

Volume

1

HEALTH & SAFETY RIGHTS AT WORK

Protecting and Advocating for Workers' Rights



WORKSAFE
safety, health, and justice for workers



Legal & Advocate Guide

1st edition

PROTECTING AND ADVOCATING FOR WORKERS' RIGHTS

Legal & Advocate Guide

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Introduction

ABOUT WORKSAFE

Worksafe is a California-based nonprofit organization dedicated to promoting workplace safety and health through education, training, technical and legal assistance, and advocacy. We focus on eliminating all types of workplace hazards and also on workplace-created toxic hazards that impact at-risk communities in California. We advocate for protective worker health and safety law and effective remedies for injured workers. As a legal services support center, we provide assistance to legal services programs throughout California who directly serve California's most vulnerable low-wage workers.

ABOUT THIS MANUAL

Worksafe is pleased to make available the following four chapters of its manual, "Protecting and Advocating for Workers' Rights: Legal & Advocate Guide."

PART 1: Health and Safety Laws

1.1 Introduction

1.2 Cal OSHA

PART 2: Remedies for On-The-Job Injuries

2.1 Introduction

2.2 Workers' Compensation

PART 3: Retaliation

3.1 Introduction

3.2 §132(a): Workers' Compensation Retaliation

3.4 NLRB: A Viable Alternative

The manual itself is a work in progress and we plan to develop and make available more chapters in future years. **The manual is designed to serve as a guidebook for legal aid and worker center advocates in California.** Although it is a legal manual, it was designed with the intent to allow non-legal advocates to assist their clients. Thus, the manual attempts to strike a balance between containing legal content that is sufficient for both legal and non-legal advocates to understand the law behind various legal practice areas that affect low-wage workers. We have provided a great deal of resources in the appendices of the available chapters for all of you, but especially for those advocates who have not practiced in the various areas of the law affecting the most vulnerable working people in California.

We do not intend the information in the manual to be legal advice, nor should you construe it as such. People who may have a legal problem should consult with an attorney or a representative from the appropriate agency. (For additional disclaimer and copyright information, please see p. iii.)

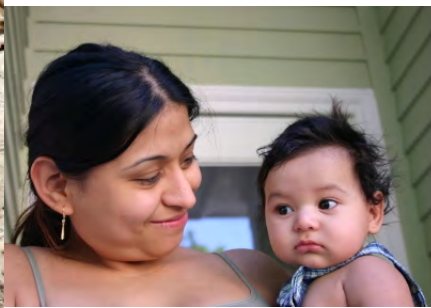
We encourage your feedback on how we can improve this manual. You can access our evaluation form online at www.worksafe.org/worksafe_materials_eval. Please take time to fill out the evaluation form for the manual to let us know how it impacted your understanding of the subject matter and your work, and how we can improve this resource. Thank you.

January 2014

HEALTH & SAFETY LAWS



WORKSAFE
safety, health, and justice for workers



Legal & Advocate Guide

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§1.1 Health and Safety Laws

“We came here to work, not to die.” Anonymous.



Note

Occupational safety and health is concerned with protecting the safety, health, and welfare of people in the workplace. Since 1950, the International Labour Organization (ILO) and the World Health Organization (WHO) have shared a common definition of occupational health. Occupational health should aim to:



Caution



Case Study



Toolkit



Practice Pointers!

- (1) Promote and maintain the highest degree of physical, mental, and social well-being of workers;
- (2) Prevent ill-health among workers caused by their working conditions;
- (3) Protect workers from factors adverse to their health in their employment;
- (4) Place and maintain workers in occupational environments adapted to their individual physiological and psychological conditions; and
- (5) Foster a safe and healthy work environment.

The following chapters discuss the two agencies responsible for oversight of health and safety in the workplace: Federal Occupational Health and Safety Administration (Fed/OSHA) and the California Occupational Health and Safety Act (Cal/OSHA) and the Division of Occupational Safety and Health (DOSH) that administers and enforces Cal/OSHA.

§1.2 Cal-OSHA

[1.2.1] Why Is This Important To Your Organization?



Note



Caution



Case Study



Toolkit



Practice
Pointers!

There were 30,700 reported cases of non-fatal work-related illness in California in 2010. (Worksafe, *Dying at Work in California: the Hidden Stories behind the numbers*, Workers Memorial Day (April 28, 2012), p. 4, 10). The most hazardous industries as identified by the Bureau of Labor Statistics for 2011 to 2012 include Agriculture, Construction, Manufacturing, Transportation and Warehousing, and Waste Management, among others. (*Ibid.* at p. 11). These industries are heavily represented by low-wage immigrant workers, particularly Latino workers, who also tend to be over-represented among workers experiencing injuries, illnesses, and fatalities at work.¹ (*Ibid.*, at 9). Moreover, studies have shown that where there is wage theft, there are often violations of health and safety laws.²

Thus, chances are high that clients who may be seeking assistance for wage theft, family law, public benefits, or economic justice may actually have an underlying issue regarding workplace health and safety. For example, a worker may come into your office to deal with issues associated with their lack of or lessened income after suffering a workplace injury. Issues that may lead them to ask for assistance in unemployment insurance, social security disability insurance, general or public assistance, or even bankruptcy or eviction assistance may stem from a deeper underlying violation of their health and safety.

It is extremely important for organizations to develop an intake process that will identify underlying health and safety issues that workers may be experiencing in order to more fully assist

¹ See e.g. AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs* (August 2005), p.1; Greenhouse, Steven, *Hispanic Workers Die at Higher Rate*, N.Y. Times (July 16, 2001), www.nytimes.com/2001/07/16/us/hispanic-workers-die-at-higher-rate.html?pagewanted=all [last visited December 13, 2013].

² See e.g. Bernhardt, et al., University of Illinois at Chicago, National Employment Labor Project, UCLA Institute for Research on Labor and Employment, *Broken Laws, Unprotected Workers* (2009); Ruth Milkman et al., University Of California Los Angeles, Institute For Research On Labor And Employment, *Wage Theft And Workplace Violations In Los Angeles* 53 (2010); Robinson EN, Nguyen HT, Isom S., et al. *Wages, Wage Violations, and Pesticide Safety Experienced By Migrant Farmworkers in North Carolina*. *New Solut.* (2011), 21(2), pp. 251-258.

them or re-route them to the proper resource. Fundamental questions that should be a part of that process would identify the industry, occupation, work tasks and exposure to potential hazards of workers.

[1.2.2] Issue Spotting

(See § [1.2.45]: “Sample Interview Questions.”)

[1.2.3] Background: Cal OSHA vs. Federal OSHA

A. [1.2.4] California’s State Plan

In 1970, Congress set a national benchmark for workplace health and safety protection by passing the Occupational Safety and Health Act of 1970, which created the Occupational Safety and Health Administration (“OSHA”) to assure safe and healthy working conditions for workers nationwide. (29 United States Code (“U.S.C.”) § 651 et seq.) OSHA was intended to create a comprehensive national system of laws and regulations that would provide safe and healthy working conditions for all. (29 U.S.C. § 651, subd. (b).) Congress allowed states the option to enact and enforce their own occupational safety and health laws. (29 U.S.C. § 651, subd., (b)(11).)

California elected to enact its own plan, the California Occupational Safety and Health Act (“Cal/OSHA”) and received state interim plan status in April 1973. (Lab. Code § 6300 et seq.; see *Murray Co. v. California Occupational Safety & Health Appeals Bd.* (2009) 180 Cal.App. 4th 43, 54.) Currently, California does not have final state plan status.

The Legislature enacted Cal/OSHA for the purpose of:

“ . . . assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.”

(Labor Code (“Lab. Code”) § 6300.) Thus, authority for occupational health safety has been yielded, with a few exceptions, by Fed/OSHA to Cal/OSHA. (See 29 Code of Federal Regulations (“C.F.R.”) § 1952.172, subd., (a).) Cal/OSHA, therefore, provides the primary, *but not exclusive*, laws regarding occupational safety and health.

B. [1.2.5] The Administration of Cal/OSHA

The Department of Industrial Relations (“DIR”) administers the California Occupational Safety and Health Program, commonly referred to as “Cal/OSHA.” Cal/OSHA is administered by three agencies dealing with three distinct functions:

- (1) Legislative: Occupational Safety and Health Standards Board (the “Standards Board”);
- (2) Executive: Division of Occupational Safety and Health (“DOSH”); and
- (3) Judicial: Occupational Safety and Health Appeals Board (“OSHAB”).

The Standards Board is an independent body comprised of seven individuals appointed by the Governor. They are the only state entity authorized to adopt occupational health and safety standards. (Lab. Code § 142.3; See *California Labor Fed., AFL-CIO v. California Occupational Safety & Health Standards Bd.* (1990) 221 Cal.App.3d 1547, 1553.) It is charged with:

- adopting, amending, and repealing safety and health regulations (also known as standards or orders),
- granting or denying applications for variances from adopted standards, and
- responding to petitions for new or revised standards.

(Lab. Code §§ 142.3, subs., (a)(1)-(2), 143.8; California Code of Regulations, tit. 8 (“8 Cal. Code Regs.”), § 401 et seq.) The standards or orders must be as effective as Fed/OSHA standards or better. (29 U.S.C. § 667, subd. (c)(2).)

DOSH is responsible for enforcing, consulting, and administering the laws and regulations concerning an employer’s duty to provide a safe and healthful place to work, which include Cal/OSHA and regulations enacted by the Standards Board. (Lab. Code § 6300 et. seq.; § 142.3; 8 Cal. Code Regs. § 330, subd. (e).) Enforcement occurs through conducting investigations of employers. Investigations are initiated by DOSH following an injury or fatality report filed with DOSH, or a complaint filed by a worker, worker representative, or any other person—even another employer. (Lab. Code § 6309.) Enforcement is achieved through citing, penalizing, and requiring corrective (abatement) measures of employers for violations of health and safety standards and regulations. (8 Cal. Code Regs. §345.)

OSHAB reviews appeals submitted by employers or employees of citations issued by DOSH. OSHAB is a three member, quasi-judicial body appointed by the Governor and confirmed by the Senate. (Lab. Code § 148 et seq.; § 6600 et seq.) OSHAB consists of one member each from management, labor, and the general public (who is not from either management or labor). (Lab. Code § 148, subd. (a).)

C. [1.2.6] When Federal OSHA Applies

Cal/OSHA does not have exclusive authority over occupational health and safety in California. Federal OSHA and the Department of Labor (“DOL”) continue to have jurisdiction in certain limited circumstances. The DOL implements and enforces Federal OSHA. The most common areas of federal jurisdiction are where there are:

- federal standards that Cal/OSHA has not yet adopted or where the federal standard affords more worker protection³;
- new emergency federal standards for which Cal/OSHA has not yet adopted an equivalent standard;
- Native American tribal enterprises operating on tribal land⁴;
- maritime activities on U.S. navigable waters (i.e. longshore operations, ship building and repair, etc.);
- federal government employers and employees;
- private contractors on federal installations where the federal agency has exclusive jurisdiction; and
- “[a]ny hazard, industry, geographic area, operation or facility over which the State is unable to exercise jurisdiction fully or effectively.”

(29 C.F.R. §1942.172, subds. (b)(1) - (3), (7)- & (9).)

Thus, if Cal/OSHA has not yet adopted an equivalent standard and the federal standard affords greater protection, workers may turn to Fed/OSHA to address their health and safety concerns. (See Chapter 1:3, Federal OSHA [forthcoming].)

[1.2.7] Workers’ Rights and Responsibilities

A. [1.2.8] Workers’ Rights

Cal/OSHA mandates that employers abide by certain rights given to workers. The Labor Code contains a number of provisions designed to protect the rights of workers for a safe and healthy working environment. These rights can be understood under three categories:

- **the right to know,**
- **the right to protection, and**
- **the right to take action.**

³ Federal standards are found at 29 C.F.R. § 1910 et seq. and are broken down into safety standards and health standards.

⁴ Cal/OSHA retains jurisdiction over tribal enterprises that are not on tribal land. (See *Donovan v. Coeur d’Alene Tribal Farm* (9th Cir. 1985) 751 F.2d 1113, 1115-1118; *R. Williams Const. Co. v. Occupational Safety and Health Review Commission* (9th Cir. 2006) 464 F.3d 1060, 1061-1062.)

Specifically, Cal/OSHA gives a worker the right to⁵ :

- **Knowledge about workplace hazards**
 - receive training from employers about workplace hazards and workers' rights,
 - request information on injuries and illnesses in the workplace and information on hazardous substances that the worker may be exposed to in your workplace,
 - clear labels of all products with hazardous ingredients,
 - clear posting of the Cal/OSHA poster and other required health and safety notices,
 - access to records of workplace exposure to chemicals or hazards and the worker's medical records,
 - be informed about the results of any Cal/OSHA inspections,
- **Protection from exposure to hazards**
 - work in a safe and healthful work place in which the employer has attempted to reduce or eliminate hazards as much as possible,
 - be provided with personal protective equipment safety devices and safeguards provided and paid for by the employer,
- **Take actions to improve health and safety conditions**
 - report and request action from the employer to correct hazards or violations without suffering retaliation,
 - refuse unsafe work or work that would violate health and safety rules and provisions without suffering discrimination,
 - file a complaint with Cal/OSHA about safety violations or serious workplace hazards without suffering retaliation,
 - participate in Cal/OSHA inspections through the walkarounds,
 - Be included in any meetings or hearings to discuss any employer objections to Cal/OSHA's citations or to changes in abatement deadlines,
 - file a formal appeal of deadlines for correction of hazards,
 - file a Cal/OSHA discrimination or whistleblower complaint with the Division of Labor Standards Enforcement,
 - request a research investigation on possible workplace health hazards from the National Institute for Occupational Safety and Health⁶,
 - file a petition to the Occupational Safety and Health Standards Board⁷ for a new standard,
 - participate in developing new standards by joining a Cal/OSHA standards development committee⁸ or by providing testimony to the Occupational Safety and Health Standards Board at a hearing when the board is considering adopting a new standard, and
 - participate in Cal/OSHA appeals proceedings if the employer appeals citations.

⁵ Listed at www.dir.ca.gov/DOSH/WorkersRights.htm [last visited December 13, 2013].

⁶ See www.cdc.gov/niosh/ [last visited September 18, 2013].

⁷ See www.dir.ca.gov/OSHSB/oshsb.html [last visited September 18, 2013].

⁸ See www.dir.ca.gov/dosh/DoshReg/advisory_committee.html [last visited September 18, 2013].

- o participate in Cal/OSHA appeals proceedings if the employer appeals citations.

Some of these are discussed in more detail below and in the Employer Duties and Responsibilities Section. (See § [1.2.19]: “Employer Duties and Responsibilities.”)

1. [1.2.9] The employee representative

A key way to help workers exercise their rights is to serve as an “employee representative”. Employee representatives can act on behalf of workers — who often feel they cannot step forward due to fear of retaliation — and assist them in advocating for their various protected health and safety rights. This section will enumerate some of these rights. In general, employee representatives may act in the place of employees to assist in exercising any of the rights listed here. A sample declaration that employees can use to designate someone as their employee representative can be found in the Appendix. (See § [1.2.126]: Appendix A: Sample Employee Declaration Letter.)

According to the Labor Code, for the purposes of making an occupational safety and health complaint, an employee representative “includ[es] but [is] not limited to, an attorney, health or safety professional, union representative, or government agency representative, or an employer of an employee directly involved in an unsafe place of employment...” (Lab. Code § 6309; see § [1.2.39]: “Who can file a complaint?”) There is tension between this definition and the rights respected by DOSH, which has traditionally ignored the “not limited to” part of the statute and treated the above definition like an exclusive list. (Division of Occupational Safety and Health Policies and Procedures Manual (“DOSH P&P”), § C-7, subd. E(1).) Worksafe is currently working with DOSH to recognize their obligations under the law.

In general, however, as the “employee representative,” worker advocates have the ability to file complaints on behalf of workers, to seek a state investigation into dangerous working conditions, and the power to participate in the inquiry that follows. Under some circumstances, when an employer is cited for a safety and health violation and then denies responsibility, employee representatives can help ensure that the citation sticks through representing the workers’ rights with the DOSH inspector or in the appeals hearing process.

⁹ DOSH Policies and Procedures Manual can be found here: www.dir.ca.gov/samples/search/querynpn.htm [last visited December 14, 2013].



Employee Representatives

This chapter will discuss the benefits and rights of the employee representatives. Special “Toolkit” boxes will highlight areas where employee representatives can play a significant role such as:

- Timing of Inspections (§ [1.2.55])
- Advance Notice of Inspections (§ [1.2.54])
- Informal Conference (§ [1.2.64])
- Walkaround (§ [1.2.57])
- Appeals (§ [1.2.76])

2. [1.2.10] Right to a safe and healthful workplace

Every employee has the right to a workplace in which the employer has taken reasonably necessary steps to protect their safety and health. (Lab. Code §§ 6400-04; *Bendix Forest Products Corp. v. Division of Occupational Safety & Health* (“*Bendix*”) (1979) 25 Cal.3d 465, 470-471.)

Employees cannot be required to go or be in any employment or place of employment that is not safe and healthful. (Lab. Code § 6402.)

3. [1.2.11] Right to health and safety information

Under various rules and regulations, employers are required to post and/or notify employees about health and safety information in the workplace.¹⁰ Thus, workers have the right to this information, which should either be provided to the workers or posted in a conspicuous place that all workers can view. (Lab. Code § 6408, subd. (a)); 8 Cal. Code Regs. § 340.) This includes, but is not limited to, the following:

- the basic Cal/OSHA informational poster which contains pertinent information about safety rules and regulations (Lab. Code § 6328);
- Industrial Commission Orders about wages, hours, and working conditions (Lab. Code § 1183, subd. (d));
- access to medical and exposure records (regarding information about rights of employees working with hazardous/toxic substances) (8 Cal. Code Regs., § 3204);
- operating Rules for Industrial Trucks (employers using forklifts have to post and enforce a set of operating rules) (8 Cal. Code Regs. § 3664);
- notice to employees about injuries caused by work and workers’ compensation benefits (8 Cal. Code Regs. § 9881);
- notice of workers’ compensation carrier and coverage (Lab. Code § 3550);

¹⁰ See <http://www.dir.ca.gov/wpnodb.html> [as of September 18, 2013].

- whistleblower protections in 14 type font (Lab. Code § 1102.8);
- log and summary of occupational injuries and illnesses for prior year (Form 300A - posted February 1 to April 30 of the year following the year of the form) (8 Cal. Code Regs. § 14300.32, subds. (b)(5)-(7));
- orders prohibiting entry or use of a machine, device, apparatus or equipment deemed to constitute an imminent hazard to employees (Lab. Code § 6325; DOSH P&P § C-8); and
- Cal/OSHA citations at or near the work area involved until the violation has been corrected or for three working days, whichever is longer (Lab. Code § 6408(b)).

Other instances in which employees have the right to request information are discussed below.

4. [1.2.12] Right to refuse unsafe work

An employee has the right to refuse to perform work that would result in a Cal/OSHA violation creating a real and apparent hazard to the employee or his/her coworkers. (Lab. Code § 6311.) Workers should be able to exercise this right free of retaliation. (*Ibid.*) Workers that refuse unsafe work should take the following steps:

1. Do everything in the presence of other employees, if possible;
2. Inform and explain to the supervisor on site of the unsafe or unhealthful condition. Ask for correction;
3. The worker should state that he/she is refusing to work because:
 - a. he/she believes that their health or safety is in danger if they were to perform the work, and
 - b. he/she believes there is a violation of health and safety laws, regulations or orders.
4. The worker should state that he/she will return to the particular task as soon as the condition is corrected;
5. The workers should offer to do other, safe work until the hazard is corrected clearly and in the presence of the supervisor and other employees;
6. The worker should give management a chance to respond. If the condition is not corrected, the worker can call Cal/OSHA to file a complaint of an imminent hazard. To ensure the best protection against retaliation, the worker should provide their name, which DOSH is required to keep confidential. Should any retaliation occur against the worker, the very fact that they have provided their name to DOSH is proof of their exercise of a protected right. When filing the complaint, the worker should note whom at DOSH they are speaking to as well as the date and time of the filed complaint.

An “imminent hazard¹¹” is any condition or practice in a place of employment constitutes a hazard which could reasonably be expected to cause death or serious physical harm immediately

¹¹ DOSH provides guidance on what constitutes an “imminent hazard” at: www.dir.ca.gov/dosh/ImminentDanger.htm [last visited December 14, 2013].

or before the imminence of the hazard can be eliminated through regular Cal/OSHA enforcement procedures. (DOSH P&P § C-8, subd. (A)(1)(b).) “Serious physical harm” is defined as an injury or illness that fit the criteria laid out in DOSH’s policy and procedures manual and includes concussion, amputation, fracture, laceration, cancer, lung disease or infectious disease. (For a complete list, see DOSH P&P § C-1B, subd. (H)(2)(a)(3).)

The worker should not walk off the job or leave the place of employment.

If the worker is laid off, terminated, or disciplined for refusing to perform work in the above scenario, they can bring an action for retaliation and lost wages under Labor Code section 6311 with the DLSE, or if more than one worker refused work and received an adverse employment action, they can file a complaint with the NLRB since their actions may be viewed as “concerted activity.” (See Chapter 3.4: NLRA, § [3.4.8]: “Workers’ Rights.”)

5. [1.2.13] Right to complain *without* retaliation

An employee has the right to bring up health and safety issues with their employer and/or to file a complaint with Cal/OSHA about health and safety violations without suffering retaliation. (Lab. Code § 6310.) The complainant’s name will be kept confidential and the identity of the worker that filed the complaint is not disclosed unless the worker specifically requests it. (8 Cal. Code Regs. § 372.1, subd. (f).) The complaint does not need to specify the particular safety statute or regulation that he/she believes the employer violated. (*Freund v. Nycomed Amersham* (9th Cir. 2003) 347 F.3d 752, 758-760.)

These actions are protected and an employer who discharges an employee for making a good faith complaint about working conditions that he/she reasonably believes are unsafe gives rise to a tort action for wrongful discharge in violation of public policy. (*Boston v. Penny Lane Ctrs., Inc.* (2009) 170 Cal.App.4th 936, 947; *Freund v. Nycomed Amersham, supra*, 347 F.3d at 758–760 [holding that wrongful termination damages were not limited to back pay recoverable under Lab. Code § 6310, subd. (b)].) The specific identification of the statute or regulation that is believed to have been violated is also not necessary for the purposes of a cause of action for tort. (*Freund v. Nycomed Amersham, supra*, 347 F.3d at 759.)

6. [1.2.14] Right to receive training about the hazards

Employees must be given training and information on hazardous substances in their work area. (Lab. Code § 6401.7, subd. (a)(4).) They must also be informed of their right (1) to personally receive information regarding hazardous substances, (2) for their physician or union to receive such information, and (3) against discharge or other discrimination for exercising their rights regarding hazardous substances. (8 Cal. Code Regs. § 5194, subd. (h); see Lab. Code § 6399.7.)


7. [1.2.15] Rights regarding hazardous substances

Employees are entitled to information regarding the hazardous substances that they may be

exposed to in the workplace under the Hazardous Substances Information and Training Act (“Hazcom”). (8 Cal. Code Regs. § 5194, subd. (b); see Lab. Code § 6360 et seq.) Hazardous substances are defined as any substance that is a physical hazard (i.e. compressed gas) or health hazard (i.e. carcinogens). (8 Cal. Code Regs. § 5194, subd. (c).) A list of Hazardous Substances can be found in Title 8 of the California Code of Regulations, section 339. Certain substances are expressly excluded from this hazard communication standard. (8 Cal. Code Regs. § 5194 subds. (b)(4) & (5).) They include tobacco products, drugs or cosmetics intended for the workers’ personal consumption, food and consumer products intended for distribution to the general public as long as the employee’s exposure to the product is not significantly greater than that faced by the ordinary consumer. (*Ibid.*)

This information may be delivered in a number of complex ways described in the Labor Code but must include warning labels, material safety data sheets (MSDS), and a written communication program. (8 Cal. Code Regs. §§ 5194, subds. (e); (f)(4),(7); (g)(8) & (11).) For example, each hazardous substance container has to be labeled with information providing the identity of the hazardous substance and the appropriate warning. (8 Cal. Code Regs. § 5194, subds. (f)(4) & (7).) If the product manufacturer or distributor had a label on the container, it cannot be removed or defaced. (*Ibid.*) However, the regulation does allow an employer, in lieu of labels on containers, to communicate this information through signage, placards, operating procedures or other written materials to employees that are readily assessable in the employees’ workplace. (8 Cal. Code Regs. § 5194, subd. (f)(5).)

Employees have a right to be able to access the product manufacturer’s MSDSs for hazardous substances. (8 Cal. Code Regs. § 5194, subds. (g)(8) & (11).) These MSDSs contain information about the contents of the hazardous substance, its physical and chemical properties, and associated hazards. (8 Cal. Code Regs. § 5194, subds. (g)(8) & (11).)



Employee Rep: Observe hazard monitoring

Employees or their representatives must be given the opportunity to observe the monitoring or measuring of hazards that they are exposed to. (Lab. Code § 6408(c)). They have the right to have access to accurate records of employee exposure to potentially toxic materials or harmful physical objects. (Lab. Code § 6408, subd. (d); 8 Cal. Code Regs. § 3204, subds. (c)(5)(A)-(D) & (e)(2)(A)(1)-(4).) They have the right to be notified if they have been exposed to toxic materials or harmful physical agents in concentrations at or exceeding those prescribed by an applicable standard, order, or special order, as well as the corrective action that the employer is taking. (Lab. Code § 6408, subd. (e)). Employee representatives can assist in requesting this opportunity.

Finally, employees have the right to request their own medical records which can include medical questionnaires or histories, the results of medical exams and laboratory tests (X-rays and all biological tests), medical opinions and diagnosis, treatment and prescription descriptions, and their medical complaints. (8 Cal. Code Regs. § 372.1, subd. (f).) This does not include actual

physical specimens, records concerning health insurance claims if not maintained with the employer's medical program records or if not easily accessible, and records of voluntary employee assistance programs (alcohol and drug abuse counseling) if these are maintained separately from the employer's medical program records. (*Ibid.*) Furthermore, if the medical records are used in analysis, the employee has the right to the analysis. (8 Cal. Code Regs. § 3204, subds. (e)(2)(C) & (c)(2).)

8. [1.2.16] Rights to participate in Cal/OSHA inspections

Workers and “a representative authorized by... employees” have the right to accompany the inspector on the inspection (“walkaround”) as well. (Lab. Code § 6314, subd. (d).) Workers will not lose pay if they participate in the inspection process; employers are required to pay employees for time spent assisting DOSH personnel during inspection tours. (DOSH P&P § C-1A, subd. (D)(2)(d); *Division of Labor Standards Enforcement v. Texaco Inc.* (1983) 152 Cal.App. 3d Supp. 1, 6. [employer's refusal to compensate employee for time spent on “walkaround” inspection may violate Labor Code section 6310].) DOSH can arrange for translation services during the visit if the inspector is told ahead of time that there is a need for a translator. (DOSH P&P § C-1A, subd. (D)(2)(c).)

Despite this right, workers often fear retaliation and do not participate in the walkaround. In addition, issues exist with regard to the right for advocates to join DOSH at the walkaround. (See § [1.2.57]: “Walkaround.”)

If there is no authorized representative, the inspector can consult with a “reasonable number” of employees regarding “matters of health and safety of the place of employment.” (See § [1.2.58]: “Interviewing the employees during the inspection.”)

9. [1.2.17] Rights to participate in appeals

Employers have the right to appeal citations issued to them by DOSH. (See § [1.2.77]: “Who Can File Appeals?”) Similarly, workers or the employee representatives have the right to contest the abatement period in which the employer has to correct the hazard. (Lab. Code § 6601.) Workers have the right to be notified of their right of participation in any appeals process. (8 Cal. Code Regs. §§ 356, 356.1.) When an appeal is filed by an employer, a copy of the Appeal Form is mailed to the employer or the appealing party along with a blank Participation Notice that must be completed by the employer. (8 Cal. Code Regs. §§ 356, subd. (a).) Employers are required to *immediately* post the docketed Appeal Form and Participation Notice at or near the site of the alleged violation, positioned so that it is easily read by employees working in the area. (*Ibid.*) If, for some reason, the employer cannot practicably post the documents in a conspicuous place where it can be seen by workers, it should be posted somewhere where workers report each day. (*Ibid.*) The documents have to remain posted until the hearing date or an order is issued that dismisses the appeal. (*Ibid.*)

10. [1.2.18] Right to personal protective equipment (PPE)

Every employee has the right to the safety devices or protective gear, also known as personal protective equipment (“PPE”), which has been determined to be necessary for their safety such as gloves, goggles, and steel-toed shoes. (Lab. Code §§ 6401, 6403.) Moreover, employers are required to provide and pay for the PPE. (*Bendix, supra*, 25 Cal.3d at 471–473; [the Supreme Court upheld a special order issued by DOSH requiring the employer to provide and pay for protective gloves or mittens to workers]; see *Oakland Police Officers Ass’n v. City of Oakland* (1973) 30 Cal.App.3d 96, 100–101 [service revolvers are safety devices that City must provide at no cost to police officers]; *In re Southern Calif. Edison* (Cal–OSH App.Bd.) 1985 WL 190769, at 1–4 [employer must provide and pay for leather gloves].)

11. [1.2.19] Right to reports and records

Employees, former employees, and their authorized representatives (i.e. union, lawyer, or worker advocate) have the right to view the records and reports of workplace injuries, illnesses, and fatalities that are kept by employers and to request copies of Cal/OSHA Forms 300, 300A, and 301 regarding his/her particular incident. (8 Cal. Code Regs. §§ 14300.35, subd. (a)(2); see § [1.2.25]: “Duty To Report And Record Workplace Injury, Illness, Or Death.”) By law, employers are required to keep records and reports of certain injuries, illnesses and when a fatality occurs in the workplace. (8 Cal. Code Regs. §§ 14000 et seq.) Once requested, the forms must be provided at no charge **by the next business day**. (8 Cal. Code Regs. § 14300.35, subd. (b)(2).) Finally, a union can request *all* of an employers’ Cal/OSHA 301 forms, which must be provided within **7 days** with the employee’s private information redacted. (8 Cal. Code Regs. § 14300, subd. (b)(2)(E).)

The reports and records of workplace incidents can be extremely useful tools for advocates in organizing around health and safety issues in the workplace since information about the types and frequency of workplace incidents can inform workers on what changes need to occur in the workplace. If workers invoke this right, it is unlawful for an employer to deny the request or to discriminate or retaliate against an employee who is requesting such records. (8 Cal. Code Regs. § 14300.36).

The regulations lay out strict guidelines for when and how employers must provide records to employees or their representatives when requested. (8 Cal. Code Regs. § 14300.36, subs. (b)(2)(C)–(F) (i.e. Cal/OSHA Form 300 within 7 calendar days, Cal/OSHA Form 301 within one business day).)



Employee Rep: Requesting Records

The record-keeping provisions are one of the only provisions in which “employee representative” is liberally defined. The record-keeping provisions state that “employees, former employees, their personal representatives, and their authorized employee representatives have the right to access the injury and illness records required by this article.” (8 Cal. Code Regs. §14300.35, subd. (b)((2).) Under these regulations, “authorized representative” is defined as “an authorized collective bargaining agent of employees” whereas a “personal representative” is defined as either “[a]ny person that the employee or former employee designates...in writing,” or “the legal representative of a deceased or legally incapacitated employee or former employee.” (8 Cal. Code Regs. §14300.35, subds. (b)((2)(A) & (B).)

B. [1.2.20] Workers’ Responsibilities

Likewise, workers also have responsibilities with respect to health and safety. Although workers are never cited for violation of workers’ responsibilities, compliance with Cal/OSHA safety rules and regulations can lead to a safer and healthier workplace.

Some of these responsibilities include:

- increasing knowledge and awareness about Cal/OSHA health and safety rules and standards;
- following all lawful employer safety and health rules and regulations as well as the employer’s safety rules, and wear or use prescribed protective equipment while working;
- report hazardous conditions to your employer and/or Cal/OSHA if necessary;
- notify co-workers immediately of any serious hazards;
- report or turn in defective or malfunctioning tools and machinery;
- report any job-related injury or illness to the employer, and seek treatment promptly; and
- cooperate with the Cal/OSHA inspectors during an inspection in the workplace¹².

It is well known, however, that the exercise of rights under health and safety law may result in employer discrimination. Thus, it is important for workers to be aware of this possibility and for worker advocates to strategize in assisting workers facing these issues. This manual contains several chapters that address retaliation faced by workers and alternative remedies that are available to workers. (See Part 3: Retaliation: Chapter 3.2: “§132(a) Workers’ Compensation; Chapter 3.3: DLSE [forthcoming]; and Chapter 3:4 NLRB.)

¹² See www.dir.ca.gov/DOSH/workersResponsibilities.htm [last visited July 30, 2013].

[1.2.21] Employer Duties and Responsibilities

Under Cal/OSHA, every employer has the duty and responsibility to make the workplace safe and healthy for their employees. These duties include the duty to keep the work environment hazard free, educate employees of workplace safety, and provide employees with the training, tools and equipment required to keep safe. This section covers employer duties and the consequences of violating those duties under Cal OSHA.

A. [1.2.22] Duty To Provide A Safe And Healthful Workplace

Every employer subject to Cal/OSHA has the general duty to make the workplace safe and healthful for their employees and to do everything reasonably necessary to protect employees' safety and health. (Lab. Code §§ 6400-04; *Bendix, supra*, 25 Cal.3d at 470-471.) Employers cannot require or permit any employee to go or be in any employment or place of employment that is not safe and healthful. (Lab. Code § 6402.) As part of this duty, employers must keep the work environment hazard free, educate employees on workplace safety, and provide training, tools and equipment required to keep employees safe. (Lab. Code §§ 6401, 6403.) These are often referred to as the “general duty clauses.” This duty has been interpreted broadly to mandate that “...California employers do ‘every...thing reasonably necessary to protect the life and safety of employees...’” (*Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 475.)

1. [1.2.23] No citation for violation of general duties

DOSH has no authority to cite employers for violating the general duties clauses. DOSH can *only* cite for a duly adopted standard, rule or order. (Lab. Code §§ 6308, 6317; *In re Gray Line Tours Div. of Industrial Safety State of Calif.* (Cal-OSH App.Bd.) 1975 WL 23373 at *2.) However, where no safety regulation addresses the hazard that the employee is experiencing, DOSH can either cite under the employers' duty to have an Injury and Illness Prevention Program or issue a *special safety order*. (*Ibid.*; see §§ [1.2.23] “Duty To Establish, Implement, And Maintain An Injury and Illness Prevention Program;” [1.2.75]: “Special Orders.”)


B. [1.2.24] Duty To Comply With Safety & Health Laws And Regulations

Employers have a duty to comply with all health and safety laws and regulations. Most of these laws can be found in Labor Code sections 6400 through 6405 and Title 8 of the California Code of Regulations, sections 330 to 14400. The employer's duty to maintain a safe workplace encompasses many responsibilities, including the duty to inspect a workplace, to discover and correct dangerous conditions, and to give adequate warning of such conditions. (See *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1034.)

Among these duties include the duty to: (1) establish, implement, and maintain injury and illness prevention program; (2) provide information (commonly referred to as the workers' "right to know"); (3) file reports of workplace accidents and injuries; and (4) fix or correct ("abate") hazards. Multi-employers owe the same duties and responsibilities to employees, even if they are the principal employer. (See Lab. Code § 6400, subd. (b); 8 Cal. Code Regs. § 336.10.)

C. [1.2.25] Duty To Establish, Implement, And Maintain An Injury and Illness Prevention Program

California Code of Regulations, Title 8, section 3203 states that all workplaces, regardless of the number of employees, must develop and implement an Injury and Illness Prevention Program ("IIPP") for all employees within the organization. It is often considered one of the most important and fundamental rudiments of a health and safety process in the workplace. The IIPP is important in reducing injuries, illness, and fatalities because it details the means and methods each employer will use to ensure the safety and health of its employees. (See § [1.2.126]: Appendix B: OSHA Fact Sheet: Injury and Illness Prevention Programs (2013).)



IIPPs are Effective


It has shown that not only do the employers that have adopted IIPP experience dramatic decreases in workplace injuries, but they often report a transformed workplace culture that can lead to higher productivity and quality, reduced turnover, reduced costs and greater employee satisfaction.

Employers with 20 or more employees must establish, implement, and maintain an effective **written** IIPP for all employees, including temporary employees and other workers whom the employer controls or directs on the job who are exposed to worksite or job assignment hazards. (Lab. Code § 6401.7, subds. (a) and (h); 8 Cal. Code Regs., § 3203.) Employers fewer than 20 employees in low hazard industries are exempted from the requirement to have a complete written IIPP. Rather they need only document that they have designated a person responsible for implementing the IIPP and have scheduled periodic inspections and trainings. (Lab. Code § 6401.7, subd. (e)(2).) The IIPP program must also accommodate non-English speakers and cover both temporary and permanent employees. (8 Cal. Code Regs. §3203, subd. (a).) Every IIPP shall contain:

- the identification of the person(s) responsible for implementing the program;
- the employer's system for identifying and evaluating workplace hazards;
- the employer's methods and procedures for correcting unsafe or unhealthy conditions and work practices in a timely manner;

- an occupational health and safety training program designed to instruct employees in general safe and healthy work practices and to provide specific instruction with respect to hazards specific to each employee’s job assignment;
- the employer’s system for communicating with employees on occupational health and safety matters, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal; and
- the employer’s system for ensuring that employees comply with safe and healthy work practices, which may include disciplinary action.

(Lab. Code § 6401.7, subs. (a)(1)–(6); 8 Cal. Code Regs. § 3203(a.) The employer’s system for communication should be in a language or literacy level that is accessible to the worker.



IIPP: The Most Cited DOSH Violation

The failure to have an IIPP is the single most commonly cited violation. They are particularly important in establishing the communication system that exists on a worksite for employees to communicate health and safety issues without fear of retaliation. (Lab. Code § 6401.7, subd. (a)(5).) Without such a system in place, there is no set policy or procedure to ensure that employees are protected from retaliation should they decide to report hazards.

Moreover, with respect to hazardous substances under HazCom, the employer is also required to implement a written hazard communication program for its employees. (8 Cal. Code Regs. § 5194, subd. (e)(1); see § [1.2.15]: “Rights regarding hazardous substances.”)

The program must include:

- a *list of all hazardous substances* known to be present in the workplace;
- the methods the employer will use to inform employees of the hazards associated with *non-routine tasks* and *unlabeled pipes containing hazardous substances*;
- the *steps* the employer will take to comply with its obligations concerning warnings, employee training and information, and MSDSs.

(*Ibid.*) If the workplace is a multi-employer workplace, the program has to also include steps that the employer will take to inform *any other employers* of the hazardous substances that the employers’ own employees may be exposed to. (8 Cal. Code Regs. § 5194, subd. (e)(2).)

D. [1.2.26] Duty To Provide Information

Every employer has a duty to provide employees with information regarding health and safety. (See §[1.2.11]: “Right to health and safety information.”)

Employers must give employees or their representatives information regarding hazardous substances. (See Section [1.2.15]: “Rights regarding hazardous substances.”) Most importantly, employers must notify any employee who has been exposed to toxic materials or harmful physical agents in concentrations at or exceeding those prescribed by an applicable standard, order, or special order, and must inform any exposed employee of the corrective action being taken. (Lab. Code § 6408, subd. (e).) This means that they must provide notice and such notice does not have to be premised by a workers’ request for the notice.

Providing information about hazardous substances does not affect any other liability the employer has with regard to safeguarding the health and safety of an employee or other persons exposed to a toxic or hazardous substance. (Lab. Code § 6399.6; *Molsbergen v. United States* (1985) 757 F. 2d. 1016, 1024 [court found that the government acting as the employer failed to warn Mr. Molsbergen of the dangers of radiation that he was being exposed to at work].)

The provision of such information is vital to every employee’s safety and health. When the employer fails to provide this information to employees, they may be cited for the employee’s subsequent injuries. Additionally, it is unlawful for an employer to retaliate against an employee for exercising their rights in accessing information about hazardous chemicals that they might be exposed to in their workplace. (Lab. Code § 6399.7.)

E. [1.2.27] Duty To Report And Record Workplace Injury, Illness, Or Death

In addition to keeping worksite logs of injury and illness, employers are also required to report certain workplace injuries and illnesses, and fatalities to DOSH. These same laws require most employers to keep track of these incidents and to make reports and records of these incidents available to employees.



Requirement of Social Security Numbers

Labor Code sections 6409, subdivision (a), and 6409.1 state: “Each report of occupational injury or occupational illnesses shall indicate the social security number of the injured employee.” However, when DOSH reviews these logs or reports and accidents, they are more concerned about the injuries and illnesses workers received than their social security numbers. It is up to the employer to handle how to list workers’ social security numbers in the reports.

1. [1.2.28] Reporting

Every employer within **5 days** of receiving information that a work-related injury or illness

has occurred, must fill out a report and file it with the Department of Industrial Relations (DIR). (Lab. Code § 6409.1, subd. (a).) These are commonly referred to as the “Employers’ Employers’ first reports.” The types of injuries and illness that must be reported are ones that result in lost time beyond the date of the injury or illness (i.e. the worker cannot come to work), or which requires medical treatment beyond first aid (i.e. the worker has to go to a medical clinic or the hospital). (*Ibid.*) Labor Code section 6409, subdivision (b) defines occupational illness as “any abnormal condition or disorder caused by exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact.”

