

# PEOSH Field Operations Manual (FOM)



NEW JERSEY DEPARTMENT OF

**LWD**

LABOR AND WORKFORCE DEVELOPMENT  
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# OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR Occupational Safety and Health Administration

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DIRECTIVE NUMBER: CPL 02-00-148 | EFFECTIVE DATE: January 9, 2009

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SUBJECT: Field Operations Manual (FOM)

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**Purpose:** This Instruction implements the OSHA Field Operations Manual (FOM), and replaces the September 26, 1994 Instruction that implemented the Field Inspection Reference Manual (FIRM). The FOM is a revision of OSHA’s enforcement policies and procedures manual that provides the field offices a reference document for identifying the responsibilities associated with the majority of their inspection duties.

**Scope:** OSHA-wide.

**References:** Title 29 Code of Federal Regulations §1903.6, Advance Notice of Inspections; 29 Code of Federal Regulations §1903.14, Policy Regarding Employee Rescue Activities; 29 Code of Federal Regulations §1903.19, Abatement Verification; 29 Code of Federal Regulations §1904.39, Reporting Fatalities and Multiple Hospitalizations to OSHA; and Housing for Agricultural Workers: Final Rule, Federal Register, March 4, 1980 (45FR 14180).

**Cancellations:** OSHA Instruction ADM 01-00-002, Administrative Subpoenas, August 19, 1991; OSHA Instruction CPL 02-00-045, Field Operations Manual, Chapter VI, Sections D, Handling Monies Received from Employers, and E, Debt Collection Procedures, March 3, 1995; OSHA Instruction CPL 02-00-045, Field Operations Manual, Chapter XI, Migrant Labor Camps, March 3, 1995; OSHA Instruction CPL 02-00-103, Field Inspection Reference Manual (FIRM), September 26, 1994; and OSHA Instruction CPL 02-00-112, National Quick-Fix Program, August 2, 1996.

**State Impact:** Notice of Intent and Adoption required. See paragraph VI.

**Action Offices:** National, Regional, and Area Offices

**Originating Office:** Directorate of Enforcement Programs

**Contact:** Directorate of Enforcement Programs  
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By and Under the Authority of

Thomas M. Stohler  
Acting Assistant Secretary

## **Executive Summary**

This Instruction cancels and replaces the PEOSH Field Inspection Reference Manual (FIRM). This Instruction constitutes PEOSH's general enforcement policies and procedures manual for use by the field offices in conducting inspections, issuing citations and proposing penalties.

## **Significant Changes**

- Cancels and replaces the Field Inspection Reference Manual (FIRM).
- Cancels sections D. and E. of Chapter VI of the prior Field Operations Manual.
- Cancels Chapter XII of the prior Field Operations Manual.
- Will consist of the following chapters:

Chapter 1. Introduction

Chapter 2. Program Planning

Chapter 3. Inspection Procedures

Chapter 4. Violations

Chapter 5. Case File Preparations and Documentation

Chapter 6. Penalties and Debt Collection

Chapter 7. Post-Citation Procedures and Abatement Verification

Chapter 8. Settlements

Chapter 9. Complaint and Referral Processing

Chapter 10. Industry Sectors (Reserved, Federal Office Programs Only)

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

Chapter 12. Specialized Inspection Procedures (Reserved, Federal Office Programs Only)

Chapter 13. Federal Agency Safety and Health Programs (Reserved, Federal Office Programs Only)

Chapter 14. Health Inspection Enforcement Policy (Reserved, Federal Office Programs Only)

Chapter 15. Legal Issues

Chapter 16. Disclosure under the Open Public Records Act

## **Disclaimer**

**This manual is intended to provide instruction regarding some of the internal operations of the Office of Public Employees Occupational Safety and Health (PEOSH), and is solely for the benefit of the Government. No duties, rights, or benefits, substantive or procedural, are created or implied by this manual. The contents of this manual are not enforceable by any person or entity against the Department of Labor and Workforce Development or the State of New Jersey.**

## **Table of Contents**

### **CHAPTER 1 INTRODUCTION**

### **CHAPTER 2 PROGRAM PLANNING**

### **CHAPTER 3 INSPECTION PROCEDURES**

### **CHAPTER 4 VIOLATIONS**

### **CHAPTER 5 CASE FILE PREPARATION AND DOCUMENTATION**

### **CHAPTER 6 PENALTIES AND DEBT COLLECTION**

### **CHAPTER 7 POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION**

### **CHAPTER 8 SETTLEMENTS**

### **CHAPTER 9 COMPLAINT AND REFERRAL PROCESSING**

### **CHAPTER 10 INDUSTRY SECTORS** (Reserved, Federal Office Programs Only)

### **CHAPTER 11 IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE**

### **CHAPTER 12 SPECIALIZED INSPECTION PROCEDURES** (Reserved, Federal Office Programs Only)

**CHAPTER 13**  
**FEDERAL AGENCY SAFETY AND HEALTH PROGRAMS**  
(Reserved, Federal Office Programs Only)

**CHAPTER 14**  
**HEALTH INSPECTION ENFORCEMENT POLICY**  
(Reserved, Federal Office Programs Only)

**CHAPTER 15**  
**LEGAL ISSUES**

**CHAPTER 16**  
**DISCLOSURE UNDER THE OPEN PUBLIC RECORDS ACT**  
**(OPRA)**

# Chapter 1

## INTRODUCTION

### I. Purpose.

This Instruction implements the Field Operations Manual (FOM), and replaces the PEOSH Field Inspection Reference Manual (FIRM). This FOM is a revision of PEOSH's enforcement policies and procedures as stated in the FIRM, which provides the compliance personnel a reference document for identifying the responsibilities associated with the majority of their inspection duties.

### II. Scope.

This Instruction applies PEOSH-wide.

### III. References.

- A. [Title 5 United States Code 504](#), The Equal Access to Justice Act.
- B. [Title 18 United States Code 601](#), Small Business Regulatory Enforcement Fairness Act.
- C. [Title 18 United States Code 1905](#), Disclosure of Confidential Information.
- D. [Title 28 United States Code 2412](#), Rules Implementing the Equal Access to Justice Act; Costs and Fees.
- E. [Title 29 United States Code 651](#), Occupational Safety and Health Act of 1970.
- F. [Title 29 United States Code 1802](#), Migrant and Seasonal Agricultural Worker Protection Act.
- G. [Title 31 United States Code 3717](#), Debt Collection Improvement Act.
- H. [Title 39 United States Code 101](#), The Postal Employee Safety Enhancement Act of 1998.
- I. [29 Code of Federal Regulations 2.21](#) and [2.22](#), Employees Served with Subpoenas.
- J. [29 Code of Federal Regulations Part 20](#), Federal Claims Collection.
- K. [29 Code of Federal Regulations 500.132](#), Applicable Federal Standards: ETA and OSHA Housing Standards.
- L. [29 Code of Federal Regulations Part 654](#), Social Responsibilities of the Employment Service System.
- M. [29 Code of Federal Regulations 1903.6](#), Advance Notice of Inspections.
- N. [29 Code of Federal Regulations 1903.14](#), Policy Regarding Employee Rescue Activities.



