



Employer Rights and Responsibilities Under HIOSH



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This informational booklet provides a general overview of employer rights and responsibilities following a Hawaii State occupational safety and health inspection. It does not alter or determine compliance responsibilities under the Hawaii Occupational Safety and Health Division (HIOSH) standards or the Hawaii Occupational Safety and Health Law. Because interpretations and enforcement policy may change over time, you should consult current HIOSH administrative interpretations and decisions by the Hawaii Labor Relations Board and the courts for additional guidance on HIOSH compliance requirements.

Addresses and telephone numbers of HIOSH offices are listed in the Directory on page 15 of this publication.

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If English is not your first language and you would like to have this information translated, please call (808) 586-9116 for assistance. Language assistance is available upon request for limited English proficient (LEP) persons to communicate with HIOSH and its representatives at no cost.

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Hawaii is one of several states that administer their own occupational safety and health programs according to the provisions of the Federal Occupational Safety and Health (OSHA) Act of 1970. The OSHA Act permits a state to manage its own occupational safety and health program if it meets certain federal requirements regarding the program's structure and operations.

The Hawaii Occupational Safety and Health Law was enacted in 1973 to assure safe and healthful working conditions for Hawaii's workers. The Hawaii Department of Labor and Industrial Relations administers the Hawaii Occupational Safety and Health Law through its Hawaii Occupational Safety and Health Division (HIOSH) and has the authority to enforce all laws and standards concerning safety and health at the worksite under its jurisdiction. HIOSH standards or rules are contained within Title 12, Subtitle 8 of the Hawaii Administrative Rules (HAR).

HIOSH covers nearly all workers in the State, including those employed by State and county governments. Excluded from State coverage are federal employees, workers in the maritime industry, domestic workers, and some small family farms.

HIOSH consists of four major branches:

- Occupational Safety Branch enforces occupational safety and health regulations through inspections and investigations with emphasis on workplace safety.
- Occupational Health Branch enforces occupational safety and health regulations through inspections and investigations with emphasis on occupational health. Both enforcement branches investigate and enforce the discrimination or whistleblower protection provisions of the Hawaii Occupational Safety and Health Law [Section 396-8, Hawaii Revised Statutes (HRS)].
- Consultation and Training Branch (C&T) provides free on-site consultation to employers and information and training on occupational safety and health to employers and employee groups. Requests for assistance from C&T are kept confidential unless an employer refuses to correct a serious hazard.
- Administration and Technical Support Branch drafts new or amends existing safety and health standards, acts on petitions for changes to standards and applications for variances, and performs audits and internal monitoring functions as required by OSHA.

The Hawaii Labor Relations Board (HLRB) hears and adjudicates contests of citations, discrimination orders, penalties and abatement dates.

After an Inspection

This pamphlet contains information regarding employer rights and responsibilities following a HIOSH inspection under the Hawaii Occupational Safety and Health Law, Chapter 396, HRS. Under the Hawaii Occupational Safety and Health Law, employers have the responsibility to provide a safe workplace.

A HIOSH inspector conducts an inspection of your workplace in accordance with the Hawaii Occupational Safety and Health Law. If a violation exists, the Division will issue you a **Citation and Notification of Penalty**. A citation informs you of the alleged violations, sets a proposed time period within which to correct the violations, and may assess penalties.

During the inspection's closing conference, the following topics should be discussed:

- The violation(s) that exist at the site;
- Possible abatement measures you may take to correct the violative condition(s);
- Possible abatement dates you may be required to meet; and
- The fact that there could be more violations cited depending on the Division's review of the evidence gathered during the inspection. If more violations will be cited, the inspector will call you to discuss them with you prior to the issuance of the citation.

To minimize employee exposure to possible hazardous conditions, abatement efforts should always begin as soon as possible.

Types of Violations

The following section contains the definition of the types of violations and explains the posting requirements for citations.