2. [1.2.29] Record-keeping

There are at least four record-keeping forms for work-related injuries that employers are required to keep: Injury Log (Cal/OSHA Form 300), the Year end summary (Cal OSHA Form 300A), Incident Report (Cal/OSHA Form 301), and the Division of Labor Statistics and Research (“DLSR”) Form 5020. (See § [1.2.126]: Appendix C: Record-keeping Forms.)

The employer must keep Cal/OSHA Forms 300, 300A and 301 **for 5 years** following the end of the calendar year that each form covers. (8 Cal. Code Regs. § 14300.33.) During this five-year storage period, employers must update the logs to include newly discovered recordable injuries or illnesses and to show any changes that occurred in the classification of previously recorded injuries and illnesses. (8 Cal. Code Regs. § 14300.33, subd. (b)(1).)

i. [1.2.30] Log 300, 300A, and 301

Log of Work-Related Injuries and Illnesses (“Log 300”): Employers with more than 10 employees are also required to keep a log of work-related injuries and illnesses, and must update the log within **7 calendar days** of receiving information that a recordable injury or illness has occurred. (8 Cal. Code Regs. §§ 14300, 14300.29, subds. (a) and (b).)

If there are privacy issues, the employer cannot list the employer’s name on the Log 300; rather, “privacy case” should be entered and a separate, confidential list must be kept and updated. (8 Cal. Code Regs. § 14300.29, subd. (b)(6).) This confidential list must be provided to the government upon request. (*Ibid.*) Privacy issues are triggered where the following conditions exist:

- injuries/illnesses to intimate body parts or the reproductive system;
- injuries/illnesses arising from a sexual assault;
- mental illness;
- HIV infection, hepatitis or tuberculosis;
- needlestick injuries or contaminated cuts; and
- when an employee requests that their name not be entered in the Log 300.

(8 Cal. Code Regs. § 14300.29, subd. (b)(7).)


Summary of Work-Related Injuries and Illnesses (“Log 300A”): At the end of the calendar year, the employer must summarize its Log 300 by filling out the Log 300A. (8 Cal. Code Regs. § 14300.29, subd. (a); 14300.32.) This completed form must be posted in a conspicuous place where notices to employees are posted from **February 1** to **April 30** of the year after the year covered in the form. (8 Cal. Code Regs. § 14300.32, subds. (b)(5)-(7).) If there are any employees that do not report to the worksite on a weekly basis during this time period, the employer must mail the form to them. (*Ibid.*)

Incident Report (“Form 301”): All employers with more than 10 employees must record injuries or illnesses on Form 301 that result in:

- death;
- one or more days away from work (not counting the day on which the injury occurred or illness began);
- restricted work or transfer to another job;
- medical treatment beyond first aid;
- loss of consciousness; or
- a significant injury or illness diagnosed by a licensed health care professional.

(8 Cal. Code Regs. § 14300.7.) The report must be recorded within **7 calendar days** of receiving information that a recordable injury or illness has occurred. (8 Cal. Code Regs. 14300.29, subds. (a), (b)(2) and (3).) Employers with 10 or fewer employees¹³ need not comply with the injury and illness recordkeeping requirements (other than for death or serious injury or illness) unless required to do so in writing by DOSH or the DLSR. (8 Cal. Code Regs. § 14300.1, subd. (a).)

Additionally, there are specific industries that are exempted (other than in cases of death or serious injury). (8 Cal. Code Regs. §§ 14300.2(a); see 8 Cal.C.Reg. §§ 14300.41, 14300.42.) These include: retail, service, finance, insurance, or real estate and applies “per establishment basis” meaning, for example, if an employer has both retail and manufacturing establishments, only the retail would be exempted. (8 Cal. Code Regs. §§ 14300.2(b).)



“Serious Injury or Illness”

“Serious” means any work-related injury or illness requiring hospitalization for more than **24 hours** for something other than medical observation or it involved the loss of any piece of the body (not a finger tip) or any serious degree of permanent disfigurement. (Lab. Code § 6302(h); 8 Cal. Code Regs. §§ 330(h), 342(a).)

¹³ The employers’ size is based on the peak number of employees during the **last** calendar year. (8 Cal. Code Regs. § 14300.1, subd. (b)(2).)

ii. [1.2.31] Employer's Report of Occupational Injury or Illness ("Form 5020")

The DLSR utilizes data regarding occupational injury and illnesses to conduct important research on economic, employment and workplace safety and health statistics. Utilizing DLSR data and analysis, workplace advocates can lobby for policy changes that benefit workers.

Employers must complete Form 5020 for each occupational injury or illness that results in lost time beyond the date of the injury or illness or that requires medical treatment beyond first aid. (Lab. Code § 6409.1; 8 Cal. Code Regs. §§ 14001, 14002, 14004.) This form is usually preceded by a report, Form 5021¹⁴, from the treating physician. The treating physician for the injured employee fills out Form 5021 when an employee receives treatment for a workplace injury or illness. (Lab. Code § 6409, subs. (a) & (b).); 8 Cal. Code Regs. § 14006.) The treating physician, as prescribed by the DLSR, must file Form 5021 with the employer or, if insured, the employer's insurer within **5** days of the initial consultation. (*Ibid.*) After the employer (or insurance company) receives Form 5021, the employer has **5** days to report via Form 5020 the occupational injuries and illnesses to the DLSR. (*Ibid.*) If the employer is self-insured, it must send the form to the DLSR within **5** days after the employer learns of the injury. (*Ibid.*)

The employer is required to report to the DLSR any occupational injury or illness, even if the physician's DLSR form only alleges that the worker's injury arose out of the course of employment and nothing more. (Lab. Code § 6409.1.) If an employee subsequently dies as a result of an occupation injury or illness, an employer must file an amended report with DLSR (or, if insured, with their insurer) within **5** days of learning of the death. (Lab. Code § 6409, subd. (a).) Failure to do so subjects the employer to a civil penalty starting at \$5,000. (Lab. Code § 6409.1, subd. (b).) An employer who is found to have a pattern or practice of failing to file timely reports or an employer who willfully fails to file timely reports may be assessed a civil penalty between \$50-200 by DOSH. (Lab. Code § 6413.5.)

3. [1.2.32] Special case for pesticide treatment

If a worker goes to a physician and requires treatment for either pesticide poisoning or a condition suspected as pesticide poisoning, the physician must file directly with the DLSR and must also file a complete report with the local health office within **24 hours** after the initial examination. (Lab. Code § 6409, subd. (a).)

4. [1.2.33] Prisoners' rights


The Department of Corrections and Rehabilitation and every physician or surgeon who attends any injured state prisoner is required file a report with DOSH regarding every injury

¹⁴ www.dir.ca.gov/OPRL/dlsrform5021.pdf [last visited September 25, 2013].

resulting from any labor performed by the prisoner unless the disability resulting from the injury does not last through the day or does not require medical service other than ordinary first aid treatment. (Lab. Code §6413; see Lab. Code §§ 6409, 6409.1 for the required forms). If the injury resulted in death, an *additional* report has to be filed with DOSH. (Lab. Code § 6413.2, subd. (b).) It is important to note, however, that this law does not create an employee–employer relationship between the DCR and the prisoner. (Lab. Code § 6413.2, subd. (c).)

5. [1.2.34] After-Hours Serious Injury or Death

If a serious injury or death occurs during or *after* normal business hours, the employer must “immediately” notify DOSH by **telephone**. (Lab. Code § 6409.1, subd. (b), see 8 Cal. Code Regs. § 342, subds. (a) & (d).) “Immediate” is understood to mean as soon as *practically possible* but not longer than **8 hours** after the employer “knows or with diligent inquiry would have known” of the death, illness or injury. (8 Cal. Code Regs. § 342, subd. (a); see *In re Cox Communication* (Cal–OSH App.Bd.) 2008 WL 5638237, *2 [holding that the employer’s duty to report was triggered “when employer learns, or reasonably could learn, of the serious injury”].) If the employer fails to provide the requisite notice, they may be subject to a minimum \$5000 civil penalty. (Lab. Code § 6409, subd. 1(b); 8 Cal. Code Regs. § 336, subd. (a)(6).)



Requesting Information (without retaliation...)

Although the Labor Code clearly states that employers are supposed to provide certain information to employees, requesting that information is another matter. Employees often fear retaliation for exercising this right. This is why serving as an employee representative is so important. Through a representative, employees can obtain the requested information and remain anonymous. Employee representatives can send a request stating that they have been designated as the representative for the employees in their request.

F. [1.2.35] Duty to Fix or Correct – “Abate” Health and Safety Violations

An employer has a duty to fix, or “abate” all Cal/OSHA violations. (Lab. Code §§ 6320, 6430; see § [1.2.72]: “Abatement.”) The date for abatement is set by DOSH when citations are issued against employers. (Lab. Code § 6317; see § [1.2.69]: “Citations.”) This date can be stayed if the employer files to appeal DOSH’s citations. (Lab. Code §§ 6600, 6600.5.)

G. [1.2.36] Duties in Dual and Multi-Employer Worksite

1. [1.2.37] Dual-employer worksites

A “dual-employer” worksite is a situation where two or more employers exercise some degree of control over a single employee. The most common dual employer situation involves a temporary staffing agency that provides employees to work at a site under the supervision and control of another company. We see this often in industries such as warehousing where a staffing agency is housed on site at the warehouse along with employees of the warehouse. The company supplying the employee is referred to as the *primary* employer, and the company supervising the employee at the worksite is the *secondary* employer. (See DOSH P&P § C-1, subd. (D); also see *Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.* (“Sully-Miller”) (2006) 138 Cal.App.4th 684, 693–695; *In re Abel Lopez, dba King City Labor Supply Salinas Mkg. Cooperative, Inc.* (Cal–OSH App.Bd.) 1986 WL 220387, *6-7.)

It is the primary employer’s responsibility to maintain and enforce an IIPP that includes employees sent to work under the direct supervision of other (secondary) employers and specifies the primary employer’s obligations to train and monitor those employees. (*Sully-Miller, supra*, 138 Cal.App.4th at 702.) Thus, the primary employer must include steps in their IIPP regarding steps they will take to inform other employers of the hazardous materials to which their employees may be exposed. (8 Cal. Code Regs. § 5194, subd. (e)(2).) The IIPP must also include training in both general and unique hazards that may be relevant to the work that the primary employer’s employees will do for the secondary employer. (*In re Adia Personnel Services* (Cal–OSH App.Bd.) 1992 WL 528570; *3-6; *In re Petroleum Maintenance Co.* (Cal–OSH App.Bd.) (“Petroleum”) 1985 WL 190705, at *3-4).

Secondary employers must also provide contract employees with a safe and healthful workplace and are responsible for Cal/OSH violations to which contract employees are exposed. (*In re Manpower* (Cal–OSH App.Bd.) 2001 WL 575154, *3; *Petroleum, supra*, 1985 WL 190705, at *3-4). The secondary employer’s IIPP must cover contract employees whom they control or direct and *directly supervise*. (Lab. Code § 6401.7(h); *In re MCI Worldcom, Inc.* (Cal–OSH App.Bd.) 2008 WL 546440, at *5 [“both factors must be present before a secondary employer must apply its IIPP to contract employees”].) For example, in *MCI Worldcom, Inc.*, OSHAB held that the secondary employer was not required to include the contract employees in its IIPP because, while it did exercise minimal control over the employees, it did not directly supervise the workers; i.e. “provided no training; did not accompany them while they did their work; did not set their hours; only had brief encounters with them, did not set their deadlines; did not tell them where to conduct their work; did not evaluate them; and did not assign them specific tasks.” (2008 WL 546440, at *6.)

Several other duties exist within dual-employer settings:

- **appropriate training for "loaned" employees:** the primary employer can only send

out those employees to the secondary employee that have been trained to do the work they have been assigned and that received training to recognize and deal with hazards involved in the work (*Sully-Miller, supra*, 138 Cal.App.4th at 699, 701; *Petroleum*, 1985 WL 190705, at *3-4);

- **inspection requirements:** the primary employer has to inspect the worksite of the secondary employer for any unsafe conditions or work practices *prior* to assigning any employees to the secondary employee *and* follow up such inspections with monitoring the worksite with periodic inspections (*Sully-Miller, supra*, 138 Cal.App. 4th at 701-702; *In re ManPower* (Cal-OSH App.Bd.) 2001 WL 575154, at 4-5.)
- **refusal to work:** the primary employer has to tell its contract employees that if they reasonably believe that a job assigned by the secondary employer is dangerous, they should refuse the work until the danger is fixed; they must also be informed that such refusal will not result in retaliation (*Sully-Miller, supra*, 138 Cal.App.4th at pp. 697, 701–702; *Petroleum, supra*, 1985 WL 190705, at *3-4);
- **PPE:** if PPE is required to do the work safely, the primary employer must provide the equipment and instruct the workers on proper usage or ensure that the secondary employer will do both of the above, (*Petroleum*, 1985 WL 190705, * 3; *see Sully-Miller, supra*, 138 Cal.App.4th at 701);
- **reporting:** the primary employer must report a death, serious injury or illness suffered by its contract employee while working for the secondary employer (*In re Labor Ready, Inc., supra*, 2001 WL 575152, *4-5; *see* Lab. Code §§ 6401, 6402, 6403, 6409.1.)

2. [1.2.38] Multi-employer worksites


At a multi-employer worksite, different employers and their respective employees work at the same location. These are often found on construction sites or complex facilities such as refineries and chemical plants where there may be a general contractor with multiple subcontractors working on different aspects of the same job (plumbing on a site building a house). A similar example is office buildings where security and janitorial services are contracted out. (See DOSH P&P § C-1C¹⁵). In these sites, employers owe a duty of care to *other* workers as well as their own employees who may also be exposed to hazards about which those employers knew or should have known. (Lab. Code, § 6400, subd. (b); 8 Cal. Code Regs., §336.10; *United Ass'n Local Union 246, AFL-CIO v. Occupational Safety and Health* (“Harris”) (2011) 199 Cal.App.4th 273, 284.)

There are four types of employers that DOSH may cite for hazards:

- ***Exposing Employer:*** any employer whose workers are exposed to a hazard;
- ***Creating Employer:*** any employer who creates a hazard;
- ***Controlling Employer:*** any employer who is responsible by contract or through actual practice for safety and health on the job; and
- ***Correcting Employer:*** any employer who is responsible for fixing a hazard.


¹⁵ www.dir.ca.gov/DOSHPol/P&PC-1C.HTM [last visited December 14, 2013].

(Lab. Code § 6400, subds. (b)(1)-(4); 8 Cal. Code Regs. § 336.10.) For example, on construction multi-employer worksites, DOSH has cited the general contractor as the “controlling employer” and the subcontractor contractor as the “exposing employer.” (*Harris, supra*, 199 Cal.App.4th at p. 284.)



Warehouse Workers

In the Inland Empire, the Warehouse Worker Resource Center, has been struggling to raise consciousness about the working conditions of warehouse workers and how big retailers negatively affect workers’ wages as well as the quality of their workplace by driving contract prices with warehouses and staffing agencies down. Warehouses dot the landscape in the Inland Empire and goods meant for big retailers like Wal-Mart often arrive for processing in these warehouses, which move billions of dollars worth of consumer goods to stores like Wal-Mart and Home Depot. Most warehouse workers have low wages and lack affordable health care coverage. Many work for temp agencies with no benefits or sick days. The warehouses, unfortunately, contain multiple hazards that warehouse workers, mostly low-income immigrant workers, must face. In the summer of 2012, warehouse worker, Domingo Blancas was hospitalized while working in a warehouse that reached 110 degrees Fahrenheit. The warehouse was owned by an employer who used a staffing agency within the warehouse. DOSH cited both the warehouse employer as well as the staffing agency because it opined that both oversaw the warehouse workers, and thus both were responsible for health and safety issues. As of February 2014, the hearings are still pending.



Warehouse Worker
Resource Center

Each employer at a multi-employer worksite is required to report to the controlling employer any hazards that its employees were exposed to during the course of their work, even if the employer reporting the hazard did not create the hazard. DOSH can cite for the employers' failure to report. Moreover, if another worker later become injured as a result of the unreported hazard, the employer may be held responsible under personal injury law for negligence. (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal. App.4th 430, 445.)

[1.2.39] Exercising Workers’ Rights

Cal/OSHA gives employees and their representatives the right to file a complaint and request an inspection of their workplace if they believe there is a serious hazard or their employer is not following health and safety laws, regulations, and standards. (Lab. Code § 6309.)



All the “Serious” Definitions

The term “serious” surfaces now and then in health and safety law to define particular circumstances. These can be confusing as there are important distinctions that exist that may not be evident at first. A “serious” **complaint** for the purposes of this section means a complaint “charg[ing] that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices , means, methods, operations, or processes...in the place of employment....” (Lab. Code § 6309.)

A **“serious injury or illness”** is defined as “any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.” (Lab. Code § 6302, subd. (h).)

A **“serious exposure”** means any exposure of an employee to a hazardous substance when the exposure occurs as a result of an incident, accident, emergency, or exposure over time and is in a degree or amount sufficient to create a substantial probability that death or serious physical harm in the future could result from the exposure.” (Lab. Code § 6302, subd. (i).)

A. [1.2.40] Filing a Complaint

A complaint alerts DOSH to employers who are not providing safe and healthful work environments. The complaint process can initiate an inspection and can result in citations, penalties, and a changed work environment. The person filing a complaint does not need to know if a law is actually being violated. The following is more detailed information on how to exercise these rights.



Before Filing a Complaint...

Before taking the step to file a complaint, the worker should identify the health and safety issues that are present in the workplace. The worker should discuss with a worker advocate strategies to address health and safety issues in the workplace to determine which issues may be citable by DOSH and to determine what actions the employer is willing to take to address the issues. Secondly, workers and their advocates can also arrange to meet with the local DOSH Regional Manager to educate DOSH about their workplace conditions and to begin a dialogue to determine what actions they should take to lead to a better, more complete complaint for DOSH. Pre-filing interviews between DOSH and workers or their advocates about the workplace conditions can be instrumental to ensuring the creation of a strong Cal/OSHA complaint. Moreover, it is important to note possible retaliatory actions that the employer may take and to strategize to make reports alongside other coworkers, if possible to take full advantage of possible remedies under the NLRA or to have coworker witnesses to the retaliatory action. (See Chapter 3.4: "NLRB.")

1. [1.2.41] Who can file a complaint?

Anyone may file a complaint, including a member of the public, who know about a work place health or safety hazard¹⁶. However, the Labor Code and DOSH's policies and procedures mandate a stronger and quicker response to complaints filed by workers (current employees of the violating employer), worker representatives, representatives from government agencies, and employers who are directly involved in an unsafe place of employment. (Lab. Code, § 6309; see DOSH P&P § C-7.) In general, employees or their representatives, have a right to request an inspection of a workplace if they believe there is a violation of a safety or health standard, or if there is any danger that threatens physical harm, or if an "imminent danger" exists.

¹⁶ See www.osha.gov/as/opa/worker/complain.html#6. [last visited September 27, 2013].



Formal vs. Informal Complaints


Formal Complaint	Informal Complaint
Filed by a <u>worker</u> , his/her representative or a law enforcement agency	Filed by anyone else
❖ Name kept confidential by Cal/OSHA <i>unless</i> the person agrees to release it	❖ Name kept confidential by Cal/OSHA <i>unless</i> the person agrees to release it
❖ Priority is given to this type of complaint	❖ Priority is lower for this type of complaint.
❖ Do <i>not</i> file the complaint anonymously because Cal/OSHA may need to contact the person filing the complaint	❖ Do <i>not</i> file the complaint anonymously because Cal/OSHA may need to contact the person filing the complaint
❖ Investigation takes place no later than 3 days (involving a serious violation) and no later than 14 days (involving a non-serious violation) (Lab. C. 6309)	❖ There is no requirement as to when the investigation should start, but it may start after all the priority issues are dealt with.

Examples of persons authorized to file Cal/OSHA complaints include, but are not limited to:

- employees;
- health and safety professionals;
- representatives from government agencies such as policepersons or firepersons;
- an authorized representative of the employee bargaining unit, such as a certified or recognized labor organization;
- an attorney acting for an employee; and

- any other person acting in a bona fide representative capacity, including, but not limited to, worker advocates or worker centers, 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.

(Lab. Code § 6309.) DOSH does not have to act, however, if it believes the person making the complaint is only doing so to harass an employer or if the complaint is without reasonable basis. (Lab. Code § 6309; see DOSH P&P § C-7, subd. (C)(2)¹⁷.)



The Importance of Naming the Complainant

If a worker or worker representative files a formal complaint **and gives the worker's name**, DOSH **must** conduct a physical inspection within **3 working days** for a serious violation and **14 calendar days** for a non-serious violation. (Lab. Code § 6309.) On the average, however, DOSH has missed this **3-day** deadline, with the average response time for a serious violation being about **6 working days**. Thus, it is very important to list in the complaint or inform the inspector of the worker or worker representatives' availability during this entire period to participate in the walkaround of the worksite with the inspector. (See §§ [1.2.56]: "Opening Conference"; [1.2.57]: "The Walkaround."). DOSH considers complaint to have alleged a "serious" violation if the complaint charges that there is a substantial probability that death or serious physical harm could result from the issues presented in the complaint. (Lab. Code § 6432, subd. (a).) If a worker or worker representative does not or cannot give the worker's name, the complaint is classified as "non-formal", and DOSH does not have to respond as quickly. DOSH is required by law to keep the complaint confidential unless the person making the complaint specifically requests otherwise. (Lab. Code § 6309.)

2. [1.2.42] How to file a complaint

Complaints should be filed with DOSH's district offices. The appropriate district office can be found on DOSH's website.¹⁸ (See § [1.2.126]: Appendix D: DOSH Enforcement District Offices.) DOSH has a web complaint form on its website that is easily downloaded.¹⁹ (See § [1.2.126]: Appendix E: Web Complaints (English & Spanish) & Web Complaint for Heat in Spanish.) It is also advisable for employees to leave a working phone number so that DOSH can call them for more information. When making the complaint give the worker's name, or, if the complainant is a worker representative, provide the representative's name *and* the name of the worker. DOSH is required to maintain the confidentiality of the worker and the

¹⁷ www.dir.ca.gov/DOSHPol/P&PC-7.HTM [last visited December 14, 2013].

¹⁸ www.dir.ca.gov/DOSH/districtoffices.htm [last visited December 14, 2013].

¹⁹ www.dir.ca.gov/dosh/WebComplaintForm.pdf [last visited December 15, 2013].

employer will not be able to find out the identity of the worker, unless the worker allows this information to be known. Additionally, if DOSH has a contact person for the complaint, they are required to inform that individual of any action they take within **14 calendar days** of taking action. (Lab. Code § 6309.)



No Time Limits for Response to Everyone Else

If the complainant is **not** a worker, worker representative, government agency representative, or employer, there is no set time limit in which Cal/OSHA must respond. However, if a complaint is made of a serious or life-threatening condition, even if it is not a formal complaint, it has the potential to push DOSH for a quick response if sufficient detailed information about the serious hazards is provided. (See § [1.2.41]: "Substance of a complaint.")

While complaints may be filed by phone, fax, mail, or in person at a DOSH office, matters involving serious violations should be telephoned and faxed to the nearest office. After calling the district office if the worker or advocate feels that their concerns have not been addressed sufficiently, they can elevate the issue to a higher level by requesting to speak to the District Manager. If the worker or advocate still feels that their issues have not been addressed adequately, they can elevate their issues up to the Regional Manager. If the Regional Manager does not provide the level of assistance desired, the worker or advocate can then elevate the matter to the Deputy Chief of Cal/OSHA Enforcement.²⁰



Complaints Filed By Phone

For a complaint filed by phone, it is important to also send DOSH a detailed **written** complaint, listing health and safety issues in order of most serious to least. The written complaint should be sent via fax, email, or regular mail to the agency immediately. It is important to follow up because DOSH's intake person may not have had the time to ask for all the details necessary for a thorough complaint.

After submitting a written complaint, the worker or advocate should follow-up with DOSH again to make sure the written complaint was received and to find out the name of the assigned inspector. The worker or advocate can ask to speak with the inspector before s/he begins an inspection and to request that the inspector inform him/her of the inspection *once the inspection begins* so that the worker or advocate can make preparations for employees to share their experiences with the inspector.

²⁰ www.dir.ca.gov/dosh/contactus.html [last visited December 14, 2013].

3. [1.2.43] Substance of a Complaint

A person does not have to know whether a specific law or regulation has been violated in order to file a complaint. The face of the complaint just needs to give the DOSH district manager enough information to determine if a health and safety violation or a serious hazard has occurred. If DOSH determines that a complaint is too vague, it can classify the complaint as being “without reasonable basis.” In such a case, DOSH is **not** required to respond. (Lab. Code § 6309, see also DOSH P&P § C-7, subd. (C)(2).)

The complaint should be as complete as possible, therefore, it is important for the worker to document whatever s/he can, submit written proof or pictures if s/he has them, write down the information from chemical labels, etc. A complete complaint assures a more complete inspection. If the worker only includes one item, it is possible that only one item will be inspected. Also, if an employer demands an inspection warrant from DOSH, a more complete complaint will assist in obtaining the necessary warrant.



Taking Pictures Of The Hazard

Advocates or workers can submit pictures or videos taken of the hazard with their complaint. Advocacy groups who are taking photos from the street of unobserved exposures will have a more difficult time in demonstrating employee exposure. Employees who can capture details of the hazard and employees exposed to it are in the best position to take pictures.

Generally, DOSH issues citations based on hazards they did not see all the time and can issue a citation even if they did not observe the incident, i.e. in an accident. DOSH needs to show employee exposure, however. Pictures or videos of hazards with identifiable workers nearby are useful if they can do the following:

- capture a hazard that may not be present much longer (i.e. one that only occurs at certain times);
- show identifiable employees that were exposed to the hazard because they were near, at, or in the hazard (more than one employee is ideal);
- show identifiable information about who the employee was, what they were doing, and for whom were they working (i.e. uniform, name tag on uniform, company logo on uniform, identification card of employee included with photo);
- show the hazard clearly;
- indicate the date and time of the hazard somehow (i.e. time signature of picture, or picture of work clock or calendar taken at the same time with things that may identify the picture with the hazard (i.e. close-up of employee's watch, photo ID, next to hazard, etc.).

4. [1.2.44] Cover letter

Although it is not required, adding a cover letter to the complaint may be helpful because it may address the information described below.

- **additional information about the employer:** Besides the basic information called for in a Cal/OSHA complaint form, a general description of the size of the operation, management structure, and current economic status can sometimes be helpful; and
- **additional information about the union or worker representative:** The worker or advocate may want to include some information about who should be contacted when DOSH does the inspection. Otherwise, if no one is indicated, no employee representative may be contacted where there is no union and if a union is present, the employer may refer the DOSH inspector to the wrong union representative (i.e. if there is more than one union at the site or if the site has more than one contact person known to the employer). Sufficient information should be provided to ensure that DOSH will be able to contact someone during the time period in which they are making a determination about whether or not to conduct an inspection of the worksite.

(See § [1.2.126]: Appendix F: Sample Complaint and Cover Letter.)

B. [1.2.45] Describing an event or incident

There are two ways in which the worker can describe what happened - through a timeline, or through a graphical method called “hazard mapping.” The advocate can interview the worker using these two techniques to gather the information that is needed for the substance of the complaint.

1. [1.2.46] Timeline

In the timeline technique, the information is presented along a time sequence or chronology. The objective of the advocate is to gather as much information as possible by letting the worker simply talk about their experience with the advocate guiding the worker.

When workers are asked to describe their injury or the hazard, they will usually start in the middle and discuss information pertinent to the moments just before an incident. The advocate’s job is to ask open-ended questions of the worker so that *all* of the information that is necessary for the most complete complaint possible can be gathered.

In this information gathering process, it may be helpful for the advocate to take the role of a film-maker, for example, that is creating the story of the incident or hazard. Thus, the

elements of information gathering can include building the setting, lighting, sounds, stage, costumes, and duration of the hazard.

Setting: All stories have a setting so it is important to ask questions about the setting of the incident or hazard. That is, where did it occur, what is the building like, where did the incident occur – what city, what was the climate or temperature, was the ground wet when it occurred, etc.

Lighting: Information regarding lighting is important to determine if there was sufficient lighting, for example, for the worker to have seen what they were supposed to have seen. Questions the advocate should ask include: was it mid-day, early morning or evening; was it the day or night shift; what was the exact time of the incident or hazard; did it occur indoors or outdoors; how much light was in the surrounding area; was it natural lighting or fluorescent lighting...etc.?

Sounds: Background noise is as important as conversation. It may be so loud that it constitutes a violation in and of itself. Or it may make it difficult for someone to hear what it is that they said they heard. Questions about sound include: what sounds are present; was it loud, was there heavy machinery running at the same time; were there forklifts or trucks running back and forth; were there announcements constantly over the intercom system, were there conversations that were taking place...etc.?

Stage: It is important to gain an understanding of the stage and surroundings. Not only can the nature of the hazard or incident be understood better, but it may be possible also to identify other hazards to add to the complaint. Questions regarding the surroundings include: what furniture was present; what machinery or instruments were present i.e. cranes, scaffolds, trenches, forklifts, heavy boxes, etc.; who was present - management (provide their positions), workers, subcontractors, supervisors, staffing agency personnel, etc.; how many workers were exposed; where were the various players located when they were exposed...etc.?

Costumes: The clothing or protective equipment that the workers utilized is important to gauge what may have contributed to the hazard or incident. Questions regarding clothing include: What clothing did they have on; was it appropriate for the work they were asked to perform: did workers have personal protection equipment (PPE) such as goggles, gloves, respirators, etc. that was provided by the employer; did workers' clothing or lack of it contribute to the incident, i.e. did they have the wrong shoes thus causing injury to their feet; did they have the appropriate tools...etc.?

Duration: A final important factor to note is whether or not the hazard is something that will go away quickly if not observed immediately. For example, if the condition only exists when a certain thing happens, i.e. when people are working on the roof, then this information needs to be gleaned and then specified in the complaint so that investigators will know that they must act quickly so that they can make arrangements to observe the hazard before it goes away (i.e. the roof work is completed). Questions about duration may include:

does the hazard only occur on certain times of the day, during certain shifts, etc.; does the hazard only occur on the weekends...etc.?

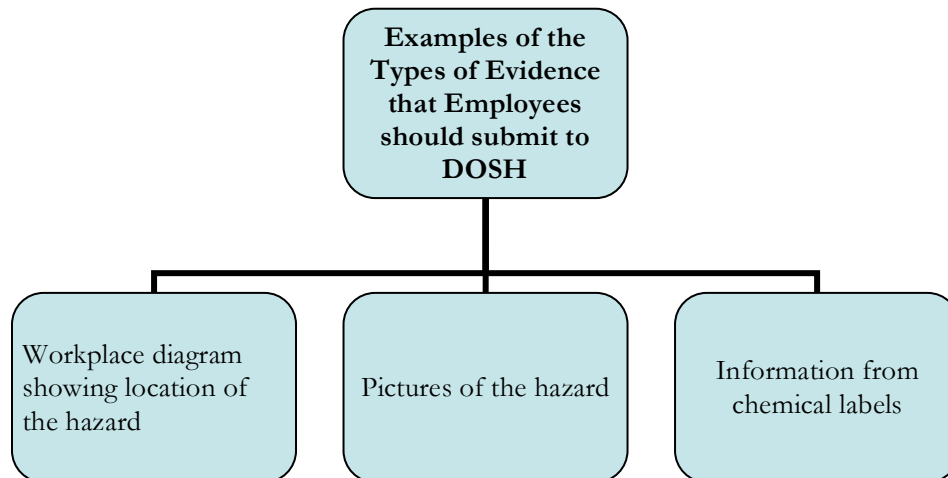


Timing Determination by Cal/OSHA

DOSH will try to determine the period of time for which the unsafe condition may continue to exist and then allocate inspection resources to respond first to those serious situations in which time is of the essence. (Lab. Code § 6309.)

It is important for the complainant to tell DOSH how long s/he believes the hazard might exist (and how long it has been in existence) so that if it is a “fleeting” hazard, DOSH has notice of it and should try to get to the location in time to address the hazard.

Then once all these components have been gathered, the legal advocate can, in a sense, turn on the camera and sound and see how the workers’ story and the details provided play out. Include dialogue and any necessary components that will enable the legal advocate to better understand what happened before, during, and after the incident or hazard in its entirety. From all of this, the advocate should be able to compose a comprehensive complaint.





Complaint Does Not Need To List Law or Regulation

It is important to note that workers do not have to know whether a specific Cal/OSHA standard has been violated in order to file a complaint. It is not necessary for a worker or worker's representative to refer to a specific rule or regulation that is believed to have been violated. As long as the worker believes that there exists a workplace hazard that is dangerous to the health and safety of workers, s/he can file a complaint.

2. [1.2.47] Sample interview questions

The questions below are examples of a worker interview that can be used to elicit details for constructing a broad complaint. Advocates may be concerned that they do not know enough about safety or industrial hygiene to conduct the interview, however, it is not necessary to use exact safety or health information. As long as the advocate encourages the worker to describe what he/she sees, hears, smells, etc. in detail, then the advocate and the worker may be able to give DOSH the kind of information it needs. If there was an injury or illness, ensure that the worker describes what they feel in their body as well as their emotions.

In conducting these interviews, do not be concerned about collecting what may not be considered as evidence or sufficient evidence. The main concern is to collect as much information as possible to create a detailed and strong complaint. In doing so, keep the following in mind:

- **hearsay** – the worker should be able to describe a situation that they did not witness, however, the report should clarify that the worker is not an eyewitness and to provide names of possible eyewitnesses or a means for DOSH to contact others who may be eyewitnesses that will eventually be necessary if an inspection warrant is demanded by the employer or if the employer later contests any citations;
- **sufficiency of the evidence** – the worker is not required to assure that the information in the report is sufficient to constitute a violation of the law because ultimately, DOSH makes observations, takes measurements, and interviews witnesses to determine whether or not there is a violation of the law; and
- **provide enough information** – be sure that DOSH knows what to look for, what to measure, and who to interview, and if the employer slows down, stops, or otherwise changes the nature of the operation when the DOSH inspector is present, make sure the worker finds a way to inform DOSH (even if it is in a separate interview conducted on another day so as to avoid retaliation).

Do not allow any of the above to limit or edit the information provided by the worker. Again, the priority is to collect as much information as possible in this stage.

A. Nature of job

- (1) What work is being done?
- (2) Where is the work being done?
- (3) When is the work done (shift) and for how long? When are the hazardous aspects of the work done (shift, time of day, weekends, etc.)? For how long? Obtain pictures if possible (be sure not to violate any employer rules).
- (4) Who and how many are doing the work? Who and how many is/are affected by the hazard of that work (is it only the worker doing the job or are neighboring workers also affected)? Obtain names and a means to contact.

B. Who is/are the responsible employer(s)?

- (1) What contractor or subcontractor is doing the work?
- (2) Which person(s) from management is/are at the site to direct and control that work?
- (3) What is the chain of command above the management person at the site?

C. What knowledge does the employer have regarding the unsafe or unhealthy condition? THIS IS IMPORTANT TO PROVE a condition is SERIOUS

- (1) How long has the hazard existed and how long will continue to exist and why?
- (2) Who in management has been notified about the hazard and what was the response? Note the date, time, and place of notification. Who gave the notice, who received it, and who else was a witness? Note the details of the conversation. Note particularly any admissions or statements by management in response. If the employer was notified in writing, obtain a copy.
- (3) Have there been any actions or statements by management that indicate in some way that they knew about this problem? Please detail as above.
- (4) Have there been any injuries or illnesses in the past associated with this particular work hazard? Detail who, what, how, when, where. Obtain a medical release if possible. Look at the Cal/OSHA LOG 300.²¹
- (5) Has DOSH ever addressed the employer about this hazard? Detail who, what, how, when, and where.²²

D. Who else is aware of this unsafe or unhealthy condition?

- (1) Have you notified any other government agencies²³?
- (2) Have you contacted any other union reps?
- (3) Have you contacted any other employees?

²¹ www.dir.ca.gov/DOSH/DoshReg/AppendixA300Final.pdf [last visited December 14, 2013].

²² For information on previous citations issued against the employer, see www.osha.gov/pls/imis/establishment.html [last visited December 14, 2013].

²³ County health offices are another possible source. However, keep in mind that they are not under the same obligation to keep the workers' identity confidential.

E. Did the worker refuse to perform unsafe work, or refused to work where they believed there was a hazard?

- (1) Had the worker ever preform the job before?
- (2) Had the worker been trained in the particular job or task?
- (3) Are there written policies and procedures for how to do this job?
- (4) Did the supervisor say or do anything to change the way the job was done
- (5) Had the conditions of the job changed recently? How
- (6) Had the worker previously protested the job?
- (7) Did other workers previously protest the job?
- (8) Did others refuse to do the job? Who? How many?
- (9) Was the company in violation of a Cal/OSHA or local safety and health regulations?
- (10) Have workers been injured or made sick doing the job?
- (11) What chemicals, machinery, etc. was the worker using or would have had to use if they performed the job?

F. Undocumented workers

- (1) Are workers undocumented or have immigration concerns?

G. General hazards involved

- (1) What are the general hazards associated with this work (falls, cave-ins, strain or over-fatigue, confined space, etc.)?
- (2) How is the worker affected (if not obvious)?
- (3) What engineering controls exist to control the hazard (safety nets, guard rails, shoring/sloping, etc.)? Were they fully operational?
- (4) What work practices exist to control the hazard (procedures requiring standbys, written policies and procedures, etc.)?
- (5) What personal protective equipment is being used to control the hazard (safety belts, hard hats, respirators)? Is it required? Does the employer provide or does the employer require the employee to pay for it?

H. Toxic hazards involved

- (1) What are the toxic hazards associated with this work (flammable vapors or corrosive, flammable or combustible liquids: solvents or paints, etc.; asbestos; wood dust or wood preservatives; welding fumes; combustible dusts; etc.)?
- (2) What is the physical description of the substance? If possible, obtain name or label or MSDS (be careful not to violate any employer rules and be careful not to injure yourself when handling or coming near the toxic substance)?
- (3) How is the worker affected (if not obvious and if you know)? By what route is the substance entering the body (inhaling it from the air, absorbing it through the skin, etc.)? What are the symptoms of exposure (rash, dizziness, trouble breathing, etc.)? Is the worker having any problems with certain organs (skin, liver, etc.)?

- (4) What engineering controls exist to control the hazard?
- (5) What work practices exist to control the hazard (working asbestos wet, etc.)?
- (6) What personal protective equipment is being used to control the hazard (respirators, eye or body protection, etc.)? Is it required? Does the employer provide it free? What type of respirator is it (if you can tell)? What type of training program was given to the worker using it (does worker have her/his own respirator, was s/he fit tested, does s/he know how to clean and store it properly, does s/he know what protection it really provides?

I. Mechanical hazards involved

- (1) What are the hazards caused by machinery, tools or heavy equipment?
- (2) How is the worker affected (if not obvious)?
- (3) What engineering controls exist to control the hazard (guarding, roll over protection and seat belts, etc.)?
- (4) What work practices exist to control the hazard (lock or block out, etc.)?
- (5) What personal protective equipment is being used to control the hazard (hard hats, goggles, etc.)? Is it required? Does the employer provide it free?

J. Does employer have a written IIPP?

The employer is required to have a written IIPP with documentation of each aspect of that program. At every inspection, DOSH must evaluate the employer's IIPP. Obtain a copy of it, if possible. Describe it, if possible. Is it adequate? Is it enforced?

K. Have you had any problems obtaining records from the employer concerning safety and health?

The employer may have the following records:

- (1) an insurance experience modification rate, an accident incident rate and/or an injury frequency rate;
- (2) DOSH or other government agency inspections;
- (3) training (including who is trained to use PPE; who is trained and qualified/experienced to operate certain equipment and machinery and power actuated tools; who is trained regarding the hazardous substances to which they might be exposed under either normal work conditions or reasonably foreseeable emergency conditions resulting from workplace operations);
- (4) periodic inspections (including records of maintenance of PPE and of all machinery and tools);
- (5) permits issued by DOSH (trenching/excavating, demolition, etc.);
- (6) permits issued by other government agencies;
- (7) licenses required by DOSH or other government agencies to conduct special work (i.e. blasting, etc.);
- (8) log of blasting;
- (9) reports indicating any carcinogens used;

- (10) certificates for certain equipment/machinery;
- (11) plans for trenching and excavating for public works jobs over \$25,000;
- (12) log of injuries and illnesses;
- (13) a copy of the IIPP (although employers must have an IIPP, it is not clear whether or not workers are entitled to a copy); and
- (14) information about Toxic Substances.

3. [1.2.48] Describing an ongoing condition

If there are ongoing incidents or conditions, the advocate should make sure to gather information that led to the creation of the condition from the very beginning. Doing so will ensure that the advocate is able to gather sufficient evidence to paint a complete picture. Some examples of on-going conditions in particular industries are as follows:

- **construction:** the advocate may want to plan the first scene of the story of the incident to include the arrival of the machinery that, for example, will begin to dig out the foundation for the building, including descriptions of the process of building, the maintenance of machinery, emergencies that may have occurred, and the movement in and out of people, materials and machinery;
- **manufacturing:** the advocate may plan the first scene as the arrival of raw materials at the plant and describe how those materials move through the plant until the final product is shipped out, remembering to discuss maintenance work as well; and
- **service:** the advocate may plan the first scene as the arrival of a patient or materials at the hospital and then describe how the activities flow from there.