- O. [29 Code of Federal Regulations 1903.19](#), Abatement Verification.
- P. [29 Code of Federal Regulations 1904.39](#), Reporting Fatalities and Multiple Hospitalizations to OSHA.
- Q. [29 Code of Federal Regulations Part 1908](#), Consultation Agreements.
- R. [29 Code of Federal Regulations Part 1910](#), Occupational Safety and Health Standards.
- S. [29 Code of Federal Regulations Part 1915](#), Occupational Safety and Health for Shipyard Employment.
- T. [29 Code of Federal Regulations Part 1926](#), Safety and Health Regulations for Construction.
- U. [29 Code of Federal Regulations Part 1928](#), Occupational Safety and Health Standards for Agriculture.
- V. [29 Code of Federal Regulations Part 1960](#), Basic Program Elements for Federal Employee Occupational Safety and Health Programs.
- W. [29 Code of Federal Regulations 1975.4\(b\)\(2\)](#), Coverage – Agricultural Employers.
- X. [29 Code of Federal Regulations Part 2200](#), Rules of Procedure.
- Y. [40 Code of Federal Regulations Part 170](#), Worker Protection Standard.
- Z. Housing for Agricultural Workers: Final Rule, *Federal Register*, March 4, 1980 (45 FR 14180).
- AA. Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, *Federal Register*, August 12, 1996 ([61 FR 41738](#)).
- BB. Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration, *Federal Register*, January 2, 1997 ([62 FR 107](#)).
- CC. Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines, *Federal Register*, January 16, 1989 ([54 FR 3904](#)).
- DD. Final Rule on State Plans Coverage of the U.S. Postal Service (*Federal Register*, June 9, 2000 ([65 FR 36618](#))).
- EE. Final Policy Concerning the Occupational Safety and Health Administration’s Treatment of Voluntary Employer Safety and Health Self-Audits, *Federal Register*, July 28, 2000 ([65 FR 46498](#)).
- FF. Secretary’s Order 5-2002; Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, *Federal Register*, October 22, 2002 ([67 FR 65007](#)).

- GG. OSHA Instruction [ADM 01-00-003](#), Redefinition of Authority and Responsibility of the Assistant Secretary for Occupational Safety and Health, March 6, 2003.
- HH. OSHA Instruction [ADM 03-01-005](#), OSHA Compliance Records, August 3, 1998.
- II. OSHA Instruction [CPL 02-00-025](#), Scheduling System for Programmed Inspections, January 4, 1995.
- JJ. OSHA Instruction [CPL 02-00-028](#), Compliance Assistance the Powered Industrial Truck Operator Training Standards, November 30, 2000.
- KK. OSHA Instruction [CPL 02-00-051](#), Enforcement and Limitations under the Appropriations Act, May 28, 1998.
- LL. OSHA Instruction [CPL 02-00-080](#), Handling of Cases to be Proposed for Violation-By-Violation Penalties, October 21, 1990.
- MM. OSHA Instruction [CPL 02-00-090](#), Guidelines for Administration of Corporate-Wide Settlement Agreements, June 3, 1991.
- NN. OSHA Instruction [CPL 02-00-094](#), OSHA Response to Significant Events of Potentially Catastrophic Consequences, July 22, 1991.
- OO. OSHA Instruction [CPL 02-00-098](#), Guidelines for Case File documentation for use with Videotapes and Audiotapes, October 12, 1993.
- PP. OSHA Instruction [CPL 02-00-111](#), Citation Policy for Paperwork and Written Program Requirement Violations, November 27, 1995.
- QQ. OSHA Instruction [CPL 02-00-121](#), Providing Assistance to Smaller Employers, March 12, 1998.
- RR. OSHA Instruction [CPL 02-00-122](#), Enforcement Guidance for the U.S. Postal Service, April 16, 1999.
- SS. OSHA Instruction [CPL 02-00-124](#), Multi-Employer Citation Policy, December 10, 1999.
- TT. OSHA Instruction [CPL 02-00-125](#), Home-Based Worksites, February 25, 2000.
- UU. OSHA Instruction [CPL 02-00-135](#), Recordkeeping Policies and Procedures Manual (RKM), December 30, 2004.
- VV. OSHA Instruction [CPL 02-00-136](#), OSHA's National Emphasis Program (NEP) on Shipbreaking, March 16, 2005.
- WW. OSHA Instruction [CPL 02-00-139](#), Longshoring and Marine Terminals "Tool Shed" Directive, May 23, 2006.
- XX. OSHA Instruction [CPL 02-00-141](#), Inspection Scheduling for Construction, July 14, 2006.

- YY. OSHA Instruction [CPL 02-00-142](#), Shipyard Employment “Tool Bag” Directive, August 3, 2006.
- ZZ. OSHA Instruction [CPL 02-00-145](#), Enhanced Enforcement Program (EEP), January 1, 2008.
- AAA. OSHA Instruction [CPL 02-02-035](#), 29 CFR 1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A, December 19, 1983.
- BBB. OSHA Instruction [CPL 02-02-038](#), Inspection Procedures for the Hazard Communication Standard, March 20, 1998.
- CCC. OSHA Instruction [CPL 02-02-043](#), Chemical Information Manual, July 1, 1991.
- DDD. OSHA Instruction [CPL 02-02-054](#), Respiratory Protection Program Guidelines, July 14, 2000.
- EEE. OSHA Instruction [CPL 02-02-072](#), Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records, August 22, 2007.
- FFF. OSHA Instruction [CPL 02-02-073](#), Inspection Procedures for 29 CFR 1910.120 and 1926.65, Paragraph (q): Emergency Response to Hazardous Substance Releases, August 27, 2007.
- GGG. OSHA Instruction [CPL 03-00-004](#), Petroleum Refinery Process Safety Management National Emphasis Program, June 7, 2007.
- HHH. OSHA Instruction [CPL 04-00-001](#), Procedures for Approval of Local Emphasis Programs (LEPs), November 10, 1999.
- III. OSHA Instruction [CSP 01-00-002](#), State Plan Policies and Procedures Manual, March 21, 2001.
- JJJ. OSHA Instruction [CSP 02-00-002](#), Consultation Policies and Procedures Manual, January 18, 2008.
- KKK. OSHA Instruction [CSP 03-01-003](#), Voluntary Protection Programs (VPP) Policies and Procedures Manual, April 18, 2008.
- LLL. OSHA Instruction [CSP 03-02-002](#), OSHA Strategic Partnership Program for Worker Safety and Health, February 10, 2005.
- MMM. OSHA Instruction [CSP 04-01-001](#), OSHA Alliance Program, June 10, 2004.
- NNN. OSHA Instruction [FAP 01-00-003](#), Federal Agency Safety and Health Programs, May 17, 1996.
- OOO. OSHA Instruction [HSO 01-00-001](#), National Emergency Management Plan (NEMP), dated December 18, 2003.

- PPP. OSHA Instruction IRT 01-00-007, The IMIS Enforcement Data Processing Manual for Use with the NCR Computer System, dated September 20, 1993.
- QQQ. OSHA Instruction [TED 01-00-015](#), *OSHA Technical Manual*, January 20, 1999.
- RRR. Memoranda dated September 12 and 13, 2000 to the Regional Administrators from H. Berrien Zettler, Deputy Director, Directorate of Construction (via email) regarding transmittal of information on construction fatalities to the University of Tennessee.
- SSS. Memoranda dated May 14, 2003 and February 18, 2004 to the Regional Administrators from Deputy Assistant Secretary R. Davis Layne regarding transmittal of information on construction fatalities to the University of Tennessee.
- TTT. [Memorandum](#) dated December 16, 2003, to the Regional Administrators from Deputy Assistant Secretary R. Davis Layne regarding IMMLANG Procedures (available on the OSHA Intranet).
- UUU. [Memorandum](#) dated March 24, 2004 to Regional Administrators from Deputy Assistant Secretary R. Davis Layne regarding Procedures for Significant Enforcement Cases (available on the OSHA Intranet).
- VVV. *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325 (11<sup>th</sup> Cir. 1983).
- WWW. *Int. Union UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.D. Cir. 1987).
- XXX. *Marion Stevens dba Chapman & Stephens Company*, [5 BNA OSHC 1395](#) (No.13535, 1977).
- YYY. *Darragh Company*, [9 BNA OSHC 1205](#), (Nos. 77-2555, 77-3074, and 77-3075, 1980).
- ZZZ. *J. C. Watson Company*, [22 BNA OSHC 1235](#) (Nos. 05-0175 and 05-0176, 2008).
- AAAA. OSHA Instruction [CPL 02-01-057](#), Compliance Directive for the Cranes and Derricks in Construction Standard, 10/17/14.
- BBBB. OSHA Instruction CPL-02-158, Inspection Procedures for the Respiratory Protection Standard, 06/26/2014.
- CCCC. OSHA Instruction TED-01-00-019, Mandatory Training Program for OSHA Compliance Personnel, 07/21/2014

#### **IV. Cancellations.**

- A. OSHA Instruction ADM 01-00-002, Administrative Subpoenas, August 19, 1991.
- B. OSHA Instruction CPL 02-00-045, Field Operations Manual, Chapter VI, Sections D. Handling Monies Received from Employers, and E. Debt Collection Procedures, March 3, 1995.