Willful: A willful violation is defined as a voluntary act or omission by the employer that is done with intentional disregard of, or plain indifference to, any standard, rule, citation, or order issued under the Hawaii Occupational Safety and Health Law. Penalties range from \$5,500 to \$77,000 per willful violation.

Serious: A serious violation exists when the workplace hazard could cause an accident or illness that has a substantial probability of death or serious physical harm. Hawaii Occupational Safety and Health Law mandates that a penalty be issued for serious violations of up to \$7,700 for each such violation.

Other-Than-Serious: This type of violation is cited in situations where the accident/incident or illness that would be likely to result would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees. HIOSH may impose a penalty of up to \$7,700 for each violation.

Failure to Abate: A failure-to-abate violation exists when a previously cited hazardous condition has never been corrected since the prior inspection and is discovered at a later inspection. If, however, the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation. HIOSH may assess a penalty of up to \$7,700 per day for each failure-to-abate violation.

Repeated: An employer may be cited for a repeated violation if that employer has been cited previously for the same standard or a substantially similar condition or hazard anywhere within the State and the citation has become a final order. Although there is no statute or rule limiting the time frame for a repeated violation, HIOSH normally uses three years from the date that the earlier citation became a final order or from the final abatement date, whichever is later. Repeated violations may be assessed a fine of up to \$77,000 for each such violation.

Posting Requirements

When you receive a Citation and Notification of Penalty, you must post the citation (or a copy of it) at or near the place where each violation occurred to make employees aware of the hazards to which they may be exposed. The citation must remain posted in a place where employees can see it for three working days or until the violation is corrected whichever is longer. (Saturdays, Sundays, and State holidays are not counted as working days.) You must comply with these posting requirements even if you contest the citation.

The abatement certification documents - such as abatement certifications, abatement plans and progress reports - also must be posted at or near the place where the violation occurred. For moveable equipment found to be in violation and where the posting of violations would be difficult or impractical, the employer has the option to identify the equipment with a "*Warning*" tag specified in the abatement verification regulation, Section 12-51-22, HAR. See:

<http://labor.hawaii.gov/hiosh/files/2012/12/12-51-Inspections-Citations-and-Proposed-Penalties.pdf>

Employer Options

As an employer who has been cited, you may take either of the following courses of action:

If you agree to the Citation and Notification of Penalty you should correct the conditions by the date set in the citation and pay the penalty, if one is assessed.

If you do not agree, you have **20 calendar days from the date you receive the citation** to request an informal conference or to contest in writing any or all of the following:

- Violation(s),
- Proposed penalty, and/or
- Abatement date(s).

How to Comply

For violations you do not contest, you must: (1) promptly notify HIOSH by letter, that has been signed by a member of management, that you have taken the appropriate corrective action within the time set in the citation and (2) pay the penalty found on the sheet titled, *Summary of Penalties*.

The notification you send the Branch Manager is referred to as an *Abatement Certification*. For Other-Than-Serious violations, this may be a signed letter identifying the inspection number, the citation item number, the method of correction and date the violation was corrected (which should be on or before the date listed in the citation). You must also state that you have notified affected employees of the abatement. For Serious, Willful, Repeated, or Failure-to-Abate violations, abatement certification requires more detailed proof such as copies of invoices, photos, etc.

You may use the blank Abatement Certification form (page 4) enclosed with your Citation and Notification of Penalty. You may make additional copies of the blank form if needed and you will need to explain how you corrected each violation.

If you have questions or need information about the citation or the abatement of any hazard specified in the citation, please feel free to contact HIOSH to discuss your questions.

Failure to submit an abatement certification letter to HIOSH within five days of the abatement date listed on the citation may result in an additional citation and penalties from HIOSH.

When the citation permits an extended time for abatement, you must ensure that employees are adequately protected from any hazard specified in the citation during this time. For example, the citation may require the immediate use of personal protective equipment by employees while engineering controls are being installed. When indicated on the citation, you must also provide HIOSH with an abatement plan (steps you will take to protect employees and correct the hazards) and periodic progress reports on your actions.