It would be helpful to have the worker draw a diagram of the situation. Note all relevant equipment and machinery and identify or name the areas where certain work is done by simply labeling them A, B, C, etc. The following section describes a technique for mapping issues at work.

4. [1.2.49] Hazard Mapping

The advocate may find that a straightforward interview does not elicit the details necessary to create as complete a picture as possible regarding the workers' injuries and workplace conditions. The following is a detailed description of the process of the methods designed to engage workers more visually and descriptively in discussions regarding their injuries, illnesses, hazards in the workplace and overall workplace health and safety conditions.

i. [1.2.50] Mapping tools

Maps have many useful purposes, reflecting individual and collective experiences, and making visible a variety of things.

Body and workplace maps are often used in occupational health and safety training or organizing workshops. They also can help legal advocates understand the hazards in a workplace or job, and/or the symptoms that are the result. They can be used with individuals or groups of workers.

ii. [1.2.51] Body maps

Body maps tell the story/ies of symptoms. Individuals mark up templates, or outlines that they draw, of the front and back of a body. Using color or other coding, they can answer questions such as:

- Where does it hurt? (gets at aches and pains, repetitive strain injuries or what some call musculoskeletal disorders)
- Where does “stress” show up in your body? (find out about the variety of physical and other effects of being stressed)
- Where was your original injury? Where do you have symptoms now? (gets at chronic pain issues)
- What symptoms do you have?/Where do you feel bad? Where do they show up? Which ones bother you the most?

For a single worker, this is a good way to start a conversation. Follow-up questions can include:

- When do you feel (the symptom/s)? What are you doing when you notice it? What makes it worse?
- What do you think causes it?
- What do others think causes it? (e.g., co-workers, a doctor, massage therapist, chiropractor)
- What could be done right away to avoid or reduce it?
- What should be analyzed or investigated in more detail?

For ergonomic issues – aches and pains is one way to think of them – the advocate could get the person to act out his/her job. Someone else, or a group of people, identifies which body parts likely are affected by force, repetition, awkward and static postures, and more. With permission, mark the spots directly on the person, using “ouch” stickers (labels printed up with the specific types of ergonomic hazards or “ouch” in the appropriate language).

For a general sense of what work is doing to someone, ask them to draw on a piece of paper (preferably with colored markers or crayons) the answer to the question: *How does work affect you?* An example of one result is in the image below, which depicts a teacher’s answer to “How does work affect you?” (Diagram from files of Dorothy Wigmore, 2011.)



These maps are great for acute or immediate symptoms, and aches and pains. They provide a way to start telling stories, see patterns and deal with literacy issues. Asking “*What do you see?*” is a good way to initiate a discussion about the maps, especially with a group of workers.

If the effects that the advocate is concerned about show up months or years after doing a particular job or being at a particular workplace, the questions need to account for this. Cancer usually takes at least 15 - 20 years to appear, serious breathing issues can be the result of breathing dust or toxic chemicals for a long time, etc.

Patterns do emerge if advocates use these questions with a group of workers to determine whether it's immediate or chronic or long-term outcomes/ symptoms/ diseases.

“This is the first time I’ve known I’m not alone in my pain,” a veteran construction worker said after seeing the body map he and others made in a workshop for operating engineers. His reaction illustrates a classic barrier to fixing health and safety hazards - individual workers think their symptoms are just their problem. It is so much easier to think about investing time and energy in fixing something if people know they are not alone. Another example comes from a study of workers and their families in southern Ontario, Canada. The workers had been employed in a foundry that turned out to have incredibly high levels of asbestos in the air. Many years later, after the factory closed, this showed up as cancers and respiratory diseases in the workers and their families. The workers also had other long-term effects such as hearing loss and musculoskeletal issues.

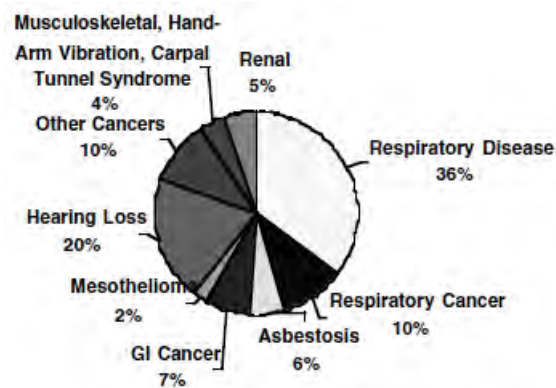
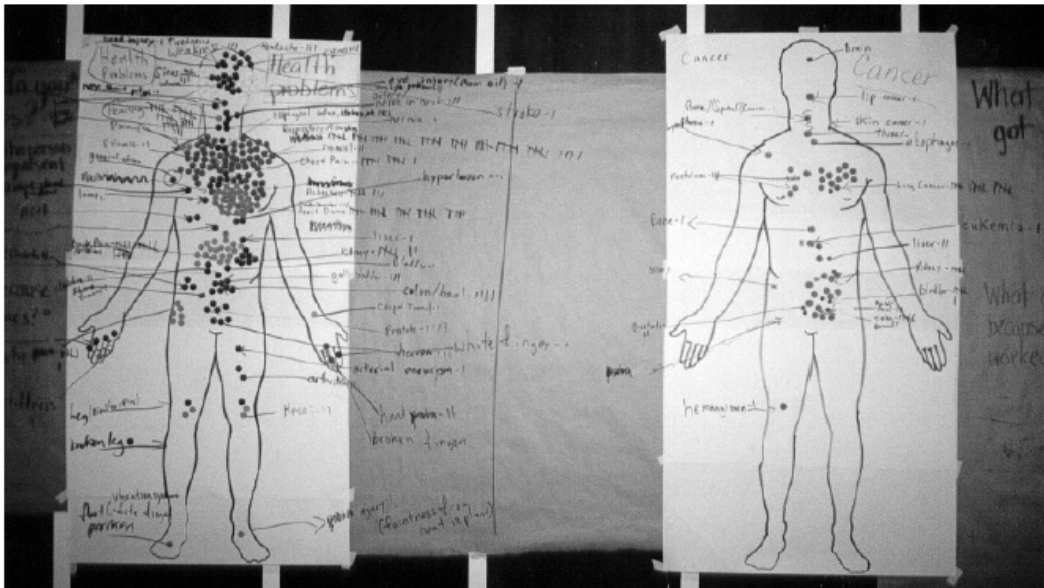
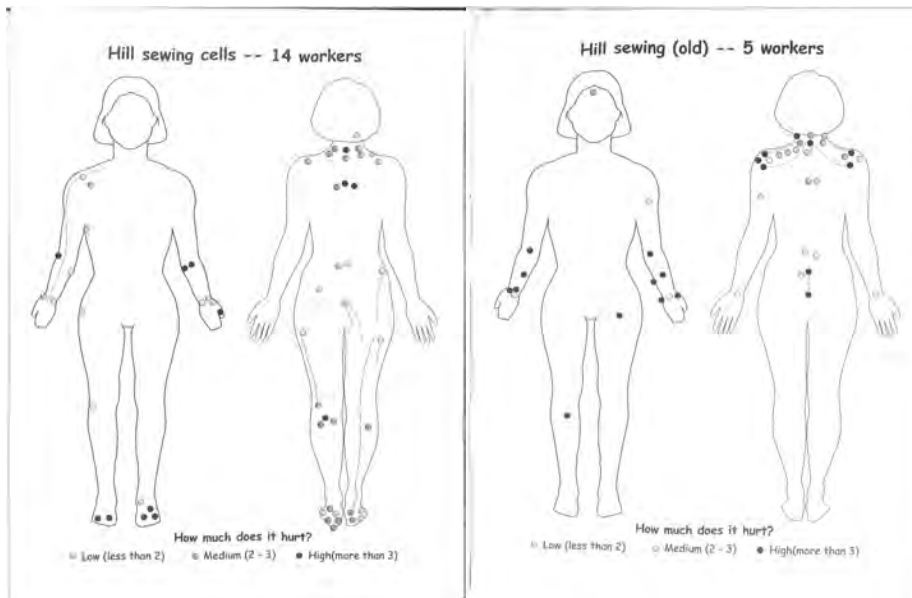


Figure 3—Holmes body-mapping data.

(Keith & Brophy, *Participatory Mapping of Occupational Hazards and Disease Among Asbestos-Exposed Workers From a Foundry and Insulation Complex in Canada*, (Apr/Jun 2004) *Int'l. J. Occup. Environ. Health* (Vol. 10, No. 2), fig. 2 and 3 at pp. 149-150.²⁴)

In an investigation of the ergonomic hazards facing women sewing the insides of coffins, body maps were able to illustrate the effects of standing that were required with a new production method that eliminated chairs. (Habes & Wigmore, *HETA 98-0085-2715*,

²⁴ See www.bvsde.paho.org/bvsacd/ijoeh/10-02-01.pdf [last visited December 9, 2013] where the images can be found on pages 149-150.



Aurora Casket Company Aurora, Indiana, National Institute for Occupational Safety and Health, (October 1998), at pp. 29 and 32.²⁵

iii. [1.2.52] Workplace hazard maps







Workplace maps integrate how people look at and experience their job and workplace. Developed to better “see” occupational health and safety issues, they can be used for any topic about which workers want to organize in their workplace and/or community. They also can help outsiders -- including legal advocates -- and workers have a common view from above, seeing the big(ger) picture “with new eyes.”

These maps -- sometimes called risk maps or hazard maps -- have been used in occupational health and safety training, problem-solving and organizing activities since the 1960s. Adapted by workers and unions in many countries, they now are required by law in several, including Italy and Brazil.

The maps can be made in several ways. All the maps involve drawing the physical space where someone works, and marking hazards where they appear. It is important to include all hazard categories to see how they overlap and/or affect one another. The following is an example of one method of coding hazards.

²⁵ The images are available at: www.cdc.gov/niosh/hhe/reports/pdfs/1998-0085-2715.pdf [last visited December 9, 2013].

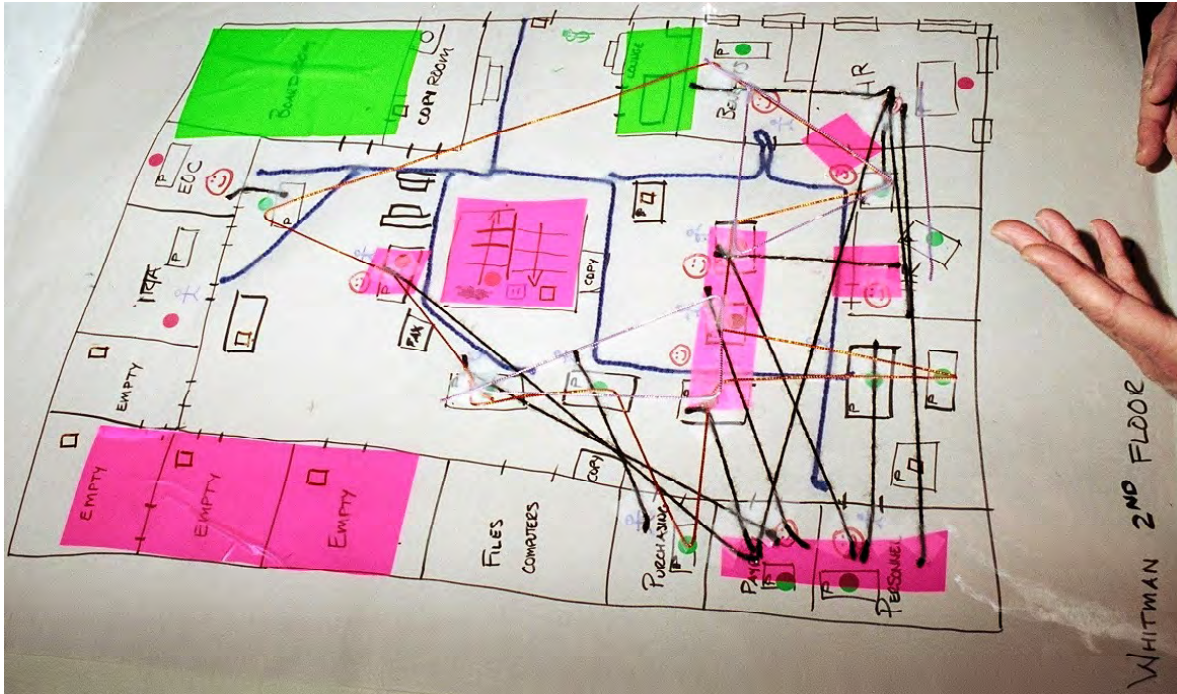
Hazard categories for mapping

Hazard	Colour	Icon
Physical (from energy sources): lighting, electricity, vibration, noise, temperature, humidity, radiation	Red	
Chemical and Mineral: gases, mists, vapours, solids, dusts, fumes, liquids	Blue	
Communicable/Biological: blood-borne diseases, viruses, bacteria, moulds, sharps/needlesticks	Yellow	
Ergonomic design: repetition, awkward and static posture, force (including contact stress), work environment	Brown	
Safety/Mechanical: slips/falls, housekeeping, tripping hazards, moving equipment/parts, things that cause traumatic injuries	Green	
Stressors/Work organisation: pace/intensity, social support/relations, workload/demands, control/latitude/say flexibility for non-work responsibilities, violence	Purple	

Many maps are made without people. This removes valuable information, however, about numbers of people affected, social relations, etc. People that should be on the map include the worker(s) involved, supervisors, patients/clients and others. Again, color coding with sticky dots is an easy way to do this.

For more complex visualizations of social relations and other factors that are normally invisible, use layers of plastic above a drawn outline of the physical work area. Each layer can cover a different category of information (e.g., hazards, people, social information such as where people like or don't like to be and lines of communication). String, colored paper and icons make the experience fun and the result colorful.

The example below shows how a version of this was done - without the plastic layers - by a state university health and safety committee examining violence hazards in their workplace. Information about the icons and meaning of the strings and colors can be found in the legend immediately below the image.



Legend for workplace violence map

1. Violence hazards (chosen by the participants)

Financial \$

Physical design

Policy and procedures/disorganization

Who we "work" with

Staffing



2. Social information

Individuals/workers



Leaders



Groups



Individuals' paths or flow of work



Lines of communication for:

- Management



- The union



- The grapevine



Hot/danger zones (where people don't want to be)



Safe/free zones (where people are comfortable "hanging out")



iv. [1.2.53] Analyzing the results


However it's done, once something is visible, it's hard to ignore the issue or situation. Hence, a different code for part-time or temp workers will make visible their presence in the workplace. So too does using string to show someone's movements from when they start their work-day until it ends. The maps²⁶ can be used to tell stories, identify "players" and start the process of prioritizing issues to tackle. Once identified, solutions can be developed and strategies to work towards them discussed.

²⁶ There are lots of resources and photos about occupational health and safety body and workplace maps at www.hazards.org/diyresearch [last visited December 14, 2013]. For more information about layered body and workplace maps, check out www.wigmorising.ca [last visited December 14, 2013], and see the instructions in SH Tool 12 of *Seeing the workplace with new eyes*, available at www.mgeu.ca/news-and-multimedia/news/read/article/95/seeing-the-workplace-with-new-eyes [last visited December 14, 2013].

[1.2.54] The Process

A. [1.2.55] Where Does The Complaint Go?

Once the complaint is sent to DOSH, they will log the complaint, and it will be routed to the District Manager or District Supervisor.²⁷ Most likely, either one of these individuals will assign the complaint that day to an Industrial Hygienist (IH) or Compliance Safety Engineer (CSE) who will make a direct contact with the complainant to obtain further information regarding the unsafe or unhealthy condition reported.²⁸ The DOSH district office then classifies all of the complaints they receive by seriousness in order to determine inspection priority of each complaint.²⁹ After a determination regarding a complaint's seriousness has been made, a copy of the Cal/OSHA 7 is given to compliance personnel designated to conduct an investigation or generate a letter response.³⁰ (See § [1.2.126]: Appendix G: Cal OSHA 7: Sample Letters to Complainant.)



Order of Priority by DOSH of Complaints
(from most urgent to least urgent)

The following is the order of priority for complaint investigation:

- 1. Imminent Hazard**
- 2. Formal Complaints About Serious Hazards**
- 3. Non-Formal Complaints About Non-Serious Hazards**

Imminent hazards can be a place of employment, machine, device, apparatus or equipment, or a part of any of these, which is in a dangerous condition, is not properly guarded or is placed dangerously so as to constitute an imminent hazard to any employee who may enter or use it. (Lab. Code § 6325.)

B. [1.2.56] DOSH's Authority To Investigate & Inspect

In general, DOSH is authorized to conduct workplace inspections, subject to constitutional and statutory restrictions, to ensure that occupational safety and health standards are being met. (Lab. Code §§ 6309, 6314, 6314.1.) DOSH inspects places of employment that are:

- on the high hazard list (Lab. Code § 6314.1);

²⁷ www.dir.ca.gov/DOSHPol/P&PC-7.HTM [last visited October 1, 2013].


²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

- that has received permits for particularly hazardous work (Lab. Code § 6500 et seq.);
- in response to complaints (Lab. Code §§ 6309, 6314.5, subd. (b)(1));
- in response to accidents (Lab. Code §§ 6313; 6314.5, subd. (b)(2)),
- following a “serious” citation (Lab. Code § 6320); and
- where there are conditions involving abatement and special orders. (Lab. Code § 6314.5, subd. (b)(4).)

Every workplace covered by DOSH may be subject to inspection by compliance safety and health staff. Inspections are conducted by DOSH safety engineers and industrial hygienists from district offices throughout California. DOSH may not give advance notice of an inspection to an employer when the inspection is a result of an employee complaint unless there is a cause for providing advance notice. (Lab. Code § 6321.)



Advance Notice of Inspections

Employers may be given advanced notice of an inspection only in extremely limited circumstances. (Labor Code § 6321, 8 Cal. Code Regs. § 331.1; DOSH P&P § C1-A, subd. A(2).) Advanced notice must be approved by the DOSH Chief or his/her designee and is usually given in the following situations: (1) When an imminent hazard is present so that the employer can abate the hazard as quickly as possible; (2) When an inspection has to be conducted after regular business hours; (3) When special arrangements are necessary to conduct the inspection, e.g., when it is necessary for maintenance of security at a correctional facility or for protecting the safety and health of compliance personnel when inspecting a correctional facility. (*Ibid.*)

But if advance notice is given, the employer must promptly notify the employee representative. (8 Cal. Code Regs. § 331.3.) Thus, although DOSH will almost always show up unannounced when investigating a complaint, worker advocates can contact the inspector after the complaint is filed to request that the worker advocate, employee, or another employee representative be notified when the inspector arrives. When speaking to the inspector, let him or her know if certain hazards occur during particular shifts or times of day to ensure that inspectors appear at the correct time to observe hazards.

The employer has the right to refuse entry to a DOSH inspector and to demand an inspection warrant, however this rarely occurs since employers are aware that DOSH has the ability to easily obtain a warrant. (See Lab. Code § 6314(b); *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625, 632.) DOSH must have either employer consent or a warrant to inspect a workplace. (*Ibid.*)



Investigation by Letter

There are times when DOSH, with its discretion, determines that an investigation can be sufficiently done by letter alone. These letters are sometimes issued when employees tell DOSH that they are not interested in getting the employer cited. They are mostly interested in ensuring that the employer fixes the situation. The letters are issued two to three days from the date of the filing of the complaint.

In these instances, DOSH will not conduct a physical inspection of the worksite, but will, instead inform the employer about the health and safety complaints. The letter will allow the employer to respond to the allegations of hazardous conditions and to state whether the employer believes the complaints to be true or not. If they believe they are true, they must agree to correct the hazard. Workers may be disappointed at the lack of a physical inspection, but oftentimes, this letter inspection puts the employer at notice that DOSH is alerted to the condition or hazard. If the employer denies the allegations, it must submit evidence. If DOSH is not satisfied with the evidence provided, it will then inspect the worksite.

C. [1.2.57] Timing of Inspections After Complaint

The timing of inspections is based upon whether or not complaints are considered formal or informal by DOSH. (See § [1.2.39]: “Who can file a complaint?”)



Make Contact with DOSH

The advocate should contact DOSH before they file and ask to talk to the IH or the CSE who has been assigned to the case. Try to establish contact shortly after the complaint has been filed the next day. The goal is to call and develop a relationship so that the advocate and worker can provide the inspector with necessary information to target their inspection of the worksite, as well as their investigation of the health and safety conditions at the worksite.

It is ideal to catch the IH or CSE **before** they go out for their inspection. The more information DOSH has before an inspection is conducted, the better able the inspector is to prepare. With more information, the inspector will be able to check all the appropriate laws and regulations before going to the site. S/he will be able to bring all the correct equipment for taking samples and the inspection will be more efficient. The inspector will also have a better understanding of the most pertinent health and safety issues of the worker.

DOSH **must** investigate upon receipt of a complaint:


- by an employee or his or her representative (but DOSH need not investigate if it determines, from the facts stated in the complaint, that the complaint was made without any reasonable basis or to willfully harass the employer); or
- by a prosecutor or local law enforcement agency charging a “serious violation.”

(Lab. Code § 6309.)

DOSH is required to inspect a job as soon as possible but no later than **3 working days** from the receipt of a **formal** complaint about a serious violation as defined in Labor Code section 6432. (Lab. Code § 6309; see DOSH P&P § C-7, subd. E(1).) If the complaint is referred by a city or state prosecutor or law enforcement agency, DOSH is required to inspect within **24 hours** of receipt of a **formal** complaint.

If it is a non-serious violation, then DOSH must inspect within **14 calendar days** of the complaint. These complaints are considered to be **informal complaints**. (Lab. Code § 6309; DOSH P&P § C-1, subd. B(2)(b)(1).) Even serious informal complaints can be investigated merely by phone and/or letter. (DOSH P&P § C-1, subds. B(2)(b) and F(2) [issued 1987, last revised 2008].)

Though DOSH policy dictates that DOSH should respond immediately to complaints involving an imminent risk of death or serious injury, only formal complaints get the benefit of a hard deadline. (DOSH P&P § C-7, subd. D(1) [procedure for evaluating and responding to imminent hazard complaints].) In this situation, an employee representative has a significant advantage over a bystander when it comes to spurring government enforcement.



Employee Rep: Cal/OSHA Complaints

Worker advocates can assist workers by serving as their employee representative in complaints filed with DOSH. By doing so, the complaint will be elevated to “formal” status, and thus receive a quicker response.

Whether workers can get inspections quickly often depends on the relationship that worker advocates build with the DOSH District Manager. Additionally, DOSH is sometimes concerned that workers may be using health and safety complaints as a part of a broader unionizing campaign. Thus educating the District Manager about the worker campaign as well as the workplace conditions may ensure the prompt treatment of complaints once filed. District Managers tend to be more responsive when they know workers have valid health and safety issues that require immediate attention and that the complaint is not a tool for labor management negotiations.

D. [1.2.58] Opening Conference

When an inspector arrives at a workplace, DOSH policy states that the inspector will hold a joint employer-employee opening conference with the employer and/or employer representative “and bargaining unit representative of the employees.” (DOSH P&P § C-1A, subd. C(2).) The investigator will explain the purpose and scope of the inspection as well as the inspection walkaround procedures. (DOSH P&P § C-1A, subd. C(4).)

The employer often will inquire as to why the inspection is occurring. The investigator will not divulge the name of the complainant,³¹ but may indicate that the inspection is the result of a complaint, an accident, a High Hazard List inspection, etc. The inspector will also cover all the basic rights and responsibilities of the employer and employees.³²



Employee Rep: Joint Opening Conference

Theoretically, workers and their employee representatives have the right to be present at the opening conference as well as the walkaround. (DOSH P&P C-1A, subd. C(2); Lab. Code § 6314, subd. (d); see *Division of Labor Standards Enforcement v. Texaco, Inc.* (1983) 152 Cal.App.3d Supp. 1, 6 [employer's refusal to compensate employee for time spent on “walkaround” inspection may violate Lab. Code § 6310, prohibiting discrimination against employees for exercising Cal/OSH rights].)


It is generally advantageous for the employee representative to be present at the joint employer-employee opening conference so that they can point out workers' health and safety issues. However, unless the employee representative is an attorney or a union representative, it is often difficult to convince the employer to agree to a joint conference. Unless the employee representative works at the worksite, it is difficult to even get a union employee representative to the worksite. If a joint opening conference is not possible, separate opening conferences can be held. (DOSH P&P § C-1A, subd. C(2).)

Although DOSH policies are not binding laws or regulations, they unfortunately, dictate DOSH's behavior. Worksafe is actively working with DOSH to push for the allowance of non-bargaining unit employee representatives during inspections.

³¹ Some advocates have argued that it can be beneficial to divulge the name of the complainant in the opening conference because this may give the worker some protection since it puts the employer on notice as to who the complainant is. That way, if the complainant gets fired, the employer will be scrutinized because he/she will have a hard time claiming that they did not fire the worker for filling a complaint. In general, DOSH's policy is to protect the complainant's identity.

³² www.dir.ca.gov/DOSHPol/P&PC-1A.HTM [last visited December 15, 2013].

E. [1.2.59] The Walkaround



Labor Disputes

If a labor dispute (including work stoppages, strikes or picketing) occurs at a worksite subject to an inspection between an employer and his or her employees, or between two labor unions competing for the right to represent the employees, the inspector is supposed to notify the District Manager before attempting the worksite.

Programmed inspections may be deferred during a labor dispute and unprogrammed inspections shall be conducted with appropriate caution. It should be noted that DOSH may evaluate the validity of any complaints that are received from a worksite in which a labor dispute is occurring to ensure that the complaint has not been filed to harass the employer. (DOSH P&P § C-7.)

Every worksite is different and it is the responsibility of compliance personnel to perform a complete and effective walkaround consistent with the scope of the inspection. At a minimum, the compliance officer is required to examine the following items before a walkaround:

- a) Cal/OSHA poster;
- b) previously issued citations;
- c) injury and illness summary;
- d) Material Safety Data Sheets ("MSDS") or Safety Data Sheets;
- e) list of hazardous substances;
- f) employee exposure records notification;
- g) permits;
- h) forklift operating rules (if applicable);
- i) workers' compensation insurer;
- j) Industrial Welfare Commission poster; and
- k) any other required postings.


(DOSH P&P § C-1A, subd. (D)(3)(b).)

Before the walkaround, the inspector reviews the employers' Log 300s and the employers' IIPP. (DOSH P&P § C-1A, subd. (C)(4)(b)(9).) They also hand out the Division of Labor Standards Enforcement form, which details the prohibition against retaliation.

Next, the inspector conducts a walkaround, during which the inspector takes a preliminary look at the area of the worksite and determines whether further testing or analysis of the site

will be necessary.³³ The inspector will ask for consent from the employer to proceed with the walkaround inspection before beginning.³⁴ Once again, the employer has the right to refuse entry to a DOSH inspector and to demand an inspection warrant from DOSH. (See Lab. Code § 6314(b); *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.*, *supra*, 214 Cal.App.3d at p. 632.)

Moreover, an “authorized employee representative” has the right to accompany DOSH during the walkaround. Unfortunately, DOSH’s policy appears to support the rule that only union representatives may accompany the inspector despite contradiction with statutes such as Labor Code section 6309, which is broader. (See § [1.2.39]: “Who can file a complaint?”)



Employee Rep: Walkarounds

The reality is that most employees fear retaliation too much to participate in the walkaround. Moreover, there is conflict between what workers recognize as the “employee representative,” and what DOSH recognizes. Labor Code section 6413, subdivision (d) simply states that “a representative authorized by his or her employees” may join in the walkaround. An “authorized representative” is defined with regard to filing complaints as: “including, but not limited to, an attorney, health or safety professional, union representative, or government agency representative, or an employer of an employee directly involved in an unsafe place of employment.” (Lab. Code § 6309.) DOSH has taken the position, however, that it will only recognize “authorized representatives” with a collective bargaining unit. (See DOSH P&P, C-1A, subd. D(2)(a) & (b).)

There is also conflict in the Industrial Relations Code, which defines an “authorized representative” as a “labor organization which has a collective bargaining relationship with an employer.” (8 Cal. Code Regs. §§ 403(k) (variances); 347, subd. (d) (appeals hearings); 14300.35, subd. (B)(2)(a) (record-keeping.)) This conflicting definition is also seen elsewhere in the Industrial Relations Code, which defines a “representative” more broadly as, “any person, including an authorized employee representative, authorized by a party or intervener to represent the party or intervener in a proceeding. (8 Cal. Code Regs. § 403(j) (variances); see also 8 Cal. Code Regs. § 347, subd. (x).)

The best course of action for non-unionized workers and their representatives is to develop a relationship with the inspector so that arrangements can be made for workers to meet with the inspector or District Manager ahead of time. This way, they can provide valuable information to the inspector prior to the inspection regarding workplace conditions and possibly direct the inspector to be aware of particular conditions.

³³ *Id.*

³⁴ *Id.*

During the walkaround inspection, the investigator takes a preliminary look at the worksite and determines whether further testing or analysis of the site will be necessary. (DOSH P&P § C-1A, subd. (D)(1)³⁵.) If the inspector observes hazards that are in violation of health and safety codes, regulations or statutes, citations will be issued and monetary penalties proposed.



Federal Walkaround Rights Expanded

In April of 2013, Federal OSHA announced in a new letter of interpretation by Richard Fairfax, Deputy Assistant Secretary of OSHA, employees can be represented in non-union worksites by outside union agents during federal health and safety OSHA inspections. (See § [1.2.128]: Appendix H: Deputy Assistant Secretary of Labor for Occupational Safety and Health, Richard E. Fairfax, letter to Mr. Steve Saliman, Health and Safety Specialist, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, February 21, 2013.) Up until that point, Federal OSHA applied the same policy as DOSH - that is, only union representatives were allowed to serve as the "employee representative" during inspections at unionized workplaces. (29 U.S.C. § 657(e).)

Federal OSHA's new policy expands the walkaround participation rights to employee representatives who are not an employee of the employer when such representation "is reasonably necessary to the conduct of an effective and thorough physical inspection." This expansion includes union organizers, community activists, and even possibly plaintiffs' attorneys.

This interpretation, of course, is facing scrutiny by the business community. However, it currently stands. The California State Cal/OSHA program is based upon the premise that California's health and safety laws must be at least as effective as federal standards, if not better.

1. [1.2.60] Interviewing employees during the inspection

Although inspectors are permitted to interview workers during the inspection on site, it is difficult to do for both the inspector (who may feel hassled) and the worker (who may feel intimidated). Thus, individual workers who have information regarding the hazards should **communicate privately** with the inspectors in a location away from the workplace so that the fear of retaliation is minimized. (Lab. Code § 6314, subd. (d).)

³⁵ *Id.*



Meet With Inspector Separately

This is an example of why the employee representative may be invaluable to workers. The employee representative or worker advocate should strive to have the worker(s) meet with the inspector prior to the citations being issued off-site at times when the worker is not required to be at work.

This will enable the worker(s) to communicate freely with the inspector without being intimidated by the employer's presence. Important information to communicate to the inspector includes: whether the production slowed down due to some fault in the equipment used for production, whether the employer failed to disclose certain important information pertinent to inspection or ceased the operation of a dangerous machinery while the inspection was going on, etc.

F. [1.2.61] The Exit Conference

An exit conference is an interim conference between the inspector and employer. An exit conference occurs while the case is still open, unlike a closing conference, which ends the case. (See DOSH P&P § C-1A, subd. (E).³⁶) This conference includes the employer and the workers or worker representatives. During the conference, the inspector will explain what was done during the day's inspection and the next steps to come. The exit conference also may be held separately with the employer and then with worker representatives.

1. [1.2.62] No violations observed

If the inspector observed no violations and is certain there are no violations and no citations or notices will be issued, the inspector will inform the employer during the exit conference that no citations or notices will be issued (subject to approval by the District Manager). (DOSH P&P § C-1A, subd. (E)(1).)

2. [1.2.63] Violations observed

During the exit conference the inspector will give the employer a preliminary report of violations observed during the walkaround, the anticipated date of closing conference when citations will be issued, and information about recommended interim corrective actions. (DOSH P&P, § C-1A, subd. (E)(2)(b).) If violations are observed and citations will be given out that day, then the inspector will hold a closing conference instead of the exit conference. (DOSH P&P § C-1A, subd. (E)(2)(a).)

³⁶ *Id.*

G. [1.2.64] The Closing Conference

When DOSH decides to issue citations or orders, its inspector holds a closing conference to discuss them along with abatement, penalties, and other matters. (See DOSH P&P § C-1A, subd. F(3).) DOSH policy is to include employee representatives at the conference, unless the employer objects. (DOSH P&P § C-1A, subd. F(2).) If the employer objects, the inspector holds a separate closing conference for the employee representative. (*Ibid.*) If DOSH requires an employer to conduct tests or engage in monitoring or measuring, the employer must notify affected employees or their representatives before the testing/monitoring/measuring begins. (8 Cal. Code Regs. § 340.1.) The employees and representatives can observe the actual testing, sampling etc. and must be given access to records of the results. (8 Cal. Code Regs. § 347(d).)

The closing conference is performed at the end of the investigation. The closing conference may be held at the worksite or by phone. (DOSH P&P § C-1A, subd. (F)(1)³⁷.) During the closing conference, DOSH presents the citations and sets abatement dates, and informs the employer that it has the right to contest the citation by filing an appeal with OSHAB within **15 working days** of issuance of the citation. (Lab. Code §§ 6600, 6600.5.)

The closing conference allows the inspector to explain the citations and other findings to the employer and the employees including the reasoning behind why certain matters were cited or not cited. It is a way for the investigator to inform the parties involved of their right to appeal any or all of the findings as well as explain the next steps that should be taken in the investigation. It is also a way for everyone to be aware of the results of the investigation. (DOSH P&P § C-1, subd. A(F).) Additionally, at the closing conference, the investigator will discuss all conditions affecting occupational safety and health which was discovered during the walkaround. (DOSH P&P § C-1, subd. A(F)(3).) The inspector will also note any subsequent visits to the worksite that will be made in the future. (DOSH P&P § C-1A, subd. (F)(3)(h).)

If workers can, they should attend the same closing conference as the employer. Some unions have found that it is beneficial to request that the closing conference be held simultaneously between the employer and the worker representative so that each side can respond to the objections raised by the other. Unfortunately, an employer has the right to object to worker presence at the meeting. (See DOSH P&P § C-1A, subd. (F)(2)(b).) If they cannot attend this conference, they have a right to a separate closing conference with the inspector. (*Ibid.*)

Workers and their employee representatives can learn valuable information during the closing conference. They should take this opportunity to note or document the inspector's discussion, asking any questions regarding violations that were not cited. Subsequent to the

³⁷ *Id.*

closing conference, if the employer was cited, the citation must be posted for at least **3 days** or until the citation is corrected, whichever is **longer**. (Lab. Code §§ 6318, 6408.)



Workers can file an appeal too!

Workers have a right to appeal the amount of time in which abatement is to take place. This is important because the time in which an employer is required to fix the hazard may be a long period of time. A worker can challenge the amount of time and press the government to shorten the amount of time the employer is required to fix the hazard. This means less time workers are exposed to a dangerous work condition. Worker participation is important so that there is a sense of involvement and ownership of the case. (See § [1.2.77]: "Who can file appeals?")

1. [1.2.65] Informing the Complainant

If DOSH knows the name of the complainant, that person will be informed about the results of the investigation and whether any citations were issued. (Lab. Code § 6309.) If DOSH decided not to issue any citations after receiving the complaint, the worker or his/her advocate can request an informal review of the reasoning for failure to issue citations. (*Ibid.*) DOSH must give the employee or the representative of employees requesting the review a written statement of the reasons for DOSH's final disposition of the case. (*Ibid.*)

H. [1.2.66] Pre-appeal Informal Conference

After receiving notification of citations, penalties, orders, or abatement requirements from DOSH and prior to filing an appeal, the employer often requests for a pre-appeal informal conference to attempt to discuss outstanding issues and to negotiate various citations and penalties. In general, employers receive citations that are stamped in red ink with the words "Informal Conference Available." These discussions usually occur shortly after the employer decides to file an appeal and may involve settlement discussions. At the pre-appeal informal conference, the employer may argue his/her position with regard to the validity of the citations or the equities of the abatement dates. (See §1.2.99: "Settlement prior to filing an appeal".)

The worker and their advocate should insist upon being kept abreast of these discussions as well as insisting on being allowed to participate in them. Advocates or workers and/or their authorized representatives can request to attend the informal conference, but the employer does not have to agree to allow them to attend and DOSH has no authority to compel the employer to do so. In such a case, advocates or workers and/or their authorized representative can request their own informal conference and attempt to have input into the settlement negotiations. However, unless an authorized representative is involved, the

advocate or worker only has indirect influence on the settlement by informing the DOSH inspector of their concerns. In this regard, it is difficult to place pressure upon DOSH to maintain certain citations and the employer to meet certain health and safety demands through the pre-appeal informal conference.

The best course of action for the worker and their advocate is to maintain a close relationship with the inspector or the District Manager so that they may relay health and safety concerns in the hopes that DOSH will keep these in mind as they meet with the employer.

If the pre-appeal informal conference does not result in a settlement between DOSH and the employer with regard to the citations and penalties, the employer will, most likely, file an appeal. If an appeal is filed, the worker and/or their advocate can file a motion to obtain "party status" in the appeals process. In doing so, they secure a position for themselves so that DOSH and the employer must allow them the opportunity to participate fully in settlement discussions. (See § [1.2.79]: "Affected employees' right to party status.")

I. [1.2.67] Follow-Up Inspection

A mandatory or discretionary follow-up inspection may also be conducted. (Lab. Code § 6320; DOSH P&P § C-1A, subd. (F)(3)(h) & C-15). This usually occurs in cases where DOSH issues an order or citation for a serious violation and the order was not complied with or the violation was not abated. If a serious violation has not been abated by the initial or subsequent inspection, the employer is required to submit assigned statement under penalty of perjury that s/he has complied with the abatement terms within the required time period. (Lab. Code § 6320, subd. (b).) If DOSH has no evidence of abatement, it "shall" conduct a re-inspection of serious violations within **45 days** following the end of the abatement period. (*Ibid.*) In practice, with the serious understaffing issues at DOSH, unfortunately, very few follow-up inspections occur, so it is important for the worker and advocate to stay on top of whether the employer has timely abated the violation and to file an additional complaint with DOSH if abatement does not occur in a timely manner or is inadequate.

J. [1.2.68] If DOSH Does Not Respond or Refuses To Act

A legal action in court can be filed against the Chief of DOSH if DOSH refuses to act to prevent an unsafe work conditions leading to the death or serious physical harm of a worker. (Lab. Code § 6327.5.) Such complaints can be for declarative and injunctive relief and for a writ of mandate to require DOSH to act.



Filing a CASPA

Advocates can file a “CASPA,” which stands for a "complaint against the state program administration.” (29 C.F.R. § 1954.20, subds. (a) & (c).) Any person or group may submit a CASPA to the Assistant Regional Director for Occupational Safety and Health. (*Ibid.*) CASPAs are investigated by the Department of Labor. (*Ibid.*)

The complaint should describe the reason for the complaint and explain the aspects of the administration or operation of the plan that is believed to be inadequate. (*Ibid.*) For example, a pattern of delays in processing cases, of inadequate workplace inspections, or the granting of variances without regard to the specifications in the State plans, are examples. (*Ibid.*)

Filing a CASPA, however, is extremely time consuming, and expensive both to the filer and to DOSH to respond. Moreover, it often will not produce effective results. It is best to figure out how to get DOSH to conduct the inspection by giving them a complete and compelling complaint, and by working to develop and build a relationship with the advocate’s regional DOSH office.

[1.2.69] Remedies

A. [1.2.70] Four Types of Remedies

A complaint can result in citations, monetary penalties and requirements for abatement (corrections). The following are “remedies” that are available for health and safety violations:

- **citations (general or serious)**³⁸;
- **civil and criminal penalties** - imposed against employers by DOSH payable to the state;
- **abatement** - DOSH can require the employer to fix the problem by a certain date;
- **imminent hazard** - DOSH can shut down an imminent hazard by issuing an Order Prohibiting Use or if there is a serious menace, DOSH can also apply for an injunction to restrain the company from operation; and
- **special order** - if there is an unsafe or unhealthful condition which poses a threat to the health and safety of an employee and which cannot be made safe under existing standards or orders of the standards board, then DOSH may issue a special order.

³⁸ Annual notable citations and citation archives can be found here: www.dir.ca.gov/dosh/citation.html [last visited December 15, 2013].)

B. [1.2.71] Citations

If DOSH finds in the course of their inspection or investigation that an employer has violated a health and safety standard, rule, or order, it must issue the citation with “reasonable promptness,” but no later than **6 months** after the violation occurred. (Lab. Code § 6317.) The citation must be in writing and should “describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated.” (Lab. Code § 6317; see § [1.2.126]: Appendix I: Sample Citation.) Citations should also give a reasonable time to the employer for the abatement of the alleged violation. (Lab. Code § 6317.) Moreover, the citation must be posted at or near the location of each alleged violation for at least **3 days** or until the dangerous condition is corrected, whichever is longer. (Lab. Code §§ 6318, 6408.)