- C. OSHA Instruction CPL 02-00-045, Field Operations Manual, Chapter XI, Migrant Labor Camps, March 3, 1995.
- D. OSHA Instruction CPL 02-00-103, Field Inspection Reference Manual (FIRM), September 26, 1994.
- E. OSHA Instruction CPL 02-00-112, National Quick-Fix Program, August 2, 1996.
- F. OSHA Instruction CPL 02-00-114 Abatement Verification Regulation Enforcement Policies and Procedures, May 28, 1998.
- G. OSHA Instruction CPL 02-00-137, Fatality/Catastrophe Investigation rocedures, April 14, 2005.
- H. OSHA Instruction CPL 02-00-140, Complaint Policies and Procedures, June 23, 2006.
- I. Memorandum dated March 23, 1995, to the Regional Administrators from Deputy Assistant Secretary James W. Stanley regarding FIRM Change: Minimum Serious Willful Penalty.
- J. Memorandum dated June 21, 1996 to the Regional Administrators from Deputy Assistant Secretary Michael G. Connors regarding FIRM Change: Mandatory Collection of OSHA-200 and Lost Workday Injury and Illness (LWDII) Data During Inspections.
- K. Memorandum dated July 13, 1999 to the Regional Administrators from Assistant Secretary Charles N. Jeffress regarding Child Labor: Probability Assessment and Good Faith Penalty Adjustment Considerations.
- L. OSHA Instruction [CPL 02-00-120](#), Inspection procedures for the Respiratory Protection Standard, September 25, 1998.

**V. Action Information.**

**A. Responsible Office.**

Directorate of Enforcement Programs (DEP).

**B. Action Offices.**

National, Regional, and Area Offices.

**C. Information Offices.**

State Plan States, OSHA Training Institute, Consultation Project Managers, VPP Managers and Coordinators, OSHA Strategic Partnership.

Coordinators, Compliance Assistance Coordinators, Compliance Assistance Specialists, and Regional EEP Coordinators.

**VI. State Impact.**

- A. Notice of Intent, Adoption, and Submission of a Plan Change Supplement are required.
- B. This instruction describes a Federal Program Change which consolidates and updates OSHA's field enforcement policies and procedures. States must have, as a part of their State plan, formal written policies and procedures on all aspects of their compliance program, including inspections, targeting, citations, penalties, and post citation processes, which are at least as effective as the procedures in this revised Field Operations Manual (FOM). In adopting equivalent policies and procedures States must address each chapter and/or policy area in this manual. Significant changes to this manual are listed in section VII of this chapter.

States need not adopt the internal OSHA administrative procedures set out in this manual, such as those relating to organizational structure and such matters as penalty collection, but must include documentation of their own comparable internal administrative procedures and processes. These will necessarily differ from those of Federal OSHA.

- C. States must notify OSHA within 60 days whether their enforcement policies will be identical to or different from those in this Instruction. State policies and procedures must be adopted within 6 months of issuance of this Instruction. Each State must both submit a copy of its revised Field Operations Manual as a plan change supplement to OSHA, preferably in electronic format, with a comparison document clearly identifying any differences from the revised FOM, within 60 days of adoption, and either post its equivalent State Field Operations Manual on its State plan website and provide the link to OSHA or provide OSHA with information on how the public may obtain a copy. OSHA will post information on the State responses to this Instruction on its website.

## **VII. Significant Changes.**

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

1. The title of this chapter has been changed from Pre-Inspection Procedures to Program Planning.
2. Section II: PEOSH Office responsibilities have been expanded.
3. Section III: A section has been added to cover OSHA Cooperative Programs Overview.
4. Specific information regarding Complaints and Referrals has been removed from this chapter.
5. Specific information regarding Inspection Preparation has been removed from this chapter.
6. Paragraph IV.D.: A section has been added to address Enforcement Exemptions and Limitations.
7. Paragraph IV.E.: A section has been added to address Preemption by Another State Agency.
8. Paragraph IV.F.: A section has been added to address enforcement activity at the United States Postal Service. (Federal program only)

9. Paragraph IV.G.: A section has been added to address Home-Based Worksites. (Federal program only)
10. Section VI.H.4.a.: A note has been added defining “other critical inspections as determined by the Assistant Secretary” to include referrals, although not limit only to referrals. (Federal program only)

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

1. This replaces the majority of Chapter II of the FIRM, Inspection Procedures.
2. Paragraph II.A.1.: Inspection planning requires an establishment search using the IMIS database.
3. Paragraph II.A.2.: State plan citation history **may** be used to document employer knowledge to support a willful violation, and to determine eligibility for the history penalty reduction actor. It **may not** be used to support a repeat violation.
4. Paragraph II.D.: Expanded guidance is provided on compliance officer safety and health.
5. Paragraph III.A.: The definition of a comprehensive inspection is revised to “a substantially complete and thorough inspection of all potentially hazardous areas of the establishment.”
6. Paragraph IV.H.: The strike or labor dispute section has been revised to emphasize that CSHOs must make every effort to ensure that their actions are not interpreted as supporting either side.
7. Paragraph V.A.: The CSHO is required to review any written hazard assessment that the employer has made in compliance with §1910.132(d) to determine appropriate personal protective equipment.
8. Paragraph V.D.: Expanded guidance is provided on review of voluntary compliance programs, including on-site consultation, SHARP, and VPP.
9. Paragraph VI.A.: Revised guidance is provided on collection of employer injury and illness data and calculation of the DART rate.
10. Paragraph VIII.B.2.: Extensive guidance is provided on interviews of non-managerial employees.

#### **C. Chapter 4. Violations.**

1. This chapter replaces section C, Violations, of Chapter III of the FIRM.
2. Paragraphs I.A.3. and 4: The definition and application of horizontal and vertical standards have been revised and clarified.
3. Paragraph II.C.: The discussion of the four factors involved in determining a serious violation has been expanded and clarified, with examples.

4. Section III: The elements of a general duty clause violation are given an expanded discussion, with examples.
5. Paragraph III.D.: Additional clarification is provided on limitations of use of the general duty clause, with examples.
6. Section V: Expanded and clarified guidance is provided on willful violations, with examples.
7. Section VI: Updated guidance is provided for criminal/willful violations.
8. Paragraph VII.A.2.: Violations cited by State Plan States cannot be used as a basis of OSHA repeat violations by Federal OSHA, even if the same standards are cited by a State agency. Only violations that have become a final order of the Review Commission are to be considered.
9. Paragraph VII.E.1.: Clarification is provided on time limitations for citing repeat violations.
10. Paragraph VII.G.: Responsibilities of the Area Director in citing repeat violations are clarified.
11. Section VIII: De minimis *violations* are corrected to de minimis *conditions*.
12. Paragraph X.C.: Clarifies when not to group or combine violations.
13. Sections XI., XII., XIII., and XIV: Guidance on citing health standard violations has been updated.