You must inform affected employees and their representative(s) about abatement activities by posting abatement documents when feasible or by other effective steps when posting is not feasible and you must inform them of their right to examine and copy all abatement documents.

Please refer to the Abatement Verification standard found in Part I, Section 12-51-22, HAR. The HIOSH standard may be accessed at:

<http://labor.hawaii.gov/hiosh/files/2012/12/12-51-Inspections-Citations-and-Proposed-Penalties.pdf>

The total penalty on the *Summary of Penalties* sheet is payable within 20 calendar days of receipt of the *Citation and Notification of Penalty*. If, however, you contest the citation or penalty in good faith, abatement and payment of penalties for those items contested are suspended until HLRB reviews your case and issues a final order. The HLRB is an independent agency and is not a part of HIOSH. The final order of the Board will either uphold, modify, or vacate the citations and/or penalties. Penalties for items not contested, however, are still due within 20 calendar days. (For further details, see the section on *How to Contest Citations*.)

Payment should be made by check or money order payable to Director of Budget and Finance. Please indicate on your payment the HIOSH inspection number (which can be found in the upper right-hand corner of your citation) and send it to the HIOSH Office at: DLIR/HIOSH; 830 Punchbowl Street, Room 423; Honolulu, HI 96813.

Petition for Modification of Abatement

Abatement dates are set on the basis of the best information available at the time the citation is issued. If you agree that the cited violations exist, but are unable to meet an abatement date because of uncontrollable events or other circumstances, you may file a Petition for Modification of Abatement (PMA) with HIOSH.

The petition must be in writing and must be postmarked or, if not mailed, received by HIOSH no later than the close of the next business day following the abatement date. To show clearly that you have made a good faith effort to meet the abatement date, the PMA must include all of the following information before it can be considered:

- Steps you have taken to achieve compliance, and dates they were taken;
- Additional time you need to comply;
- Why you need additional time;
- Interim steps you are taking to safeguard your employees against the cited hazard(s) until the abatement; and
- A certification that the petition has been posted, the date of the posting and, when appropriate, a statement that the petition has been furnished to an authorized representative of the affected employees. The petition must remain posted for 10 working days, during which employees may file an objection.

A PMA may be granted or denied. If a PMA is granted, a monitoring inspection may be conducted to ensure that conditions are as they have been described and that adequate progress toward abatement has been made. If the PMA is denied, you may file a notice of contest. (See *How to Contest*.) During the contest proceedings, you will have the burden of proving that you have met all of the above requirements. Further information on PMAs may be obtained from the HIOSH office.

Follow-up Inspection and Failure to Abate

If you receive a citation, a follow-up inspection may be conducted to verify that you have done the following:

- Posted the citation as required;
- Corrected the violations as required in the citation; and/or
- Protected employees adequately and made appropriate progress in correcting hazards during multi-step or lengthy abatement periods.

In addition to providing for penalties for failure-to-post citations and failure-to-abate violations, the Hawaii Occupational Safety and Health Law clearly states that you have a continuing responsibility to comply with the Hawaii Occupational Safety and Health Law and assure your employees of safe and healthful working conditions. Any new violations discovered during a follow-up inspection will be cited.

Informal Conference and Settlement

You are encouraged to take advantage of the opportunity to have an Informal Conference to discuss the *Citation and Notification of Penalty* especially if you foresee any difficulties in complying with any part of the citation.

Please note that an Informal Conference must be held within the 20 calendar day Notice of Contest period and will neither extend the 20 calendar day Notice of Contest period nor take the place of the filing a written Notice of Contest if you desire to contest. The original written and signed Notice of Contest must be in the HIOSH office by the 20th day. HIOSH does not accept faxes or email attachments.

You may use the informal conference to do any of the following:

- Obtain a better explanation of the violations cited;
- Obtain a more complete understanding of the specific standards that apply;
- Discuss ways to correct violations;
- Discuss issues concerning the assessed penalties;
- Discuss problems concerning the abatement dates;
- Resolve disputed citations and penalties by negotiating and entering into a Settlement Agreement (thereby eliminating the need for the more formal procedures associated with litigation before HLRB); and
- Obtain answers to any other questions you may have.