Within **15 working days**, the employer may contest any part of a citation. (Lab. Code §§ 6319, subs. (a) & (b), 6600, 6601; 8 Cal. Code Regs., §§ 333, 361.3; see § [1.2.76]: “Appeal.”) If a worker wants to appeal the abatement period determined by DOSH, s/he must file an appeal within **15 working days** to contest the abatement period. (Lab. Code § 6601.) After an inspection, if citations or orders are issued and not appealed (or if the citations are ultimately upheld), the employer is required to correct the unsafe or unhealthful condition. (See §[1.2.72]: “Abatement.”)

1. [1.2.72] Classification of Violations

Violations are classified as (1) general and/or regulatory, (2) serious, or (3) repeat and/or willful. (See DOSH P&P § C-1B.) The employer usually attempts to negotiate down any violations that are not general or regulatory so that they will not have either a serious or willful violation on their record. Any violations, but particularly more serious ones, will count against the employer in determining their workers’ compensation premium and their ability to qualify to bid on a government contract. Specifically, categories of violations are:

- **general:** a violation which is “specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees” (8 Cal. Code Regs. § 334, subd. (b));
- **regulatory:** a violation, other than one defined as "serious" or "general" that pertains to permit, posting, recordkeeping, and reporting requirements as established by a regulation or statute (i.e. failure to obtain permit; failure to post citation or poster; failure to keep required records; failure to report industrial accidents, etc.) (8 Cal. Code Regs. 8, § 334, subd. (a));
- **serious:** a ‘serious violation’ exists if there is a “realistic possibility” that death or serious physical harm could result from the actual hazard created by the violation (Lab. Code § 6432);
- **willful:** a violation where the employer either (a) knew that what it was doing constituted a violation of a safety law or (b) was aware of an unsafe or hazardous condition and made no reasonable effort to eliminate it (8 Cal. Code Regs. § 334, subd. (e); *Rick’s Electric, Inc. v. California Occupational Safety and Health Appeals Board* (2000) 80 Cal.App.4th 1023, 1034-1035);

- **repeat:** a violation is considered to be "repeat" where, within **3 years** of an earlier violation (**5 years** for violations of field sanitation), the employer is found to be out of compliance for the *same* violation despite reporting that they corrected the prior violation. (8 Cal. Code Regs. §§ 334, subd. (d)(1), 3457; 29 C.F.R. § 1928.110.)

A similar test for repeat violations is whether the employees were exposed to the same hazard based upon substantially similar facts as the first cited violation. (*In re R. Burke Corp.* (Cal-OSH App.Bd.) 1985 WL 190796, * 3; *In re Granite Const. Co.* (Cal-OSH App.Bd.) 1979 WL 31540, * 2.) For the purpose of considering whether a violation is a repeat for employers with fixed establishments (e.g., factories, terminals, stores), only citations issued to the same location is counted; for employers with no fixed establishments (e.g., construction, painting, excavation), a repeat violation will be based on prior violations cited within the same Region of the prior citation. (8 Cal. Code Regs. § 334, subd. (d)(1), (2).)

C. [1.2.73] Penalties

There are two types of penalties for the employer: Civil and Criminal. (See Lab. Code §§ 6319, 6423-6436; 8 Cal. Code Regs. §§ 334-336; DOSH P&P § C-10.) DOSH imposes civil penalties on employers, meaning the employer must pay a fine to the state for health & safety violations. (Lab. Code § 6317.) In assessing civil penalties, DOSH adjusts the statutorily created penalty amounts listed above either upwards or downwards by considering the following factors:

- size of the business of the employer being charged;
- gravity of the violation;
- good faith of the employer, including timely abatement; and
- history of previous violations.

(Lab. Code § 6319, subd. (c).)

In addition, criminal penalties are also possible and prosecutors have the authority to file either misdemeanor or felony criminal charges against employers for certain health and safety violations. (See Lab. Code § 6425; Bus. & Prof. Code § 17200; § [1.2.115]: Criminal Liability.”)

The following chart depicts the minimum and maximum penalties for various violations:

Category of Violation	Penalty Amounts:	
	Minimum	Maximum
Regulatory or General	\$500	\$7,000
General	\$1000-\$2000	\$7,000
Serious	\$18,000	\$25,000
Willful or repeat	\$5,000	\$70,000

(8 Cal. Code Regs. §§ 336, subds., (a)(1) [regulatory]; (b) [general]; (c)(1) [serious]; Lab. Code §§ 6427 [general and regulatory]; 6428 [serious] 6429, subd. (a) [willful and repeat].)



OSHAB Can Change the Penalties

Unfortunately, OSHAB is not bound by DOSH's regulations in determining the appropriate penalty. (Lab. Code § 6602.) OSHAB has **full** discretion to set the final monetary penalty “necessary to encourage elimination of safety and health hazards” so long as that discretion does not deviate from Labor Code statutes. (*In re W.F. Scott & Co., Inc.* (Cal–OSH App.Bd.) 1999 WL 1025235, *3.)

Most of the time, however, OSHAB does consider penalties calculated by DOSH as preemptively reasonable where supported by the evidence. (*In re Bragg Cane & Rigging Co.* (Cal–OSH App.Bd.) 2004 WL 1590390, * 3.) Thus, the employer has the burden of proving that the particular penalty is unreasonable. (*Ibid.*; see also *Sheffield Furniture Corporation*, Cal/OSHA App. 00-1322, Decision After Reconsideration (June 8, 2006); cf. *In re Central Valley Contracting* (Cal–OSH App.Bd.) 2009 WL 1740718, *3–*4 [OSHAB may increase penalty to punish and deter employer's intentional falsification of evidence submitted at hearing].)

D. [1.2.74] Abatement

Once DOSH identifies health and safety violations, DOSH will require employers to fix or "abate" the hazards by a certain date. (Lab. Code §§ 6320, 6430; see Section [1.2.126]: I: Sample Citation.) Failing to abate can result in fines of up to \$15,000 a day until the violation is corrected. (Lab. Code § 6430, subd. (a); 8 Cal. Code Regs. § 336, subds. (d) & (e).) However, the actual penalty an employer may receive for failure to abate is calculated based upon a complex formula that is outside the scope of this manual. (See 8 Cal. Code Regs., § 336 subds. (d) & (e).) The advocate should note, however, that controversy surrounds the issue of penalties, especially the abatement “credit” which is provided to an employer on the presumption that the employer will abate the violation in a time-frame set by DOSH. (8 Cal. Code Regs. § 336, subd. (e).) The penalty is reduced an additional 50% *before* the actual abatement occurs on the presumption that the employer will abate the violation by the timeframe set by DOSH. (*Ibid.*) This reduction does not always apply (i.e. when the violation is serious, involves the use of a carcinogen, or causes death, serious injury or illness, or exposure), however, it causes considerable consternation to advocates since the reduction serves to offset the intent of the penalty as a deterrent. (See 8 Cal. Code Regs. § 336, subd. (e).)

In addition, another disturbing issue is that the abatement duty is *stayed*, if the employer files an appeal. (Lab. Code §§ 6600, 6600.5; 8 Cal. Code Regs., § 362.) Thus, a familiar tactic of employers is to file an appeal to push out the date for their duty to fix the hazard until after the appeals hearing.



Abatement Stayed!

Filing an appeal stays all abatement periods and obligations until the appeal is either withdrawn or a final disposition is issued by OSHAB. (Lab. C. §§ 6600 & 660.5.) This means that workers may be exposed to the harmful, uncorrected work condition during the entirety of the appeals process. The stay of abatement also includes any potential delay of criminal liability that may be appropriate from the violation of a safety order. Immediate abatement is already the law in Washington, Oregon, and under the Federal Mine Safety and Health Act. Worksafe is attempting to push through legislation in California that has similar protections.

E. [1.2.75] Order Prohibiting Use For Imminent Hazard

When necessary, DOSH does have the ability to *shut down* an imminent hazard at any worksite by issuing an Order Prohibiting Use (“OPU”). (Lab. Code § 6325.) This is one of the most effective steps that DOSH can take to ensure worker’s health and safety. An imminent hazard can be a place of employment, machine, device, apparatus or equipment, or a part of any of these, which is in a dangerous condition, is not properly guarded, or is placed dangerously so as to constitute an imminent hazard to any employee who may enter or use it. (Lab. Code § 6325.)

When an OPU is issued, DOSH will post a conspicuous notice of the OPU, which is a yellow OPU tag wired to the imminent hazard to bar entry into the area or use of the equipment. (Lab. Code § 6325; See DOSH P&P § C-8.) If an OPU has been issued, employees can only enter the area or use the equipment with DOSH’s knowledge and *permission* and solely for the purpose of eliminating the hazard. (*Ibid.*) DOSH is the only entity able to remove the OPU; removal usually only occurs after the hazard has been abated. (*Ibid.*)

Employers do have the ability to contest the OPU by submitting a written request to the relevant District Manager within **five working days** of the issuance of the OPU that states the specific reasons why the employer feels the OPU is improper. DOSH is required to grant a hearing regarding the OPU within **24 hours** of the request. (Lab. Code § 6327; 8 Cal. Code Regs. § 340.42, subd. (b).) The employer is required to post a hearing notice once the hearing has been set to inform employees who may be interested in participating in the hearing. Employees and/or his/her representative can submit a written request to participate. The District Manager will determine if the participation “will be relevant to any issues presented at the hearing.” (8 Cal. Code Regs. §§ 340.43, subd. (d), 340.44, subd. (a)(3).)

At the hearing, held before the District Manager of the district office that issued the order, evidence is received from both DOSH and the employer and considered by the District Manager. (8 Cal. Code Regs. § 340.44, subds. (a)-(d).) Once concluded, the District Manager must issue a written decision concerning the validity of the OPU within **2 working days**. (8 Cal. Code Regs. § 340.44 (f)(2),(g).)

An employer can be held criminally liable for violation of the OPU. (Lab. Code § 6326; see § [1.2.115]: “Criminal Liability.”) Violation of an OPU is a misdemeanor. (Lab. Code § 6326.) DOSH has the ability to go to court for civil enforcement if the company fails to comply. Additionally, if there is a serious menace, DOSH can apply for an injunction to restrain the company from using or operating the “machine, device, apparatus, or equipment” until it was fixed. (Lab. Code §§ 6323, 6324).

F. [1.2.76] Order to Take Special Action

If an unsafe workplace condition can be addressed by an existing safety order, standard, or regulation, then DOSH can issue an “Order to Take Special Action.” (8 Cal. Code Regs. § 330(g).) These orders require employers to remedy an unsafe condition or pay for required safety devices. (Lab. Code § 6308; DOSH P&P § C-6.) For example in *Bendix Forest Products Corp. v. DOSH*, DOSH issued a Special Order requiring the employer to provide gloves or mittens for employees removing lumbar from drag chains at dry kilns. (25 Cal.3d at p. 468.) Like the OPU and Special Order, these can also be contested by the employer and heard at an expedited hearing. (8 Cal. Code Regs. § 376, subd. (b).)

G. [1.2.77] Special Order

If there is a condition that poses a threat to the health or safety of an employee and existing regulations and orders do not address the condition, DOSH may issue a “Special Order” (Lab. Code §§ 6305, 6308, 6317; *In re Gray Line Tours Div. of Industrial Safety State of Calif., supra*, 1975 WL 23373 at *2.) A special order applies only to a designated unsafe condition or device that is specified in the order. (Lab. Code § 6305; 8 Cal. Code Regs. § 332.2; see DOSH P&P § C-3.)³⁹ Moreover, since the passage of the legislation creating the IIPP, the issuance of a special order has been rare. (See, *supra*, § [1.2.23]: “Duty To Establish, Implement, And Maintain An Injury and Illness Prevention Program.”)




15 Days to Appeal a Special Order!

Be on the lookout for a possible appeal by the employer. Employers that want to appeal the special order must file an appeal within **15 working days** of receipt of the special order to OSHAB. (Lab. Code § 6600.) The time for filing an appeal may be extended by a party if it is able through a written showing of good cause that there are sufficient facts to demonstrate a reasonable basis for the delay. (8 Cal. Code Regs. § 359, subds. (b), (c).) If the employer does not meet the deadline, the special order will become final and it cannot be reviewed by *any* court or agency. (Lab. Code § 6601.5.)

³⁹ www.dir.ca.gov/DOSHPol/P&PC-3.HTM [last visited September 20, 2013].

Special orders do not generally carry civil penalties; they are similar to an order to correct rather than a citation for a violation. (Cf. Lab. Code § 6317.) However, failure to comply with the special order can result in the issuance of a citation and civil penalties for its violation. (Lab. Code §§ 6317, 6430.) In addition, DOSH has the ability to conduct a re-inspection after the issuance of a special order to ensure compliance. (Lab. Code § 6320, subd. (a)(1).)



If DOSH Does NOT Issue an Order

If the advocate and/or employee feels that DOSH *arbitrarily and capriciously* fails to prevent any unsafe conditions that could reasonably be expected to result in *immediate death or serious physical injury*, they can file a writ of mandamus to compel DOSH to prevent or prohibit the condition (i.e. by issuing an OPU or a Special Order). (Lab. Code § 6327.5; see §[1.2.102]: “Petition for Writ of Mandamus.”)

[1.2.78] Appealing the Case

OSHAB is in charge of hearing appeals of citations, orders, proposed penalties and all other actions taken by DOSH. (Lab. Code §6317.) When an appeal is filed, it will be scheduled to be heard before an Administrative Law Judge (“ALJ”), barring settlement in the case. The following is a discussion of the appeals process.

A. [1.2.79] Who Can File Appeals?

An employee or his/her representative may also file an appeal from any citation, notice, special order, or action notice. (Lab. Code § 6601; 8 Cal. Code Regs. §§ 347, subds. (b), (d), (l); 354, subd. (b); 361.1.) Their appeal is limited, however, to solely an appeal of the period or time range allowed by DOSH to abate the hazard or unsafe condition. (8 Cal. Code Regs. § 361.1.) The employer is a party to any appeal filed by an employee. (8 Cal. Code Regs. § 354, subd. (d).)



Employee Rep: Definition under OSHAB

OSHAB regulations handle the designation of “employee representatives” differently than the Labor Code section 6309. According to OSHAB regulations, an “Authorized Employee Representative” means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees or an employee organization which has been formally acknowledged by a public agency as the representatives of the employees of the public agency.” (8 Cal. Code Regs. § 347, subd. (d).) Despite this, however, OSHAB has authorized non-unionized worker advocates to represent workers in Appeals Hearings. (See § [1.2.79]: “Affected employees’ right to party status.”)

The employer or its representative may appeal a citation, order, notice, the abatement date, the abatement conditions or the penalty. (Lab. Code §§ 6319, subd. (a), 6600-6600, 6600.5; 8 Cal. Code Regs. § 361.) They may raise affirmative defenses in their Appeal Form request such as lack of knowledge of the presence of the violation, “unpreventable employee misconduct,” the “isolated event,” “impossibility of complying with the requirements of the OSHA standard,” and the “creation of greater hazard by compliance.” (See Lab. Code § 6432, subd. (b).)

An “obligor” or someone that has the responsibility to an employer to repair any machines, device, apparatus or equipment and to pay penalties assessed against the employer may also file an appeal from any citation, special order, or action notice. (Lab. Code §§ 6319, subd. (b), 6600; 8 Cal. Code Regs. §§ 347, subd. (r), 361.2.) Their appeal has to be specific to the condition of the item they are required to either repair or pay a penalty for. (*Ibid.*) An employer may move at any time before the beginning of a hearing to participate as a party. (8 Cal. Code Regs. § 354, subd. (f).)

Finally, anyone else can make a motion to become an “intervener” in an appeal. (8 Cal. Code Regs. § 354.1, subs. (a),(b).) A request for intervener status should explain the interest of the moving party, the alignment of their interests to that of a current party, how the mover’s participation will assist in determining the issues before OSHAB, and that the intervener status will not “unnecessarily delay the proceeding.” (*Ibid.*)

DOSH is a party to any appeals filed with OSHAB. (8 Cal. Code Regs. § 354, subd. (a).)



Pre-appeal Informal Conference

If the employer has requested a pre-appeal informal conference with DOSH, they must notify affected employees or their representatives of the date, time, and location of the informal conference. (DOSH P&P § C-20, subd. (B)(3)(a)(2)(d).) Unfortunately, employers do not always do so.

Thus, advocates should ensure that they are informed about any such conference since the negotiations between DOSH and the employer during an informal conference may result in citations, orders, and notices being withdrawn or amended.

If the employer refuses to allow the worker and/or their representative to attend or participate, workers and/or their representative can request their own informal conference, and DOSH must offer a separate informal conferences (*Id.*)

Since this informal conference occurs before an appeal is filed, an agreement can be reached to change citation classifications (i.e. from “serious” to “general”) without obtaining approval from OSHAB. (DOSH P&P § C-20, subd. (D)(4)(a).)

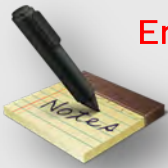
B. [1.2.80] How Is An Appeal Filed?

Appeals can be filed a number of ways including through telephonic notice.⁴⁰ (8 Cal. Code Regs., § 359, subd. (a); See *In re California Erectors, Bay Area, Inc.* (Cal-OSH App.Bd.) 1998 WL 433557, *4.) This must be followed up with a written Appeal Form, otherwise, failure to do so will result in dismissal of the appeal. (8 Cal. Code Regs., §359.1, subd. (b); see § [1.2.126]: Appendix J: Appeal Form.)⁴¹ A *separate* Appeal Form is needed for each citation, order, or notice being appealed. (8 Cal. Code Regs., § 359.1, subd. (a).)

Appeals must be filed within **15 working days** of the date the citations, order, or notice was issued. (Lab. Code §§ 6600, 6602; 8 Cal. Code Regs., § 361.1, subd. (a).) Late filed appeals are permitted only upon a written showing of good cause that has enough facts to show a reasonable basis for the delay. (8 Cal. Code Regs. § 359, subds. (b),(c).) Advocates need to make sure they file such a late-filed appeal with a declaration based upon the declarant’s personal knowledge. (8 Cal. Code Regs. § 359, subds. (b),(c); see § [1.2.126]: Appendix K: Sample Notice of Motion, Motion, and Declaration of Witness.)

⁴⁰ See www.dir.ca.gov/oshab/oshabappealpro.html [last visited December 15, 2013].

⁴¹ *Ibid.*



Employer Must Post and Serve Docketed Appeal!

One of the concerns of advocates is the inability to know when an appeal has been filed. Advocates should check in with the inspector during the **15-day period** after issuance of a DOSH citation, order, or notice.

Technically, the employer is supposed to provide notice of the Appeal by posting the Appeal after it has been received by OSHAB and assigned a docket number. (8 Cal. Code Regs. §§ 347, subd. (j), 356, subd. (a).) Once the Appeal becomes a “docketed appeal”, OSHAB mails a copy of the Appeal Form with the docket number in addition to a Participation Notice for affected employees. (8 Cal. Code Regs. § 356.1.) In addition, the employer must serve the docketed Appeal Form and Participation Notice upon the authorized employee representative if affected employees are represented by a labor organization. (8 Cal. Code Regs. §§ 355, subd. (d), 356, subd. (b)(1).)

C. [1.2.81] Affected employees’ right to party status


Workers, referred to as “affected employees”, or their representatives have a right to party status during the appeals process. (8 Cal. Code Regs. § 354, subds. (b),(e).) Party status allows employees at the worksite to have the requisite standing to be parties to the legal action. An “affected employee” is defined as “an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties.” (8 Cal. Code Regs. § 347, subd. (b).) Notice that only exposure is required, not actual injury. For OSHAB purposes, a worker is an “employee” of a cited employer even if s/he actually works for somebody else, as long as the cited employer created the hazard, controlled the hazard, or had responsibility for correcting the hazard. (Lab. Code § 6400.) For example, employees for Contractor X who were exposed to a cited danger by Contractor Y can therefore become parties in Company Y’s citation appeal.

Motions are often heard and decided at the pre-hearing conferences, thus, in order to participate as fully as possible in all of the appeals proceedings, advocates should file the motion as soon as they receive the docketed appeal. To obtain party status, the employee or his or her representative can file a motion for party status with OSHAB, served on all parties for party status at any point **20 days** prior to the hearing. (8 Cal. Code Regs., §§ 354, subds. (b),(e), §371, subd. (c)(1); see § [1.2.126]: Appendix L: Sample Motion for Party Status.)

The dates for the hearing are often set after the prehearing conference. The ALJ issues a notice to parties regarding the date of the appeals hearing. If workers or their advocates do not yet have party status, they may not receive the notice informing them of the appeals hearing date. Thus, they must obtain such information from either the DOSH inspector or the DOSH attorney handling the case. If they have the docket number, they may also contact OSHAB. Since OSHAB is not entirely efficient with respect to setting the dates for hearings and informing parties of the dates, it is always best to file the motion for party status as soon as the case is docketed so the ALJ will provide notice to the worker and/or

their advocate for the prehearing conference when the motion will be discussed. If party status is granted, they will continue (ideally) to receive all the notices that will be issued in the case.

Once party status is granted, employees and/or their employee representative have the right to participate throughout the entire appeals process, to receive all notices and documents, and to be included in the settlement discussions between DOSH and the employer. (8 Cal. Code Reg. § 354(h).) The case cannot be settled without at least allowing the worker or his/her representative to participate in the settlement discussions. (*In the Matter of the Appeal of Dey Laboratories, Inc.* (1995) 1995 WL 137676, *2.) That notwithstanding, although the employee must be included in settlement discussions, an employee cannot prevent DOSH and the employer from settling. (*Ibid*; see also *In re San Diego Union Tribune Publishing Co.*, (1991) WL 528427, * 2.)



Union Can Obtain Party Status

Under the party status regulation, affected employees have participated in citation appeals on their own or through a representative such as an attorney, union, or worker membership organization. But an authorized employee representative, defined above, can also request party status *on its own behalf*. In other words, even when no individual affected employees wish to participate in the citation appeal, the cited employer's union can still become a party. The authorized employee representative can therefore step in, when workers themselves don't want to risk retaliation.

If a person or organization is not granted party status, they can also move to intervene in the administrative appeal. (8 Cal. Code Regs. § 354.1.) The difference between an intervenor and a party is that the ALJ can (but does not have to) limit the scope of the intervenor's participation. (*Ibid*.) Those with party status, however can always request documents or depositions, present witness testimony or other evidence at the hearing, and otherwise participate fully. (8 Cal. Code Reg. § 354(h).) Any opposition to either the motion for party status or to intervene will need to be filed no later than 10 days from service of the motion or request and replies must be filed and served no later than 5 days before the hearing date. (8 Cal. Code Regs., § 371, subds. (c)(2), (3).)



Party Status vs. Intervenor Status

The key difference between workers or their advocates taking "party status" as opposed to "intervenor" status lies in the alleged equal status they obtain as a "party" to the case versus someone who is merely an intervenor, which amounts to an active observer. With party status, workers and/or their representatives are supposed to be able to obtain discovery, participate in all settlement discussions and negotiations, and the entire appeals process including calling, examining, and cross-examining witnesses at the appeals hearing. If a settlement is reached, the ALJ will ask workers and/or their representative with party status on whether or not they agree to the terms of the settlement, and those with party status may object to the settlement (though they cannot stop settlement).

Intervenors, on the other hand, do not have the right to receive discovery in the case, participate in settlement discussions, or present evidence, question and cross-examine witnesses at the appeals hearing. Their participation is subject to the discretion of the ALJ, who may limit their involvement substantially in comparison to workers and/or their representatives who have "party status." (8 Cal. Code Regs. § 354.1.)

Unfortunately, due to the retaliation that many workers experience, it is rare for non-unionized workers to obtain party status in OSHAB appeals hearings. Thus, DOSH attorneys are not accustomed to working with and collaborating with the workers and/or their representative towards building a strong case for the appeals hearing. It behooves the worker or their advocate to make it clear to the DOSH attorneys that they are available to assist them towards gathering evidence and strong witnesses for the appeals hearing.

DOSH will contact workers or their representative regarding settlement discussions, however, this is far from being allowed to be involved in settlement discussions, which the law guarantees. This is, in part, due to the employers' refusal to engage with those with party status, but also due to the unfortunately weak law and caselaw which allows DOSH to have the discretion to "include" those with party status in settlement discussions in any way they feel is appropriate - which often boils down to DOSH attorneys speaking to workers and/or their advocates after some settlement has been negotiated and reached between the employer and DOSH and asking the third party how they "feel" about it. This is blatantly NOT the same as being equals at the table. The party status protections have a long way to go to ensure that labor truly comes to the table in OSHAB hearings as equals.


D. [1.2.82] Assignment to ALJ

At some point after the case is docketed it is assigned to an administrative law judge ("ALJ") for prehearing and hearing. Once the parties receive their first notice for the Prehearing Conference, the name of the assigned ALJ should be at the bottom of the notice. (Lab. Code §§ 6604, 6605; 8 Cal. Code Regs. §§ 375.1, 375.2, subd. (a); see § [1.2.126]: Appendix M:

Notice of Prehearing Conference.) The ALJ is considered the “trial judge” of this process whose decisions can be further appealed to OSHAB. (See §[1.2.76]: “Appealing the case.”)

E. [1.2.83] Working with DOSH Attorney

It may take some time for DOSH’s legal department to assign docketed appeals to the appropriate DOSH attorney. Maintain close contact with the inspector to learn when the case has been assigned to an attorney. If the inspector does not know, it is possible to also contact the Legal Unit of DOSH to request further information. Once the case has been assigned, reach out and establish a relationship with the attorney. The best approach is to offer to support or assist the attorney in learning what s/he believes are the critical issues in the case, which witnesses may be helpful for the hearing, and what further preparation needs to be done to prepare for the case. A key role the advocate or worker party can play is to assist DOSH in identifying and preparing key witnesses as well as clarifying facts regarding health and safety in the workplace.



Work in Tandem with DOSH attorney

DOSH attorneys are overworked and understaffed so they may not have sufficient time to adequately prepare worker witnesses. Sometimes, workers only receive a subpoena with no contact with the DOSH attorney before having to appear at the hearing. Obviously this is a less than ideal situation to ensure that witnesses come prepared and the testimony presented is relevant and beneficial to upholding the citations issued. Thus, working cooperatively with the DOSH attorney is key to ensuring that citations issued against employers stick. As a party, you will be able to present witnesses and evidence and to cross-examine witnesses, thus, a great deal of your preparation will mirror the DOSH attorney’s since you are both poised for similar outcomes. Thus, it may be beneficial to work in tandem with the DOSH attorneys.

F. [1.2.84] Prehearing Motions

Prehearing motions or requests for actions and their oppositions and replies must be in writing and directed to OSHAB. (8 Cal. Code Regs., § 371, subd. (a).) They must also be signed by the party or party’s representative and served on all parties with the appropriate proof of service filed with OSHAB. (*Ibid.*; see § [1.2.126]: Appendix N: Sample Motion for Continuance.) Motions or request must be served and filed no later than **20 days** before the hearing date. (8 Cal. Code Regs., § 371, subds. (c)(1)-(3).) Oppositions must then be filed and served **10 days** from service of the motion or request. (*Ibid.*) Reply papers are due **5 days** before the hearing date. (*Ibid.*)

The following is a brief summary of a few of the prehearing motions that are common in OSHAB proceedings.

1. [1.2.85] Motion to Amend or Withdraw a Citation or Appeal

Upon receipt of the appeals notice from OSHAB, DOSH's District Manager for the area in which the citations were issued reviews the case to determine if, among other things, the case will be sustainable at a hearing. (DOSH P&P § C-23.) If the District Manager believes that any part of the citation contained an error or is not supported by the evidence, s/he will amend or withdraw the citation. (8 Cal. Code Regs., §§ 364.1, subd. (a), 371.2, subds. (a), (b).) In general, DOSH has up to **6 months** after a violation has occurred to file an amendment alleging a new violation. (8 Cal. Code Regs., § 371.2, subd. (a).)

In fact, after parties are notified that there is a docketed appeal, any party can file a motion to amend the citation. (8 Cal. Code Regs. § 371.2, subds. (a), (b).) The appealing party can withdraw the appeal in whole or in part in writing or by oral motion on the hearing record without penalty any time before a decision issues. (8 Cal. Code Regs. § 364, subd. (a).)

2. [1.2.86] Motion to Expedite Proceedings

Any party or OSHAB on its own motion, can move for an order for an expedited proceeding. (8 Cal. Code Regs., § 373.) In cases of abatement, there is new language under section 373, regarding expedited proceedings, that will go into effect July 1, 2013 which sets up an expedited process which will bring appeals with abatement issues to the front of the hearing docket. (8 Cal. Code Regs., § 373, subd. (b), (c).) Despite this change, however, the "expedited" hearing on whether or not an abatement needs to be fixed can still take up to eight months to occur. (*Ibid.*)

3. [1.2.87] Motion to Continue

Although continuances are disfavored, OSHAB may grant a motion for continuance for "good cause." (8 Cal. Code Regs. § 371.1, subds. (a),(b),(d).) "Good cause" can include emergencies (death or illness of a party, witness or representative) but cannot include inability to obtain representation and parties' failure to comply with discovery request (unless OSHAB orders a continuance following a motion to compel discovery). (8 Cal. Code Regs. § 371, subds. (d), (e)(1), (2), see § [1.2.126]: Appendix N: Sample Motion to Continue.)

4. [1.2.88] Motion to Disqualify

It is possible for a party to object, through a motion to disqualify, to the appointment of a particular ALJ based upon bias. (Lab. Code § 6606; 8 Cal. Code Regs., § 375.2 subd. (a); see Code Civ. Pro. § 641; and Gov. Code § 11425.40.) The motion needs to be filed with a supporting affidavit or declaration explaining the details for why disqualification is appropriate at least **5 working days** before the scheduled hearing. (8 Cal. Code Regs. § 375.2, subd. (b).) The declaration must be based on things that the declarant has personal knowledge of. For those things that are not known, the declarant can say that they are submitted based upon "information and belief." (See § [1.2.126]: Appendix K: Sample Notice of Motion, Motion, and Declaration of Witness.)

5. [1.2.89] Motion to Compel Discovery

If a party, such as the employer, has not given the worker or their representatives documents that have been requested ("discovery") in a timely manner, the aggrieved party can make a motion to compel the discovery of documents or witness identities with the ALJ. (8 Cal. Code Regs., § 372.6, subd. (a); see Gov. Code § 11507.7; see § [1.2.89]: "Discovery.") The hearing on the motion is held within **15 days** after the motion is filed or at a later time set by the ALJ on his/her own motion and can be by telephone. (8 Cal. Code Regs., § 372.6, subd. (c); Govt. Code § 11440.30.) If the noncompliant party agrees that the requested items are privileged from disclosure or not discoverable, the ALJ may order that the requested items be provided to the court and examined by the judge in private. (8 Cal. Code Regs., § 372.6, subd. (d); see Evid. Code § 915, subd. (b).) After examining the requested items, any briefs or arguments filed by the parties, or heard orally at a motion hearing, the ALJ will decide on the motion to compel. (8 Cal. Code Regs., § 372.6, subd. (d).) Unless the parties agree otherwise, no later than **15 days** after the hearing, the ALJ must issue and promptly serve on all parties a written order either denying or granting the motion. (8 Cal. Code Regs., § 372.6, subd. (e).) An order granting the motion will explain the items that the moving party is entitled to receive. (*Ibid.*)

G. [1.2.90] Pre-Hearing Conference

After the appeal has been docketed and an ALJ assigned, OSHAB may notice and order a prehearing conference "for the purposes of simplifying the issues, expediting a hearing and affording parties an opportunity to participate in the disposition of the appeal." (8 Cal. Code Regs., § 374, subd. (a).) The pre-hearing conference is usually conducted telephonically. (*Ibid.*) As stated in the notice, each party must be "prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the ALJ has compelled discovery prior to the prehearing, and to do such other things as may aid in the disposition of the proceeding." (8 Cal. Code Regs., § 374, subd. (b).) Oftentimes, the first pre-hearing conference is really a check-in for all parties to discuss the logistics of the case. Settlement overtures may be made shortly before or after the pre-hearing conference takes place. Parties can also talk about what type of discovery or documents requests will be made and discuss a timeline for making the documents available. The ALJ will also make a determination as to how much hearing time the appeal hearing may necessitate and attempt to secure potential dates. Hearing dates will not be known until the ALJ has a chance to check the court calendar. Oftentimes, parties will provide possible months of availability for hearings and estimate how many hours or days a hearing may take, but the actual hearing date may not be determined or known for weeks or even months after the first pre-hearing conference.

H. [1.2.91] Discovery

All parties are entitled to discovery for the identity of witnesses, document requests, issuance of subpoenas, and depositions. (8 Cal. Code Regs., §§ 372, 372.1, 372.2, 372.3; see § [1.2.126]: Appendix K: Request for Discovery/OSH Documents.) The identity of the person who originally submitted the complaint, however, is kept strictly confidential, unless that person specifically requests otherwise. (8 Cal. Code Regs § 372.1, subd. (f).)

Upon written request, a party is entitled to inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

- any statements of parties or witnesses relating to the subject matter of the proceeding;
- all writings or things which the party then proposes to offer in;
- any other writing or thing which is relevant and which would be admissible in evidence; and
- inspection and investigative reports made by or on behalf of DOSH or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis of the proceeding, or (2) reflect matters perceived by DOSH in the course of its inspection, investigation or survey, or (3) contain or include by attachment any statement or writing described above.

(8 Cal. Code Regs., §372.1, subds. (a)-(d).)

1. [1.2.92] Subpoenas

Parties have the right to compel attendance of a person at a hearing or production of a document or thing through the use of a subpoena, which is issued by OSHAB before the hearing at the request of a party. (8 Cal. Code Regs., § 372.2, subd. (a).) After the hearing has begun, OSHAB will only issue subpoenas if the party can show good cause. (8 Cal. Code Regs., § 372.2, subd. (a).) The subpoena or subpoena duces tecum has the effect of compelling the attendance of a witness who is a California resident. (8 Cal. Code Regs., § 372.2, subds. (c), (e).) A party prepares the subpoena in the form of an affidavit or declaration under penalty of perjury that:

- shows good cause for production of the document or thing requested;
- specifies the exact document or thing to be produced;
- sets forth in full detail the materiality thereof to the issues in the proceeding;
- and states that the desired document or thing is in the witness' possession or control.

(8 Cal. Code Regs., § 372.2, subd. (b)(2); see § [1.2.126]: Appendix P: Sample Subpoena.)

DOSH attorneys are often assigned hearings back to back and they are as severely understaffed as is the rest of the agency. Thus, it is not uncommon for them to have not met with and prepared witnesses prior to a hearing. Rather, DOSH attorneys may issue widely multiple subpoenas a few weeks (or the week before!) the hearing for the various workers that the inspector identified in his/her investigatory documents. These workers may not recall their initial interview with the inspector that occurred months ago and thus may be completely surprised by the subpoenas, which are in English and which appear to be a formal document requesting their appearance in court. Obviously, this may be quite frightening for low-wage immigrant workers that may not be literate in English, and who have not been informed of the pending appeals hearing process or the employers' appeal of the citations.

Such subpoenas are often issued by service processors that are strangers to workers and thus appear quite threatening. What happens is that workers, under such circumstances, may avoid the subpoena and not appear to testify. Or if they do appear, they are frightened and uninformed about the process except for any information the DOSH attorney may have told them (sometimes through an interpreter right before the hearing. Once on the witness stand, they will be sworn in, perhaps a word or two of introduction from the ALJ, but they must provide all of their testimony in front of a representative of the employer, which they may or may not recognize as one of their supervisors. Obviously, this is a less than ideal situation to ensure that workers give the best testimony possible about unsafe work conditions. Advocates, thus, should work closely with DOSH attorneys (if possible) to assist them in identifying good witnesses, working with such witnesses and warning them that at some point, they will be served with a subpoena which not only commands their appearance at the appeals hearing, but also assures their reimbursement for travel fees from DOSH for their appearance.

I. [1.2.93] Hearing

The hearing will be held before an ALJ of OSHAB. (Lab. Code § 6605; 8 Cal. Code Regs. § 375.1.) Parties will receive a Notice of Hearing, which specifies the date, time and location of the hearing. (8 Cal. Code Regs. § 356, subd. (a).) The employer is required to post the Notice of Hearing as well as serve the authorized employee representative with the Notice if there is a union. (8 Cal. Code Regs. § 356, subd. (b).)

1. [1.2.94] Relaxed Rules of Evidence

The hearing is held like a trial with evidence presentation and testimony taken under oath, affirmation, or penalty of perjury. (8 Cal. Code Regs. §§ 376.1, subd. (a); 376.7.) In addition, the proceedings are taped. (*Ibid.*) The ALJ will take whatever measures necessary to protect privileged, trade secret or confidential information during the trial. (*Id.*) This includes excluding all witnesses during a hearing. (8 Cal. Code Regs. § 376.6.) Generally, the parties, any parties' representative, the inspector or investigator for DOSH, and DOSH's attorney are the only individuals besides the ALJ and interpreter that will be present during the

hearing. (*Ibid.*) From time to time, if the case merits sufficient interest, the District Manager may even attend. Member of the public may also observe as long as they are not serving as witnesses in the hearing. The hearing rooms are very small, however, so there may not be enough room or seats to enable a lot of people to be in attendance.

Each party has the right to call and examine witnesses, introduce exhibits, question opposing witnesses on any matter relevant to the issues (whether or not the matter was covered in direct examination, impeach any witness (regardless of who called the party to testify), and rebut any opposing evidence. (8 Cal. Code Regs. § 376.1, subd. (b).) A party can appear in person or have a representative appear for them. (8 Cal. Code Regs., § 378, subd. (a).) The representative does *not* need to be an attorney, but must file a written notice of representation with OSHAB and serve a copy on all parties. (*Ibid.*)

The rules of evidence are slightly relaxed and all relevant evidence upon which “responsible persons are accustomed to rely in the conduct of serious affairs” is considered even if that evidence would have otherwise been inadmissible in civil actions. (8 Cal. Code Regs. § 376.2.) This includes stipulations facts that the parties agree to. (*In re Safeway* #951 (Cal–OSH App.Bd.) 2007 WL 2584813, *3–*4.) It also includes hearsay evidence; however, hearsay evidence cannot, by itself, be sufficient to support a finding of fact. (8 Cal. Code Regs. § 376.2.) In addition, parties are able to provide evidence by affidavits or declarations in lieu of live testimony at hearings. (8 Cal. Code Regs. § 372.4.) However, parties must mail or deliver a copy of any affidavit or declaration that the party intends to introduce into evidence to the opposing parties ten or more days prior to a hearing with the requisite notice. The opposing party has to mail or deliver their request to cross-examine the witness within seven days. Failure to do so constitutes waiver of the right to cross-examine at the hearing and the affidavit or declaration will come in as if the declarant testified orally. (8 Cal. Code Regs. § 372.4, subd. (a).) Even if opposing counsel is not afforded the right to cross-examine, however, the affidavit or declaration can still come in as hearsay. (*Ibid.*; see § [1.2.126]: Appendix K: Sample Notice of Motion, Motion, and Declaration of Witness.)

Finally, OSHAB has the discretion to exclude time-consuming evidence where the probative value has been shown to be substantially outweighed by the probability that the admission of the evidence will require an “undue consumption of time.” (8 Cal. Code Regs. § 376.2.) Thus, it is important to prepare arguments for why certain evidence should come in if the worker or his/her advocate believes there will be opposition to the evidence.

J. [1.2.95] DOSH’s Case

1. [1.2.96] Employee Exposure

DOSH has to prove that a health and safety violation exists. Thus, DOSH puts on their case first and they have the burden of proving each element of a violation by a preponderance of

the evidence⁴². (Evid. Code. § 115; *In re Harris Const. Co., Inc.* (Cal-OSH App.Bd.) 2007 WL 1248417, at *5.) One of the most important components of this is proving “employee exposure” or that employees came within the zone of danger and was therefore, “exposed” to the danger or hazard. (*In re Wickes Forest Industries* (Cal-OSH App.Bd.) 1984 WL 183126, at * 2; *In re Roof Structures, Inc.* (Cal-OSH App.Bd.) 1981 WL 140437, at * 2.)

A violation cannot be based upon assumption or conjecture; rather, DOSH has to offer reliable evidence that employees are exposed to an existing hazardous condition. (*In re Harbor Sand & Gravel, Inc.* (Cal-OSH App.Bd.) 2003 WL 21374493, at *3; *In re Benicia Foundry & Iron Works, Inc.* (Cal-OSH App.Bd.) 2003 WL 21016118, at *7.) The DOSH inspector is not required to have direct evidence that an employee was present within a zone of danger (i.e. actually witnessing an employee exposed to a hazard), but circumstantial evidence is sufficient as long as it shows that “more likely than not” the exposure occurred. (*In re Cambro Mfg. Co.* (Cal-OSH App.Bd.) 1986 WL 220370, at *3 [citing *In re Truestone Block, Inc.* (Cal-OSH App.Bd.) 1985 WL 190741, at *3]; see *In re Wickes Forest Industries, supra.*, 1984 WL 183126, at *2; *In re Carlos Interior Systems, Inc.* (Cal-OSH App.Bd.) 1994 WL 663315, at *2 [circumstantial evidence of employee exposure sufficient where inspector heard nail gun and immediately thereafter observed employee lowering gun while safety goggles lied on floor].)

In this regard, the employee's voice is key to providing evidence of employee exposure. Workers’ perspectives and experience are highly invaluable to give a real perspective of the work environment.