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

1. This chapter replaces section A., Four Stage Case File Documentation, and section B., Specific Forms, of Chapter III, and section C., Citations, of Chapter IV of the FIRM.
2. Paragraph X.A.: Expanded guidance is provided on Inspection Case File Activity Diary Sheet.
3. Paragraph XI: Clarification is provided on Statute of Limitation for issuance of citations.
4. Paragraph XII.C.: Expanded guidance is provided on Classified and Trade Secret Information.

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

1. This chapter replaces Section C. of Chapter IV of the FIRM.
2. Paragraph III.B.2.c.: A provision requiring documentation in the case file if the Director approves a partial reduction for *Size* for small employers (1-25 employees) is added.



3. Paragraph III.B.3.d.: A provision allowing some OSHA Strategic Partnership (OSP) sites to qualify for an extra 10% *Good Faith* reduction is added.
4. Paragraph III.B.4.a.: A provision clarifying that the *History* reduction factor is to be applied nationwide, and to include State Plan state history as well, is added.
5. Paragraphs III.B.4.c. second bullet and X.C.2.c.: A *History* reduction will no longer be given to employers being cited for failure to certify abatement.
6. Paragraph IV.C.1. and Table 6-5: The Quick-Fix policy has been modified to allow it to apply to medium gravity serious violations.
7. Paragraph VI.B.: A note has been added to clarify that the second *Size* chart applies only to serious willful violations.
8. Paragraph VI.C.2.: The reduction factor for *History* is allowed for penalties for regulatory violations that are classified as willful; this is in addition to the reduction factor for *Size* that has been allowed.
9. Paragraph X.C.2.c. and 3.b.: A change has been made to abatement verification policy to not allow a *History* reduction to employers being cited for failure to certify abatement or for failure to notify employees and tagging movable equipment.
10. Paragraph X.D.2.: A clarification has been added to the Part 1904 provision that the Repeated and Willful penalty policies of paragraphs V.D. and VI.C., respectively, are applicable to recordkeeping violations.
11. Section XIII replaces section D of Chapter VI of the prior Field Operations Manual (FOM), CPL 02-00-045, regarding Handling Monies Received from Employers.
12. Section XIV replaces section E. of Chapter VI of the prior Field Operations Manual (FOM), CPL 02-00-045, regarding Debt Collection Procedures.
13. All references to the Office of Management Data Systems (OMDS) have been replaced with the Debt Collection Accountability Team (DCAT). (Federal program only)
14. Paragraph XIII.B.3.: Adjustment to Payments – If a check is unsigned it should be forwarded to the lockbox instead of being returned to the employer.
15. Paragraph XIII.B.4.a., fourth bullet: If a payment instrument is dated more than six months prior to the current date, it should be returned to the employer via a certified delivery service.
16. Paragraph XIII.C.: Returning Penalty Payments – Refund requests should go to DCAT instead of the Office of Financial Management. (Federal program only)
17. Paragraph XIV.C.: Notification Procedures – Referencing the “Notice” as the first demand letter has been removed. All subsequent references to second or third demand letters have also been removed.

18. Paragraph XIV.D.: Notification of Overdue Debt – Demand letters do not have to be mailed via certified mail. They may be mailed using regular mail. Also, demand letters may be faxed if it is verified that the company received the fax. (Federal program only)
19. Paragraph XIV.D.2.: Contested Case with Penalties – Instead of sending a demand letter with late fees to the employer, the Area Director may send a letter, without assessing late fees, which notifies the employer that the debt is now past due. This “notification” letter is a substitute for the demand letter requirement and allows the Area Director some leeway in contested cases with special circumstances, i.e. not receiving or acting on the Final Order Document in a timely manner.
20. Paragraph XIV.F.6.: If the Area Office receives a check for a case that was referred to DCAT, the check should not be forwarded to the National Office. Instead, DCAT should be notified immediately so proper action can be determined. (Federal program only)
21. Paragraph XIV.H.: Uncollectible Penalties – A provision is added for dealing with debts that the Area Office may deem as uncollectible. (Federal program only)
22. Paragraph XIV.I.: National Office Debt Collection Procedures are updated to reflect the current procedures and processes for referring uncollected debts to the Department of Treasury. (Federal program only)
23. Paragraph XIV.I.5.: Compromise of Debts over \$100,000 –Instead of the Solicitor, DCAT will obtain Department of Treasury or Justice approval for waiving these debts. (Federal program only)
24. Paragraph XIV.I.6.: Return to the Area Office – The requirement that the Area Director forward cases to the RSOL for legal action to collect debts returned by DCAT as uncollectible has been removed. (Federal program only)

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

1. Paragraph I.A.: Procedures for accepting and handling electronic (e-mail) notices of contest are provided.
2. Section II: Provides policies and procedures for informal conferences; policies and procedures for settlement of cases is in Chapter 8.
3. Paragraph II.B.: Provides guidance on the attendance of the employer’s attorney at the informal conference.
4. Paragraph II.F.2.b.: Specifically prohibits any discussion of possible criminal referrals in fatality cases during the informal conference.
5. Section III: Provides updated policies and procedures on Petitions for Modification of Abatement Date.
6. Sections IV through XVI: Replace the current directive on abatement verification, OSHA Instruction CPL 02-00-114, Abatement Verification Regulation Enforcement Policies and Procedures, May 28, 1998. (Federal program only)

7. Paragraph IV.A.: Provides an expanded definitions section, including definitions of the terms *Abatement* and *Abatement Dates*.
8. Sections V through VIII: Provide expanded guidance on citations for violations of §1903.19.
9. Paragraph XI.C. and paragraph XII: Provide policy on follow-up inspections for employer failure to verify abatement under §1903.19, including follow-up inspections under the Enhanced Enforcement Program.

**G. Chapter 8. Settlements.**

This chapter incorporates the Settlement policies and procedures that currently exist in the FIRM, except that Section 17 settlements will be handled in accordance with established agency procedures.

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

1. This incorporates and replaces the current directive on this subject, OSHA Instruction CPL 02-00-140, Complaint Policies and Procedures, June 23, 2006.
2. Paragraph I.A.1.: The definition of *complaint* has been clarified to include only present employees, not past employees.
3. Paragraph I.A.2.a.: The potential harm necessary to file a complaint has been clarified to include health harm as well as physical harm.
4. Paragraph I.A.8.: The OSHA-90 form has been identified as the proper form in which to use the coding identified under the referral sources.
5. Paragraph I.F.2.b.: This paragraph explicitly states that information received via telephone from a current employee or representative of employees is considered a non-formal complaint until a signed copy of the information is received.

**I. Chapter 10. Industry Sectors.**

(Federal program only)

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

1. This chapter incorporates and replaces OSHA Instruction CPL 02-00-137, Fatality/Catastrophe Investigation Procedures, April 14, 2005.
2. Section III. A section on rescue operations and emergency response has been added.

**K. Chapter 12. Specialized Inspection Procedures.**

(Federal program only)

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

(Federal program only)

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

(Federal program only)

**N. Chapter 15. Legal Issues.**

(Federal program only)

**O. Chapter 16. Open Public Records Act (OPRA)**

[Reserved]

**VIII. Background.**

The Field Inspection Reference Manual (FIRM) replaced most of the previous Field Operations Manual (FOM). Since that time, the FIRM has never revised, but has been supplemented and modified by numerous additional directives, memorandums, and interpretations.

This Instruction, the PEOSH Field Operations Manual, incorporates and replaces the FIRM and many of the subsequent directives and memoranda, and provides a single, updated source of instruction on general PEOSH enforcement policies and procedures.

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

**IX. Definitions and Terminology.**

**A. The Act.**

This term refers to the Public Employees Occupational Safety and Health Act (N.J.S.A. 34:6A-25 et seq.)

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

This term refers to Safety Compliance Officers and Industrial Hygienists.

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

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

**D. Professional Judgment.**

All PEOSH employees are expected to exercise their best judgment as safety and health professionals and as representatives of the New Jersey Department of Labor & Workforce Development in every aspect of carrying out their duties.

