applicable, will be made available or provided to you:

- ☐ On: [Click here to enter text.](#)
- ☐ After prepayment of fees and costs of \$ \_\_\_\_\_ (50% of fees + 100% of costs, as estimated below)  
Payment may be made by cash or check made payable to “Director of Budget & Finance”

**ESTIMATED FEES & COSTS:**

The agency is authorized to charge you certain fees and costs to process your request (even if no record is subsequently found to exist), but must waive the first \$30 in fees assessed for general requesters and the first \$60 in fees when the agency finds that the request is made in the public interest. See HAR §2-71-19, -31 and -32. The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. The following is the estimate of the fees and costs that the agency will charge you, with the applicable waiver amount deducted:

Fees:	Search	Estimate of time to be spent: ____ minutes (\$2.50 for each 15-minute period)	\$ _____
	Review & segregation	Estimate of time to be spent: ____ minutes (\$5.00 for each 15-minute period)	\$ _____
	Fees waived	<input type="checkbox"/> General (\$30) <input type="checkbox"/> Public interest (\$60)	<\$ 30.00>
	Total Estimated Fees:		\$ _____
Costs	Copying	Estimate of # of pages to be copied: ____ pages (@ \$.05 per page)	\$ _____
	Other	Postage	\$ _____
	Total Estimated Costs		\$ _____
Total Amount due as prepayment (50% of fees and 100% of costs)			\$ _____
Balance due (if any)			\$ _____

For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or [oiip@hawaii.gov](mailto:oiip@hawaii.gov)

**HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**  
**830 Punchbowl Street, Room 425**  
**Honolulu, Hawaii 96813**  
**(808) 586-9116**

**CLOSED CASES –  
Civil Case Pending**

**NOTICE TO REQUESTER**

(Use multiple forms if necessary)

TO: \_\_\_\_\_  
(Name of Requester)

FROM: \_\_\_\_\_  
(Division Contact Person)

Date: \_\_\_\_\_

Phone No. 808-586-9116

Date of Request: \_\_\_\_\_

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1.	
2.	
3.	
4.	

**NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:**

- ☐ Will be granted in its entirety
- ☐ Cannot be granted because:
- ☐ Agency does not maintain the records. Agency believed to maintain records: [Click here to enter text.](#)
- ☐ Agency needs a further description or clarification of the records requested. Please contact us and provide the following information: [Click here to enter text.](#)
- ☐ Request requires agency to create a summary or compilation from records not readily retrievable.
- ☐ Is denied in its entirety      ☒ Will be granted only as to certain parts.  
based upon the following exemption provided in HRS §92F-13 and/or §92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

**RECORDS OR INFORMATION WITHHELD**

**APPLICABLE  
STATUTES**

**AGENCY JUSTIFICATION**

Entire case file with the exception of material already publicly available (citation and related documents)

§396-14\*

Law

\*§396-14, HRS states: “No record or determination of any administrative proceeding under this chapter or any statement or any report of any kind obtained, received, or prepared in connection with the administration or enforcement of this chapter shall be admitted or used, whether as evidence or as discovery, in any civil action growing out of any matter mentioned in the record, determination, statement, or report other than for enforcement or review under this chapter.

**REQUESTER’S RESPONSIBILITIES:**

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have

Chapter 16 – Disclosure under the Hawaii Uniform Information Practices Act (UIPA)

abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

**Method of Disclosure:**

- ☐ Inspection at the following location: [Click here to enter text.](#)
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- ☐ On: [Click here to enter text.](#)
- ☐ After prepayment of fees and costs of \$\_\_\_\_\_ (50% of fees + 100% of costs, as estimated below)  
Payment may be made by cash or check made payable to “Director of Budget & Finance”

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Total Amount due as prepayment (50% of fees and 100% of costs)			\$ _____
Balance due (if any)			\$ _____

For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or [oiip@hawaii.gov](mailto:oiip@hawaii.gov)

**HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION**

**830 Punchbowl Street, Room 425**

**Honolulu, Hawaii 96813**

**(808) 586-9116**

**CONSULTATION**

**NOTICE TO REQUESTER**

(Use multiple forms if necessary)

TO: \_\_\_\_\_  
(Name of Requester)

FROM: \_\_\_\_\_  
(Division Contact Person)

Date: \_\_\_\_\_

Phone No. 808-586-9116

Date of Request: \_\_\_\_\_

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

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2.	
3.	
4.	

**NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:**

- ☐ Will be granted in its entirety
- ☐ Cannot be granted because:
- ☐ Agency does not maintain the records. Agency believed to maintain records: [Click here to enter text.](#)
- ☐ Agency needs a further description or clarification of the records requested. Please contact us and provide the following information: [Click here to enter text.](#)
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- ☒ Is denied in its entirety ☐ Will be granted only as to certain parts.
- based upon the following exemption provided in HRS §92F-13 and/or §92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

**RECORDS OR INFORMATION WITHHELD**

**APPLICABLE  
STATUTES**

**AGENCY JUSTIFICATION**

Entire file\*

29 CFR 1908.6(g) and (h) Federal regulation

\*This notice is in no way an admission that a consultation for the specific employer or establishment was performed or requested.

**REQUESTER'S RESPONSIBILITIES:**

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed on the next page; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

Chapter 16 – Disclosure under the Hawaii Uniform Information Practices Act (UIPA)

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Payment may be made by cash or check made payable to “Director of Budget & Finance”

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	Review & segregation	Estimate of time to be spent: ____ minutes (\$5.00 for each 15-minute period)	\$ _____
	Fees waived	<input type="checkbox"/> General (\$30) <input type="checkbox"/> Public interest (\$60)	<\$ 30.00>
	Total Estimated Fees:		\$ _____
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For questions about this notice, please contact the person named above. Questions regarding compliance with the UIPA may be directed to the Office of Information Practices at 808-586-1400 or [oiip@hawaii.gov](mailto:oiip@hawaii.gov).

## **CHAPTER 17**

### **PREEMPTION BY OTHER AGENCIES**

#### **I. Introduction**

When promulgating the Occupational Safety and Health Act of 1970 (OSH Act), Congress recognized that other federal agencies possess authority over safety and health matters in certain industries. To avoid a duplication of federal and state effort and prevent conflict between different sets of regulations covering the same working condition, Congress provided, in Section 4(b)(1) of the Act, “Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under Section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” 29 U.S.C. 653(b)(1).

The process of making a Section 4(b)(1) determination can be complex. The process is fact-specific. The determination process involves a review of the other federal agencies regulations, policy statements, memoranda of understanding, and court and Commission cases. All federal agencies continually create and amend their regulations. Policy statements may be amended or rescinded. Agencies may enter into new Memoranda of Understanding or issue interpretations and directives. Links to some of these resources are included in this document. A working condition OSHA covered one day may end up being covered by another federal agency the next day. Because the federal regulatory universe is in a constant state of flux, this document does not comprehensively address the coverage of the OSH Act within each industry. Although it is useful to contact the field offices of the other agency, the guidance received from that field office is not necessarily determinative. The determination should be made after consultation with the Regional Solicitor’s Office.

#### **II. Testing Exemptions.**

Generally speaking, there is a two-pronged test to determine whether or not working conditions are exempt from coverage by Section 4(b)(1) of the OSH Act: (1) Does the other federal agency possess the statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health, and (2) has the other federal agency “exercised” its statutory authority over the particular working condition? A “working condition” is generally a particular occupational hazard. Another agency’s requirement dealing with an occupational hazard preempts OSHA even if the requirement also protects public safety or health, unless the other agency’s requirement only incidentally affects occupational safety or health. It is important to note that the Commission and the courts have stated that OSHA may not question the efficacy of another federal agency’s requirements. The mere fact that the other federal agency has exercised its statutory authority over the working condition is enough to preempt OSHA.

In some cases, the other agency has formally decided that its regulations comprehensively address an entire area. In such cases, OSHA is preempted with respect to the entire identified area. In other cases, an agency has formally decided



that a particular hazard will not be regulated. In such a case, OSHA is preempted with respect to that hazard.

### **III. Statutory Exercise.**

The vast majority of the time an “exercise” of statutory authority takes the form of a regulation in the Code of Federal Regulations. However, the Commission and the courts have recognized other agency actions as forms of this exercise of authority. For instance, safety and health requirements contained in a maintenance manual that has been reviewed and approved by the Federal Aviation Administration (FAA), have been deemed to be an exercise of statutory authority, thereby exempting working conditions covered by manual provisions from applicable OSHA requirements. Another example is a requirement on an EPA-approved label on a pesticide container.

Section 4(b)(1) is not a “jurisdictional” issue. It is an affirmative defense to a citation. That means an employer must prove that OSHA is preempted pursuant to Section 4(b)(1) in order to defeat the citation on those grounds. The employer must show that the other agency’s requirements are enforceable against that employer, not others who may be involved in the work. However, HIOSH must not issue a citation with respect to a working condition preempted by another agency pursuant to Section 4(b)(1). Where there may be Section 4(b)(1) preemption, HIOSH, in consultation with the OSHA Region, must make an initial determination before a citation is issued.