2. [1.2.97] Serious Violations

In 2011, AB 2774 was signed into law. It provided that where there is a serious violation, a rebuttable presumption exists that the violation is “serious” if there is a “realistic possibility” that death or serious physical harm could result from the actual hazard created by the violation. (Lab. Code § 6432(a).) Showing that there was a violation is not enough by itself to establish that the violation is serious. (*Ibid.*)

“Realistic possibility” is neither defined in the Labor Code nor in any 1 regulation, however the legislative intent was to broaden the definition of a “serious violation” to facilitate DOSH’s ability to issue serious violations since, historically, California has issued very few “serious” citations in comparison with Fed/OSHA. Prior to issuing a serious citation, DOSH must make a “reasonable attempt” to determine and consider a variety of issues set out in Labor Code section 6432, subdivision (b)(1) including:

⁴² A “preponderance of the evidence” is the lowest standard of proof and it refers to just enough evidence to make it more likely than not that the claim exists. The next step up is “clear and convincing” which refers to evidence that has a higher probability than not of being true. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.) The highest standard of proof is the “beyond a reasonable doubt” standard usually seen in criminal cases where one has to show that the evidence indicates that there is little to no doubt that the defendant is guilty of a crime. (Penal Code § 1096.)

- training for employees and supervisors relevant to preventing employee exposure to the hazard or similar hazards;
- procedures for discovering, controlling access to, and correcting the hazard or similar hazards;
- supervision of employees exposed or potentially exposed to the hazard;
- procedures for communicating to employees about the employer's health and safety rules and programs; and
- information that the employer wishes to provide, at any time before citations are issued, including, any of the following explanations of:
 - the circumstances surrounding the alleged violative events;
 - why the employer believes a serious violation does not exist;
 - why the employer believes its actions related were reasonable and responsible so as to rebut the presumption of a serious violation; and
 - any other information that the employer wishes to provide.

(Lab. Code § 6432, subd. (b)(1).) This duty is presumed to have been satisfied if not less than **15 days** before issuing a serious violation citation, it delivers a standardized form to the employer containing the alleged violation description (“AVD”) which clearly contains the information discussed above. (Lab. Code § 6432, subd. (b)(2); see § [1.2.126]: Appendix R: Sample 1BY form.)

K. [1.2.98] The Employer’s Case

After DOSH puts on their case, the employer has the opportunity to rebut the evidence put forth by DOSH. If the employer feels like DOSH's case is weak, it can simply rest its case without presenting any evidence. However, if it chooses to, the employer can put forth affirmative defenses, which, if shown by a preponderance of the evidence, may lift liability from the employer. (See *In re Columbia Helicopters, Inc.* (Cal–OSH App.Bd.) 2004 WL 367762, at *2; *In re Manuel M. Rodriguez* (Cal–OSH App.Bd.) 1998 WL 903849, at 2; *In re City of Sacramento Fire Dept.* (Cal–OSH App.Bd.) 1989 WL 431957, at 2-3.)

To avoid liability, the employer must show *all* of the following:

- it did not create the hazard;
- it did not have the ability to correct or remove the hazard;
- it took appropriate feasible steps to protect its employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with the hazard⁴³; and
- The creating, controlling and/or correcting employers (above) were notified or aware of the hazards to which its employees were exposed.

⁴³ Where an “extreme” hazard is involved, appropriate feasible steps include removing the employees from the job if there is no other way to protect them from the hazard. (8 Cal. Code Regs. § 336.11, subds. (e).)

(8 Cal. Code Regs. § 336.11, subds. (a)-(e); see DOSH P&P § C-1C; *Suarez v. Pacific Northstar Mechanical, Inc.*, *supra*, 180 Cal. App. 4th at 441.)

In general, the types of affirmative defenses that the advocate should look for are those that blame the employee. It is not uncommon for the employer to attempt to blame the employee for the violation. Two common such defenses are the "employee's independent act" and the "unforeseeable employee act" defenses.


The "employee's independent act" defense was created by OSHAB so that an employer could defend a citation by showing that the violation was due to the employee's independent act. (*In re Cutter Laboratories (Cal-OSH App.Bd.)* 1982 WL 174727, at 2-3; *In re Mercury Service, Inc. (Cal-OSH App. Bd.)* 1980 WL 100722 at 2.) It was meant to cover situations where the employer has done its best to comply with Cal/OSHA but it has employees that act against the employers' best safety efforts. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1242; *In re Western Pipeline (Cal-OSH App.Bd.)* 1981 WL 140531, at 1-2.) To prevail on this defense, the employer has to prove that it has a well-defined safety program that includes training employees in safety matters respective to their job assignments, that it effectively enforces the safety program and sanctions employees that fail to follow its program, and that the employee, who was not a supervisor, caused a safety infraction that s/he knew was contrary to the employer's safety requirement.⁴⁴

The "unforeseeable employee act" refers to the allegation that the employee committed a safety violation that the employer could not have foreseen. (*Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045; *Newbery Elec. Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, 650.) This defense applies even when the violation was committed by a supervisor. (See *Newbery Elec. Corp. v. Occupational Safety & Health Appeals Bd.*, *supra*, 123 Cal.App.3d at p. 650.)

The employer may also defeat a citation with proof that no employee was exposed to the hazard. (See *In re Lou Perini Plastering (Cal-OSH App.Bd.)* 1984 WL 183104, at 2 [no exposure where employer had no employees].) Thus, if the employer provides evidence that is as substantial as or more substantial than DOSH's and DOSH fails to meet its burden to prove

⁴⁴ For cases regarding safety program, see *In re Mercury Service, Inc. (Cal-OSH App.Bd.)* 1980 WL 100722; *In re Andersen Tile Co. (Cal-OSH App.Bd.)* 2000 WL 245479 [holding that element not proven where safety program was only 2 pages of rules that did not address when scaffolds should be used]; for cases regarding enforcement of safety programs, see *In re Kingston Constructors, Inc. (Cal-OSH App.Bd.)* 1999 WL 735461 [existence of extensive safety program does not matter if employer does not enforce its program]; *In re T.A. Rivard, Inc. (Cal-OSH App.Bd.)* 1998 WL 895869; for cases regarding sanctions against employees see *In re David Fisher (Cal-OSH App.Bd.)* 1991 WL 528437; *In re City of Los Angeles Dept. of Pub. Works (Cal-OSH App.Bd.)* 1986 WL 220381 [as corrected 1/22/87]; *In re Mercury Service, Inc. (Cal-OSH App.Bd.)* 1980 WL 100722; for cases regarding employee knowledge see *In re Marine Terminals Corp. (Cal-OSH App.Bd.)* 1999 WL 973884; *In re California Erectors, Bay Area, Inc. (Cal-OSH App.Bd.)* 1986 WL 220397; *In re Jerlane, Inc. (Cal-OSH App.Bd.)* 2009 WL 1740710 [showing employee's negligence does not meet burden of showing that employee "knowingly and intentionally" violated rule.]

that the citations issued should stand, it is possible for OSHAB to find in the employer's favor. (*In re Shea Kenny JV* (Cal-OSH App.Bd.) 2008 WL 2854511, 1-2.)



Interpreters

Since proceedings are conducted in English, parties with witnesses that would benefit from or need an interpreter need to make a request at least **10 working days** before the date the interpreter will be needed. (8 Cal. Code Regs., § 376.5, subd. (b).) The requesting party has to pay for the interpreter unless OSHAB agrees to pay the cost due to the party's *financial hardship*. (*Ibid.*)

L. [1.2.99] Post-Hearing

There may be some limited activity after the hearing. If there are outstanding issues that need to be briefed posthearing, the ALJ has the discretion to grant a motion for leave to submit a written posthearing brief as long as the briefing will be “productive” and not “unreasonably delay disposition.” (8 Cal. Code Regs. § 380.) The motion has to be made before the close of the hearing. (*Ibid.*) If briefing is granted, the party has **15 working days** from the hearing to submit the brief and opposing parties have **10 working days** from the service of the brief to reply. (*Ibid.*)

In addition, the ALJ also has the discretion to amend the issues to (1) correct any clerical errors, (2) address any issues litigated by the parties, (3) amend the section number cited in the citation if the same set of facts applies to both the cited and proposed sections, or (4) amend any part of DOSH's citations to conform to a statutory requirement. (8 Cal. Code Regs. § 386, subd. (a).) These amendments are only permitted if, upon notice and the opportunity to show prejudice is afforded to all parties, no prejudice is shown. (8 Cal. Code Regs. § 386, subd. (b); see *In re County of Los Angeles Met. Transp. Auth.* (Cal-OSH App.Bd.) 1999 WL 1254170, *4-8 [amendment to allege violation of different standard prejudicial where standards addressed different hazards].)

Within **30 days** of the hearing, the ALJ has to summarize the evidence and make findings based upon the facts involved in the case. (8 Cal. Code Regs. § 385, subds. (a), (b).) The ALJ will file a written order or decision which includes the grounds for the final disposition and can include any modification or vacating of DOSH's citation, order or proposed penalty, or direct any other appropriate relief. (8 Cal. Code Regs. § 385, subds. (a),(b).) The decision is served on all the parties along with a statement informing them of their right to petition OSHAB for reconsideration within **30 days** of service of the order. (8 Cal. Code Regs. § 386, subd. (c).) After this 30 day window, if no petition for reconsideration is filed, the decision is deemed final and not subject to review by any court or agency. (8 Cal. Code Regs. § 390.3, subd. (a).)

After an appeals hearing, the ALJ must summarize the evidence and make findings upon all facts involved in the appeal and issue a written decision within **30 days** after the close of the appeals hearing. (8 Cal.C.Reg. § 386(c).) These decisions are **not** considered precedent and

are not citable precedent. (See *In re Western Plastering Inc.* (Cal-OSH App.Bd.) 1983 WL 164230, * 4; *In re Pacific Ready Mix Inc.* (Cal-OSH App.Bd.) 1982 WL 174763, *2; and *In re Sturgeon & Son, Inc.* (Cal-OSH App.Bd.) 1994 WL 383160, *5.) The decisions will include information on whether or not the ALJ has determined that the citations and penalties assessed by DOSH against the employer, or the abatement schedule will still stand.



Finding OSHAB Decisions

OSHAB decisions may be obtained by request from OSHAB. They are also available through Westlaw ("CA-OSHA" database). Summaries of decisions are available through subscription to the Cal-OSHA Reporter, a private publication that uses a headnote indexing system. A limited number of recent decisions are also available on the OSHAB's Web site.

Caution: None of these sources for OSHAB's decisions contains a feature to alert the user to subsequent decisions that reverse, overrule or modify prior decisions. This places a heavy burden on practitioners to "know" the occupational safety and health area. Practitioners that utilize Westlaw are able to search for cases that mention the case in question to determine whether or not there have been subsequent decisions. (See Appendix Q: Finding and Key-Citing OSHAB cases in Westlaw.)

M. [1.2.100] Settlement

Settlement regarding the citations issued by DOSH can occur at any time, however different rules apply depending upon whether or not an appeal has been filed.

1. [1.2.101] Settlement prior to filing an appeal

Settlement can occur at any point from the issuance of the citation to the last day of the appeals proceeding. However, one of the most optimal times is at the post-inspection closing conference.

Settlement talks conducted before the filing of the appeal can be the most frustrating for workers and their advocates because at this point, neither one has "party status." Thus neither DOSH nor the employer are required to include the worker and/or their advocate in the settlement discussions. The investigator or Regional Manager who may be managing the settlement discussions may include the worker and/or their advocate since they have the most information about the day to day workplace issues. However, they are under no requirement to do so and the employer will often refuse to have any discussions with the worker and/or their advocate unless it is a unionized workforce.

This is why it is so important to maintain a close connection with the inspector or Regional Manager involved in the case so that advocates who have employee representative status, or

workers who have filed complaints can participate in the settlement process. (See [1.2.64]: "Pre-appeal Informal Conference".)

Another optimal time is at the "informal conference" that is offered by DOSH **10 working days** after issuing a citation. (*Ibid.*) The advantage of reaching a settlement at these stages is that parties do not require the approval of OSHAB.


2. [1.2.102] Settlement after filing an appeal

Settlement can also occur at any time after an appeal has been filed. It is imperative that advocates or workers obtain party status as soon as possible to be able to participate fully in any settlement discussion. (See § [1.2.79]: "Affected employees' right to party status.") Once the affected employee or his/her authorized representative takes party status, they must be given the opportunity to participate in settlement discussions between DOSH and the employer. Although employees or their representatives cannot prevent settlement from occurring, they can object and the ALJ can reject a disposition if party employees were not given the opportunity to participate. (*In re Dey Labs., Inc.* (Cal-OSH App.Bd.) 1995 WL 137676, *1-2; see *In re San Diego Union Tribune Publishing Co.* (Cal-OSH App.Bd.) 1991 WL 528427, *2.)

Any settlement (called a "disposition" at this phase) reached during an appeal must be supported by "good cause" and requires the approval of OSHAB. (8 Cal. Code Regs. §§ 364 to 364.2; *In re Ray Cammack Shows* (Cal-OSH App.Bd.) 2004 WL 817769, *4-5 [DOSHA could not agree to reduction of civil penalty as part of global settlement of criminal and Cal-OSHA proceedings without OSHAB's approval].) The preferred method of informing the ALJ that settlement is nearing is by email or by oral motion to the ALJ at the prehearing settlement conference. For these reasons, it is important to have the ALJ's email address and to remain connected to DOSH's attorney as well as the employer's representative during settlement negotiations. (See *In re Amish Country Gazebos, Inc.* (Cal-OSH App.Bd.) 2009 WL 1740716, *1-2.)

The ALJ will seek approval for the settlement terms from all parties prior to ruling on the settlement. If settlement is reached at the appeals hearing, it will be read into the record, which is taped. The worker and/or their representative have the opportunity to voice any objections they may have regarding the settlement terms at this point. Although an employee party cannot block settlement between DOSH and the employer, the employee parties' objection has the potential to influence the terms of the settlement. Moreover, if the employee party has not been provided with the statutory right to participate fully in the settlement negotiations, the objection can be recognized by the ALJ and the parties ordered to renegotiate once more to include the employee party. Take caution, however, because the court has held that where a party employee worked closely with the DOSH attorney, settlement was approved even where the party employee claimed they were not able to participate but knew that settlement discussions were taking place. (*In re Foster Turkey Products* (Cal-OSH App.Bd.) 2002 WL 743438, *1-3.)

If the ALJ accepts the settlement terms, s/he will read the terms into the record and then incorporate the terms into a formal order that is submitted to OSHAB for approval. (See 8 Cal. Code Regs. §§ 350.1, subd. (a), 374.3; *In re Jack Barcenski* (Cal–OSH App.Bd.) 2007 WL 1248420, *3 [self-represented employer who entered into disposition could not retract on basis he did not fully understand the legal consequences].)



Cal/OSHA Settlement Affect On Other Cases

The worker and his/her advocate should keep in mind the effect that a settlement may have on any other civil or workers' compensation proceeding that he/she may also bring against the employer. In general, an adverse decision before OSHAB can have a collateral estoppel effect on the employer - that is, they will not be able to re-litigate the proceedings in the collateral proceeding (i.e. workers' compensation). However, a settlement will not prevent the employee from litigating the existence of the Cal/OSHA violation in a collateral proceeding because the issue was not fully litigated. (See *In re Foster Turkey Products, supra*, 2002 WL 743438, *1-3 [party employee pursuing workers' compensation claim]; *In re Goodwill Industries of Orange County, Calif.* (Cal–OSH App.Bd.) 2001 WL 1456831, *3-4 [nonparty employee pursuing workers' compensation claim].) Thus, if the settlement results in a violation, the worker could use the Cal/OSHA violation to establish "serious and willful misconduct" in a workers' compensation proceeding. (Lab. Code § 4553; see [1.2.112]: "Serious and Willful Misconduct.")

N. [1.2.103] Petition for Reconsideration.

Any party aggrieved by the ALJ's decision may file a Petition for Reconsideration with OSHAB. (Lab. Code §§ 6614, subd. (a), 6626; 8 Cal. Code Regs. § 390.2, subd. (b).) OSHAB may also order reconsideration on its own motion. (8 Cal. Code Regs. § 390.2, subd. (a).) The petition must be based upon one or more of the following grounds:

- The order or decision exceeds the ALJ's powers or was procured by fraud;
- The evidence does not justify the findings of fact or the findings of fact do not support the order or decision; or
- The petitioner discovered new material evidence that it could not, with reasonable diligence, have discovered and produced at the hearing.

(Lab. Code §§ 6617; 8 Cal. Code Regs. § 390.1, subd. (a).) The filing of a petition suspends the affected order or decision for **10 days**, unless it is ordered otherwise by OSHAB. (Lab. Code § 6625; 8 Cal. Code Regs. § 390.9.)

The petition has to set forth the grounds "specifically and in full detail", including citing supporting references to the OSHAB's record. (Lab. Code § 6616; 8 Cal. Code Regs. § 391.) The OSHAB is required to "promptly" provide a copy of the hearing record to any

requesting party (who is responsible for payment of the cost of reproduction and delivery of the record). (8 Cal. Code Regs. § 392.5.) Since any issue not raised in the petition may be deemed a waiver of those issues, it is very important to consult with a practitioner to ensure that the worker's petition is complete. (Lab. Code §§ 6616, 6618; 8 Cal. Code Regs. § 391.)

The petition must be filed within **30 workings days** of service or posting of the order or decision by the ALJ and it must be verified (signed by the party or party's representative). (Lab. Code §§ 6616, 6619; 8 Cal. Code Regs. § 390, subd. (c).) The petition must be filed at OSHAB in Sacramento, and is considered filed on the day it is delivered or mailed to OSHAB. (8 Cal. Code Regs. §§ 390, subd. (a); 391.1, subd. (a).) Moreover, any party to the appeals hearing can file an answer to the petition for reconsideration within **30 days** of service of the petition upon the party. (8 Cal. Code Regs. § 390, subd. (b).)

The petition is deemed "denied" if OSHAB does not act on it within **45 days** of service. (Lab. Code § 6624; 8 Cal. Code Regs. § 390.3, subd. (b).) This may be extended up to an additional **15 days** for good cause. (*Ibid.*) If the petition is "granted", OSHAB can (1) affirm, rescind, alter, or amend the findings, order or decision, (2) grant oral argument (though this is rare), briefs or other proceedings that not involve requesting further evidence, or (3) direct the taking of additional evidence either by submission or further hearing. (Lab. Code §§ 6620, 6621; 8 Cal. Code Regs. § 390.1, subds. (b), (c); see 8 Cal. Code Regs. §§ 393, 394.) The decisions of OSHAB are made by a majority of its members, unless otherwise expressly provided. (See Lab. Code § 148.9; see *Murray Co. v. California Occupational Safety & Health Appeals Bd.* (2009) 180 Cal.App.4th 43, 49.)

It is important to note that OSHAB gives great deference to the ALJ's findings with respect to the credibility of witnesses and evidence. Thus, findings of fact with sufficient credible evidence are only overturned if a party can show that the findings are overcome by contrary evidence of "considerable substantiality" based upon the entire record. (*In re Sasco Electric* (Cal-OSH App.Bd.) 1999 WL 300264, *3-4; *In re Caves Const.* (Cal-OSH App.Bd.) 1991 WL 528424, *5-7.)

OSHAB's decisions after reconsideration are binding precedent upon employers and DOSH. Which means that OSHAB must follow those rules set out in such cases. (See *In re Western Plastering Inc.* (Cal-OSH App.Bd.) 1983 WL 164230, * 4; *In re Pacific Ready Mix Inc.* (Cal-OSH App.Bd.) 1982 WL 174763, *2; and *In re Sturgeon & Son, Inc.* (Cal-OSH App.Bd.) 1994 WL 383160, *5.) An OSHAB case, called a decision after reconsideration ("DAR") may be cited in proceedings, briefings, etc. before an ALJ or OSHAB. (*Ibid.*) However, decisions made by an ALJ are not citable as precedent. (*Ibid.*)

O. [1.2.104] Petition for Writ of Mandamus


Any "person affected" by OSHAB's decision may apply to the superior court for a writ of mandate. (Lab. Code §§ 6627, 6327.5; Code Civ. Proc. § 1094.5; see Lab. Code § 6632.) A writ or order of mandamus is an order to a public agency or governmental body to perform an act required by law when the agency has neglected or refused to do so. It is considered an

“extraordinary court order” because it is made without the benefit of full judicial process, or before a case has concluded.

An order of mandamus may be issued by a court at any time that it is appropriate, but it is usually issued in a case that has already begun. The petition for writ of mandamus must be filed within **30 days** after the denial of the petition for reconsideration or, if a petition was granted or reconsideration had on OSHAB’s own motion, within **30 days** after filing the order or decision following reconsideration. (Lab. Code § 6627.) It is filed in a Superior Court and is based upon the record made before the ALJ. The findings of OSHAB on questions of fact are conclusive and not subject to review (Lab. Code § 6630.) Thus, the court may review OSHAB’s interpretation of a regulation, for instance, which is a *legal* question that the court may decide upon. (See *Overaa Const. v. OSHAB* (2007) 147 Cal.App.4th 235, 244; *DOSH v. State Bd. of Control* (1987) 189 Cal.App.3d 794, 807.)

The grounds for review of OSHAB’s order or decision are limited to whether OSHAB exceeded its power and whether the order or decision was procured by fraud, was unreasonable, was not supported by substantial evidence, or was not supported by the findings of fact. (Lab. Code § 6629; see *Overaa Const. v. OSHAB*, *supra*, 147 Cal.App.4th at p. 245.) If review is granted, it is based upon OSHAB’s record, not a trial de novo, evidence submitted to the superior court, or upon the superior court’s exercise of its independent judgment of the evidence. (Lab. Code §§ 6628, 6629.)

All parties to the OSHAB proceeding have the right to appear in the mandate proceeding. (Lab. Code § 6630.)



What If An Order Was Not Issued?

The worker or his/her representative can file a writ of mandamus to compel DOSH to prevent or prohibit an unsafe condition that DOSH *arbitrarily and capriciously* fails to prevent that could reasonably be expected to result in *immediate death or serious physical injury*. (Lab. Code § 6327.5.)

P. [1.2.105] Appellate Review

The judgment issued by the superior court on the writ of mandamus is further reviewable on appeal to the court of appeal. (Code of Civil Procedure § 1094.5, See Cal. Const., art. VI, § 11.) Appellate review of OSHAB’s decision is the same as the superior court’s ruling on the writ of mandamus. That is, the court has to decide based upon OSHAB’s record of the decision whether or not OSHAB’s decision was supported by substantial evidence and was reasonable. (*Murray Co. v. OSHAB* (2009) 180 Cal.App.4th 43, 48.)



"Person affected" vs. "Affected Employee"

"Person affected" as it is used in Labor Code section 6627, is broader in scope than the terms "affected employee" and "party." In order to apply for a writ of mandate, the petitioner must have standing (i.e., s/he must be beneficially interested in the action) and must have exhausted all administrative remedies before filing suit. (See *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87.)

[1.2.106] Retaliation

More often than not, employees face retaliation for making oral or written complaint to DOSH or other governmental agencies with respect to any workplace hazard or unsafe or unhealthy condition. It is against the law for an employer to retaliate against an employee for making a bona fide complaint concerning unsafe working conditions. (Lab. Code § 6310.)

Retaliatory acts include discharge, threatened discharge, demotion, suspension or refusing to renew an employment contract. In this section, we discuss some of the causes of action that an employee may have against his/her employer for retaliatory actions.



Statute of Limitations

California: An employee or job applicant alleging retaliation in violation of any law under the jurisdiction of the Labor Commissioner must file a complaint with the Division of Labor Standards and Enforcement (DLSE) within **6 months** of the adverse action. If the complaint regards retaliation against victims of domestic violence or sexual assault, the complaint must be filed within **one year** of the alleged violation. (Lab. Code §§ 230, subd., (c), 230.1.) If the discrimination regards being paid less than another worker of the opposite sex, then it must be filed within **two years**. (Lab. Code § 1197.5.) A complaint regarding retaliation for reporting violations of licensing or other laws relating to a child care facility has to be filed no later than **90 days** after the adverse action. (Health and Safety Code § 1596.881; see www.dir.ca.gov/dlse/howtofilediscriminationcomplaint.htm [last visited January 2, 2014] for more information.)

Federal: If the worker is filing with the federal agency, Fed OSHA, s/he only has 30 days to file a complaint for retaliation, commonly referred to as an "11(c)" complaint. (Occupational Safety and Health Act (OSHA 11(c)), 29 U.S.C. § 660(c); for filing options, including online, see http://www.whistleblowers.gov/complaint_page.html [last visited January 2, 2014].)

A. [1.2.107] Immigrant Based Retaliation

In October 2013, California passed three bills, AB 263, AB 524, and SB 666, which significantly expand retaliation protections for workers who seek to exercise their workplace rights. The laws will take effect on January 1, 2014. In the context of health and safety, this is particularly poignant because many immigrant workers experience what is known as the "chilling" effect of retaliation, which ultimately results in the silencing of immigrant workers when it comes to reporting injuries and illnesses as well as workplace conditions. It is not uncommon for immigrant workers to find themselves facing demotion, job transfer, shift change, or lay-offs after coming forward to report health and safety issues at work. This results in the absence of a key worker voice when the employer attempts to appeal the citations issued to it by DOSH for health and safety violations.



Preemptive Retaliation

The DLSE has also held that it is not appropriate to terminate or discriminate against an employee because the employer has a fear that the employee will complain of safety violations. Doing so is actionable as retaliation under Labor Code § 6310(b); *Lujan v. Minagar* (2004) 124 Cal.App. 4th 1040, 1045-1046 [employer feared employee, who was a friend of co-employee who had filed workplace safety complaint, would file similar complaint].)

In general, the new laws strengthen California's labor laws by expanding the grounds for a finding of immigrant-based retaliation, increasing penalties for retaliation, and broadening protections for whistleblowers.⁴⁵ Many of these strengthened laws apply to workers' complaints regarding wage issues. However, studies have often found that where wage and hour violations exist, so do health and safety issues. (Bernhardt, Annette, et. al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*⁴⁶ (2010), pp. 2-4, 20, 24-26; Milkman, Ruth, et. al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*⁴⁷ (2010), pp. 1-5, 26-30.)

B. [1.2.108] OSH based Retaliation filed with DLSE

Labor Code Section 6310 protects workers who make bona fide good faith complaints concerning unsafe working conditions against retaliation or discrimination. (Lab. Code § 6310(b); see *Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 44.) In addition, employees have the right to refuse to perform work that would result in a Cal/OSH violation creating a *real*

⁴⁵ See www.nelp.org/page/-/Justice/2013/ca-immigration-retaliationv3.pdf [last visited November 4, 2013].

⁴⁶ See www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1 [last visited November 4, 2013].

⁴⁷ See www.labor.ucla.edu/publications/reports/LAwagetheft.pdf [last visited November 4, 2013].

and apparent hazard to the employee or other coworkers. (Lab. Code § 6311.) If s/he is terminated or laid off for refusing to work under such conditions, a complaint can be filed or a private right of action can be brought for discrimination under Labor Code section 6311, which may result in remedies of lost wages, reinstatement, or backpay. (*Ibid.*; see § [1.2.12]: "Right to refuse unsafe work.")

Workers who have experienced retaliation under Labor Code Sections 6310 and 6311 can file a complaint with the Labor Commissioner. (Lab. Code § 6312, see Ch. 3.3: DLSE [forthcoming].) If the Labor Commissioner makes a determination that retaliation has occurred, s/he can direct the employer to stop the retaliatory treatment or actions and to even rehire or reinstate the employee and reimburse lost wages. (Lab. Code § 6312; see Lab. Code § 98.7, subd. (c).)

The employee is **not** required by law, however, to file with the DLSE first. New law passed in October 2013 through SB 666 clarifies that workers do not need to exhaust administrative remedies by filing with the DLSE before bringing claims in court, unless the claim expressly requires exhaustion. (Lab. Code § 244, subd. (a).) In addition, new law passed through AB 263 also clarifies that there is no administrative exhaustion required for claims of unlawful discharge or discrimination. (Lab. Code § 98.7, subd. (g).)

C. [1.2.109] Retaliation for Workplace Violence

Employers cannot discriminate or retaliate against workers who are victims of workplace violence. Such retaliation or discrimination often comes in the form of the employers' reaction to the workers' status as a victim of either domestic violence or sexual assault or their need for either time off to address their situation or their request for a workplace accommodation. (See Ch. 4.2: Workplace Violence [forthcoming].)

D. [1.2.110] Common Law Tort Claim

Discharging an employee for making a good faith complaint against unsafe working conditions violates fundamental public policy. (Lab. Code § 6310.) The employee may file a tort action for wrongful discharge in violation of public policy. (*Boston v. Penny Lane Ctrs., Inc.* (2009) 170 Cal.App.4th 936, 947; *Freund v. Nycomed Amersham* (9th Cir. 2003) 347 F.3d 752, 758–760.) Remedies may include reinstatement and backpay. (Lab. Code § 6310, subd. (b); see *Daly v. Exxon Corp.* (1997) 55 Cal.App.4th 39, 44.)

It is irrelevant whether or not the employer specified the particular safety statute or regulation that was allegedly violated. *Freud v. Nycomed Amersham, supra*, 347 F.3d at 759. In addition, a unique feature of Labor Code section 6310 is that a cause of action may exist even if an employee makes a health and safety complaint against a *former* employer as well. (*Skillskey v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088, 1092–1093.) That is, an employer cannot terminate an employee for filing a workplace safety complaint against a *former* employer. (*Ibid.*) Doing so is actionable as a wrongful discharge in violation of public policy based upon Labor Code section 6310. (*Ibid.*) The rationale behind this is to prevent employers from stifling safety complaints by threatening retaliation in

future employment (especially in industries where employers tend to know one another or have contractual relationships with regard to employees). (*Ibid.*)

E. [1.2.111] NLRA

Further, if the workers engaged in protected concerted activities as a group, they can seek the protection of section 7 of the National Labor Relations Act by filing a section 8(a)(1) unfair labor practice charge before the National Labor Relations Board. (See Ch. 3.4: NLRB.)

[1.2.112] Alternatives

Regulations can also be enforced through civil actions and criminal and civil prosecutions with or without administrative enforcement. The following is a brief discussion of some alternative options.

A. [1.2.113] Workers' Compensation

If an employee has been injured, their exclusive remedy, with a few exceptions, for a workplace injury is the state workers' compensation program. (Lab. Code §§ 3600, 3601, 3602, subd. (a); see Chapter 3.2: Workers' Compensation.) Thus, an employer's violation of a safety standard resulting in a workplace injury or illness does not itself give rise to a civil action by the employee against the employer *even if* the violation resulted in the workers' death or was criminally negligent. (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 723 (dictum); *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 726; *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal.App.4th 1280, 1285–1286.)

However, Workers' Compensation does have some exceptions, which include:

- injury resulting from removal or non-installation of power press guard (Lab. Code § 4558); and
- action against an employer by an employee's child for in utero injuries suffered by virtue of the mother's employment during pregnancy (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 998–1001, 1006 [child suffered in utero injury from mother's inhalation of carbon monoxide].)

B. [1.2.114] Serious and Willful Misconduct

However, it is possible for an injured worker to use the Cal/OSHA violation to establish “serious and wilful misconduct” in a workers' compensation proceeding. (Lab. Code § 4553.) Any such charge has to be brought within **12 months** from the date of the injury. (Labor Code §5407.) Under Labor Code § 4553, “serious and willful misconduct” refers to an intentional act that has been committed either (a) for the purposes of injuring another, (b) with knowledge that serious injury is a probable result, or (c) with a positive and reckless

disregard of its possible consequences. *Grason Elec. Co. v. Industrial Acc. Comm'n* (1965) 238 Cal.App.2d 46, 48.

Injured Employee's Action Against Employer's "Hirer"



The person hiring an independent contractor is not liable to the contractor's employees for on-the-job injuries. Remedies against the "hirer" are also limited by workers' compensation. (*Privette v. Sup.Ct. (Contreras)* (1993) 5 Cal.4th 689, 693, 700–702 [no hirer liability to contractor's employee]; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244–1245 [no hirer liability to contractor's employee].) Similarly, Labor Code section 6305.4, which usually allows the use of Cal/OSHA provisions to show the appropriate duty or standard of care, cannot be used to establish liability for a resulting injury to a contractor's employee (except where the hirer *affirmatively contributed* to the employee's injuries.) (*SeaBright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, 595.)

Exceptions: An employee of an independent contractor can recover, however, from the person who hired their employer where the contractor did *not* know and *could not have reasonably discovered* the hazard and the "hirer":

- *knew* or should have known of a *latent or concealed preexisting hazardous condition* on the property; and
- *failed to warn* the contractor about the hazard.

(*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664, 675.)

The "hirer" can also be liable to the contractor's employee where the *retained control* over all or part of the contractor's work and *affirmatively contributed* to the employee's injury. (*Hooker v. Department of Transp.* (2002) 27 Cal.4th 198, 210–213.) For example, the court found the "hirer" to be liable where it negligently furnished unsafe equipment that injured the contractor's employee. (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225.)

When an employee is injured due to the serious and willful misconduct of (a) the employer or his/her managing representative (if a sole proprietor), (b) a partner, managing representative or general superintendent (if a partnership), or (c) an executive, managing officer or general superintendent (if a corporation), their total workers' compensation is increased one-half, together with cost and expenses not to exceed §250. (Lab. Code §4553; see *Ferguson v. Workers' Comp. App. Bd.* (1995) 33 Cal.App.4th 1613, 1619–1621.)

C. [1.2.115] Private Attorneys General Act

Employees may also bring a civil action under the Private Attorneys General Act ("PAGA") to recover 25% of the penalties assessed against employers for violations of Cal/OSHA standards. (Lab. Code §§ 2699, subd. (i); 2698.) In general, the California Labor and Workforce

Development Agency (LWDA) is authorized to assess and collect civil penalties for certain violations of the Labor Code. However, since LWDA cannot possibly prosecute every employer for every Labor Code violation, PAGA was enacted to allow employees to file their own lawsuit against their employers. (See Lab. Code § 2698; *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 Cal.App.4th 365, 370, 374–75; *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1301.)

In addition, employees are allowed under PAGA to seek compensation for themselves as well as other current or former employees. (Lab. Code § 2699.) The employee is also able to recover reasonable attorney fees and costs if they prevail in their lawsuit. (Lab. Code § 2699, subd. (g)(1).)

Thus, employees can pursue fines otherwise only available to the state of California. The catch, however, is that the employee can only receive 25% of the civil penalty but the rest goes to the LWDA for “education and enforcement purposes.” (*Amalgamated Transit Union, Local 1756, AFL–CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 Cal.4th 993, 1000-1001.)

D. [1.2.116] Third Party Lawsuits

An employee may file a lawsuit against a third party for a work-related injury. In such a lawsuit, they can use Cal/OSHA provisions to show a duty or standard of care regardless of whether the defendant is their employer or a third party. (Lab. Code § 6304.5; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 927, 935–936.)

E. [1.2.117] Criminal Liability

Criminal liability is appropriate against employers, supervisors and even other employees in certain circumstances, especially where the hazard results in death or serious injury to an employee. City Attorneys or District Attorneys, depending upon county, have the authority to bring criminal cases. DOSH will contact the City or District Attorney in cases where there may be criminal liability.

A corporation can be criminally prosecuted under the Corporate Criminal Liability Statutes. (Lab. Code §§ 6243-6436; Pen. Code § 387.) The intent of corporate criminal liability is to require corporations to monitor the safety of their worksites, and to develop health and safety procedures. In general, Cal/OSHA standards, findings, and decisions are admissible as evidence in any criminal prosecution for violation of the Cal/OSHA Act. (Lab. Code § 6315.5.) Likewise, criminal convictions involving the same conduct as the citations are admissible as final judgments under California Evidence Code § 1300 at Appeals Board hearings regardless of whether or not the conviction is being appealed. (*In re BLF, Inc.* (Cal-OSH App.Bd) 2010 WL 774143, *6–8 (following *In re Peterson* (2008) 156 Cal.App.4th 676, 692.)



The District Attorney

Practically speaking, the District Attorney will want to prosecute individuals when they have real control of the work place and are high enough up in the "food chain" that they could meaningfully allocate resources to make the workplace safe. That does not mean that someone lower down might not be charged, but in reality, if a foreman, general foreman, or even superintendent has taken reasonable steps to ask superiors for safety or health protection for their crew, and acted reasonably under all the circumstances to provide health and safety, it is not likely they will be charged. As a precaution, workers should document all communications with superiors.

The following are some instances that may result in criminal liability:

1. [1.2.1118] Liability for Failure to Report or Maintain Records

Employers have a duty to maintain records and make reports about injuries and illness that occur in the workplace. (See §§ 1.2.29 & 1.2.30.) Anyone who makes a **knowingly** false statement in any of these records or reports can be punished with up to six months' imprisonment and/or a \$70,000 fine. (Lab. Code § 6426.)

2. [1.2.119] Occupational Death or Serious Injury or Illness

Under Labor Code § 6409.1, subd. (b), employers have to **immediately** report any occupational death or serious injury or illness. (Lab. Code § 6409.1, subd. (b).) *Knowing* failure to report a **death** is a misdemeanor punishable by up to one year in jail and/or a \$15,000 fine. (Lab. Code § 6423, subds. (a)(3), (c).)

3. [1.2.120] Failure to Comply with an OPU

An employer's failure to comply with an OPU constitutes a misdemeanor. (Lab. Code § 6326; See, *supra*, § [1.2.69]: "Order Prohibiting Use For Imminent Hazard.") DOSH can also go to Court for Civil Enforcement of the order. (Lab. C. § 6317.) If a serious menace has been identified, DOSH may apply to the Superior Court for an injunction restraining its use or operation. (Lab. Code §§ 6323, 6324.)

4. [1.2.121] Liability for Knowing Concealment of Occupational Hazard

Criminal liability under Penal Code § 387 can be charged upon a corporation, limited liability company or individual manager who has actual authority over safety or the conduct of research or testing for having *actual knowledge of a serious concealed danger* and failing to report it to DOSH and

affected employees. (Pen. Code §§ 387, subs. (a), (b)(4); 387, subs. (b)(2), (B).) A “serious concealed danger” refers to one that is not readily apparent and that could foreseeably cause death, great bodily injury or serious exposure. The employer has to provide notification *in writing* within 15 days of actual knowledge of the danger. (Pen. Code § 387, subd. (a)(2).) If imminent risk of danger or great bodily harm is involved, the employer must give *immediate* notification. (*Ibid.*) The penalty for failure to take appropriate action is up to three years’ imprisonment and/or a \$25,000 fine (which can be as much as one million for a corporate or limited liability company). (Pen. Code § 387, subs. (a), (b)(4).)

5. [1.2.122] Liability for Failure to Abate

After DOSH has provided notification of a health and safety violation, employers, managers, and supervisors must abate (fix or correct) the violation before a prescribed expiration date known as the “abatement period.” (See §§ [1.2.33]: “Duty to Fix or Correct – “Abate” Health and Safety Violations,” [1.2.72]: “Abatement”.) Under Labor Code Section 6423 it is a misdemeanor to knowingly or negligently commit a “serious” violation of a standard or order, to create a real and apparent hazard by repeatedly violating a standard, or by failing to abate. Failing to abate can result in fines of up to \$15,000 a day until the violation is corrected. (Lab. Code § 6430, subd. (a); 8 Cal. Code Regs. § 336, subs. (d), (e).) If the employer fails or refuses to abate, it is a misdemeanor punishable by up to one year imprisonment and a \$15,000 fine (which can increase to as much as \$150,000 for a corporate or limited liability company). (Lab. Code § 6432, subs. (a)(4), (d).)

6. [1.2.123] Liability for Serious and Repeat Violations

A misdemeanor, punishable by up to six months’ imprisonment and/or a \$5000 fine can be charged against an employer, supervisor, or manager who knowingly or negligently commits a “serious” violation of a Cal/OSHA standard. (Lab. Code § 6423, subs. (a)(1), (b); see *People v. Gaglione* (1982) 138 Cal.App.3d 52, 58–60.) They can also be charged for repeat violations that create a real and apparent hazard to employees with a penalty up to one year imprisonment and/or a \$15,000 fine (which can be as high as \$150,000 for a corporation or LLC.) (Lab. Code § 6423, subs. (a)(2), (c).)

7. [1.2.124] Liability for Death or Serious Injury

In the worst of cases, a severe occupational injury may result in criminal liability against supervisory or managerial employees for “willful” violation of a Cal/OSHA standard or order that ultimately caused an employee's death or permanent or prolonged bodily impairment. (Lab. Code § 6425, subd. (a).) This is a misdemeanor. (*Ibid.*)

For purposes of Labor Code § 6425, “willful” refers to having “a purpose or willingness to commit the act” without any requirement of an intent to violate the law or even injure another. (Lab. Code § 6425, subd. (e); see Pen. Code § 7.) It is a very high standard and rarely cited. The penalty for a first offense can be up to three years in prison and/or a \$250,000 fine for an individual employer and \$1.5 million for a company employer. (Lab.

Code § 6425, subds. (b)-(d).) Higher penalties may be possible for subsequent violations. (*Ibid.*)

In these instances, employers will often appeal the citation because there is the possibility of criminal prosecution and the appeal *postpones* a final citation of the violation of a safety order. In addition, if the employer is successful in their appeal, they may be able to avoid criminal prosecution. Often the Appeals Board may defer a hearing if there is a pending criminal referral causing even more delay in a final Cal/OSHA citation.