Employee representative(s) have the right to participate in any Informal Conference or negotiations between the Administrator or Branch Manager and the employer.

Whenever the employer, an affected employee, or employee representatives requests an informal conference, **all** the parties shall be afforded the opportunity to participate fully. If any party chooses not to participate in the informal conference, that party forfeits the right to be consulted before decisions are made that affect the citations. If the requesting party objects to the attendance of another party, HIOSH may hold separate informal conferences. During a joint informal conference, separate or private discussions will be permitted if any party requests them. Informal conferences may be held by any means practical.

If you do not contest within 20 calendar days after receipt of the citation, your citation will become final and is not subject to review by any court or agency. After this occurs, the HIOSH Branch Manager may continue to provide you with information and assistance on how to abate the hazards cited in your citation, but may not amend or change any citation or penalty which has become a final order. The Branch Manager may only advise you on abatement methods or extend the time you need to abate the violation. (See *Petition for Modification of Abatement.*)

How to Contest Citations

If you wish to contest any portion of your citation, a Notice of Contest must be submitted in writing within 20 calendar days after receipt of the *Citation and Notification of Penalty* even if you have orally stated your disagreement with a citation, penalty, or abatement date during a telephone conversation or an Informal Conference.

The Notice of Contest must be a written and signed original. If it is not mailed, the original document must be hand delivered and received by the HIOSH office within 20 calendar days of your receipt of the citation. If it is mailed, the postmark must be within 20 calendar days of your receipt of the citation. Facsimiles and emails are not acceptable means to file a contest.

The Notice of Contest (notice) must clearly state what is being contested — the citation, the penalty, the abatement date, or any combination of these. The notice must state whether all the violations on the citation, or just specific violations, are being contested. (For example, "I wish to contest the citation and penalty proposed for Items 3 and 4 of Citation No. 2 issued on June 27, 2014.")

Your contest must be made in good faith. A contest filed solely to avoid your responsibilities for abatement or payment of penalties will not be considered a good-faith contest. A contest of any items suspends your legal obligation to abate a violation and pay its corresponding penalty until the item contested has been resolved. If you contest only the penalty, you must still correct all violations by the dates indicated on the citation. If you contest only some items on the citation, you must correct the other items by the abatement date and pay the corresponding penalties within 20 days of notification.

After you file a Notice of Contest, your case is officially in litigation before the HLRB. The HLRB hears and adjudicates contests of citations, discrimination orders, penalties and abatement dates. If you wish to settle the case, you may contact the Branch Manager who will give you the name of the State's attorney handling your case for HIOSH. While settlements of contested cases are negotiated between you and the State's attorney, they will not become final until approved by HIOSH and the HLRB.

The Contest Process

After HIOSH receives your letter of contest, your case will be forwarded to the HLRB. You will receive a notice from HLRB informing you of an initial conference date to determine the issues and to discuss whether the parties wish to settle. At the initial conference, dates may be set for discovery and live witness cutoffs, settlement conferences, and for the trial. Both employers and employees have the right to participate in all phases of the contest process. The trial may contain all the elements of a trial, including examination and cross-examination of witnesses. You may choose to represent yourself or have an attorney represent you. The Board may affirm, modify, or vacate any contested items of the citation or penalty.

As with any other legal procedure, there is an appeals process. Once the HLRB has ruled, any party to the case may appeal to the appropriate state Circuit Court.

What Employees Can Do

Employees or their authorized representatives may contest any or all of the abatement dates set for violations if they believe them to be unreasonable. A written Notice of Contest must be filed with HIOSH within 10 days after the employer receives the citation. **The filing of an employee contest does not suspend the employer's obligation to abate.**

Employees also have the right to object to a PMA. Such objections must be in writing and must be sent to HIOSH within 10 days of service or posting.