NOTE: Section 4(b)(1) does not preempt citations for violations of the Part 1904 recordkeeping regulations. Thus, citations may be issued for violations of Part 1904 without regard to Section 4(b)(1).

State agencies do not preempt OSHA pursuant to Section 4(b)(1), with a few exceptions. Section 4(b)(1) expressly provides for preemption by state nuclear regulatory agencies with respect to materials regulated by the Nuclear Regulatory Commission. Also, when state agencies enforce federal regulations pursuant to a plan approved by another federal agency, those regulations trigger Section 4(b)(1) preemption, but state regulations merely compatible with federal regulations do not preempt OSHA. Examples of state agencies which enforce federal regulations are agencies which regulate natural gas pipelines and commercial motor vehicles.

At times, OSHA State Plan officials may have questions about preemption by other federal agencies. Section 4(b)(1) does not apply to State Plan agencies. However, some state OSHA statutes have provisions the same as or similar to Section 4(b)(1). In those cases, Area Offices should consult with their Regional Solicitors. Also, the federal statutes establishing the other federal agencies may preempt the States directly. Thus, when State Plan officials ask questions about preemption by other federal agencies, they should be advised to consult with their attorneys and with the relevant federal agency.

### **IV. Other Agencies which may Preempt OSHA.**

The following information is meant to help point HIOSH personnel in the right direction. Should an instance arise where one or more federal agencies are at the scene of an inspection or investigation and authority is at issue, the Branch Manager is to notify the Administrator who will then contact the Area Office and/or the Regional Office for additional guidance. The agencies with respect to which most Section 4(b)(1) questions arise are listed below along with their websites. This is not

an exhaustive list of all agencies whose requirements may preempt OSHA. OSHA's Memoranda of Understanding and Memoranda of Agreement with other agencies can be found at:

[http://www.osha.gov/pls/oshaweb/owasrch.search\\_form?p\\_doc\\_type=MOU&p\\_toc\\_level=0&p\\_keyvalue](http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=MOU&p_toc_level=0&p_keyvalue)

A. Department of Transportation

The Department of Transportation (DOT) protects the safety and health of employees and the public under various federal transportation laws.

1. Federal Aviation Administration.

The Federal Aviation Administration (FAA) has the authority to develop regulations and minimum standards in the interest of safety in air commerce.

The Commission has held that FAA-mandated maintenance manual provisions concerning safety instructions for aircraft maintenance personnel trigger Section 4(b)(1), preemption of OSHA requirements. With respect to flight crew, the FAA has issued a policy statement stating that the FAA comprehensively regulates the working conditions of flight crew, except that OSHA may enforce its noise, hazard communication, and bloodborne pathogens standard with respect to all cabin crewmembers other than flight deck crew. OSHA began this enforcement on March 26, 2014.

<http://www.faa.gov/>

2. Federal Motor Carrier Safety Administration.

DOT's Federal Motor Carrier Safety Administration (FMCSA) regulates commercial motor vehicles. The types of vehicles covered are listed in 49 U.S.C. 31132. FMCSA has issued extensive regulations related to commercial motor vehicle safety, including regulations to prevent the unintended movement of parked vehicles, regardless of their location.

<http://www.fmcsa.dot.gov/>

3. Pipeline and Hazardous Materials Safety Administration.

The Pipeline and Hazardous Materials Safety Administration (PHMSA) prescribes safety requirements for natural gas and oil pipelines, liquefied natural gas facilities, and breakout tanks. These statutes only reach the owners and operators of pipelines and the other facilities mentioned above. Therefore, the employees of a contractor who is not the owner or operator of such a facility are covered by OSHA. States are authorized, by statute, to enforce PHMSA natural gas pipeline safety regulations. Such regulations, although enforced by a state agency, preempt OSHA.

PHMSA also regulates the transportation of hazardous materials by vehicles. Because of a special provision in the hazardous materials transportation law, Section 4(b)(1) does not apply to this transportation. However, as matter of policy, OSHA does not issue citations regarding the design of, or materials used for, containers of hazardous materials. <http://www.phmsa.dot.gov/>

4. Federal Railroad Administration.

The Federal Railroad Administration (FRA) enforces a number of statutes covering railroad safety. FRA regulations comprehensively regulate the movement of equipment over the rails. The FRA generally does not regulate

working conditions in railroad repair shops. FRA Policy Statement, 43 FR 10583 (March 14, 1978). The FRA also has fall protection regulations for railroad bridge workers. <http://www.fra.dot.gov/>

B. Department of Labor.

The Mine Safety and Health Administration.