8. [1.2.125] Liability for Homicide or Mayhem

In the worst of cases, a severe occupational injury may result in criminal liability for mayhem. (Pen. Code § 203.) California's mayhem law punishes the crime of maliciously disfiguring or disabling another person's body (which is also referred to as "maiming")⁴⁸. In addition, an occupational death may result in criminal liability for manslaughter or even murder. (Pen. Code §§ 187, 192; See *Granite Const. Co. v. Sup.Ct. (People)* (1983) 149 Cal.App.3d 465, 466 [holding that a corporation may be charged with manslaughter following the accidental on-the-job deaths of seven of its employees]; *People v. Gaglione* (1982) 138 Cal.App.3d 52, 56 [convicting the superintendent of a plant lacking the required safety equipment with involuntary manslaughter for the asphyxiation deaths of two employees who entered manhole without gas masks or safety harnesses].)

F. [1.2.126] Civil Liability

Civil liability is also available under the unfair competition provisions of the Unfair Competition Law ("UCL") which defines unfair competition as "any unlawful, unfair, or fraudulent business act or practice.." and includes violations of any other state or federal law." (Business and Professions Code ("Bus. & Prof. Code") § 17200 et. seq.) The UCL is broad, allowing virtually anyone to bring an action. (*Ibid.*) Thus, actions under the UCL can be brought either by the Attorney General or private persons. (*Ibid.*)

Due to the passage of Proposition 64 in 2004, a private person's standing to sue under Business and Professions Code § 17200 became limited to require that he/she have "suffered injury in fact" and "lost money or property as a result of the unfair competition." Unfortunately, damages are not available in private actions; the only available remedies under the UCL are injunctive and restitution (i.e. orders to restore money or property). (See Bus. & Prof. Code § 17203.) On a positive note, the plaintiff does not have to show that the employer intended to injure anyone since Section 17200 imposes "strict liability where property or monetary losses are occasioned by conduct that constitutes an unfair business practice." (*Cortex v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 172.)

⁴⁸ Cal. Pen. Code § 203: Mayhem - "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Due to these limitations, private lawsuits generally include Bus. & Prof. Code Section 17200 causes of action in conjunction with other causes of action such as violation of Labor Code Sections 6310 or 6311. Moreover, prosecutors such as the Attorney General will, most likely, only prosecute cases under Business and Professions Code Section 17200 involving Cal/OSHA violations if they are a repeat violator and the violation is a continuing one that is likely to cause death or serious injury.

G. [1.2.127] Workplace Violence

There is no action at law against an *employer* for a co-worker’s or a third party’s assault on an employee. His or her only remedy is through workers’ compensation. (Lab. Code § 3601, subd. (a)(1); *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1263–1266.) This does not apply to situations where the employer’s willful physical assault has caused an employee’s injury or death. (Lab. Code § 3602, subd. (b)(1); see *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723–728.) However, an employee injured by a co-worker’s “willful and unprovoked physical act of aggression” may bring an action at law against the co-worker. (Lab. Code § 3601, subd. (a)(1); *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1486–1489.)

An employer may, on behalf of an employee, obtain a temporary restraining order as well as a permanent injunction against those who engaged in unlawful violence or made a “credible threat” of violence in the workplace. (Code Civ. Pro. § 5.27.8.) (See Chapters 3.2: Workers’ Compensation and 4.2: Workplace Violence for a more detailed discussion.)

[1.2.128] Appendix

A	Sample Employee Declaration Letter
B	OSHA Fact Sheet: Injury and Illness Prevention Programs
C	Record-keeping Forms
D	DOSH Enforcement District Offices
E	Web Complaints (English & Spanish) & Web Complaint for Heat in Spanish
F	Sample Complaint and Cover Letter
G	Cal OSHA 7: Sample Letters to Complainant
H	Deputy Assistant Secretary of Labor for Occupational Safety and Health, Richard E. Fairfax Memo regarding Federal Walkaround, February 21, 2013
I	Sample Citation
J	Appeal Form

K	Sample Notice of Motion, Motion, and Declaration of Witness
L	Sample Motion for Party Status
M	Notice of Prehearing Conference
N	Sample Motion to Continue`
O	Request for Discovery/OSH Documents
P	Sample Subpoena
Q	Finding and Key-Citing OSHAB cases in Westlaw
R	Sample 1BY form

Appendix A

[SAMPLE FOR INDIVIDUAL EMPLOYEE]

DECLARATION OF REPRESENTATION

As affected employee of the [EMPLOYER] in [LOCATION], California, I, the undersigned, [NAME OF EMPLOYEE], hereby designate [ATTORNEY OR WORKER ADVOCATE] to represent me under the Occupational Safety and Health Act, including serving as my “representative” or “employee representative” in communications with the Division of Occupational Safety and Health and any proceedings before the Occupational Safety and Health Appeals Board.

Signature

Date

Print Name

Appendix B

Injury and Illness Prevention Programs

Injury and Illness Prevention Programs are proactive processes that can substantially reduce the number and severity of workplace injuries and illnesses and can alleviate the associated financial burdens on U.S. workplaces. These systematic programs allow employers and workers to collaborate on an ongoing basis to find and fix workplace hazards before workers are hurt or become ill. This Fact Sheet describes some common program elements and how to implement them.

Injury and Illness Prevention Programs are an effective tool for reducing occupational injuries, illnesses and fatalities. Many workplaces have already adopted such approaches, for example, as part of OSHA's Voluntary Protection Programs (VPP) and Safety and Health Achievement Recognition Program (SHARP) for small employers. Not only do these workplaces experience significant decreases in workplace injuries, but they often report a transformed workplace culture that can lead to higher productivity and quality, reduced turnover, reduced costs and greater worker satisfaction.

Thirty-four states and many nations around the world already require or encourage employers to implement similar programs. Based on the positive experience of these employers, OSHA believes that Injury and Illness Prevention Programs can provide the foundation for breakthrough changes in the way employers and their workers identify and control hazards, leading to a significantly improved workplace health and safety environment. Adoption of an Injury and Illness Prevention Program will result in workers suffering fewer injuries, illnesses and fatalities. In addition, employers will improve their compliance with existing standards and experience the financial benefits of a safer and healthier workplace.

Injury and Illness Prevention Programs should include the systematic identification, evaluation and prevention or control of general workplace hazards and the hazards of specific jobs and tasks.

The major elements of an effective program include:

Management Leadership

- Establish clear safety and health goals for the program and define the actions needed to achieve those goals.
- Designate one or more individuals with overall responsibility for implementing and maintaining the program.
- Provide sufficient resources to ensure effective program implementation.

Worker Participation

- Consult with workers in developing and implementing the program and involve them in updating and evaluating the program.
- Include workers in workplace inspections and incident investigations.
- Encourage workers to report concerns, such as hazards, injuries, illnesses and near misses.
- Protect the rights of workers who participate in the program.

Hazard Identification and Assessment

- Identify, assess and document workplace hazards by soliciting input from workers, inspecting the workplace and reviewing available information on hazards.
- Investigate injuries and illnesses to identify hazards that may have caused them.
- Inform workers of the hazards in the workplace.

Hazard Prevention and Control

- Establish and implement a plan to prioritize and control hazards identified in the workplace.
- Provide interim controls to protect workers from any hazards that cannot be controlled immediately.
- Verify that all control measures are implemented and are effective.
- Discuss the hazard control plan with affected workers.

Education and Training

- Provide education and training to workers in a language and vocabulary they can understand to ensure that they know:
 - Procedures for reporting injuries, illnesses and safety and health concerns.
 - How to recognize hazards.
 - Ways to eliminate, control or reduce hazards.
 - Elements of the program.
 - How to participate in the program.
- Conduct refresher education and training programs periodically.

Program Evaluation and Improvement

- Conduct a periodic review of the program to determine if it has been implemented as designed and is making progress towards achieving its goals.
- Modify the program, as necessary, to correct deficiencies.
- Continuously look for ways to improve the program.

For more information, visit the Injury and Illness Prevention Program page on OSHA's website at: www.osha.gov/dsg/topics/safetyhealth.

Twenty-seven states operate their own occupational safety and health programs approved by OSHA. States enforce similar standards that may have different or additional requirements. A list of state plans is available at www.osha.gov/dcsp/osp.

This is one in a series of informational fact sheets highlighting OSHA programs, policies or standards. It does not impose any new compliance requirements. For a comprehensive list of compliance requirements of OSHA standards or regulations, refer to Title 29 of the Code of Federal Regulations. This information will be made available to sensory-impaired individuals upon request. The voice phone is (202) 693-1999; teletypewriter (TTY) number: (877) 889-5627.

For assistance, contact us. We can help. It's confidential.



U.S. Department of Labor
www.osha.gov (800) 321-OSHA (6742)

Appendix C

Cal/OSHA Form 301

Injury and Illness Incident Report

Appendix C

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.
See CCR Title 8 14300.29(b)(6)-(10)



Department of Industrial Relations
Division of Occupational Safety & Health

This *Injury and Illness Incident Report* is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with *Log of Work-Related Injuries and Illnesses* and the accompanying *Annual Summary*, these forms help the employer and Cal/OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the instructions and information asked for on this form.

According to CCR Title 8 Section 14300.33 Cal/OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy and use as many as you need.

Completed by _____

Title _____

Phone (____) _____-_____ Date ____/____/____

Information about the employee

- 1) Full name _____
- 2) Street _____
- City _____ State _____ ZIP _____
- 3) Date of birth ____/____/____
- 4) Date hired ____/____/____
- 5) Male
 Female

Information about the physician or other health care professional

- 6) Name of physician or other health care professional _____
- 7) If treatment was given away from the worksite, where was it given?
- Facility _____
- Street _____
- City _____ State _____ ZIP _____
- 8) Was employee treated in an emergency room?
 Yes
 No
- 9) Was employee hospitalized overnight as an in-patient?
 Yes
 No

Information about the case

- 10) Case number from the Log _____ (Transfer the case number from the Log after you record the case.)
- 11) Date of injury or illness ____/____/____
- 12) Time employee began work _____ AM / PM
- 13) Time of event _____ AM / PM Check if time cannot be determined
- 14) What was the employee doing just before the incident occurred? Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific. Examples: "climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer key-entry."
- 15) What happened? Tell us how the injury occurred. Examples: "When ladder slipped on wet floor, worker fell 20 feet"; "Worker was sprayed with chlorine when gasket broke during replacement"; "Worker developed soreness in wrist over time."
- 16) What was the injury or illness? Tell us the part of the body that was affected and how it was affected; be more specific than "hurt," "pain," or "sore." Examples: "strained back"; "chemical burn, hand"; "carpal tunnel syndrome."
- 17) What object or substance directly harmed the employee? Examples: "concrete floor"; "chlorine"; "radial arm saw." If this question does not apply to the incident, leave it blank.
- 18) If the employee died, when did death occur? Date of death ____/____/____

Annual Summary of Work-Related Injuries and Illnesses



All establishments covered by CCR Title 8 Section 14300 must complete this Annual Summary, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary.

Using the Log, count the individual entries you made for each category. Then write the totals below, making sure you've added the entries from every page of the Log. If you had no cases, write "0."

Employees, former employees, and their representatives have the right to review the Cal/OSHA Form 300 in its entirety. They also have limited access to the Cal/OSHA Form 301 or its equivalent. See CCR Title 8 Section 14300.35, in Cal/OSHA's recordkeeping rule, for further details on the access provisions for these forms.

Number of Cases

Total number of deaths	Total number of cases with days away from work	Total number of cases with job transfer or restriction	Total number of other recordable cases
_____	_____	_____	_____
(G)	(H)	(I)	(J)

Number of Days

Total number of days away from work	Total number of days of job transfer or restriction
_____	_____
(K)	(L)

Injury and Illness Types

Total number of . . .			
(M)			
(1) Injuries	_____	(4) Poisonings	_____
(2) Skin disorders	_____	(5) Hearing loss	_____
(3) Respiratory conditions	_____	(6) All other Illnesses	_____

Post this Annual Summary from February 1 to April 30 of the year following the year covered by the form.

Establishment information

Your establishment name _____

Street _____

City _____ State _____ ZIP _____

Industry description (e.g., *Manufacture of motor truck trailers*)

Standard Industrial Classification (SIC), if known (e.g., *SIC 3715*)

Employment information (If you don't have these figures, use the optional Worksheet to estimate.)

Annual average number of employees _____

Total hours worked by all employees last year _____

Sign here

Knowingly falsifying this document may result in a fine.

I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete.

Company executive _____ Title _____

Phone _____ Date _____

Cal/OSHA Form 300 (Rev. 7/2007) Appendix A Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes. See CCR Title 8 14300.29(b)(6)-(10)



Year 20____
Department of Industrial Relations
Division of Occupational Safety and Health

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in CCR Title 8 Section 14300.8 through 14300.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (Cal/OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local Cal/OSHA office for help.

Establishment name _____
City _____ State _____

Identify the person		Describe the case				Classify the case				Enter the number of days the injured or ill worker was:		Check the "Injury" column or choose one type of illness:					
---------------------	--	-------------------	--	--	--	-------------------	--	--	--	---	--	--	--	--	--	--	--

(A) Case no.	(B) Employee's name	(C) Job title <small>(e.g., Welder)</small>	(D) Date of injury or onset of illness	(E) Where the event occurred <small>(e.g., Loading dock north end)</small>	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill <small>(e.g., Second degree burns on right forearm from acetylene torch)</small>	Using these four categories, check ONLY the most serious result for each case:				(K) ____ days	(L) ____ days	Check the "Injury" column or choose one type of illness:						
						Death (G)	Days away from work (H)	Job transfer or restriction (I)	Other recordable cases (J)			(1) Injury	(2) Skin disorder	(3) Respiratory condition	(4) Poisoning	(5) Hearing loss	(6) All other illnesses	
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____	_____	_____	month/day	_____	_____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	____ days	____ days	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Page totals ➔ _____
Be sure to transfer these totals to the Summary page (Form 300A) before you post it.

Injury	Skin disorder	Respiratory condition	Poisoning	Hearing loss	All other illnesses
(1)	(2)	(3)	(4)	(5)	(6)

Appendix D



Cal/OSHA

Cal/OSHA

Cal/OSHA Enforcement Unit regional and district offices

To locate the Cal/OSHA Enforcement Unit district office nearest your workplace by using your zip code, click below:
[Cal/OSHA Enforcement district office locator](#)

[Click here to see a map of the regional and district offices](#)

Region 1

San Francisco Regional Office
 Chris Grossgart, Acting - Regional Manager
 455 Golden Gate Ave., Rm 9516
 San Francisco, CA 94102
 (415) 557-0300
 (415) 557-0900 (Fax)
DOSHREG1SanFrancisco@dir.ca.gov

San Francisco District Office
 Juan Calderon, District Manager
 455 Golden Gate Ave., Rm 9516
 San Francisco, CA 94102
 (415) 557-0100
 (415) 557-0123 (Fax)
DOSHsf@dir.ca.gov

Fremont District Office
 Michael Frye, District Manager
 39141 Civic Center Dr., Ste. 310
 Fremont, CA 94538
 (510) 794-2521
 (510) 794-3889 (Fax)
DOSHfremont@dir.ca.gov

Foster City District Office
 Barbara Kim, District Manager
 1065 East Hillsdale Blvd., Ste. 110
 Foster City, CA 94404
 (650) 573-3812
 (650) 573-3817 (Fax)
DOSHFC@dir.ca.gov

Oakland District Office
 Abigail Fabricante, District Manager
 1515 Clay Street, Ste. 1303
 Oakland, CA 94612
 (510) 622-2916
 (510) 622-2908 (Fax)
DOSHOak@dir.ca.gov

Santa Rosa District Office
 Kathy Lynn Garner, District Manager
 1221 Farmers Lane, Ste. 300
 Santa Rosa, CA 95405
 (707) 576-2388
 (707) 576-2598 (Fax)
DOSHsr@dir.ca.gov

Region 2

Sacramento Regional Office
 William Estakhri, Regional Manager
 2424 Arden Way, Ste. 300
 Sacramento, CA 95825
 (916) 263-2803
 (916) 263-2824 (Fax)
DOSHREG2Sacramento@dir.ca.gov

Sacramento District Office
 Jon Weiss, District Manager
 2424 Arden Way, Ste. 165
 Sacramento, CA 95825
 (916) 263-2800
 (916) 263-2798 (Fax)
DOSHsac@dir.ca.gov

Concord District Office
 Lisa Matta, District Manager
 1450 Civic Court, Ste. 525
 Concord, CA 94520
 (925) 602-6517
 (925) 676-0227 (Fax)
DOSHCON@dir.ca.gov

Modesto District Office
 John Caynak, District Manager
 4206 Technology Drive, Ste. 3
 Modesto, CA 95356
 (209) 545-7310
 (209) 545-7313 (Fax)
DOSHMOD@dir.ca.gov

Fresno District Office
 Jerry Walker, District Manager
 2550 Mariposa Street, Rm. 4000

Redding Field Office
 Jon Weiss, District Manager
 381 Hemsted Drive

Cal/OSHA

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- [Obtain a free consultation](#)
- [Report an accident or injury](#)

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Fresno, CA 93721
 (559) 445-5302
 (559) 445-5786 (Fax)
DOSHFRE@dir.ca.gov

Redding, CA 96002
 (530) 224-4743
 (530) 224-4747 (Fax)
DOSHRED@dir.ca.gov

Region 3

Santa Ana Regional Office
 Peter Riley, Regional Manager
 2000 E. McFadden Ave., Ste. 119
 Santa Ana, CA 92705
 (714) 558-4300
 (714) 558-4083 (Fax)
DOSHREG3SantaAna@dir.ca.gov

Santa Ana District Office
 Richard Fazlollahi, District Manager
 2000 E. McFadden Ave., Ste. 122
 Santa Ana, CA 92705
 (714) 558-4451
 (714) 558-2035 (Fax)
DOSHSA@dir.ca.gov

San Diego District Office
 Kathy Derham, District Manager
 7575 Metropolitan Dr., Ste. 207
 San Diego, CA 92108
 (619) 767-2280
 (619) 767-2299 (Fax)
DOSHSD@dir.ca.gov

San Bernardino District Office
 Ayman Shiblak, District Manager
 464 W. 4th Street, Ste. 332
 San Bernardino, CA 92401
 (909) 383-4321
 (909) 383-6789 (Fax)
DOSHSD@dir.ca.gov

Torrance District Office
 Jim Ryel, District Manager
 680 Knox Street, Ste. 100
 Torrance, CA 90502
 (310) 516-3734
 (310) 516-4253 (Fax)
DOSHTOR@dir.ca.gov

Region 4

Monrovia Regional Office
 Debra Lee, Regional Manager
 750 Royal Oaks Drive, Ste. 104
 Monrovia, CA 91016
 (626) 471-9122
 (626) 471-9133 (Fax)
DOSHREG4Monrovia@dir.ca.gov

Los Angeles District Office
 Hassan Adan, District Manager
 320 West 4th Street, Rm. 670
 Los Angeles, CA 90013
 (213) 576-7451
 (213) 576-7461 (Fax)
DOSHDLA@dir.ca.gov

West Covina District Office
 Laura Drew, District Manager
 1906 W. Garvey Ave. So., Ste. 200
 West Covina, CA 91790
 (626) 472-0046
 (626) 472-7708 (Fax)
DOSHWC@dir.ca.gov

Van Nuys District Office
 Andreea Minea, District Manager
 6150 Van Nuys Blvd., Ste. 405
 Van Nuys, CA 91401
 (818) 901-5403
 (818) 901-5578 (Fax)
DOSHVN@dir.ca.gov

Bakersfield District Office
 Efren Gomez, District Manager
 7718 Meany Ave.
 Bakersfield, CA 93308
 (661) 588-6400
 (661) 588-6428 (Fax)
DOSHBAK@dir.ca.gov

Region 5 - Mining & Tunneling Regional Office

Steve Hart, Regional Manager
 1367 E. Lassen Ave., Ste. B-4
 Chico, CA 95973
 (530) 895-6938
 (530) 895-6941 (Fax)
DOSHREG5Chico@dir.ca.gov

Mining and Tunneling
 Sacramento District Office
 Doug Patterson, District Manager
 2424 Arden Way, Suite 125
 Sacramento, CA 95825
 (916) 574-2540
 (916) 574-2542 (Fax)
DOSHMTSAC@dir.ca.gov

Mining and Tunneling
 Van Nuys District Office
 Jim Wittry, District Manager
 6150 Van Nuys Blvd., Rm. 310
 Van Nuys, CA 91401
 (818) 901-5420
 (818) 901-5579 (Fax)
DOSHMTVN@dir.ca.gov

Mining and Tunneling
 San Bernardino District Office
 Jim Henze, District Manager
 464 W. 4th Street, Ste. 354
 San Bernardino, CA 92401
 (909) 383-6782
 (909) 388-7132 (Fax)
DOSHMTSB@dir.ca.gov

Region 6 - Targeted Inspection Unit, HHU, PSM & LETF Regional Office

Wende Carleson, Regional Manager
 2000. E. McFadden Ave., Ste. 204
 Santa Ana, CA 92705
 (714) 558-4415
 (714) 558-4449 (Fax)
DOSHREG6SantaAna@dir.ca.gov

High Hazard Unit - North
 Oakland District Office
 Clement Hsieh, District Manager
 1515 Clay Street, Ste. 1303
 Oakland, CA 94612
 (510) 622-3009
 (510) 622-3025 (Fax)

High Hazard Unit - South
 Santa Ana District Office
 Michael Loupe, District Manager
 2000 E. McFadden Ave., Ste. 111
 Santa Ana, CA 92705
 (714) 567-7100
 (714) 567-6074 (Fax)

Process Safety Management
 Concord District Office
 Clyde Trombetta, District Manager
 1450 Civic Court, Ste. 550
 Concord, CA 94520
 (925) 602-2665
 (925) 602-2668 (Fax)
DOSHPSMCONCORD@dir.ca.gov

Labor Enforcement Task Force
 Oakland District Office
 Jan Hami, District Manager
 1515 Clay St., Ste. 1303, Box 43
 Oakland, CA 94612
 (510) 286-1213
 (510) 622-3025 (Fax)

Labor Enforcement Task Force
 Santa Ana District Office
 Mike Nelmda, District Manager
 2000 E. McFadden Ave., Ste. 104
 Santa Ana, CA 92705
 (714) 558-4120
 (714) 558-6774 (Fax)

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Appendix E



Notice of Alleged Safety or Health Hazards – Web Complaint

For the General Public:

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a complaint may be lodged with Cal/OSHA.

Section 6309 of the California Labor Code provides that a complaint from an employee or an employee's representative (including, but not limited to, an attorney, health or safety professional, union representative; or a representative of a government agency), or an employer or an employee directly involved in an unsafe place of employment, must be investigated within three days after receipt of a complaint charging a serious violation, and not later than 14 days after receipt of a complaint charging a nonserious violation. Cal/OSHA will attempt to determine the period of time in the future that the complainant believes the unsafe condition may continue to exist and will allocate inspection resources so as to respond to those situations in which time is of the essence.

NOTE: Section 6310 of the California Labor Code provides explicit protection for employees exercising their rights, including making safety and health complaints.

INSTRUCTIONS:

Open the form and complete the front page as accurately and completely as possible. Describe each hazard you think exists in as much detail as you can. If the hazards described in your complaint are not all in the same area, please identify where each hazard can be found at the worksite. If there is any particular evidence that supports your suspicion that a hazard exists (for instance, a recent accident or physical symptoms of employees at your site) include the information in your description. If you need more space than is provided on the form, continue on any other sheet of paper.

After you have completed the Web Complaint Form, mail or fax the form to the [Cal/OSHA Enforcement Unit District Office](#) nearest to where the hazard(s) exists.



Notice of Alleged Safety or Health Hazards – Web Complaint

		Complaint Number		
Establishment Name				
Site Address			Site Phone	
			Site FAX	
Mailing Address			Mail Phone	
			Mail FAX	
Management Official			City	
Type of Business				
<p>HAZARD DESCRIPTION/LOCATION. Describe briefly the hazard(s) which you believe exist. Include the approximate number of employees exposed to or threatened by each hazard. Specify the particular building or worksite where the alleged violation exists.</p>				
Has this condition been brought to attention of:	<input type="checkbox"/> Employer <input type="checkbox"/> Other Government Agency (specify): _____			
Please Indicate Your Desire:	<input type="checkbox"/> Do NOT reveal my name to my Employer <input type="checkbox"/> My name may be revealed to the Employer			
The Undersigned believes that a violation of an Occupational Safety or Health standard exists which is a job safety or health hazard at the establishment named on this form.	(Check ONE box) <input type="checkbox"/> Employee <input type="checkbox"/> California Safety & Health Committee <input type="checkbox"/> Representative of Employees <input type="checkbox"/> Other (specify): _____			
Complainant Name			Telephone	
Address (Street, City, State, ZIP)				
Signature			Date	
If you are an authorized representative of employees affected by this complaint, please state the name of the organization that you represent and your title:				
Organization Name:			Your title:	



Reporte de Peligros en General de Seguridad y Salud en el Sitio de Trabajo - Página 1 de 2

Información para el público en general:

La agencia de Cal/OSHA provee esta forma para ayudar a los personas a reportar problemas o peligros de seguridad y salud en el sitio de trabajo que pueden causar accidente(s) o enfermedad(es) al trabajador.

Bajo la Sección 6309 del Código Laboral del Estado de California, el trabajador tiene el derecho de poner una queja sobre peligros asociados con la seguridad y la salud en contra de su lugar de trabajo, sin temor a represalias.

INSTRUCCIONES:

- Llene ésta forma lo más completamente posible.
- Describa con el mayor detalle que pueda cada peligro que usted cree que existe.
- Indique el lugar exacto dónde existe éste peligro(s) en el sitio de trabajo.
- Si existe alguna prueba particular que apoye su sospecha de que existe un peligro (por ejemplo, un accidente reciente o síntomas físicos de sus colegas) incluya la también en ésta forma.
- Si necesita más espacio puede usar cualquier hoja de papel.
- Una vez que haya llenado ésta forma, mándela por correo o fax a la oficina de Cal OSHA más cercana al lugar de trabajo dónde existe éste peligro.

Concord
1450 Enea Circle, Suite 525,
Concord 94520
(925) 602-6517; fax (925) 676-0227

Oakland
1515 Clay Street, Ste. 1301,
Oakland 94612
(510) 622-2916; fax (510) 622-2908

Santa Rosa
1221 Farmers Lane, Ste. 300,
Santa Rosa 95405
(707) 576-2388; fax (707) 576-2598

Foster City
1065 East Hillsdale Blvd., Ste. 110,
Foster City 94404
(650) 573-3812; fax (650) 573-3817

Redding (field office)
381 Hemsted Drive,
Redding 96002
(530) 224-4743; fax (530) 224-4747

Torrance
680 Knox Street, Ste. 100,
Torrance 90502
(310) 516-3734; fax (310) 516-4253

Fremont
39141 Civic Center Dr. Suite 310
Fremont, CA 94538-5818
510-794-2521; fax 510-794-3889

Sacramento
2424 Arden Way, Ste. 165,
Sacramento 95825
(916) 263-2800; fax (916) 263-2798

Van Nuys
6150 Van Nuys Boulevard, Ste. 405,
Van Nuys 91401
(818) 901-5403; fax (818) 901-5578

Fresno
2550 Mariposa Street, Ste. 4000,
Fresno 93721
(559) 445-5302; fax (559) 445-5786

San Bernardino
464 W. 4th St., Ste. 332,
San Bernardino 92401
(909) 383-4321; fax (909) 383-6789

Ventura (field office)
1000 Hill Road, Ste. 110,
Ventura 93003
(805) 654-4581; fax (805) 654-4852

Los Angeles
320 West 4th Street, Ste. 850,
Los Angeles 90013
(213) 576-7451; fax (213) 576-7461

San Diego
7575 Metropolitan Drive, Ste. 207,
San Diego 92108
(619) 767-2280; fax (619) 767-2299

West Covina
1906 West Garvey Ave So, Ste. 200,
West Covina 91790
(626) 472-0046; fax (626) 472-7708

Modesto
1209 Woodrow, Ste. C-4
Modesto 95350
(209) 576-6260; fax (209) 576-6191

San Francisco
121 Spear Street, Ste. 430,
San Francisco 94105
(415) 972-8670; fax (415) 972-8686

Monrovia
750 Royal Oaks Drive, Ste. 104
Monrovia 91016
(626) 256-7913; fax (626) 359-4291

Santa Ana
2000 E. McFadden Ave., Ste 122,
Santa Ana 92705
(714) 558-4451; fax (714) 558-2035



Reporte de Peligros en General de Seguridad y Salud en el Sitio de Trabajo - Página 2 de 2

Información Confidencial:

Su nombre no se revelará a menos de que Usted lo solicite:		<input type="checkbox"/> No revele mi nombre	<input type="checkbox"/> Si puede revelar mi nombre
Nombre de la Compañía:	Nombre del Contratista:		
Dirección del sitio de empleo:			
Número y Calle, Ciudad y Zona Postal:			
Teléfono:	Fax:		
Nombre del Mayordomo o Supervisor:	Nombre del patrón o dueño:		
Tipo de Trabajo:			
Peligro de seguridad o salud:			
¿Cuáles peligros de seguridad o salud están presentes en su lugar de trabajado?			
¿En qué parte de la planta, número de parcela o sitio de trabajo se encuentra éste peligro?			
¿Cuántos trabajadores están expuestos a éste peligro?			
¿Se ha informado al supervisor de éste peligro?		<input type="checkbox"/> Si	<input type="checkbox"/> No
Su nombre:	Teléfono:		
Su domicilio:			
(Número y Calle, Ciudad y Zona Postal)			
Fecha:			



Reporte de Peligros Relacionados al Calor en el Sitio de Trabajo - Página 1 de 2

Información para el público en general:

La agencia de Cal/OSHA provee esta forma para ayudar a los personas a reportar problemas o peligros de seguridad y salud en el sitio de trabajo que pueden causar accidente(s) o enfermedad(es) al trabajador.

Bajo la Sección 6309 del Código Laboral del Estado de California, el trabajador tiene el derecho de poner una queja sobre peligros asociados con la seguridad y la salud en contra de su lugar de trabajo, sin temor a represalias.

INSTRUCCIONES:

- Llene ésta forma lo más completamente posible.
- Describa con el mayor detalle que pueda cada peligro que usted cree que existe.
- Indique el lugar exacto dónde existe éste peligro(s) en el sitio de trabajo.
- Si existe alguna prueba particular que apoye su sospecha de que existe un peligro (por ejemplo, un accidente reciente o síntomas físicos de sus colegas) incluya la también en ésta forma.
- Si necesita más espacio puede usar cualquier hoja de papel.
- Una vez que haya llenado ésta forma, mándela por correo o fax a la oficina de Cal OSHA más cercana al lugar de trabajo dónde existe éste peligro.

Concord
1450 Civic Court, Suite 525,
Concord 94520
(925) 602-6517; fax (925) 676-0227

Oakland
1515 Clay Street, Ste. 1301,
Oakland 94612
(510) 622-2916; fax (510) 622-2908

Santa Rosa
1221 Farmers Lane, Ste. 300,
Santa Rosa 95405
(707) 576-2388; fax (707) 576-2598

Foster City
1065 East Hillsdale Blvd., Ste. 110,
Foster City 94404
(650) 573-3812; fax (650) 573-3817

Redding (field office)
381 Hemsted Drive,
Redding 96002
(530) 224-4743; fax (530) 224-4747

Torrance
680 Knox Street, Ste. 100,
Torrance 90502
(310) 516-3734; fax (310) 516-4253

Fremont
39141 Civic Center Dr. Suite 310
Fremont, CA 94538-5818
510-794-2521; fax 510-794-3889

Sacramento
2424 Arden Way, Ste. 165,
Sacramento 95825
(916) 263-2800; fax (916) 263-2798

Van Nuys
6150 Van Nuys Boulevard, Ste. 405,
Van Nuys 91401
(818) 901-5403; fax (818) 901-5578

Fresno
2550 Mariposa Street, Ste. 4000,
Fresno 93721
(559) 445-5302; fax (559) 445-5786

San Bernardino
464 W. 4th St., Ste. 332,
San Bernardino 92401
(909) 383-4321; fax (909) 383-6789

Ventura (field office)
1000 Hill Road, Ste. 110,
Ventura 93003
(805) 654-4581; fax (805) 654-4852

Los Angeles
320 West 4th Street, Ste. 670,
Los Angeles 90013
(213) 576-7451; fax (213) 576-7461

San Diego
7575 Metropolitan Drive, Ste. 207,
San Diego 92108
(619) 767-2280; fax (619) 767-2299

West Covina
1906 West Garvey Ave So, Ste. 200,
West Covina 91790
(626) 472-0046; fax (626) 472-7708

Modesto
1209 Woodrow, Ste. C-4
Modesto 95350
(209) 576-6260; fax (209) 576-6191

San Francisco
121 Spear Street, Ste. 430,
San Francisco 94105
(415) 972-8670; fax (415) 972-8686

Monrovia
750 Royal Oaks Drive, Ste. 104
Monrovia 91016
(626) 256-7913; fax (626) 359-4291

Santa Ana
2000 E. McFadden Ave., Ste 122,
Santa Ana 92705
(714) 558-4451; fax (714) 558-2035



Reporte de Peligros Relacionados al Calor en el Sitio de Trabajo - Página 2 de 2

Información Confidencial:

Su nombre no se revelará a menos de que Usted lo solicite:		<input type="checkbox"/> No revele mi nombre	<input type="checkbox"/> Si puede revelar mi nombre
Nombre de la Compañía:	Nombre del Contratista:		
Dirección del sitio de empleo:			
Número y Calle, Ciudad y Zona Postal:			
Teléfono:	Fax:		
Nombre del Mayordomo o Supervisor:	Nombre del patrón o dueño:		
Tipo de Trabajo:			
Peligro de seguridad o salud:			
¿Cuáles peligros de seguridad o salud están presentes en su lugar de trabajado? Marque la información que le aplica a Usted:			
<input type="checkbox"/> No hay suficiente agua fresca, potable o limpia			
<input type="checkbox"/> No hay sombra, sombrilla o protección contra el sol.			
<input type="checkbox"/> No he recibido entrenamiento o capacitación sobre cómo protegerme de la insolación			
<input type="checkbox"/> No hay suficiente baños y los pocos que hay están sucios			
¿En qué parte de la huerta, campo, parcela o sitio de trabajo se encuentra éste peligro?			
¿Cuántos trabajadores están expuestos a éste peligro?			
¿Se ha informado al supervisor de éste peligro? <input type="checkbox"/> Si <input type="checkbox"/> No			
Su nombre:	Teléfono:		
Su domicilio:			
(Número y Calle, Ciudad y Zona Postal)			
Fecha:			

Appendix F

[REDACTED]

District Manager

Cal-OSHA [REDACTED] District Office

[REDACTED]

[REDACTED]

Re: Serious Violations of Health and Safety Regulations at [REDACTED]
[REDACTED].

Dear Mr. [REDACTED]

I am writing to you on behalf of [REDACTED], an employee of [REDACTED] at a facility operated by [REDACTED]. This letter serves as a serious formal complaint against [REDACTED] and [REDACTED] pursuant to California Labor Code § 6309, with a request that Cal/OSHA conduct a wall-to-wall on-site inspection of this site. In addition, we request that Cal/OSHA keep names and all contact information for Mr. [REDACTED] confidential. Please contact us in order to get in touch with Mr. [REDACTED]. The other workers whose issues are detailed below are available for conversations. Contact me to schedule these conversations.

California Labor Code § 6134(d) stipulates that employees have the right to communicate privately with the inspector about health and safety concerns during the investigation, and may authorize a representative to be present at the inspection tour:

a representative authorized by his or her employees shall have an opportunity to accompany him or her on the tour of inspection. Any employee or employer, or their authorized representatives, shall have the right to discuss safety and health violations or safety and health problems with the inspector privately during the course of an investigation or inspection.

If you believe you cannot comply with this request, I would greatly appreciate it if you would contact me so we can discuss it before the inspection and make arrangements to identify for you

a mutually acceptable employee representative who may be at the jobsite and fulfill these obligations. I do not believe it would be appropriate to ask the employer or a manager to select an employee to represent the workers during the inspection.

The detailed listing of unsafe conditions described below meet the criteria for “serious,” which is set forth in California Labor Code § 6309, which states:

A complaint is deemed to allege a serious violation if the division determines that the complaint charges that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in a place of employment.

The unsafe conditions described below meet the criteria for “serious,” which is set forth in the California Labor Code. If, based on the information provided here, you do not believe this matter should be classified as a serious formal complaint, please contact me as soon as possible to discuss that determination.

I am a representative of the worker named above as described by § 6309 and the attached authorization by Mr. [REDACTED] (See attachment) designates our organization as his representative. Accordingly, the investigatory provisions of Section 6309 are triggered with the filing of this complaint.

Ongoing and seriously unsafe conditions at NFI in Chino include:

Lack of Heat Illness Prevention Program as mandated by 8 CCR § 3395:

Significant numbers of workers, specifically loaders and lumpers, spend some of their time working in and trailers and shipping containers outdoors. This work is considered outdoor and as such the California outdoor heat standard applies to these workers. The company does not follow this standard:

- Employees are not allowed or encouraged to take cool-down rests in the shade as mandated by 8 CCR § 3395(d)(3).
- Employer does not implement high-heat procedures when temperatures equals or exceeds 95 degrees Fahrenheit as mandated by 8 CCR § 3395(e)(1-4).
- Employees have never received heat illness prevention education or training, from the employer as mandated by 8 CCR § 3395(f)(1)(A-I).
- Employer's procedures for complying with each requirement of this standard are not in writing and are not available to employees upon request as mandated by 8 CCR § 3395(3).

Lack of Hazard Communication Program as mandated by 8 CCR § 5194(h)(1-2):

- Employees are often exposed to dusts, fumes, mists, vapors and gases and are not informed them about the hazardous substances being used at their warehouse. When new employees are hired, there is no training on the use or exposure to hazardous or toxic products.
- Workers have never seen or been trained in how to read or use a Material Safety Data Sheet (MSDS), as mandated by 8 CCR § 5194(g)(1).

Lack of control of harmful exposure to employees as mandated by 8 CCR § 5141(c):

- On the battery-operated cherrypickers, the battery often overheats and starts burning up the acid within. The battery acid releases fumes that smell horrible and cause the cherrypicker drivers to get headaches and feel dizzy. A worker notes that

This happens at least twice a month and sometimes it can be a week before the battery acid leak is taken care of. Supervisors are well aware that they need to change these batteries because machine operators always fill out a checklist before and after using a machine, where they report problems with the machine. This worker said that even when they continually report the battery acid leakage, employers delay in replacing the battery for a new one. The worker was not informed of the hazards of these fumes.

- The same employee described that when the forklift hoses are not connected correctly, propane leaks out. It continues to leak and spread throughout the warehouse, causing workers to feel dizzy and light-headed. This happens at least once or twice a month.

Lack of hand protection as mandated by 8 CCR § 3384(a):

- Many employees use equipment that present a hazard of punctures, cuts and burns and are not provided with protective gloves.
- Workers have been provided with hair blow-dryers to weaken the bond of labels in order to remove them. As a result, the heat from the dryer burns their fingers. The only thing that the lead did was warn them to be careful because the dryers get “really hot.”
- Several employees described that they work with and around broken pallets, as well as pallets with nails sticking out of them. They also often experience splinters. They expressed that protective gloves would prevent this issue from continuing.

Industrial Trucks as mandated by 8 CCR §3650

- Employer lacks to give attention to the proper functioning of tires, battery, brakes, and other maintenance issues as mandated by 8 CCR §3650(t)(7).
- An employee described how even though they are required to report maintenance issues on forklifts, they frequently do not get addressed right away. Such is the issue with cracked or torn tires on forklifts because workers often have to drive them like this for weeks before the tires get fixed or replaced. This creates risks of the vehicle sliding or drifting, not making the turn right, and possibly even tipping over.
- The same employee noted that in the last year there were 3 forklift explosions because there were electrical shorts that ignited the propane. This was a mechanical issue that has yet to be addressed properly.

- Employees often operate forklifts with leaks in the fuel systems, contrary to 8 CCR §3650(t)(8).
- Due to time pressures imposed by leads and supervisors to meet production quotas, forklift drivers are often forced to operate their vehicle faster than a designated safe speed, contrary to 8 CCR §3650(t)(9).
- Due to a lack of space, forklifts are often driven too close to people with the danger of knocking them down or running them over, contrary to §3650(t)(12).

Lack of Brakes and Warning Devices as mandated by 8 CCR §3661

- Cherrypickers often have faulty brakes that prevent it from stopping safely and effectively, as mandated by 8 CCR §3661(a).
- One employee noted how the brakes on the cherrypickers are not adequate because it takes a long time for the vehicle to stop after you hit the brakes. He says that drivers have crashed against building posts because the brakes do not work appropriately. This employee said that the employer is well aware of the lack of adequate brakes because drivers report it each time they fill out the checklist after operating the machine, yet the brakes do not get fixed.

Lack of Operating Instructions (Aerial Devices) as mandated by 8 CCR §3648

- Cherrypicker operators are often not provided with harnesses to secure them to the machine as mandated by 8 CCR §3648(o), this creates fall hazards for workers on cherrypickers.

Working Area as mandated by 8 CCR §3273

- Several workers have reported grease and oil spills on the ground which creates slippery floors, contrary to 8 CCR §3273(a). These spills are left until workers are sent to clean them up at the end of shifts.