E. **Workplace and Worksite.**

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

## Chapter 2

### PROGRAM PLANNING

#### I. Introduction.

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

#### II. Responsibilities.

##### A. Responding to Requests for Assistance.

All requests from employers or employees for compliance information or assistance shall receive timely, accurate, and helpful responses from PEOSH. See the section on [Employer Information Requests](#) in this chapter for additional information.

#### III. PEOSH Cooperative Programs Overview.

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

##### A. Onsite Consultation Program.

1. Onsite consultation programs are available under [Section 21\(d\)](#) and [23\(g\)](#) agreements with Federal OSHA or under State plans approved by OSHA.
  - a. The State Onsite Consultation Program offers a variety of services at no cost to employers. These services include assisting in the development and implementation of an effective safety and health management system, and offering training and education to the employer and employees at the worksite. Smaller businesses in high hazard industries or those involved in hazardous operations receive priority.
  - b. The State Onsite Consultation Program is separate from PEOSH's enforcement efforts. Under onsite consultation programs, no citations are issued, nor are penalties proposed.
2. **Safety and Health Achievement Recognition Program (SHARP).**
  - a. Another program that recognizes employers' efforts to create a safe workplace and exempts them from inspection is the Safety and Health Achievement Recognition Program (SHARP). This program is administered by the State Onsite Consultation Program but is funded under [Section 21\(d\)](#) of the OSHA Act.

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

**NOTE:** See [CSP 02-00-002](#), Consultation Policies and Procedures Manual, dated January 18, 2008, for additional information.

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

##### **A. General.**

1. PEOSH's priority system for conducting inspections is designed to allocate available PEOSH resources as effectively as possible to ensure that maximum feasible protection is provided to working men and women. The Director or designee will ensure that inspections are scheduled within the framework of this chapter, and that they are consistent with the objectives of the office, also that appropriate documentation of scheduling practices is maintained.
2. The Director or designee will also ensure that PEOSH resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Director or designee may consider requesting additional OSHA resources. In other circumstances, the use of outside resources may aid the office to deploy available resources more effectively. PEOSH will retain control of the inspection.

##### **B. Inspection Priority Criteria.**

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

**Table 2-1: Inspection Priorities**

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

##### **1. Efficient Use of Resources.**

Deviations from this priority list are allowed so long as they are justifiable, lead to the efficient use of resources, and promote effective employee protection.

##### **2. Follow-up Inspections.**

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

**NOTE:** See the Chapter on Post-Citation Procedures and Abatement Verification, for additional information.

### 3. **Monitoring Inspections.**

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

**NOTE:** See the Chapter on Post-Citation Procedures and Abatement Verification, for additional information.

### 4. **Employer Information Requests.**

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

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

The Director or designee will act in accordance with established inspection priority procedures.

**NOTE:** See Section V. of this chapter, Unprogrammed Activity –Hazard Evaluation and Inspection Scheduling, for additional information.

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

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

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

**NOTE:** See the paragraph on Inspection Priority Criteria, of this chapter for additional information.

## D. **Preemption by Another Agency.**

1. The Act does not apply to working conditions over which other state agencies exercise statutory responsibility to prescribe standards for safety and health. The determination of preemption by another state office is, in many cases, a highly complex matter.



2. At times, an inspection may have already begun when the coverage jurisdiction question arises. Any such situation will be brought to the attention of the Director or designee as soon as they arise, and dealt with on a case-by-case basis.

**E. Home-Based Worksites.**

1. PEOSH will not perform any inspections of employees' home offices. A home office is defined as office work activities in a home-based setting/worksites (e.g., filing, keyboarding, computer research, reading, writing) and may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).

**F. Inspection/Investigation Types.**

**1. Unprogrammed.**

- a. Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to:
  - Imminent Dangers;
  - Fatalities/catastrophes;
  - Complaints; and
  - Referrals.
- b. It also includes follow-up and monitoring inspections.

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

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

**NOTE:** *See [CPL 02-00-124](#), Multi-Employer Worksite Citation Policy, dated December 10, 1999, for additional information.*

**2. Unprogrammed Related.**

- a. Inspections of employers at multi-employer worksites whose operations are not directly addressed by the subject of the conditions identified in a complaint, accident, or referral are designated as unprogrammed related.
- b. An example would be: A trenching inspection conducted at the unprogrammed worksite where the trenching hazard was not identified in the complaint, accident report, or referral.

**3. Programmed.**

Inspections of worksites which have been scheduled based upon objective or neutral selection criteria are programmed inspections, such as the PEOSH Strategic Plan.

**4. Program Related.**

Inspections of employers at multi-employer worksites whose activities were not included in the programmed assignment, such as a low injury rate employer at a worksite where programmed inspections are being conducted for all high rate employers.

## V. **Unprogrammed Activity – Hazard Evaluation and Inspection Scheduling.**

Enforcement procedures relating to unprogrammed activity are located in subject specific chapters of this manual:

- ▶ Imminent Danger, see [Chapter 11](#), *Imminent Danger, Fatality, Catastrophe, and Emergency Response*.
- ▶ Fatality/Catastrophe, see [Chapter 11](#), *Imminent Danger, Fatality, Catastrophe, and Emergency Response*.
- ▶ Emergency Response, see [Chapter 11](#), *Imminent Danger, Fatality, Catastrophe, and Emergency Response*.
- ▶ Complaint/Referral Processing, see [Chapter 9](#), *Complaint and Referral Processing*.
- ▶ Whistleblower Complaints, see [Chapter 9](#), *Complaint and Referral Processing*.

## VI. **Programmed Inspections.**

### A. **Site-Specific Targeting (SST) Program.**

In order to achieve PEOSH's goal of reducing the number of injuries and illnesses that occur at individual worksites, the PEOSH Strategic Plan directs enforcement resources to those worksites where the highest rate of injuries and illness have occurred. The PEOSH Strategic Plan is based on the data collected by the NJ LWD Bureau of Labor Statistics.

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

Special Emphasis Programs provide for programmed inspections of establishments in workplaces with potentially high injury or illness rates that are not covered by other programmed inspection scheduling systems or, if covered, where the potentially high injury or illness rates are not addressed to the extent considered adequate under the specific circumstances. SEPs are also based on potential exposure to health hazards.

#### 1. **Identification of Special Emphasis Programs.**

The description of the particular Special Emphasis Program shall be identified by one or more of the following:

- Specific industry;
- Trade/craft;
- Substance or other hazard;
- Type of workplace operation;
- Type/kind of equipment; and
- Other indentifying characteristic.

#### 2. **Special Emphasis Program Scope.**

The reasons for and the scope of a Special Emphasis Program shall be described; and may be limited by geographic boundaries, size of worksite, or similar considerations.

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

1. Employers who participate in voluntary compliance programs may be exempt from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Director or designee will determine whether the employer is actively participating in a Cooperative Program that would impact inspection and enforcement activity at the worksite being considered for inspection. Where possible, this determination should be made prior to scheduling the inspection.
2. Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity:
  - a. Pre-SHARP and SHARP Participants;
  - b. Consultation 90-Day Deferrals.
3. **Consultation.**
  - a. **Consultation Visit in Progress.**
    - If an onsite consultation visit is in progress, it will take priority over PEOSH programmed inspections. An onsite consultation visit will be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. If an onsite consultation visit is already in progress it will terminate when the following kind of PEOSH compliance inspection is about to take place:
      - Imminent danger inspection;
      - Fatality/catastrophe inspection;
      - Complaint inspections; and/or
      - Other critical inspections, as determined by the Director.

**NOTE:** Other "such critical inspections" may include, but are not limited to, referrals as defined in [Chapter 9](#), Complaint and Referral Processing. Following an evaluation of the hazards alleged in a referral, if the Director determines that enforcement action is required prior to the end of an abatement period established by the state consultation project, the consultation visit in progress shall be immediately terminated to allow for an enforcement inspection.