Employer Responsibilities

Employers have the responsibility to provide a safe workplace. Employers **MUST** provide their employees with a workplace that does not have preventable hazards and must follow all HIOSH safety and health standards. Employers must find and correct safety and health hazards and violations.

Employers **MUST** also:

- Inform employees about hazards through training, labels, alarms, color-coded systems, chemical information sheets and other methods.
- Train employees in a language and vocabulary they can understand.
- Keep accurate records of work-related injuries and illnesses.
- Perform tests in the workplace, such as air sampling, required by the HIOSH standards.
- Provide hearing exams or other medical tests required by HIOSH standards.
- Post HIOSH citations and injury and illness data where workers can see them.
- Notify HIOSH within eight hours of a workplace fatality, when three or more workers are hospitalized, or when property damage exceeds \$25,000.
- Prominently display the HIOSH poster that describes rights and responsibilities under the Hawaii Occupational Safety and Health Law.

Employee Discrimination

Section 396-8(e) of the Hawaii Occupational Safety and Health Law prohibits employers from discharging or otherwise discriminating against an employee who has exercised any right under this law, including the right to make safety and health complaints or to request a HIOSH inspection. HIOSH will investigate complaints from employees who believe they have been discriminated against. If the investigation discloses violations of employee rights, the employer will be ordered to take appropriate action. Such action may include reinstatement, back wages and payment of a penalty.

Employees who believe they have been discriminated against must file their complaints within 60 days of the alleged act or discrimination. To obtain further information on this matter, employees may contact HIOSH and inquire about Section 8(e) procedures. In addition, employees in the private sector have the right to also dually file with OSHA within 30 days of the alleged act of discrimination to preserve their rights under federal law.

Providing False Information

All information reported to HIOSH by employers and employees must be accurate and truthful. Providing false information is a violation under the Hawaii Occupational Safety and Health Law, HRS 396-10(m). If convicted, fines of up to \$11,000 may be assessed and/or there may be a prison term of not more than six months.

Variations

Variations from the HIOSH regulations can be obtained if an employer can show that equivalent protection is provided to the affected employees. For more information about variations, please see:

<http://labor.hawafi.gov/hiosh/files/2012/12/12-53-Rulesof-Practice-for-Variance.pdf>

HIOSH Assistance, Services, and Programs

Free On-site Consultation Service for Small Employers

Free and confidential on-site safety and health consultation services are available to small and medium sized businesses on all islands with priority given to high-hazard worksites.

On-site consultation services are separate from enforcement and do not result in penalties or citations. Consultants work with employers to identify workplace hazards, provide advice on compliance with HIOSH/OSHA standards, and assist in establishing injury and illness prevention programs. The comprehensive assistance that is offered includes an appraisal of all mechanical systems, physical work practices, environmental hazards of the workplace, and all aspects of the employer's safety and health program.

To request such services, an employer can phone (808-586-9100) or write to HIOSH C&T. The consultant is not able to intervene during an open enforcement case. It is, therefore, advisable to contact C&T before any enforcement issues arise. In addition, an on-site safety and health consultation requires that the employer correct all serious workplace hazards. Uncorrected serious hazards may result in a referral to the enforcement branch.

Safety and Health Achievement Recognition Program

Under the consultation program, certain exemplary employers may request participation in HIOSH's Safety and Health Achievement Recognition Program (SHARP). Eligibility for participation includes, but is not limited to, an injury and illness rate that is less than the average for that industry Statewide for three years, receiving a full-service, comprehensive consultation visit, correcting all identified hazards, and developing an effective injury and illness prevention program.

Electronic Information

Internet — HIOSH standards and related information may be accessed through the Internet at <http://labor.hawaii.gov/hiosh/>. OSHA standards, interpretations, directives, and additional information are available at <http://www.osha.gov> and <http://www.osha-slc.gov>.

CD-ROM — A wide variety of OSHA materials including standards, interpretations, directives, and more can be purchased on CD-ROM from the U.S. Government Bookstore, <http://bookstore.gpo.gov>.