- Pallets full of heavy boxes are frequently stacked on top of each other without the use of racks or safeguards to minimize the risk of them falling on workers, as mandated by 8 CCR §3273(e). Boxes are reported to be stacked as high as 15 feet, and are often unwrapped (loose). Workers report boxes falling off these stacks on a daily basis, both when moved by lift trucks and when just sitting in a pile. Workers report that they are told they must move toward boxes that are falling in order to restack them as quickly as possible.
- Many employees identified the danger of stacked pallets, full of heavy boxes, as high as 20 feet without any wrapping, bracing or shelving. This creates a major a risk of receiving head injuries from them falling on their heads. A worker reported:

They were either double-stacked with 6 rows of boxes on each pallet, or triple-stacked with 4 rows of boxes on each pallet. Many of these stacks were not plastic wrapped and only had industrial tape wrapped around the edges of the boxes. Many of these stacks were also incredibly uneven and seemed like they could fall over easily. I also saw forklift drivers moving stacks of boxes that were neither taped nor plastic wrapped. These were usually triple-stacked (4 rows, 3 rows, 3 rows) and the boxes actually wobbled while the forklift was moving. In the morning, I noticed a man walking behind a forklift that was stacked up high like this with the boxes wobbling. Towards the end of the shift, I saw another forklift stacked like this as well, but actually witnessed two boxes fall on top of the forklift cabin while the forklift was moving.

A worker who asked a manager about the dangers that might come from height of the stacking of these boxes was told that it was not a problem, and that they rarely stack above 2 pallets high, and if they stack to 3 pallets they're very careful. Photos of such stacks taken in July 2011 are attached.



These stacks are often placed close together even when they fill the only route for workers to return to the front for their breaks or lunch. The picture below was taken of a route that workers are told to take instead of going around stacks that would take several minutes.



The hazards identified above are easily preventable if [REDACTED] and [REDACTED] take the necessary precautions. I strongly believe that the above hazards will continue to exist and place workers at risk of serious harm if no action is taken.

If you have questions or concerns about this complaint, please contact me at [REDACTED] or via e-mail at [REDACTED]. Please contact me about the Opening Conference, Exit Conference(s) and the Closing Conference for this investigation.

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

WORKSAFE! COMPLAINT FORM

(may also be used to report ACCIDENTS)

See reverse side of this form for name of person or organization filing this document.

COMPLAINT (of unsafe or unhealthful condition) or **REPORT OF ACCIDENT**

Use extra sheets to record all separate problems. Include as much of the information below as possible.

1. Date/Time of Condition/Accident _____ Specific Location of Condition/Accident _____
Work being done at Condition/Accident _____ Number of Workers at Condition/Accident _____
Worker Rep Contact at Site _____ Employer Agent Contact at Site _____
Company Name _____ Phone _____
Street _____ Number of Workers Overall _____
Address _____ Type of Business _____
City/State/Zip _____
Operations and Shifts _____

Describe unsafe or unhealthful Condition or Accident. If necessary, explain why this is unsafe/unhealthful. Note, if possible, information regarding engineering controls, work practices, protective equipment and related training, knowledge of the hazard to which workers are exposed.

How long has condition existed? _____ Do you feel it will continue to exist? _____ How long? _____

If this condition exists only at certain times of the day or week or month, please state. _____

If possible, identify physical and chemical agents involved.

Describe exposure information such as duration (continuous or intermittent), symptoms, how many and who exposed and means to contact, etc.

To assure proper evaluation of medical information when there is an accident or an illness or injury involved, please note:

<u>NAME OF INJURED OR EXPOSED AND SOME MEANS TO CONTACT (phone)</u>	<u>WHERE TREATED</u>	<u>NATURE/EXTENT OF INJURY</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

Yes No Shall we keep your name confidential? Labor Code 6309 states your name is kept confidential unless you request otherwise.

2. Name of Complainant or

Reporting Person _____ DOB _____ SSN _____

Address _____ ~~Work~~ Phone _____ ~~Home~~ Phone _____

City/State/Zip _____ Title or Position _____

Complainant or Reporting Person is Worker Worker Rep other _____

What type of work does complaint/injured person do? _____

Name and means to contact any other person who knows about this condition _____

Comments _____

3. Does or did the Employer have knowledge of the unsafe or unhealthful Condition? Use an extra sheet to record all separate items. Include as much of the information below as possible.

a. Have there been complaints regarding this? Yes No.

1) When? _____ To Whom? _____ By whom? _____

Describe the circumstances and results:

2) When? _____ To Whom? _____ By whom? _____

Describe the circumstances and results:

b. What actions or statements have been made by employer or its agents that may indicate employer knew about the problem.

1) When? _____ By Whom? _____ Who else present? _____

Describe the circumstances and results:

2) When? _____ To Whom? _____ Who else present? _____

Describe the circumstances and results:

c. Employer's Previous Contacts with CAL/OSHA (if known) _____

4. Do you know of any other government/private agencies involved regarding this? Which ones? _____

5. I have read the information contained in paragraphs 1 through 4 above. I declare that the information contained, to the best of my knowledge, is true and correct.

Date _____ County _____

(Signature of Reporting Person or Complainant)

March 15, 2004

Darrel Roloff, District Manager R1-D2
Cal/OSHA
39141 Civic Center Drive #310
Fremont, CA 94538

via hand delivery and fax (510) 794-3889

Re: 879 Blossom Hill Road, San Jose, CA - Target Store - under construction

Dear Mr. Roloff,

This is being submitted as a serious formal complaint pursuant to Labor Code Section 6309. For a complaint to be classified as formal and serious, Labor Code 6309 requires the complaint be filed by a certain class of persons and also that the character of the unsafe conditions be serious.

With respect to who is filing the complaint, Labor Code 6309 provides:

"if the division receives a complaint from an employee, an employee's representative, including, but not limited to, an attorney, health or safety professional, union representative, or government agency representative, or an employer of an employee directly involved in an unsafe place of employment, that his or her employment or place of employment is not safe, it shall, with or without notice or hearing, summarily investigate the complaint as soon as possible, but not later than three working days after receipt of a complaint charging a serious violation...."

In that regard, I am an attorney representing Iron Workers Local 377 and its members for the purposes of this complaint. Iron Workers Local 377 represents workers working for Nor-Cal Steel Inc., one of the subcontractors at the jobsite referenced above. These employees and others working for the general contractor and other subcontractors are being exposed to serious unsafe conditions being created by K.D. Steel Inc., 700 North Altamont, Spokane, WA 99217 (509) 467-5309, a subcontractor, and created and/or controlled by W.L. Butler Construction Inc., 204 Franklin Street, Redwood City, CA 94062, (650) 361-1270, which are described below

in more detail. Thus our members are being exposed, under the multi-employer regulation, to unsafe conditions and this complaint is being submitted on their behalf and on behalf of others who may also be exposed.

The unsafe conditions described below also meet the criteria for serious which is set forth in Labor Code 6309, which says:

"For purposes of this section, a complaint is deemed to allege a serious violation if the division determines that the complaint charges that there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in a place of employment."

The photographs we are submitting clearly show violations of, among other regulations, Title 8 CCR 1710 (steel erection). The workers who are pictured in most of the photographs are working at heights, a fall from which could easily result in death or serious physical harm. This is a commercial structure with open steel and no decking. On most commercial structural steel building projects, the floors are often 15 feet, but could range from 12 feet to 25 feet. Exact height information is verifiable by looking at the architectural plans. Thus when a worker is on the second tier, it is likely they are working at a height of 24 to 30 feet. And when a worker is at a height of more than 6 feet, studies show that a fall could result in a substantial possibility of death or serious injury.

If based on the information provided here, you do not believe this matter should be classified as a serious formal complaint, I would appreciate it if you could notify me as soon as so that we may discuss that issue.

Cal/OSHA's Policy & Procedure notes that during the **opening conference** an employee representative is permitted to attend, stating:

"Compliance personnel shall hold a joint opening conference with the employer, or his or her representative, and **bargaining unit representative of the employees**. When is not possible to hold a joint opening conference, compliance personnel shall hold separate opening conferences when appropriate." [Emphasis added.]

As well, employee representatives have a right to accompany the inspector on the **walkaround** according to Cal/OSHA's Policy & Procedure:

"An **authorized employee representative** shall be offered the opportunity by the employer to accompany compliance personnel during the walkaround." [Emphasis added.]

I realize it is a violation of law for Cal/OSHA to notify anyone in advance of an inspection, but **should you decide to do an inspection**, I would greatly appreciate hearing from the inspector assigned to this matter by phone as soon as possible after that inspector announces his or her presence to the employer(s) who are present at the jobsite referenced above. My cell phone is (415) 385-3905 and if for some reason I am not available to take the call, I would greatly appreciate it if the inspector would leave a message for me indicating the inspection has commenced. In this way, I will try to make sure that an employee representative is present at the opening conference and is able to accompany you on the walkaround.

As well, or alternatively, please contact John Ford, Iron Workers 377, at the union hall at (415) 285-3880 or via his mobile phone at (415) 760-1509 if you are unable to reach Mr. Ford through the union hall. Mr. Ford is the Business Representative of employees working for Nor-Cal Steel Inc., one of the subcontractors at the jobsite referenced above, and represents the workers who, among other workers at this site, are being exposed to unsafe conditions created by K.D. Steel Inc. and/or created by or controlled by W.L. Butler Construction Inc. in this multi-employer setting. **He will attend the opening conference and accompany the Cal/OSHA inspector on the walkaround.**

If you decide to conduct an inspection, but feel you cannot comply with this request, I would greatly appreciate it if you would contact me so we can discuss it before the inspection and make arrangements to identify for you a steward who may be at the jobsite and fulfill these obligations until Mr. Ford arrives. We do not believe it would be appropriate to ask the general contractor or the subcontractor who are creating and/or controlling employers to select an employee from among their ranks to represent the workers of Iron Workers Local 377 during this inspection.

The unsafe conditions described below are accompanied by photographs taken on March 7, 8, 9, 10 and 12. Some of the photographs include pictures of the workers exposed to the unsafe conditions and some do not. We will supply you with written declarations under penalty of perjury by the photographer that the photographs were taken on the days which are indicated on the photos themselves and are a true representation of what the declarant observed. Further, the declarations will include the names, if possible, of the worker(s) exposed to the unsafe condition and by whom those worker(s) are employed. This information, along with documents that can be obtained from the contractor(s) will provide adequate proof of the employer-employee relationship and other elements of a violation that can result in a citation by Cal/OSHA.

Please be aware we are continuing to monitor this extremely unsafe jobsite, and will continue to take photographs of conditions we believe are unsafe. We will submit these to Cal/OSHA with declarations as amendments to this complaint for the purposes of requesting citations based upon the evidence that we observed and are submitting.

For those situations illustrated by the photographs submitted this far and which may be submitted as an amendment to this complaint, where we can provide declarations and other evidence to prove all the elements of a violation, we would ask Cal/OSHA to issue citations based upon such evidence. **If for some reason, Cal/OSHA does not wish to issue citations based on this referred evidence, we would appreciate your informing us as soon as possible so that we may proceed with other independent remedies available to us.**

Whether or not Cal/OSHA decides to issue citations based on the referred evidence, we believe that the conditions shown by these photographs merit a speedy inspection by Cal/OSHA so as to address the unsafe conditions which are continuing at this jobsite. It is our opinion that there are numerous violations of Title 8 California Code of Regulations ranging from more general violations of Sections 1509 and 3203 to more specific regulations such as Sections 1710, 3648 and others which a Cal/OSHA inspector will recognize, and that this inspection is necessary to assure for all those on the site, a safe and healthful workplace.

Finally, please be aware that time is of the essence with respect to this complaint. The Labor Code requires you to respond within 3 working days of receipt of the complaint. Additionally, the Labor Code 6309 provides:

"The division shall attempt to determine the period of time in the future that the complainant believes the unsafe condition may continue to exist, and shall allocate inspection resources so as to respond first to those situations in which time is of the essence."

To help you in your determination of when to inspect, please also be aware that the erection of this facility began on or about Sunday March 7. We would estimate that the erection may be completed within the next two weeks. As of Sunday March 14, there is still no decking spread, but that process will begin shortly. When the decking process begins and is underway, there may be other and different violations observable, but some violations related to the erection of structural steel may not be observable.

Thus, in order to observe violations similar to those in the accompanying photographs, we would request that an inspection commence as soon as possible. And in order to observe other violations, which based on the nature of the violations and sloppy procedures we have seen thus far we believe will occur, we would request that an inspector continue the inspection during the course of the steel erection and decking.

VIOLATIONS

Below is a list of what we believe constitute violations of some Cal/OSHA regulations based upon what various pictures show (and what was observed by the photographer who will testify to that). We may not have cited every single violation for each picture, but we have tried to cite the regulation we thought appropriate; we understand that Cal/OSHA may see other violations that we missed or regulations that are more applicable.

Date	Violation	Picture(s)
3/7/04	8 CCR 1710 (d) (1) (B) 1. When working under loads, materials being hoisted shall be rigged to prevent unintentional displacement.	See pictures D3 and D6 which show hoisting a column using a below the hook lifting device where the running tail of the choker is against a quick release shackle pin creating a dangerous condition where the load could be unintentionally displaced.
3/7/04	8 CCR 1710 (d) (1) (B) 3. and 8 CCR 1710 (q) - all loads shall be rigged by a qualified rigger.	See pictures D3 and D6 which show hoisting a column using a below the hook lifting device where the running tail of the choker is against a quick release shackle pin. Cal/OSHA might determine based on this rigging that there is also a violation because the rigger wasn't qualified and properly trained.
3/8/04	8 CCR 1710 (d) (1) (B) 1. When working under loads, materials being hoisted shall be rigged to prevent unintentional displacement.	See pictures B20, B18, B21, B24, P1, P2, P3, P8, P9, P10, P22 which show hoisting a column using a below the hook lifting device where the running tail of the choker is against a quick release shackle pin, and in addition, the column has been rigged with a simple choke with no device to prevent sliding off the top of the load. All this create a dangerous condition where the load could be unintentionally displaced.
3/8/04	8 CCR 1710 (d) (1) (B) 3. and 8 CCR 1710 (q) - all loads shall be rigged by a qualified rigger.	See pictures B20, B18, B21, B24, P1, P2, P3, P8, P9, P10, P22 which show hoisting a column using a below the hook lifting device where the running tail of the choker is against a quick release shackle pin and in addition, the column has been rigged with a simple choke with no device to prevent sliding off the top of the load. Cal/OSHA might determine based on this rigging that there is also a violation because the rigger wasn't qualified and properly trained.

Date	Violation	Picture(s)
3/9/04	8 CCR 1710 (m) (1) (A) - When connecting beams or other structural members at the periphery or interior and the fall distance is greater than 2 stories or 30 feet, whichever is less, iron workers shall be provided with and use a personal fall protection system ... tied-off to either columns, pendant lines secured at the tops of columns, catenary lines, or other secure anchorage points.	See picture W1 for an overview of the structure; it shows the connector is working at a height over 2 stories. See pictures W2 and W3 to show the connector is not tied off. One worker exposed: worker with yellow shirt and red bandana.
3/9/04	8 CCR 1710 (l) (7) - Where skeleton steel is being erected, a tightly planked and substantial floor shall be maintained within 2 stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed.	See picture W1 for an overview of the structure; it shows the worker is working at a height over 2 stories. Pictures W2 and W3 show there is no temporary flooring (decking). One worker exposed: worker with yellow shirt and red bandana.
3/9/04	8 CCR 1710 (m) (1) (A) - When connecting beams or other structural members at the periphery or interior and the fall distance is greater than 2 stories or 30 feet, whichever is less, iron workers shall be provided with and use a personal fall protection system ... tied-off to either columns, pendant lines secured at the tops of columns, catenary lines, or other secure anchorage points.	See pictures BB1, BB2 and BB3 which show an overview of the structure; they show the connector is working at a height over 2 stories. They also show at least one connector is not tied off. One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 1710 (l) (7) - Where skeleton steel is being erected, a tightly planked and substantial floor shall be maintained within 2 stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed.	See pictures BB1, BB2 and BB3 which show an overview of the structure; they show the connector is working at a height over 2 stories. They also show there is no temporary flooring (decking). Two workers exposed: worker with yellow shirt and red bandana and worker with white shirt (known as Little Hat).
3/9/04	8 CCR 1710 (l) (7) - Where skeleton steel is being erected, a tightly planked and substantial floor shall be maintained within 2 stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed.	See picture BB4 which shows an overview of the structure; it shows the connector is working at a height over 2 stories. It also shows there is no temporary flooring (decking). One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 3648 (e) - Employees shall not sit or climb on the edge of the basket ... to gain greater working height.	See pictures W4 and W5 which show the connector is standing on the midrail of the aerial basket. See also pictures T1, T2, T3, T4 which show the connector then climbing up to and actually standing on the toprail of the aerial basket. One worker exposed: worker with white shirt (known as Little Hat).

Date	Violation	Picture(s)
3/9/04	8 CCR 3648 (o) - Employees while in an elevated aerial device shall be secured to the boom, basket or tub of the aerial device through the use of a safety belt, body belt or body harness equipped with safety strap or lanyard.	See pictures W4 and W5 which show the connector is in the aerial basket and not tied off. One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 3648 (e) - Employees shall not sit or climb on the edge of the basket ... to gain greater working height.	See pictures N5 and N6 which show the connector is actually standing on the toprail of the aerial basket. One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 3648 (o) - Employees while in an elevated aerial device shall be secured to the boom, basket or tub of the aerial device through the use of a safety belt, body belt or body harness equipped with safety strap or lanyard.	See pictures N5 and N6 which show the connector is in the aerial basket and not tied off. One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 1710 (m) (1) (C) 2. - When shinning columns, and the fall distance exceeds 2 stories or 30 feet, whichever is less, ironworkers shall be provided with and use a personal fall protection system ... tied-off to either columns, pendant lines secured at the tops of columns, catenary lines, or other secure anchorage points, when connecting beams or other structural members at columns.	See pictures M5 and M6 which show the connector out of the man basket and is shinning the column Picture M7 shows the connector is working at a height over 2 stories. One worker exposed: worker with white shirt (known as Little Hat).
3/9/04	8 CCR 1710 (m) (1) (A) - When connecting beams or other structural members at the periphery or interior and the fall distance is greater than 2 stories or 30 feet, whichever is less, iron workers shall be provided with and use a personal fall protection system ... tied-off to either columns, pendant lines secured at the tops of columns, catenary lines, or other secure anchorage points.	See picture M7 which shows an overview of the structure; it shows the connector is working at a height over 2 stories. See pictures M24 and M25 which show one connector is not tied off. One worker exposed: worker with white shirt (known as Little Hat).
3/10/04	8 CCR 1710 (l) (7) - Where skeleton steel is being erected, a tightly planked and substantial floor shall be maintained within 2 stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed.	See pictures DD1, DD2 and DD3 for an overview of the structure; it shows the worker is working at a height over 2 stories. They also there is no temporary flooring (decking). One worker exposed: worker with white shirt (known as Little Hat).
3/10/04	8 CCR 1710 (d) and (q) (3) (A) - Hoisting and rigging and Training. Special training programs are required for workers who engage in Multiple Lift Rigging procedures.	See pictures EE2, EE3, EE4 and EE5 which depict multiple lift rigging, which Cal/OSHA might determine to be a violation if the rigger wasn't qualified, among other violations.

Date	Violation	Picture(s)
3/12/04	8 CCR 1710 (d) and (q) (3) (A) - Hoisting and rigging and Training. Special training programs are required for workers who engage in Multiple Lift Rigging procedures.	See pictures X1, X2, X3, X4, X5, Y1, Y2, Y3, Y4, Y5, Y6 and Y7 which depict multiple lift rigging, which Cal/OSHA might determine to be a violation if the rigger wasn't qualified, among other violations.
3/12/04	8 CCR 1710 (q) (3) (B) 1. - Training. Special training programs are required for workers who engage in Connector Procedures with respect to the nature of the hazards associated with connecting.	See pictures U1, U2, U3, U4 and U5 which depict a connector standing and traveling on top flange of the free end of a suspended load in position on only one end. The crane is swinging the load in to be connected. The worker is using no means of fall protection. Cal/OSHA might determine based on this activity that there is a violation because the connector wasn't qualified and properly trained.

If there is further information we can provide, we would be happy to do so.

Sincerely,

Frances C. Schreiber
Attorney for Iron Workers Local 377

cc: Roy Berg

Appendix G

P&P C-7 LETTER "f"

ACKNOWLEDGEMENT TO COMPLAINANT ABOUT WRITTEN/ORAL COMPLAINT

(For written and oral formal complaints)

Date

Name

Address

City State Zip

Dear Complainant:

This letter is to acknowledge receipt of your written/oral complaint (Complaint No. _____) about safety and health hazards at establishment name and address. An inspection will be conducted/has been conducted and you will be informed of the results of the inspection when they are available.

California law protects any person who makes a complaint about a workplace safety or health hazard from being treated differently, discharged or discriminated against in any manner by their employer. If you believe that you have been discriminated against because you made a complaint to the Division of Occupational Safety and Health, you may file a discrimination complaint with the nearest office of the Division of Labor Standards Enforcement (Labor Commissioner). However, you must file your complaint within six (6) months of the discriminatory action.

Thank you for your interest in safety and health.

Sincerely,

Name

District Manager or Designee

P&P C-7 LETTER "a"
INVALID COMPLAINT
CONFIDENTIAL

Date

Name
Address
City State Zip

Dear Complainant:

I have received your complaint (Complaint No. _____) of alleged hazards at (establishment name and address).

After careful review, I have decided not to conduct an investigation because (select one of the following reasons):

1. The complaint is too vague to tell whether a workplace hazard exists.
2. As a result of a previous inspection (give date and copy of citations, if any), the hazard you brought to my attention
(is not present) (has been corrected) or (will shortly be corrected).
3. The hazard does not fall with jurisdiction of the Division of Occupational Safety and Health
because _____.
As a result, your complaint has been referred to _____.

If you are able to provide additional information about your complaint which you think I should consider, or disagree with my decision and would like to review the reasons for the decision, please contact me at the address on the letterhead.

If you are still unsatisfied with the action taken by me on your complaint after reviewing the reasons with me, you have the right to review my decision with my Regional Manager.

California law protects any person who makes a complaint about a workplace safety or health hazard from being treated differently, discharged or discriminated against in any manner by their employer. If you believe that you have been discriminated against because you made a complaint to the Division of Occupational Safety and Health, you may file a discrimination complaint with the nearest office of the Division of Labor Standards Enforcement (Labor Commissioner). However, you must file your complaint within six (6) months of the discriminatory action.

Thank you for your concern about workplace safety and health.

Sincerely,

Name
District Manager or Designee

enclosure: Citation(s) from previous inspection, if applicable.

P&P C-7 LETTER "e"

NOTIFICATION TO COMPLAINANT WITH LETTER "d" or "m"

CONFIDENTIAL

Date

Name

Address

City State Zip

Dear Complainant:

In response to your complaint (Complaint No. _____), the Division of Occupational Safety and Health has sent the attached letter ("d" or "m") to the employer. Your identity has not been revealed to the employer.

(If a complaint item is not covered by Title 8, write an explanation why the item was not included in the employer letter.)

When the Division receives the employer's response, a copy of the response will be sent to you.

California law protects any person who makes a complaint about a workplace safety or health hazard from being treated differently, discharged or discriminated against in any manner by their employer. If you believe that you have been discriminated against because you made a complaint to the Division of Occupational Safety and Health, you may file a discrimination complaint with the nearest office of the Division of Labor Standards Enforcement (Labor Commissioner). However, you must file your complaint within six (6) months of the discriminatory action.

Thank you for your concern about workplace safety and health.

Sincerely,

Name

District Manager or Designee

enclosure: Complaint Notification to Employer, letter "d" or "m."

P&P C-7 LETTER "f"

ACKNOWLEDGEMENT TO COMPLAINANT ABOUT WRITTEN/ORAL COMPLAINT

(For written and oral formal complaints)

Date

Name

Address

City State Zip

Dear Complainant:

This letter is to acknowledge receipt of your written/oral complaint (Complaint No. _____) about safety and health hazards at establishment name and address. An inspection will be conducted/has been conducted and you will be informed of the results of the inspection when they are available.

California law protects any person who makes a complaint about a workplace safety or health hazard from being treated differently, discharged or discriminated against in any manner by their employer. If you believe that you have been discriminated against because you made a complaint to the Division of Occupational Safety and Health, you may file a discrimination complaint with the nearest office of the Division of Labor Standards Enforcement (Labor Commissioner). However, you must file your complaint within six (6) months of the discriminatory action.

Thank you for your interest in safety and health.

Sincerely,

Name

District Manager or Designee

Appendix H



UNITED STATES
DEPARTMENT OF LABOR

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[Standard Interpretations - Table of Contents](#)

• Standard Number: [1903.8](#); [1903.11](#); [1952.10](#); [1903.20](#)

FEB 21 2013

Mr. Steve Sallman
Health and Safety Specialist
United Steel, Paper and Forestry, Rubber, Manufacturing,
Energy, Allied Industrial and Service Workers International Union
Five Gateway Center
Pittsburgh, PA 15222

Dear Mr. Sallman:

Thank you for your December 18, 2012, letter to the Occupational Safety and Health Administration (OSHA). You ask whether workers at a workplace without a collective bargaining agreement may authorize a person who is affiliated with a union or a community organization to act as their representative under the Occupational Safety and Health Act (OSH Act). This would include "representing the employee(s) as a personal representative" and "accompanying the employee on an OSHA inspection" in a non-unionized workplace. You also inquire whether, under these circumstances, the individual who is filing an OSHA complaint on behalf of an employee could act as a "walkaround representative" during an OSHA inspection.

For clarity, we have paraphrased your inquiry as two questions.

Question # 1 – May one or more workers designate a person who is affiliated with a union without a collective bargaining agreement at their workplace or with a community organization to act as their "personal representative" for OSH Act purposes?

Yes. The OSH Act, the Secretary's regulations implementing it, and OSHA's Field Operations Manual (FOM) all recognize the role of an "employee representative," who may represent employees' interests in enforcement-related matters. For example, a representative may: (1) file complaints on behalf of an employee (29 U.S.C. § 657(f), 29 C.F.R. § 1903.11(a)); (2) request workplace inspections (29 U.S.C. § 657(f), 29 C.F.R. § 1952.10(a)); and (3) participate in informal conferences to discuss issues raised by citations (29 C.F.R. § 1903.20). An employee representative may also contest the abatement period in OSHA citations and participate in contest proceedings filed by an employer (29 U.S.C. § 659(c)). The Field Operations Manual explains that an employee representative may include any person acting in a bona fide representative capacity, including nonprofit groups or organizations (FOM Chapter 9, I.A).

Question # 2 – May workers at a worksite without a collective bargaining agreement designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative?

Yes. The OSH Act authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by [the employer's] employees." 29 U.S.C. § 657(e). Therefore, a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative so long as the individual has been authorized by the employees to serve as their representative. This right, however, is qualified by the Secretary's regulations, which allow OSHA compliance officers (CSHOs) to exercise discretion over who participates in workplace inspections.

Section 8(e) of the OSH Act provides that, "[s]ubject to the Secretary's regulations, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection." 29 U.S.C. § 657(e). This language makes plain that, subject to the Secretary's regulations, where employees have chosen a representative, they have a right to have that representative accompany the CSHO during a workplace inspection. The Secretary's regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, but only in order to allow OSHA to manage its inspections effectively. They allow the Secretary or her authorized representative (the compliance officer) conducting the inspection to determine who can participate in an inspection. See 29 C.F.R. §§ 1903.8(a)-(d).

The legislative history of section 8 of the OSH Act shows Congress' intent to involve employees in workplace inspections. The October 6, 1970 Senate Report declared that an authorized representative of employees would "aid the inspection" and "provide an appropriate degree of involvement of employees. . . ." See S. REP. NO. 91-1282, 91ST CONG., 2D SESS. (1970), reprinted in 1970 U.S.C.C.A.N. 5177, 5187. One of the bill's sponsors, Senator Harrison A. Williams of New Jersey, stated that "[t]he opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair . . ." SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 430 (Comm. Print 1971).

The OSHA regulation implementing section 8, 29 C.F.R. § 1903.8, likewise recognizes the value of participation by employee representatives in OSHA inspections. Although the regulation acknowledges that most employee representatives will be employees of the employer being inspected, it also makes clear that there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection. Thus, section 1903.8(c) explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is "reasonably necessary to the conduct of an effective and thorough physical inspection." It is OSHA's view that representatives are "reasonably necessary" when they will make a positive contribution to a thorough and effective inspection.

And, as you point out, there are numerous ways that an employee representative who is neither an employee of the employer being

inspected nor a collective bargaining agent could make an important contribution to a thorough and effective inspection. This could be because of the representative's experience and skill, for example because of experience evaluating similar working conditions in a different plant. There are also many instances where non-English speaking workers want a representative who is fluent in both their own language and English, something that will facilitate more useful interactions with the CSFO during the inspection. Finally, workers in some situations may feel uncomfortable talking to an OSHA CSFO without the trusted presence of a representative of their choosing.

OSHA recognizes that there has been some confusion about these issues arising from a March 7, 2003, OSHA letter to Milan Racic. Although this letter addressed an issue related to your inquiry, it is important to explain the distinction between the situation discussed in that letter and your letter. The Racic letter merely states that a non-employee who files a complaint does not necessarily have a right to participate in an inspection arising out of that complaint. It does not address the right of workers at a facility without a collective bargaining agreement to have a representative of their own choosing participate in an inspection. To the extent it has been interpreted to prohibit such a right, it is inconsistent with the OSH Act and with OSHA's regulations. Because of the confusion it has engendered, OSHA is withdrawing the Racic letter.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our letters of interpretation do not create new or additional requirements but rather explain these requirements and how they apply to particular circumstances. This letter constitutes OSHA's interpretation only of the requirements discussed. To assure that you are using the correct information and guidance, please consult OSHA's website at <http://www.osha.gov>. If you have further questions, please contact the Directorate of Enforcement Programs at (202) 693-2100.

Sincerely,

Richard E. Fairfax
Deputy Assistant Secretary

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U.S. Department of Labor | Occupational Safety & Health Administration | 200 Constitution Ave., NW, Washington, DC 20210
Telephone: 800-321-OSHA (6742) | TTY: 877-889-5627
www.OSHA.gov

Appendix I

Phone: () Fax: ()

Citation and Notification of Penalty

To:

and its successors

Inspection Number:

Inspection Date(s):

Issuance Date:

CSHO ID:

Optional Report #:

Reporting ID:

Inspection Site:

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty (hereinafter Citation) is being issued in accordance with California Labor Code Section 6317 for violations that were found during the inspection/investigation. **This Citation or a copy must be prominently posted upon receipt by the employer at or near the location of each violation until the violative condition is corrected or for three working days, whichever is longer.** Some violations of Title 8 of the California Code of Regulations, or of the California Labor Code, may result in prosecution for a misdemeanor or a felony.

YOU HAVE A RIGHT to contest this Citation and Notification of Penalty by filing an appeal with the Occupational Safety and Health Appeals Board. To initiate your appeal, you **must** contact the Appeals Board, in writing or by telephone, within 15 working days from the date of receipt of this Citation. If you miss the 15 working day deadline to appeal, the Citation and Notification of Penalty becomes a final order of the Appeals Board, not subject to review by any court or agency.

Informal Conference - You may request an informal conference with the Manager of the District Office which issued the Citation within 10 working days after receipt of the Citation. However, if the citation is appealed, you may request an informal conference at any time prior to the day of the hearing. Employers are encouraged to schedule a conference at the earliest possible time to assure an expeditious resolution of any issues. At the informal conference, you may discuss the existence of the alleged violation, classification of the violation, abatement date or proposed penalty.

Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an agreement which resolves this matter without litigation or contest.

APPEAL RIGHTS

The Occupational Safety and Health Appeals Board (Appeals Board) consists of three members appointed by the Governor. The Appeals Board is a separate entity from the Division of Occupational Safety and Health (Division) and employs experienced attorneys as administrative law judges to hear appeals fairly and impartially. To initiate an appeal from a Citation and Notification of Penalty, you must contact the Appeals Board, in writing or by telephone, within 15 working days from the date of receipt of a Citation. After you have initiated your appeal, you must then file a completed appeal form with the Appeals Board, at the address listed below, for each contested citation. Failure to file a completed appeal form with the Appeals Board may result in dismissal of the appeal. Appeal forms are available from district offices of the Division, or from the Appeals Board:

Occupational Safety and Health Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
Telephone: (916) 274-5751
Fax: (916) 274-5785

If the Citation you are appealing alleges more than one item, you must specify on the appeal form which items you are appealing. You must also attach to the appeal form a legible copy of the Citation you are appealing.

Among the specific grounds for an appeal are the following: the safety order was not violated, the classification of the alleged violation (e.g., serious, repeat, willful) is incorrect, the abatement requirements are unreasonable or the proposed penalty is unreasonable.

Important: You must notify the Appeals Board, not the Division, of your intent to appeal within 15 working days from the date of receipt of the Citation. Otherwise, the Citation and Notification of Penalty becomes a final order of the Appeals Board not subject to review by any court or agency. An informal conference with the Division does not constitute an appeal and does not stay the 15 working day appeal period. If you have any questions concerning your appeal rights, call the Appeals Board, (916) 274-5751.

PENALTY PAYMENT

Penalties are due within 15 working days of receipt of this Citation and Notification of Penalty unless contested. Make your check or money order payable to "CAL/OSHA". Please indicate the Inspection Number on the remittance. Return one copy of the Citation with your remittance and mail to:

Department of Industrial Relations
Cashier, Accounting Office
P. O. Box 420603
San Francisco, CA 94142-0603

You can make payments by VISA or MasterCard for a convenience fee of \$5.00 per payment. Please call (415) 703-4308 for processing.

CAL/OSHA does not agree to any restrictions, conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

NOTIFICATION OF CORRECTIVE ACTION

For violations which you do not contest, you should notify the Division of Occupational Safety and Health promptly by letter that you have taken appropriate corrective action within the time frame set forth on this Citation and Notification of Penalty. Please inform the District Office listed on the Citation by submitting the CAL/OSHA Form 160 and/or 161 with the specific measures and equipment you have taken and the date the violation was abated, together with adequate supporting documentation, e.g., drawings or photographs of corrected conditions, purchase/work orders related to abatement actions, air sampling results, etc. The adjusted penalty for serious and general violations is reduced by 50% on the presumption that the employer will correct the violations by the abatement date. **If the CAL/OSHA Form 161 is not returned to the District Office within 10 working days following the abatement date, the abatement credit will be revoked, causing the penalty to double.**

Note: Return the CAL/OSHA Form 160/161 to the District Office listed on the Citation and as shown below:

Division of Occupational Safety and Health

Telephone: ()

EMPLOYEE RIGHTS

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under Labor Code Section 6310 or 6311. An employee who believes that he/she has been discriminated against may file a complaint no later than six (6) months after the discrimination occurred with the Division of Labor Standards Enforcement.

Employee Appeals - An employee or authorized employee representative may, within 15 working days of the issuance of a citation, special order, or order to take special action, appeal to the Occupational Safety and Health Appeals Board the reasonableness of the period of time fixed by the Division of Occupational Safety and Health (Division) for abatement. An employee appeal may be filed with the Appeals Board or with the Division. No particular format is necessary to initiate the appeal, but the notice of appeal must be in writing.

If an Employee Appeal is filed with the Division, the Division shall note on the face of the document the date of receipt, include any envelope or other proof of the date of mailing, and promptly transmit the document to the Appeals Board. The Division shall, no later than 10 working days from receipt of the Employee Appeal, file with the Appeals Board and serve on each party a clear and concise statement of the reasons why the abatement period prescribed by it is reasonable.

Employee Appeal Forms are available from the Appeals Board, or from a District Office of the Division.

Employees Participation in Informal Conference. Affected employees or their representatives may notify the District Manager that they wish to attend the informal conference. If the employer objects, a separate informal conference will be held.

State of California
Division of Occupational Safety and Health
Cal/OSHA District Office

Inspection Number:
Inspection Dates:
Issuance Date:
CSHO ID:
Optional Inspection Nbr:

Telephone: ()

Citation and Notification of Penalty

Company Name:
Inspection Site:

Citation 1 Item 1 Type of Violation:

T8CCR

Date By Which Violation Must be Abated:
Proposed Penalty:

\$

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of California
Division of Occupational Safety and Health
Cal/OSHA District Office

Inspection Number:
Inspection Dates:
Issuance Date:
CSHO ID:
Optional Inspection Nbr:

Telephone: ()

Citation and Notification of Penalty

Company Name:

Inspection Site:

Citation 2 Item 1 Type of Violation

Date By Which Violation Must be Abated:

Proposed Penalty:

\$ 0

Compliance Officer/District Manager

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of California
Division of Occupational Safety and Health
Cal/OSHA District Office

Phone:

NOTICE OF PROPOSED PENALTIES

Company Name:

Inspection Site:

Mailing Address:

Issuance Date:

Index Code:

Summary of Penalties for Inspection Number

Citation 1, Item 1 = \$

TOTAL PROPOSED PENALTIES = \$

Penalties are due within 15 working days of receipt of this notification unless contested. If you are appealing any item of this citation, remittance is still due on all items that are not appealed. Make your check or money order payable to "CAL/OSHA". Please indicate the Inspection Number on the remittance.

RETURN THIS FORM ALONG WITH A COPY OF THE CITATION AND NOTIFICATION OF PENALTY WITH YOUR REMITTANCE AND MAIL TO:

DEPARTMENT OF INDUSTRIAL RELATIONS

CASHIER, ACCOUNTING OFFICE

P. O. BOX 420603

SAN FRANCISCO, CA 94142-0603

You can make payments by VISA or MasterCard for a convenience fee of \$5.00 per payment. Please call (415) 703-4308 for processing.

CAL/OSHA does not agree to any restrictions, conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions or endorsements do not exist.

Appendix J

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300

Sacramento, CA 95833

(916) 274-5751

FAX (916) 274-5785

A P P E A L F O R M

Inspection Number on Citation

Employer Name on Citation

Employer Legal Name or DBA (Optional)

Address

DOCKET _____

(Leave blank-Appeals Board will fill in.)

1. You only have 15 working days from receipt of a citation to appeal.

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

**FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION**

1. This is an Appeal from:

CITATION NO(s): _____ Item No(s): _____

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION
CITATION NO(s): _____ Item No(s): _____

SPECIAL ORDER/SPECIAL ACTION NO: _____
Item No(s): _____

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

4.

(Signature of Employer or Employer's Representative)

{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

(Type or print name)

(Title)

(Address) {Address where all communications from the Appeals Board will be sent}

(City)

(State)

(Zip Code)

(Telephone)

(E-Mail Address)

(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing }

IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item **do not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

Appendix K

1 Jora Trang, SBN # 218059
2 Nicole Marquez, SBN # 277664
3 Worksafe, Inc.
4 55 Harrison St., Ste. 300
Oakland, CA 94607

5 Attorneys for [REDACTED]

7 BEFORE THE STATE OF CALIFORNIA
8 OCCUPATIONAL SAFETY AND HEALTH
9 APPEALS BOARD

10 In the Matter of the Appeal of:

11 [REDACTED]

Docket # [REDACTED]

12 In the Matter of the Appeal of:

13 [REDACTED]

Docket # [REDACTED]

14) REPLY and SUPPLEMENTAL Declaración

15) [REDACTED]
16) Hearing Dates: September 5 & 6, 2013

17
18 **TO ALL PARTIES:**

19
20 Attorneys for [REDACTED] are now submitting the signed Spanish translation of the
21 “Declaración of [REDACTED]”, and resubmitting the English translation, “Declaration of
22 [REDACTED],” which was previously timely served on all counsel in March of 2013.
23 Accompanying the declarations is the email confirmation of the Declarations of [REDACTED]
24 [REDACTED] (English and Spanish) that accompanied our receipt of the Declarations. Moreover,
25 verification as to the accuracy of the English translation of the Declaración of [REDACTED]
26 [REDACTED] is attached in the Declaration of [REDACTED], a state certified court interpreter.

27
28 As stated by Mr. [REDACTED], the very same certified translator who provided translation
29 during the March hearing dates of this case, both English and Spanish translations were
30 reviewed and Mr. [REDACTED] certifies their accuracy. The English version is unchanged from the
31 previously submitted declaration. Both versions have been provided to our client, and we read
32

1 and verified both documents to him over the phone prior to his signature on March 21st in
2 Cuernavaca, Mexico.

3
4 We believe our prior served "Declaration of [REDACTED]" to be completely proper
5 and appropriate given the fact that the declarant resides out of the country in a rural part of
6 Mexico with little access to the amenities that many of us are accustomed to in the United
7 States. It is extremely difficult for the declarant to obtain access to a facsimile machine in
8 Cuernavaca, Morelos. It is not uncommon for attorneys to submit declarations on behalf of
9 their clients who may be disabled, sight impaired, not literate in English, on their deathbed, or
10 who are experiencing any number of issues which prevent their ability to access the internet or
11 a facsimile machine in this manner. (*People v. Wilkinson*, 185 Cal.App.4th 543, 551 (2010)
12 (stating that, in representing his client, the attorney has the general authority to stipulate to
13 procedural matters that may "be necessary or expedient for the advancement of [the] client's
14 interest[s]"); *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 404 (1985) (holding authority
15 conferred upon an attorney is in part apparent authority - i.e., the authority to do that which
16 attorneys are normally authorized to do in the course of litigation manifested by the client's act
17 of hiring an attorney - and in part actual authority implied in law, for efficiency).
18

19
20 Creating unreasonable limitations would violate the due process rights of aggrieved
21 persons who may be experiencing multiple factors that limit their access to modern technology
22 or other means of physically signing a declaration.