- For purposes of efficiency and expediency, an employer's worksite shall not be subject to concurrent consultation and enforcement-related visits. The following excerpts from [CSP 02-00-002](#), *Consultation Policies and Procedures Manual*, Chapter 7: Relationship to Enforcement, dated January 18, 2008, to clarify the interface between enforcement and consultation activity at the worksite:
  - **Full Service OnSite Consultation Visits.**

While a worksite is undergoing a full service onsite consultation visit for safety **and** health, programmed enforcement activity may not occur until after the end of the worksite's visit "In Progress" status.

- **Full Service Safety or Health OnSite Consultation Visits.**

An onsite consultation visit "in Progress" is discipline-related, whether for safety **or** health; programmed enforcement activity may not proceed until after the end of the worksite's visit "in Progress" status, and is limited to the discipline examined, safety or health.

- **Limited Service OnSite Consultation Visits.**

If a worksite is undergoing a limited service onsite consultation visit, whether focused on a particular type of work process or a hazard, programmed enforcement activity may not proceed while the consultant is at the worksite. The re-scheduled enforcement activity must be limited only to those areas that were not addressed by the scope of the consultative visit (posted List of Hazards).

- **Enforcement Follow-Up and Monitoring Inspections.**

If an enforcement follow-up or monitoring inspection is scheduled while a worksite is undergoing an onsite consultation visit, the inspection shall not be deferred; however, its scope shall be limited only to those areas required to be covered by the follow-up or monitoring inspection. In such instances, the consultant must halt the onsite visit until the enforcement inspection is completed. In the event PEOSH issues a citation(s) as a result of the follow-up or monitoring inspection, an onsite consultation visit may not proceed until the citation(s) becomes a final order(s).

- b. **On-site Consultation and 90-Day Deferral.**

- If an establishment has requested an initial full-service comprehensive consultation visit for safety or health from the office, and that visit has been scheduled by the office, an inspection may be deferred for 90 calendar days from that date. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is "in progress."
- PEOSH may, however, in exercising its authority to schedule inspections, assign a lower priority to worksites where consultation visits are scheduled.

***NOTE:*** See [CSP 02-00-002](#), Consultation Policies and Procedures Manual, *Chapter 7: Relationship to Enforcement*, dated January 18, 2008, for additional information.

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

- a. Those employers who do not meet the SHARP requirements, but who exhibit a reasonable promise of achieving agreed-upon milestones and time frames for SHARP

participation, may be granted Pre-SHARP status. Pre-SHARP participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard identification survey, including a comprehensive assessment of the worksite's safety and health management system.

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

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

SHARP is designed to provide support and incentives to those employers that implement and continuously improve effective safety and health management system(s) at their worksite. SHARP participants are exempted from PEOSH programmed inspections, see [§1908.7\(b\)\(4\)](#).

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

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

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

As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from PEOSH's Programmed Inspection Schedule. However, the following types of incidents can trigger an OSHA enforcement inspection at SHARP sites: imminent danger; fatality/catastrophe; or formal complaints.

***NOTE:*** See [CSP 02-00-002](#), Consultation Policies and Procedures Manual, *Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and Pre-HARP*, dated January 18, 2008, for additional information.

## Chapter 3

### INSPECTION PROCEDURES

#### I. Inspection Preparation.

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

#### II. Inspection Planning.

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

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

1. Compliance Officers will carefully review data available at the office for information relevant to the establishment scheduled for inspection. This may include inspection files and source reference material relevant to the facility. CSHOs will also conduct an establishment search by accessing the IMIS database. CSHOs should use name variations and address matching in their establishment search to maximize their efforts.
2. If an establishment has an inspection history that includes citations, the CSHOs should be aware of this information. This inspection history may be used to document an employer's heightened awareness of a hazard and/or standard in order to support the development of a willful citation and may be considered in determining eligibility for the history penalty reduction. The previous citations may be used to support a repeat violation.

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

CSHOs will contact the office to obtain information about employers who are currently participating in cooperative programs. CSHOs will verify whether the employer is a current program participant during the opening conference. CSHOs will be mindful of whether they are preparing for a programmed or unprogrammed inspection, as this may affect whether the inspection should be conducted and/or its scope. See Paragraph V.C. of this chapter, Review of Voluntary Compliance Programs.

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

###### 1. Hazard Assessment.

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

NJOSH form 300 log work-related injuries and illnesses and shall select personal protective equipment accordingly.

## 2. **Respiratory Protection.**

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

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

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

CSHOs must comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by PEOSH/OSHA standards or by the employer for the protection of employees.

## 4. **Restrictions.**

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

## D. **Advance Notice.**

## 1. **Policy.**

- a. [N.J.A.C. 12:110-4.3](#) contains a general prohibition against the giving of advance notice of inspections, except as authorized by the Commissioner or designee.

- b. **Advance Notice Exceptions.**

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

- In cases of apparent imminent danger to enable the employer to correct the danger as quickly as possible;
- When the inspection can most effectively be conducted after regular business hours or when special preparations are necessary; (for example: prisons, correctional institutions, etc.)
- To ensure the presence of employer and employee representatives or other appropriate personnel who are needed to aid in the inspection; and
- When giving advance notice would enhance the probability of an effective and thorough inspection; e.g., in complex fatality investigations.

- c. **Delays.**

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

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

## 2. **Documentation.**

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

## E. **Expert Assistance.**

1. The Director or designee shall arrange for a specialist and/or specialized training, preferably from within OSHA, to assist in an inspection or investigation when the need for such expertise is identified.



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

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

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

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

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

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

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

1. A partial inspection may be expanded based on information gathered by the CSHO during the inspection process consistent with the Act and office priorities.
2. CSHOs shall use pre-determined criteria from their offices to determine the necessity for expanding the scope of an inspection, based on information gathered during records or program review and walkaround inspection.

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

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

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

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

1. At the beginning of the inspection, the CSHO shall locate the highest ranking non-elected management official at the workplace and present credentials.
2. When neither the person in charge nor a management official is present, contact may be made with the employer to request the presence of the management official. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. This delay should normally not exceed one hour. On occasions when the CSHO is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation the CSHO should contact the Director or designee for guidance. If the person in charge at

the workplace cannot be determined, record the extent of the inquiry in the case file and proceed with the physical inspection.

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

[N.J.A.C. 12:110-4.2](#) provides that CSHOs may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. Unless the circumstances constitute a recognized exception to the warrant requirement (i.e., consent, third party consent, plain view, open field, or exigent circumstances) an employer has a right to require that the CSHO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

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

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

#### **2. Employer Interference.**

Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CSHO shall determine whether or not to consider this action as a refusal. Examples of interference are refusals to permit the walkaround, the examination of records essential to the inspection, the taking of essential photographs and/or videotapes, the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices.

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

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

- a. If a CSHO is assaulted while attempting to conduct an inspection, they shall contact the proper authorities such as the State or local police and immediately notify the Director.
- b. Upon receiving a report of such forcible interference, the Director or designee shall immediately notify the Commissioner or designee.
- c. If working at an offsite location, CSHOs should leave the site immediately pending further instructions from the Director or designee.

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

If it is determined, upon refusal of entry or refusal to produce evidence required by subpoena, that a warrant will be sought, the Director shall proceed according to guidelines and procedures established for warrant applications.

#### **D. Employee Participation.**

CSHOs shall advise employers that the [PEOSH Act](#) and N.J.A.C. [12:110-4.4](#) require that an employee representative be given an opportunity to participate in the inspection.

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

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

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

#### **F. Employee Responsibilities.**

1. Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to the Act which are applicable to his own actions and conduct. The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
2. In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Director.