The Mine Safety and Health Administration (MSHA) comprehensively regulates the safety and health of employees engaged in mining and mineral milling. In order to clarify where milling ends and OSHA authority begins, OSHA and MSHA entered into an extensive Memorandum of Understanding (MOU) that delineates respective agency authorities. <http://www.msha.gov/>

Also see CPL 02-00-042, Interagency Agreement Between the Mine Safety and Health Administration and the OSHA-USDOL, dated March 14, 1980. This CPL includes the Interagency Agreement dated September 16, 1980 which is the basis for Change-1 of the CPL.

C. Environmental Protection Agency.

The Environmental Protection Agency (EPA) administers the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Under that law, EPA requires pesticides to have labels containing instructions for the safe use of pesticides. Some of those labels incorporate EPA regulations for the protection of farmworkers. The label instructions preempt OSHA with respect to occupational pesticide hazards. <http://www.epa.gov/pesticides/>

In Hawaii, EPA has delegated the enforcement authority to the Hawaii Department of Agriculture, Pesticides Branch.

D. Nuclear Regulatory Commission.

The Nuclear Regulatory Commission (NRC) is responsible for licensing and regulating nuclear facilities and materials. In 2013, OSHA and NRC entered into a revised MOU that generally identifies four kinds of hazards associated with NRC-licensed nuclear facilities and designates which agency will be responsible for each kind of hazard. Generally, the NRC is responsible for the following hazards at NRC-licensed facilities: 1) radiation hazards produced by radioactive materials; 2) chemical hazards produced by radioactive materials; and 3) facility conditions that affect the safety of radioactive materials, such as fire and explosion hazards. At these facilities, OSHA has authority over facility conditions that do not involve the use of radioactive materials, such as toxic nonradioactive material, electrical, fall, confined space, and equipment energization hazards. <http://www.nrc.gov/>

E. Department of Energy.

The Department of Energy (DOE) is responsible for the production of nuclear weapons, as well as the dismantling and cleanup of nuclear sites under the Atomic Energy Act. DOE has established and enforces a comprehensive set of occupational safety and health standards for the working conditions of contractor employees at its Government-Owned, Contractor-Operated (GOCO) facilities engaged in the Atomic Energy Act activities described above. Therefore, OSHA does not inspect the working conditions of these contractor employees. DOE's statutory authority extends to construction, including new construction, on GOCO facilities. <http://energy.gov/>

F. Department of Homeland Security.

United States Coast Guard.

The United States Coast Guard (USCG) promulgates and enforces safety and health regulations for U.S. flag vessels on the high seas and navigable waters of the United States. USCG has exercised its statutory authority over “inspected vessels” by issuing a comprehensive set of regulations. An “inspected vessel” is one for which the Coast Guard has issued a Certificate of Inspection (COI). The types of “inspected vessels” are listed in 46 U.S.C. 3301 and exemptions in 46 U.S.C. 3302. OSHA and the USCG entered into a MOU acknowledging that, due to USCG’s extensive regulations, OSHA will not enforce the OSH Act with respect to the working conditions of seamen aboard inspected vessels. However, this prohibition does not apply to recordkeeping.

Conversely, USCG has issued only a limited number of regulations applicable to “uninspected” vessels, which are not classified as “inspected vessels.” To the extent USCG has not regulated a particular working condition on an uninspected vessel, OSHA may conduct enforcement activity.

Under the Outer Continental Shelf Lands Act, the Coast Guard, along with the Bureau of Safety and Environmental Enforcement of the Interior Department (see below), has issued many safety and health regulations for offshore platforms in particular, provisions designed to prevent fires and explosions.

Enforcement Directive, CPL 02-01-047, *OSHA Authority Over Vessels and Facilities on or Adjacent to U.S. Navigable Waters and the Outer Continental Shelf (OCS)*, Feb. 22, 2010, addresses the issues in this paragraph.

<http://www.uscg.mil/>

G. Department of Justice.

Bureau of Alcohol, Tobacco, Firearms and Explosives.

A law enforcement agency in the United States Department of Justice, the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) promulgates and enforces regulations relating to the illegal use and storage of explosives.

OSHA directive CPL 02-01-053, *Compliance Policy for Manufacture, Storage, Sale, Handling, Use and Display of Pyrotechnics*, October 27, 2011, clarifies the interplay between OSHA’s Process Safety Management Standard, 29 CFR 1910.119, OSHA’s Explosives and Blasting Agents standard, 1910.109; and the BATFE regulations. <http://www.atf.gov/>

H. Department of Interior.

Bureau of Safety and Environmental Enforcement.

The Department of the Interior’s Bureau of Safety and Environmental Enforcement (BSEE), along with the Coast Guard (see above), promulgates and enforces safety regulations for offshore platforms on the Outer Continental Shelf in particular, provisions designed to prevent fires and explosions.

<http://www.bsee.gov/>