23
24 That notwithstanding, we have, with much diligence and difficulty, managed to arrange
25 for our client to review the Spanish declaration which he previously provided to us via
26 telephone, which we then provided by English translation to the court and all counsel in March
27 2013. He has now reviewed both the Spanish version and the English version and signed both
28 versions of the declaration. We met with him over the phone to assist him in reviewing the
29 documents. We have also gone to great lengths to arrange for our client to travel the three or so
30 hours that he needed to by public transportation or other means to a city in his country to scan
31 and email his signed declarations to us.
32

1 All of these affidavits or declarations, the Declaration of [REDACTED], the
2 Declaración De [REDACTED], the Declaration of [REDACTED], and the email
3 confirmation of receipt of the Declarations of [REDACTED] (English and Spanish) will be
4 introduced as evidence at the combined hearing of Docket numbers [REDACTED] & [REDACTED]
5 [REDACTED], in the Matter of [REDACTED] and [REDACTED], respectively.
6 Unfortunately, [REDACTED] will not be called to testify orally, and you will not be entitled
7 to question the affiant or declarant unless you notify Nicole Marquez at 55 Harrison St. Ste. 400,
8 Oakland California 94607. To be effective, your request must be mailed or delivered to Nicole
9 Marquez on or before August 2nd, 2013. (See 8 Cal.C.Reg. Section 372.4(b).)
10

11 Finally, we would like to remind all counsel and the court that California extends
12 protections to immigrants in the discovery and trial process. (See Cal. Lab. Code. § 1171.5 (b);
13 see also Cal. Civ. Code § 3339 (civil rights case); Gov. Code § 7285 (housing cases); see also
14 *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 609 (discovery directed at a worker's
15 immigration status is expressly prohibited).) As such, any questions or comments directed at
16 the immigration status or that inquire into matters related to the immigration status of our
17 clients' or any workers that have come forward to testify (despite the fear of reprisal) will not
18 be tolerated.
19

20 Respectfully submitted,
21

22
23 7/26/13
24 _____
25 Date

22
23 
24 _____
25 Jora Trang

1 Jora Trang, SBN # 218059
2 Nicole Marquez, SBN # 277664
3 Worksafe, Inc.
4 55 Harrison St., Ste. 400
Oakland, CA 94607

5 Attorneys for [REDACTED]

7 BEFORE THE STATE OF CALIFORNIA
8 OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

9 In the Matter of the Appeal of:

10 Docket # [REDACTED]

11 [REDACTED]
12
13 In the Matter of the Appeal of:

14 Docket # [REDACTED]

15 PROOF OF SERVICE

16 Hearing Dates: September 5 & 6, 2013

- 17
18
19 1. I am at least 18 years of age, not a party to this action, and employed in the County of
20 Alameda, State of California.
21 2. My business address is: 55 Harrison Street, Suite. 400, Oakland, CA 94607.
22 3. On July 26, 2013, I served a copy of the following documents described as:

23 **REPLY and SUPPLEMENTAL Declaración De** [REDACTED]

24 **EMAIL CONFIRMATION FROM** [REDACTED] **NIECE OF** [REDACTED]
25 [REDACTED]

26 **DECLARATION OF** [REDACTED]

27 **DECLARACION DE** [REDACTED]

28 **DECLARATION OF** [REDACTED]

- 29
30 (1) By placing a true copy thereof in an envelope addressed to the persons named below at
31 the addresses set out immediately below each respective name, and by sealing and
32 depositing said envelope in the United States Mail at Ontario, California with first class
postage thereon fully prepaid. There is delivery service by United States Mail at each of

1 the places so addressed, or there is regular communications by mail between the place of
2 mailing and each of the places so addressed below.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

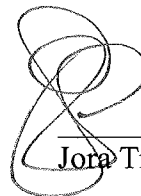
10 [REDACTED] Staff Counsel
11 [REDACTED] Staff Counsel
12 Los Angeles Legal Unit
13 320 West Fourth Street, Ste. 400
14 Los Angeles, CA 90013

15 [REDACTED]
16 Occupational Safety and Health Appeals Board
17 100 N. Barranca Street, Suite 410
18 West Covina, CA 91791

19 Ruth Silver-Traube
20 Supervising Attorney
21 Workers' Rights Clinic
22 Katharine & George Alexander Community Law Center
23 Santa Clara University School of Law
24 500 El Camino Real
25 Santa Clara, CA 95053

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

29 7/26/13
30 Date

31 
32 Jora Trang

[REDACTED]

From: Nicole Marquez <nmarquez@worksafe.org>
Sent: Sunday, March 24, 2013 9:07 PM
To: [REDACTED]
Subject: Fwd: le envio los documentos ya firmados
Attachments: 2.jpg; 2 001.jpg; 2 003.jpg; 2 004.jpg; 2 003.jpg; 2 005.jpg; 2 006.jpg; 2 007.jpg; 2 008.jpg; 2 009.jpg; 2 010.jpg

----- Forwarded message -----

From: [REDACTED]
Date: Fri, Mar 22, 2013 at 6:50 PM
Subject: le envio los documentos ya firmados
To: "nmarquez@worksafe.org" <nmarquez@worksafe.org>

--
Nicole Marquez
Staff Attorney
Worksafe, Inc.
55 Harrison Street, Suite 400
Oakland, CA 94607
(510) 302-1043

PRIVILEGED AND CONFIDENTIAL- All information transmitted hereby is intended only for the use of the addressee(s) named above. If you are not an intended recipient, please note that any distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately and return the original message via e-mail to sender.

1 Jora Trang, SBN # 218059
2 Nicole Marquez, SBN # 277664
3 Worksafe, Inc.
4 55 Harrison St., Ste. 300
Oakland, CA 94607

5 Attorneys for [REDACTED]

7 BEFORE THE STATE OF CALIFORNIA
8 OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

9 In the Matter of the Appeal of:

Docket # [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

Declaración de [REDACTED]

13 Employer

Hearing Dates: March 27, 28 & 29, 2013

15 Yo, [REDACTED] doy esta declaración jurada bajo pena de perjuicio.

- 16 1. Yo tengo al menos 18 años de edad.
- 17 2. Yo trabajé como una persona que cargaba o descargaba los contenedores (referido como un lumper¹) [REDACTED] y para [REDACTED]
- 18 en o alrededor de Agosto 2010 hasta Marzo 2012.

21 3. Yo fui contratado a trabajar para [REDACTED] por medio de [REDACTED] la cual es una agencia de empleo.

23 4. Mis deberes como una persona que cargaba o descargaba los contenedores (referido como un lumper) incluían de vaciar y cargar contenedores y barrer el polvo de las entradas. Era muy estresante, tenía que andar corriendo mucho y desempeñar tareas rápidamente. Yo desempeñaba este trabajo diariamente.

27 5. Trabajaba 8 horas cada día y tomaba 30 minutos de descanso para el almuerzo y un descanso de 15 minutos.

29 6. Trabajaba bajo la supervisión de [REDACTED], una empleada de [REDACTED].

30 7. [REDACTED] me proporcionaba las horas cuales yo tenía que trabajar.

32 ¹ Lumper – there is no direct translation for this word as it is a term of art for the specified duties in a warehouse.

- 1 8. Las oficinas de [REDACTED] estaban ubicadas dentro de la bodega en donde yo trabajaba.
- 2 9. También trabajaba bajo la supervisión de [REDACTED], un empleado de [REDACTED]
- 3 10. Yo deje mi posición en o alrededor de Marzo 17 2012 por un motivo personal.
- 4 11. En o alrededor del lunes 29 de agosto 2011, me empecé a sentir enfermo, pero no quise
5 decir nada porque ya era alrededor del fin del día y ya nada mas me quedaba una hora y media
6 restante de trabajo.
- 7 12. En o alrededor del martes 30 de agosto 2011 yo llegue al trabajo a las 7am y me empecé
8 a sentir mareado y caliente.
- 9 13. Yo le dije a [REDACTED] y, con [REDACTED], a través de un interprete, que me sentía enfermo. Se me
10 instruyo de reportarme a la agencia.
- 11 14. El día en el que me enferme, yo estaba cargando materiales para adentro y removiendo
12 materiales de los contenedores los cuales estaban muy calientes.
- 13 15. Yo desempeñaba este tipo de trabajo diariamente.
- 14 16. Yo me reporte a la oficina de [REDACTED] y se me informo que ellos no me llevarían a la
15 clínica y me que debería irme con un compañero de trabajo nombrado [REDACTED] quien
16 también se estaba sintiendo enfermo y mareado por el calor, quien también estaba por irse a la
17 clínica.
- 18 17. Yo fui a la clínica y el doctor reviso mi pulso y me instruyo de ir a la sala de emergencia.
- 19 18. Yo no pude presentarme a la sala de emergencia porque no tenia transportación, entonces
20 me regrese a mi hogar.
- 21 19. El o alrededor del miércoles 31 de agosto 2011, yo regrese al trabajo a las 7am.
- 22 20. A o alrededor de las 8 a.m., me empecé a sentir enfermo y mareado de nuevo.
- 23 21. Yo le dije a la señora [REDACTED] que me sentía mareado, caliente, que me dolía la cabeza y los
24 pies y que no tenia fuerza en los pies.
- 25 22. Yo le informe a la señorita [REDACTED] que quería ir a la sala de emergencia.
- 26 23. Se me informo que nadie me llevaría y que tendría que obtener mi propia transportación a
27 la sala de emergencia.
- 28 24. Yo camine hacia la bodega en donde trabaja mi hijo y le pedí que me llevara a la sala de
29 emergencia.
- 30 25. Me reuní con mi hijo a las 10 am en la bodega en la cual trabaja. Tuve que esperar que
31 mi hijo tomara su descanso a las 12 p.m., para que el me llevara a la sala de emergencia.
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26. Mi hijo me llevo a la sala de emergencia a las 12 p.m.. Llegamos a la sala de emergencia a las 1 p.m. y espere casi dos horas para ser revisado por un doctor.

27. Me quede en el hospital por tres días y se me dio de alta el viernes 2 de septiembre 2011. El doctor me advirtió que si hubiese llegado mas tarde pudiese haber sido mas mucho peor.

28. Mientras en el hospital, tuve un IV y una revisión de mi corazón.

29. Después de haber sido dado de alta tuve que ir a terapias para mis pies porque sentia mucho dolor. Por tres meses estuve yendo por 2 horas cada semana.

30. Cuando regrese al trabajo, nadie de [redacted] o [redacted] me pregunto acerca de mi accidente de enfermedad del calor. Pienso haber llenado un reporte de lesión.

31. Yo nunca recibí una copia por escrito del Plan de Prevención de Accidentes y Enfermedades de [redacted] o de [redacted].

32. Yo nunca recibí capacitación acerca de enfermedades del calor por parte de [redacted] o [redacted].

33. Las ventanas de la bodega se mantenían cerradas diariamente mientras que yo trabajaba allí y los abanicos estaban descompuestos.

34. Cuando sostuve mi accidente la temperatura estaba a 110 grados centígrados dentro de la bodega. Por lo regular el calor se mantenía alrededor de 100 a 105 grados dentro de la bodega.

35. Nadie de [redacted] o [redacted] nos revisaba o revisaba la temperatura.

Yo declaro bajo pena de perjuicio bajo las leyes del estado de California que lo siguiente es cierto y correcto. Ejecutado este día 21 de marzo del 2013 en Cuernavaca, Morelos.


[redacted]

1 Jora Trang, SBN # 218059
2 Nicole Marquez, SBN # 277664
3 Worksafe, Inc.
4 55 Harrison St., Ste. 300
Oakland, CA 94607

5 Attorneys for [REDACTED]

7 BEFORE THE STATE OF CALIFORNIA
8 OCCUPATIONAL SAFETY AND HEALTH
9 APPEALS BOARD

10 In the Matter of the Appeal of:

Docket # [REDACTED]

11 [REDACTED]
12 [REDACTED]

DECLARATION OF [REDACTED]

13 Employer

Hearing Dates: March 27, 28 & 29, 2013

16
17 I, [REDACTED] give this affidavit under penalty of perjury.

- 18 1. I am at least 18 years of age.
- 19 2. I worked as a lumper for [REDACTED] and [REDACTED]
20 ([REDACTED]) from on or around August 2010 to March 2012.
- 21 3. I was contracted to work for [REDACTED] through [REDACTED], which is a staffing company.
- 22 4. My duties as a lumper included empty and carry containers and sweep and dust from the
23 entry way. It was very stressful, I had to run around a lot and do things quickly. I did this
24 work everyday.
- 25 5. I worked 8 hours each day and took 30 minutes for lunch and one 15 minute break.
- 26 6. I worked under the supervision of [REDACTED] a [REDACTED] employee.
- 27 7. [REDACTED] would give us the hours I had to work.
- 28 8. [REDACTED]'s office was located in the building where I worked.
- 29 9. I also worked under the supervision of [REDACTED] [REDACTED] employee.
- 30 10. I left my position on or around March 17 2012 because of a personal reason.
- 31 11. On or around, Monday, August 30, 2011, I started feeling sick, but I did not want to
32

1 say anything because it was already towards the end of the day and I only had an hour and half
2 left of work.

3 12. On or around, Tuesday August 30, 2011 I arrived to work at 7 a.m. and started to feel
4 dizzy and hot.

5 13. I told Rudy, with [REDACTED], through a translator, that I felt ill. I was told to report to the
6 agency.

7 14. On the day that I became ill, I was carrying materials in and out of the containers
8 which were very hot.

9 15. I did this type of work everyday.

10 16. I reported to the [REDACTED] office and I was informed that they would not take me to
11 the

12 clinic and that I should go with a co-worker named [REDACTED] who was also feeling sick
13 and dizzy because of the heat and also on his way to the clinic as well.

14 17. I went to the clinic and the doctor checked my pulse and told me to go to the
15 emergency room.

16 18. I could not go to the emergency room because I did not have a ride, so I returned
17 home.

18 19. On or around Wednesday, August 31, 2011, I returned to work at 7 a.m.

19 20. On or around 8 a.m., I started feeling dizzy and sick again.

20 21. I told [REDACTED] that I felt dizzy, hot, my head hurt, and my feet hurt and that I did not
21 have any strength in my feet.

22 22. I told [REDACTED] that I wanted to go to the emergency room.

23 23. I was informed that no one would take me and that I needed to find my own ride to
24 the emergency room.

25 24. I walked over to the warehouse where my son worked and asked him to take me to
26 the emergency room.

27 25. I met my son at 10 a.m. at his warehouse where he works. I had to wait for my son to
28 take his break at 12 p.m., so that he could take me to the emergency room.

29 26. My son took me to the emergency room at 12 p.m. We arrived at the hospital at 1
30 p.m. and I waited for 2 hours before being seen by a doctor.

31 27. I stayed at the hospital for 3 days and was released on Friday September 2, 2011. The
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28. While at the hospital, I had an IV and heart check.

29. After they released me I had to go to therapy for my feet because they were in a lot of pain. I went for 3 months 2 hours every week.

30. When I returned to work, no one from [redacted] or [redacted] asked me about my heat illness accident. I believe I filled out an accident/injury report.

31. I never received a written copy of [redacted] or [redacted] IIPP or Heat Illness Prevention Program.

32. I never received training in regards to heat illness from either [redacted] or [redacted].

33. The windows were closed in the warehouse while I worked there everyday and the fans were broken.

34. When I had my accident the temperature was 110 degrees in the warehouse. On

35. average the heat was about 100-105 degrees in the warehouse.

36. No one from [redacted] or [redacted] checked on us or checked the temperature.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21st day of March in 2013 in Cuernavaca, Morelos.

[Redacted signature box]

[Redacted name]

1 Jora Trang, SBN # 218059
2 Nicole Marquez, SBN # 277664
3 Worksafe, Inc.
4 55 Harrison St., Ste. 300
Oakland, CA 94607

5 Attorneys for [REDACTED]

7 BEFORE THE STATE OF CALIFORNIA
8 OCCUPATIONAL SAFETY AND HEALTH
9 APPEALS BOARD

10 In the Matter of the Appeal of:

Docket # [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 Employer

DECLARATION OF [REDACTED]
Hearing Dates: March 27, 28 & 29, 2013

16 I, [REDACTED] give this affidavit under penalty of perjury.

- 18 1. I am a state certified court interpreter. My certification number is # [REDACTED]
- 19 2. On March 21, 2013, I reviewed the document titled, "Declaración de [REDACTED]
- 20 [REDACTED]s," which is in Spanish, a true and correct copy of which is attached.
- 21 3. On March 21, 2013, I reviewed the document titled, "Declaration of [REDACTED]
- 22 [REDACTED], which is in an English translation of the above-mentioned document, "Declaración de [REDACTED] true and correct copy of which is attached.
- 23 4. I reviewed the English translation, "Declaration of [REDACTED] of the Spanish
- 24 document, "Declaración de [REDACTED]" and certify its accuracy as a true and correct
- 25 translation of the Spanish document, "Declaración de [REDACTED]"
- 26 5. The only difference between the two documents that was not translated accurately is
- 27 the final date in which the document was signed. I understand this to be due to the fact that the
- 28 English document was signed on a different date as the Spanish document.

29 Respectfully submitted,

30 [REDACTED]
31 [REDACTED]

32 Date 3/21/2013

Appendix L

[LETTERHEAD]

October 4, 2012

BY FACSIMILE & U.S. MAIL: (916) 274-5785

OSH Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

Re: *Request for Party Status for the Appeals of Citations issued to* [REDACTED] No. [REDACTED]
(Docket #: [REDACTED])

To OSH Appeals Board:

I am writing as an authorized representative of [REDACTED], workers employed or formerly employed at [REDACTED], Inc. and/or [REDACTED], Inc. I am the Director of the [REDACTED] who has served as the representative of these workers and assisted them in filing their complaint with Cal/OSHA (Complaint # 2 [REDACTED]) on November 17, 2011. On August 24, 2012 [REDACTED] was granted [REDACTED] in the matter of the appeal of [REDACTED] Inc. (Inspection No. [REDACTED] (Docket #: [REDACTED] & [REDACTED])).

Pursuant to §§ 354 and 371, I hereby request Party Status for the workers named above who are or were affected employees in the appeals as defined in §347(b), in the matter of the appeal of South Coast Fibers, Inc. These workers are employed or formerly were employed by [REDACTED] its recycling subsidiary, [REDACTED] Inc., and their staffing agency, [REDACTED] Inc. and are or were exposed to or likely to be exposed to the hazards described in the citations as a result of their assigned duties.

For the foregoing reasons, I hereby request party status pursuant to Title 8 CCR § 354 for these workers and for myself as their representative.

Finally, we request notification of any and all pre-hearing conferences or other meetings scheduled to discuss these citations in addition to notice and full participation at the formal hearing itself.

Thank you for your consideration of this matter.

Sincerely,

[REDACTED] Director
[REDACTED]

Cc: [REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

DOSH – Los Angeles
320 West 4th Street, Room 850
Los Angeles, CA 90013

DOSH – Legal Unit
320 W. Fourth Street, Ste. 400
Los Angeles, CA 90013

Chief Counsel
DOSH – Legal Unit
1515 Clay Street, 19th Floor
Oakland, CA 94612

[REDACTED]

[REDACTED] District Manager
DOSH Los Angeles Enforcement
320 West 4th Street, Suite 850
Los Angeles, CA 90013

Jora Trang
Managing Attorney
WorkSafe, Inc.
55 Harrison St. Suite 400

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is: Worksafe, 55 Harrison St. Ste. 400, Oakland, CA 94607.

On October 4, 2012, I served the attached

Request for Party Status for the Appeals of Citations issued to [REDACTED]. No. [REDACTED] (Docket #: [REDACTED])

by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Oakland, California with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

[REDACTED]

Jora Trang
Managing Attorney
WorkSafe, Inc.
55 Harrison St. Suite 400
Oakland, CA 94607

[REDACTED]

DOSH – Los Angeles
320 West 4th Street, Room 850
Los Angeles, CA 90013

[REDACTED]

DOSH – Legal Unit
320 W. Fourth Street, Ste. 400
Los Angeles, CA 90013

[REDACTED] District Manager
DOSH Los Angeles Enforcement
320 West 4th Street, Suite 850
Los Angeles, CA 90013

Chief Counsel
DOSH – Legal Unit
1515 Clay Street, 19th Floor
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 4, 2012 at Oakland, California.

Nicole Marquez

Appendix M

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

Docket No(s).

I.D. No.

IMIS# 314757147

Amended
NOTICE OF PREHEARING
CONFERENCE

NOTICE IS HEREBY GIVEN that a prehearing conference in the above-captioned matter will be conducted by telephone on July 23, 2012 - 11:30 AM. The conference call will be initiated by the undersigned Administrative Law Judge or other designee. Unless the undersigned has been otherwise advised, the call will be placed to the person and telephone number appearing on the Appeal Form and to the DOSH District Office from which the Citation issued.

The purpose of the prehearing conference is to simplify the issues, expedite the hearing and afford the parties an opportunity to participate in settlement discussions. The parties shall be prepared to discuss the issues to be presented, the scope and timing of discovery, pending and contemplated motions, a firm estimate of the length of the hearing, and any other matters that may aid in expediting the hearing or otherwise disposing of the case. (Title 8, California Code of Regulations, Section 374)

NOTICE IS HEREBY GIVEN that failure to be prepared for or to participate in the prehearing conference may result in the imposition of sanctions, inferences or other orders during the conference or during the hearing, as the Appeals Board may deem appropriate. (Title 8, California Code of Regulations, Section 374(c).)

NOTICE IS FURTHER GIVEN that if the prehearing conference does not resolve the matter it will proceed as deemed appropriate by the Board.

A party may be, but need not be, represented by an attorney at the prehearing conference. A party may also request the assistance of an interpreter for the prehearing conference; any such request should be made immediately to the person listed below.

All communications or questions regarding the prehearing conference should be directed to the undersigned, addressed to 100 North Barranca Street, Suite 410, West Covina, CA 91791, or call Mirna Lopez, Sr. Typist Legal at (626)332-1145, Fax:(626)966-4490. Any party unable to participate in the prehearing conference must notify the person listed above.

A copy of this Notice of Prehearing shall be served by the employer on an authorized employee representative of affected employees by personal delivery or by postage pre-paid first class mail, or on affected employees who are not represented by an authorized employee representative by posting a copy of this notice at or near the referenced site of violation, positioned so as to be easily read by employees working in the area. *In addition, notice of this prehearing shall be served on any employee or their Representative, seriously injured or killed in an accident related to this appeal.*

Dale A. Raymond

DATED: June 18, 2012

Dale Raymond
Administrative Law Judge

NOTICE TO PARTIES: Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the Occupational Safety and Health Appeals Board, should contact the Appeals Board at the above listed office or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

Appendix N

1 [REDACTED]

2 DIVISION OF OCCUPATIONAL SAFETY
AND HEALTH

3 320 W. 4th Street, Suite 400
Los Angeles, CA 90013
4 Telephone: (213) 576-7700
5 Facsimile: (213) 576-7498

6 Attorneys for DIVISION

7
8
9 BEFORE THE
10 OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
11 DEPARTMENT OF INDUSTRIAL RELATIONS
12 STATE OF CALIFORNIA

13
14 In the Matter of the Appeal of:
15 [REDACTED]

Docket No(s). [REDACTED]

16
17 In the Matter of the Appeal of:
18 [REDACTED]

Docket No(s). [REDACTED]

19 **MOTION FOR CONTINUANCE**

20
21 TO THE BOARD AND EACH PARTY AND TO THE ATTORNEY OF RECORD OR
22 REPRESENTATIVE FOR EACH PARTY IN THIS ACTION:

23 The State of California, Division of Occupational Safety and Health (“Division”) files
24 this Motion for Continuance for an order to continue the consolidated hearing in these matters,
25 pursuant to Title 8 California Code of Regulations (“C.C.R.”) section 371.1. The hearing is
26 calendared to occur on August 15 and 16, 2013 at 9:00 a.m. in West Covina, CA. The Division
27 seeks to continue the hearing until any such later date that the Appeals Board finds appropriate,
28 on the grounds that one of the Division’s attorneys of record, [REDACTED] is unavailable.

1 Good cause exists for the Appeals Board's granting of the Division's motion on the
2 following grounds:

3 A. This motion is timely. (Title 8 C.C.R. § 371.1, subd. (b); 371, subd. (c)(1).) The hearing
4 in the instant matter is set for August 15-16, 2013 at 9 a.m. in West Covina, California. The
5 Notice of Hearing was issued on or about Thursday, March 28, 2013 and received by the
6 Division on Monday, April 1, 2013. (See Exhibit A to Declaration of [REDACTED] (" [REDACTED]
7 Decl."), ¶ 3.)

8 B. The Division seeks to continue the hearing on the grounds that one of the Division's
9 attorneys of record, [REDACTED], is unavailable on August 16, 2013. (See Exhibit B to [REDACTED]
10 Decl., ¶ 5.) Ms. [REDACTED] will be on a scheduled vacation and gave notice to the Board of her
11 unavailability verbally via Administrative Law Judge Dale Raymond on Friday, March 22, 2013.
12 (See [REDACTED] Decl. ¶ 4.) Ms. [REDACTED] then filed a Notice of Unavailability filed with the Board on
13 Monday, March 25, 2013. (See Exhibit B to [REDACTED] Decl. ¶ 5.)

14 C. Ms. [REDACTED] unavailability on the current noticed hearing dates is through no fault of the
15 Division. The Board issued its Notice of Hearing in this matter on Thursday, March 28, 2013,
16 three days after Ms. [REDACTED] filed her Notice of Unavailability with the Board. (See Exhibit A to
17 [REDACTED] Decl. ¶ 3.) The Notice of Hearing in this matter was served on the Division the following
18 Monday, April 1, 2013. This is the first request for continuance the Division has made in this
19 matter. (See [REDACTED] Decl., ¶ 7.)

20 D. The Division contacted representatives for all parties in this matter and informed them of
21 the Division's intention to file a request for continuance due to Ms. [REDACTED] unavailability for the
22 scheduled hearing dates and none of them oppose the Division's instant motion. (See [REDACTED]
23 Decl., ¶ 6.)

24 E. Great prejudice will result against the Division if its request is not granted because it will
25 be deprived of necessary counsel.

26 ///

27 ///

1 In light of the foregoing, the Division requests that the Appeals Board find good cause
2 and grant the Division's motion.

3 DATED: May 6, 2013

Respectfully Submitted,

4
5 By: 

 Staff Counsel
6 DIVISION OF OCCUPATIONAL SAFETY
7 AND HEALTH, STATE OF CALIFORNIA
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DECLARATION OF [REDACTED]

I, [REDACTED] declare as follows:

1. I am over the age of eighteen, and not a party to this action. I am personally familiar with the matters set forth in this declaration, and if called upon to testify, I could and would testify competently thereto.

2. I am one of the Division of Occupational Safety and Health's staff counsel assigned to the instant civil appeal, [REDACTED], Docket No. [REDACTED], that has been consolidated for hearing with [REDACTED] Docket No. [REDACTED]

3. On or about Thursday, March 28, 2013, the Board issued a Notice of Hearing in this matter for August 15-16, 2013 at 9:00 a.m. in West Covina, California. This notice was received by the Division on or about Monday, April 1, 2013. A true and correct copy of the August 15-16, 2013 Notice of Hearing is attached hereto as **Exhibit A**.

4. On or about Friday, March 22, 2013, at the close of the hearing in this matter, presiding Administrative Law Judge Dale Raymond requested that counsel for all parties verbally provide their dates of unavailability in August so that she could communicate said dates to the Board when submitting a request for a continued hearing date. At that time, I informed ALJ Raymond that I would most likely be unavailable the entire week of August 19th, but was certain that I would be unavailable on Friday, August 16 and Monday, August 19, 2013.

5. On or about Monday, March 25, 2013, I filed a Notice of Unavailability with the Board after ascertaining the exact dates I would be out of town due to my scheduled vacation. A true and correct copy of the Notice of Unavailability for Melissa Peters is attached hereto as **Exhibit B**.

6. On or about Friday, May 3, 2013, I contacted all party representatives in this matter via e-mail and informed them of the Division's intention to file a request for continuance in this matter due to my unavailability for the scheduled hearing dates. Jora Trang, Esq., representative for the third parties, [REDACTED], Esq., representative for employer [REDACTED] inc., and [REDACTED] Esq., representative for employer [REDACTED] all confirmed that they do not oppose the Division's request for a continuance.

1 7. This is the Division's first request for continuance in this matter.

2 I declare under penalty of perjury under the laws of the State of California that the
3 foregoing is true and correct. Executed this 6th day of May at Los Angeles, California



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EXHIBIT A

STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
2520 Venture Oaks Way, Suite 300
Sacramento, California 95833
(916) 274-5751

In the Matter of the Appeal of:

[REDACTED]

Docket No(s).

[REDACTED]

[REDACTED]

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the above-captioned matter has been set for hearing at

OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD
100 N. Barranca Street, Ste. 410, Hrg. Room
West Covina, CA 91791


August 15 and August 16, 2013 - 09:00 AM

and that at the above time and place the Occupational Safety and Health Appeals Board will proceed to hear and dispose of the appeal in the manner prescribed by Law. A party may be, but not need be, represented by an attorney, may present any relevant evidence and will be given full opportunity to cross-examine all witnesses. A party is entitled to the assistance of an interpreter and the issuance of subpoenas to compel the attendance of witnesses and subpoenas duces tecum to compel the production of documents or things in accordance with established rules of practice and procedure by applying to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Date of Notice: March 28, 2013

By:



Acting
Executive Officer

NOTE: CONTINUANCES ARE DISFAVORED AND WILL BE GRANTED ONLY UPON A CLEAR SHOWING OF GOOD CAUSE. REQUESTS FOR CONTINUANCES ARE TO BE MADE IMMEDIATELY, BUT NOT LATER THAN 15 DAYS AFTER THE DATE OF THIS NOTICE (5 extra days if the address of the recipient seeking a continuance is in California - 10 days if out-of-state).

The parties are expected to submit all issues for decision at the hearing. All witnesses, evidence, and other proof must be available at the hearing. The official record for Appeals Board hearings shall be taken by an electronic device. Any party desiring the presence of a court reporter must make their own arrangements.

A copy of this Notice of Hearing shall be served by the employer on an authorized employee representative of affected employees by personal delivery or by postage pre-paid first class mail, or on affected employees who are not represented by an authorized employee representative by posting a copy of this notice at or near the referenced site of violation, positioned so as to be easily read by employees working in the area. In addition, notice of this Hearing shall be served on any employee or their representative, seriously injured or killed in an accident related to this appeal.

NOTICE TO PARTIES: Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the Occupational Safety and Health Appeals Board, should contact the Appeals Board at the above listed office or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 2520 Venture Oaks Way, Suite 300, Sacramento, California.

On March 28, 2013 I served the attached Notice of Hearing by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery by the United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

[REDACTED]

Jora Trang, Managing Attorney
WORKSAFE, INC.
55 Harrison Street
Suite 400
Oakland, CA 94607-0000

District Manager
DOSH-SO. CA. HIGH HAZARD UNIT
2000 East McFadden Avenue, Suite 111
Santa Ana, CA 92705

[REDACTED] Div.'s Legal Rep.
DOSH - Legal Unit
320 West Fourth Street, Room 400
Los Angeles, CA 90013

[REDACTED] Div.'s Legal Rep.
DOSH - Legal Unit
320 West Fourth Street, Room 400
Los Angeles, CA 90013

DOSH - Legal Unit
1515 Clay Street, Suite 1901
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 28, 2013 at Sacramento, California.

[REDACTED]

Declarant

EXHIBIT B

TRANSACTION REPORT

MON/MAR/25/2013 16:44

FAX (TX)

#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
001	MAR/25	16:43	919162745785	0:01:08	1	OK	SG3 2006

STATE OF CALIFORNIA

EDMUND G. BROWN JR., Governor

DEPARTMENT OF INDUSTRIAL RELATIONS

Division of Occupational Safety and Health

LEGAL UNIT-Southern Area

320 W. 4th Street, Suite 400

Los Angeles, CA 90013

Tel: (213) 576-7700 Fax: (213) 576-7498



March 25, 2013

VIA FACSIMILE ONLY

Kari Johnson, Acting Executive Officer

California OSH Appeals Board

2520 Venture Oaks Way, Suite 300

Sacramento, CA 95833

(916) 274-5785

Re: Notice of Unavailability for [REDACTED]

Dear Ms. Johnson:

Please take note that [REDACTED] Staff Counsel for the Division of Occupational Safety and Health, will be unavailable to attend any and all prehearing conferences, status conferences, hearings, or other proceedings of the Appeals Board and will be unreachable in person, by facsimile, by telephone, by voicemail, and by electronic mail on the following days:

- Friday, August 16, 2013
- Monday, August 19, 2013
- Tuesday, August 20, 2013
- Wednesday, August 21, 2013
- Thursday, August 22, 2013
- Friday, August 23, 2013

If you have any questions or concerns, please do not hesitate to contact the undersigned. Thank you for your professional courtesy.

Very truly yours,

[REDACTED]
Legal Secretary

cc:

[REDACTED]

Approval:

DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Occupational Safety and Health
LEGAL UNIT-Southern Area
320 W. 4th Street, Suite 400
Los Angeles, CA 90013
Tel: (213) 576-7700 Fax: (213) 576-7498



March 25, 2013

VIA FACSIMILE ONLY

Kari Johnson, Acting Executive Officer
California OSH Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833
(916) 274-5785

Re: Notice of Unavailability for [REDACTED] [REDACTED]

Dear Ms. Johnson:

Please take note that [REDACTED] [REDACTED] Staff Counsel for the Division of Occupational Safety and Health, will be unavailable to attend any and all prehearing conferences, status conferences, hearings, or other proceedings of the Appeals Board and will be unreachable in person, by facsimile, by telephone, by voicemail, and by electronic mail on the following days:

- Friday, August 16, 2013
- Monday, August 19, 2013
- Tuesday, August 20, 2013
- Wednesday, August 21, 2013
- Thursday, August 22, 2013
- Friday, August 23, 2013

If you have any questions or concerns, please do not hesitate to contact the undersigned. Thank you for your professional courtesy.

Very truly yours,

[REDACTED]
Legal Secretary

cc: [REDACTED]
[REDACTED]

Approval:

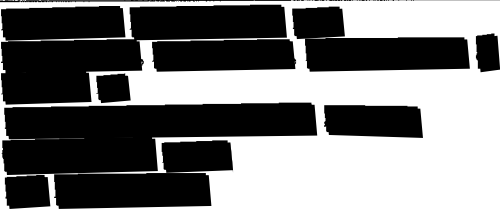

A handwritten signature in black ink, appearing to be "A. M. S.", written over a white background.

DECLARATION OF SERVICE

I, the undersigned, declare the following:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action. My place of employment and business address is 320 W. 4th Street, Suite 400, Los Angeles, CA 90013.

On May 3, 2013, I served the attached **MOTION FOR CONTINUANCE** on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

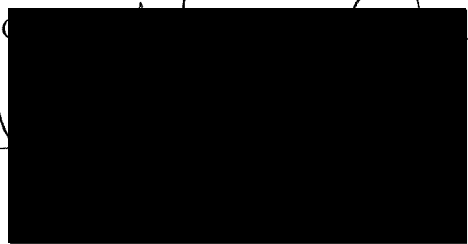
Kari Johnson, Executive Officer California OSH Appeals Board 2520 Venture Oaks Way, Suite 300 Sacramento, CA 95833 (916) 274-5785 <i>VIA FACSIMILE AND MAIL</i>	Jora Trang, Esq. WORKSAFE, INC. 55 Harrison Street, Ste. 400 Oakland, CA 94607-0000 <i>VIA MAIL ONLY</i>
ALJ Dale Raymond California OSH Appeals Board 100 N. Barranca Street, Suite 410 West Covina, CA 91791 (626) 966-4490 <i>VIA FACSIMILE AND MAIL</i>	
	

(X) **BY MAIL:** I am "readily familiar" with this office's practice of collection, processing, and depositing mail, with postage fully prepaid, with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that, on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing as stated in the affidavit.

(X) **BY FACSIMILE:** In addition to the above service by mail, hand delivery, or Golden State Overnight, I caused said document(s) to be transmitted by facsimile.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on May 6, 2013 at Los Angeles, CA



Appendix 0

August 15, 2013

[Employer Name]
[Address]
[City, State, Zip]

Re: Request for Information

Dear Business Representative,

Pursuant to our labor rights under the NLRA¹, Labor Code § 6360 et.seq. and Title 8 California Code of Regulations § 3204, this local union requests the company to submit the following information in order that it may properly carry out its representational responsibilities under the collective bargaining agreement:

1. A copy of the Employer's Illness and Injury Logs (OSHA form 300) for the past 5 years and the current year (2007 – 2012 and 2012 to present) and OSHA Supplementary Record of Occupational Injuries and Illnesses (OSHA Form 301). In accordance with OSHA Standard 1904.35 (or 14300 in California) these copies must be complete (no names removed).
2. The list of chemicals workers may be exposed to under Title 8 Cal. Code. Regs § 5194, the Hazard Communication Standard.
3. The Employer's Injury and Illness Prevention Plan as required under Title 8 Cal. Code. Regs§ 3203, including:
 - a. A copy of the employer's written H&S plan.
 - b. A set of the training materials that are used to train workers under § 3203.
 - c. A list of all safety trainings including, description and topic, date, attendance sheets, list of management present and presenters.
 - d. Names and/or job title of the person or persons with the authority and the responsibility for implementing the program.
 - e. Copies of any recognition programs to award workers for not reporting hazards.
 - f. Copies of the worksite inspections conducted to identify hazards covering the last 5 years, and information indicating when these hazards were abated.
4. All industrial hygiene monitoring data for toxic substances and/or harmful physical agents that employees are currently exposed to, or potentially exposed to; all results of historical monitoring data from past industrial hygiene surveys, including a list of all toxic substances or harmful agents which have been monitored in the past; any analysis, or use of these industrial hygiene monitoring results.
5. Description of your hearing conservation program, if any, including a description of any periodic audiometric examination, noise level surveys and engineering

¹ See *NLRB v. Acme Industrial Co.*, (1967) 385 U.S. 432, 435-36; *Oil, Chemical & Atomic Workers Local Union No. 6*, (D.C.Cir.1983) 711 F.2d 348, 360; *NLRB v. Holyoke Water Power Co.*, (1st Cir. 1985)778 F.2d 49.

control measures, which are in effect.

Please be assured that this local union requests the above information for the sole purpose of pursuing its representational responsibilities under the collective bargaining agreement.

We will accept photocopies of insurance carriers' reports, payroll records or any other written form convenient to the company to supply this information. The order in which the above questions have been asked is not to indicate their priority or to in anyway describe the format under which the company chooses to answer this request.

We would appreciate receiving this data and information, or any part thereof which is readily available, as quickly as possible, as we may desire to propose steps to be instituted in order to protect the health and lives of the bargaining unit personnel. However, partial response to this request in no way relieves the obligation to provide all data and information requested herein. This is an on-going request for any new information.

Yours truly,

(signed by local union officer or group chairman)

Appendix P

Appendix Q

To find OSHAB decisions:

Ca- OSHA

To find out whether OSHAB decisions have been overturned:

Go to select a database

Type in : Ca- OSHA, Ca-Cs

Go to terms and connectors type in "case name" "docket number" "WL number"

If the case has been overturned then there maybe other cases citing to it, but you should read the cases if other come up because they may be distinguishable.

Otherwise, if just your one case comes up, its likely that it has not been overtuned.

Appendix R

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
Cal/OSHA -Los Angeles District Office
320 W. 4th Street Room 670
Los Angeles, CA 90013
(213) 576-7451 FAX (213) 576-7461



August 16, 2013

An inspection was opened by Fred Porter at a place of employment located at [REDACTED] on March 14, 2013. As a result of this inspection the Division intends to cite as Serious the following alleged violation(s) of Title 8 California Code of Regulations.

On or about March 14, 2013, at [REDACTED] the employer did not train employees on the operating and rescue procedures of the [REDACTED] confined space program, or provide effected employees with any operating and rescue procedures before a confined space was entered.

You as the employer are encouraged to submit any information you would like to have considered prior to the issuance of citations alleging a serious violation. This information could include any or all of the following:

1. Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
2. Procedures for discovering, controlling access to and correcting the hazard or similar hazards.
3. Supervision of employees exposed or potentially exposed to the hazard.
4. Procedures for communicating to employees about your health and safety rules and programs.
5. Any additional information that you wish to provide such as:
 - a. An explanation of the circumstances surrounding the alleged violative events.
 - b. Why you believe a serious violation does not exist.
 - c. Why you believe your actions related to the alleged violative events were reasonable and responsible.

Please use "Employers Signed Response to Notice of Intent to Issue Serious Violation" attached to this letter to respond and attach any documentation used to support your claims. Use one form per proposed serious violation.

Please return this form as soon as possible with any supporting documentation. Information received by **August 31, 2013** will be considered prior to the issuance of this citation. If no information is received, the proposed citation may be issued.

If you have any questions concerning this matter, please contact me at the phone number or address in the letterhead.

Sincerely,


District Manager or Designee

This form will be considered properly served if personally delivered, mailed first class mail with proof of service, or faxed.