3. Under no circumstances are CSHOs to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. CSHOs are expected to obtain sufficient information to assess whether the employer is using its authority to ensure employee compliance with the Act. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

## **G. Strike or Labor Dispute.**

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

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

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

### **2. Unprogrammed Inspections.**

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

## **H. Variances.**

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in the Act.

1. An employer will not be subject to citation if the observed condition is in compliance with an existing variance issued to that employer.
2. In the event that an employer is not in compliance with the requirement(s) of the issued variance, a violation of the applicable standard shall be cited with a reference in the citation to the variance provision that has not been met.

## **V. Opening Conference.**

### **A. General.**

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

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

**1. Attendance at Opening Conference.**

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

**2. Scope of Inspection.**

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

**3. Video/Audio Recording.**

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

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

**4. Immediate Abatement.**

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

**5. Abbreviated Opening Conference.**

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

- a. In such cases, the opening conference shall be limited to presenting credentials, purpose of the visit, explanation of rights, and a request for employer and employee representatives. All other elements shall be fully addressed in the closing conference.
- b. Pursuant to PEOSH Act, the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace.

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

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

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

**NOTE:** *Current agency policies for applying exemptions can be found on the OSHA website. See [CPL 03-00-004](#), Petroleum Refinery Process Safety Management National Emphasis Program, dated June 7, 2007.*

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

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

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

- a. In accordance with Chapter VII of [CSP 02-00-002](#), *The Consultation Policies and Procedures Manual*, CSHOs shall ascertain at the opening conference whether a visit is in progress. A consultation Visit in Progress extends from the beginning of the opening conference to the end of the correction due dates (including extensions).
- b. An on-site consultation Visit in Progress has priority over programmed inspections except for imminent danger investigations, fatality/catastrophe investigations, complaint investigations, and other critical inspections as determined by the Director or designee.

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

- a. Upon verifying that the employer is a current participant, the CSHO shall notify the Director or designee so that the employer can be removed from the General Programmed Inspection Schedule for the approved exemption period, which begins on the date the Director approves the employer's participation in SHARP.
- b. The initial exemption period is one year. The renewal exemption period is one or two years, based on the recommendation of the Consultation Project Manager.

## D. **Disruptive Conduct.**

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

## VI. **Review of Records.**

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

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

- a. At the start of each inspection, the CSHO shall review the employer's injury and illness records for three prior calendar years, record the information on a copy of the NJOSH-300 screen, and enter the employer's data using the IMIS Application on the NCR (micro). This shall be done for all inspections and investigations.
- b. CSHOs shall use these data to calculate the Days Away, Restricted, or Transferred (DART) rate and to observe trends, potential hazards, types of operations and work-related injuries

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

- a. CSHOs shall request copies of the NJOSH-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees.
- b. If CSHOs have questions regarding a specific case on the log, they shall request the NJOSH-301s or equivalent form for that case.

- c. CSHOs shall check if the establishment has an on-site medical facility and/or the location of the nearest emergency room where employees may be treated.

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

### 3. Automatic DART Rate Calculation.

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

### 4. Manual DART Rate Calculation.

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

The formula is:

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

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

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

### 5. Construction.

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

## B. Recording Criteria.

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



1. Death;
2. Days Away from Work;
3. Restricted Work;
4. Transfer to another job;
5. Medical treatment beyond first aid;
6. Loss of consciousness;
7. Diagnosis of a significant injury or illness; or
8. Meet the recording criteria for Specific Cases noted in [§1904.8](#) through [§1904.11](#).

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

1. If there is evidence that the deficiencies or inaccuracies in the employer's records impairs the ability to assess hazards, injuries and/or illnesses at the workplace, a comprehensive records review shall be performed.
2. Other information related to this topic:
  - a. See [CPL 02-00-135](#), *Recordkeeping Policies and Procedures Manual*, dated September 3, 2004, and [CPL 02-02-072](#), *Rules of Agency Practice and Procedure concerning OSHA Access to Employee Medical Records for Policy Regarding Review of Medical and Exposure Records*, dated August 22, 2007.
  - b. Other PEOSH programs and records will be reviewed including hazard communication, lockout/tagout, emergency evacuation and personal protective equipment. Additional programs will be reviewed as necessary.
  - c. Many standard-specific directives provide additional instruction to CSHOs requesting certain records and/or documents at the opening conference.

## **VII. Walkaround Inspection.**

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

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

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

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

During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in the walkaround. The CSHO has the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. If in the judgment of the CSHO, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany CSHOs during the inspection.

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

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for PEOSH inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

**3. Safety Committee.**

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

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

The employer's safety and health system shall be evaluated to determine its good faith for the purposes of penalty calculation. See the chapter on *Penalties and Debt Collection*.

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

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

***NOTE:*** *If employee exposure to hazards is not observed, the CSHO shall document facts on which the determination is made that an employee has been or could be exposed.*

**D. Testifying in Hearings.**

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

**E. Collecting Samples.**

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

**F. Photographs and Videotapes.**

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

**G. Violations of Other Laws.**

If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency. Referrals shall be made using appropriate procedures.

**H. Interviews of Non-Managerial Employees.**

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

**1. Background.**

- a. N.J.S.A 12:110-4.6 authorizes CSHOs to question **any employee privately** during regular working hours or at other reasonable times during the course of a PEOSH inspection. The purpose of such interviews is to obtain whatever information CSHOs deem necessary or useful in carrying out inspections effectively. The mandate to interview employees in private is PEOSH's right.
- b. Employee interviews are an effective means to determine if an advance notice of inspection has adversely affected the inspection conditions, as well as to obtain information regarding the employer's knowledge of the workplace conditions or work practices in effect prior to, and at the time of, the inspection. During interviews with employees, CSHOs should ask about these matters.
- c. CSHOs should also obtain information concerning the presence and/or implementation of a safety and health system to prevent or control workplace hazards.
- d. If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Director or designee, in determining the need for the statement.

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

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

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

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

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

CSHOs shall inform employers that interviews of non-managerial employees will be conducted in private. CSHOs are entitled to question such employees in private regardless of employer preference. If an employer interferes with a CSHOs ability to do so, the CSHO should report this to the Director. Interference with a CSHOs ability to conduct private interviews with non-managerial employees includes, but is not limited to, attempts by management officials or representatives to be present during interviews.

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

### **a. General Protocols.**

- At the beginning of the interview CSHOs should identify themselves to the employee by showing their credentials, and provide the employee with a business

card. This allows employees to contact CSHOs if they have further information at a later time.

- CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection. It is not appropriate to assume that employees already know or understand the agency's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, CSHOs should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If an interpreter is needed, CSHOs should contact the Director.
- Every employee should be asked to provide his or her name, home address and phone number. CSHOs should request identification and make clear the reason for asking for this information.
- CSHOs shall inform employees that PEOSH has the right to interview them in private and of the protections afforded under the Act.
- In the event an employee requests that a representative of the union be present, CSHOs shall make a reasonable effort to honor the request.
- If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Director for guidance.
- Rarely, an attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Director.

**b. Interview Statements.**

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

- Any changes or corrections to the statement shall be initialed by the individual. Statements shall not otherwise be changed or altered in any manner.
- Statements shall include the words, "I request that my statement be held confidential to the extent allowed by law" and end with the following; "I have read the above, and it is true to the best of my knowledge."
- If the person making the declaration refuses to sign, the CSHO shall note the refusal on the statement. The statement shall, nevertheless, be read back to the person in an attempt to obtain agreement and noted in the case file.

- A transcription of any recorded statement shall be made when necessary to the case.
- Upon request, if a management employee requests a copy of his/her interview statement, one shall be given to them.

**c. The Informant Privilege.**

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

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

- The privilege also protects the contents of statements to the extent that disclosure may reveal the witness's identity. Where the contents of a statement will not disclose the identity of the informant (i.e., does not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply. Interviewed employees shall be told that they are under no legal obligation to inform anyone, including employers, that they provided information to PEOSH. Interviewed employees shall also be informed that if they voluntarily disclose such information to others, it may impair the agency's ability to invoke the privilege.

**I. Multi-Employer Worksites.**

On multi-employer worksites (in all industry sectors), more than one employer may be cited for a hazardous condition that violates an OSHA/PEOSH standard. A two-step process must be followed in determining whether more than one employer is to be cited. See [CPL 02-00-124](#), *Multi-Employer Citation Policy*, dated December 10, 1999, for further guidance.

**J. Administrative Subpoena.**

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

**K. Employer Abatement Assistance.**

**1. Policy.**

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

## 2. **Disclaimers.**

The employer shall be informed that:

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

## **VIII. Closing Conference.**

### **A. Participants.**

At the conclusion of an inspection, CSHOs shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. The closing conference may be conducted on-site or by telephone as CSHOs deem appropriate. If the employer refuses to allow a closing conference, the circumstances of the refusal shall be documented in the narrative and the case shall be processed as if a closing conference had been held.

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

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

1. CSHOs shall discuss the apparent violations and other pertinent issues found during the inspection and note relevant comments on the 1B, including input for establishing correction dates.
2. CSHOs shall give employers the publication, "Employer Rights and Responsibilities Following a PEOSH Inspection," which explains the responsibilities and courses of action available to the employer if a citation is issued. They shall then briefly discuss the information in the booklet and answer any questions. All matters discussed during the closing conference shall be documented in the case file, including a note describing printed materials distributed.
3. CSHOs shall discuss the strengths and weaknesses of the employer's occupational safety and health system and any other applicable programs, and advise the employer of the

benefits of an effective program(s) and provide information, such as, OSHA's and PEOSH's website, describing program elements.

4. Both the employer and employee representatives shall be advised of their rights to participate in any subsequent conferences, meeting or discussions, and their contest rights. Any unusual circumstances noted during the closing conference shall be documented in the case file.
5. Since CSHOs may not have all pertinent information at the time of the first closing conference, a second closing conference may be held by telephone or in person.
6. CSHOs shall advise employee representatives that:
  - a. Under N.J.A.C. 12:110-4.13 if an employer contests a citation, the employees shall be afforded an opportunity to participate;
  - b. The employer should notify them if a notice of contest or a petition for modification of abatement date is filed;
  - c. They have a right to contest the abatement date. Such contests must be in writing and must be postmarked within 15 working days after receipt of the citation.

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

1. The CSHO shall advise those attending the closing conference that a request for an informal conference with the Director is encouraged as it provides an opportunity to:
  - a. Resolve disputed citations and penalties without the need for litigation which can be time consuming and costly;
  - b. Obtain a more complete understanding of the specific safety or health standards which apply;
  - c. Discuss ways to correct the violations;
  - d. Discuss issues concerning proposed penalties;
  - e. Discuss proposed abatement dates;
  - f. Discuss issues regarding employee safety and health practices; and
  - g. Learn more of other PEOSH/OSHA programs and services available.
2. If a citation is issued, an informal conference or the request for one does not extend the 15 working-day period in which the employer or employee representatives may contest.
3. Verbal disagreement with, or intent to, contest a citation, penalty or abatement date during an informal conference does not replace the required written Notice of Intent to Contest.
4. Employee representatives have the right to participate in informal conferences or negotiations between the Director and the employer.

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



CSHOs shall explain that penalties must be paid within 30 calendar days after the employer receives a penalty order to comply. If, however, an employer contests the citation and/or the penalty, penalties need not be paid for the contested items until the final order date.

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

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

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

###### *a. Engineering Controls.*

Consist of substitution, isolation, ventilation and equipment modification.

###### *b. Administrative Controls.*

Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is not considered a means of administrative control.

###### *c. Work Practice Controls.*

A type of administrative controls by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

###### *d. Feasibility.*

Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.

###### *e. Technical Feasibility.*

The existence of technical know-how as to materials and methods available or adaptable to specific circumstances, which can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced.

###### *f. Economic Feasibility.*

Means that the employer is financially able to undertake the measures necessary to abate the citations received.

**NOTE:** *If an employer's level of compliance lags significantly behind that of its industry, allegations of economic infeasibility will not be accepted.*

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

- a. CSHOs shall document the underlying facts which give rise to an employer's claim of infeasibility.
- b. When economic infeasibility is claimed, the CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it may be considered during an informal conference or during settlement negotiations.
- c. Complex issues regarding feasibility should be referred to the Director or designee for determination.

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

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

## **G. Abatement Verification.**

During the closing conference the Compliance Officer should thoroughly explain to the employer the abatement verification requirements.

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

Abatement certification is required for all citation item(s) which the employer received except for those citation items which are identified as "Corrected During Inspection."

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

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

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

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

### **4. Placement of Abatement Verification Tags.**

The required placement of abatement verification tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walkaround portion of the inspection.

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

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

## **H. Employee Discrimination.**

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

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

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

1. The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These type of inspections will not normally be conducted when evidence of abatement is provided by the employer or employee representatives.
2. **Failure to Abate.**
  - a. A failure to abate exists when a previously cited violation continues unabated and the abatement date has passed or the abatement date is covered under a settlement agreement, or the employer has not complied with interim measures within the allotted time specified in a long-term abatement plan.
  - b. If previously cited items have not been corrected, a penalty order to comply shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the Director shall be consulted for further guidance.

***NOTE:*** *If the employer has demonstrated a good faith effort to comply, a late Petition for Modification of Abatement (PMA) may be considered.*

- c. If an originally cited violation has at one point been abated but subsequently recurs, a citation for a repeated violation may be appropriate.
3. **Reports.**
  - a. For any items found to be abated, a copy of the previous OSHA-1B, or citation can be notated with "corrected" written on it, along with a brief explanation of the abatement measures taken,. This information may alternately be included in the narrative of the investigative file.
  - b. In the event that any item has not been abated, complete documentation shall be included on an OSHA-1B.

#### **4. Follow-up Files.**

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

### **B. Construction Inspections.**

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

The standards published as [29 CFR Part 1926](#) have been adopted as occupational safety and health standards. They shall apply to every employment and place of employment of every employee engaged in construction work, including non-contract construction.

#### **2. Definition.**

The term "construction work" as defined by [§1926.32\(g\)](#) means work for construction, alteration, and/or repair, including painting and decorating. These terms are also discussed in [§1926.13](#). If any question arises as to whether an activity is deemed to be construction for purposes of the Act, the Chief of enforcement shall be consulted.

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

a. Inspections of employers in the construction industry are not easily separable into distinct worksites. The worksite is generally the site where the construction is being performed (e.g., the roadway). Where the construction site extends over a large geographical area (e.g., 1 mile stretch of road), the entire job will be considered a single worksite.

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

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

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

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

## Chapter 4

### VIOLATIONS

#### I. Basis of Violations.

##### A. Standards and Regulations.

1. The Act states that each employer has a responsibility to comply with occupational safety and health standards promulgated under the Act, which includes standards incorporated by reference. Only the mandatory provisions, i.e., those containing the word “shall” or other mandatory language of standards incorporated by reference, are adopted as standards under the Act.
2. The specific standards and regulations are found in [N.J.A.C. 12:100](#) and Title 29 Code of Federal Regulations (CFR) 1900 series. The standards serve as the basis of violations. Standards are subdivided as follows per the preferred Federal Register nomenclature:

<b>Subdivision Naming Convention</b>	<b>Example</b>
Title	29
Part	1910
Subpart	D
Section	1910.23
Paragraph	1910.23(c)
Paragraph	1910.23(c)(1)
Paragraph	1910.23(c)(1)(i)

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

#### 3. Definition and Application of Vertical and Horizontal Standards.

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

#### 4. Application of Horizontal and Vertical Standards.

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

- a. When a hazard in a particular industry is covered by both a vertical (e.g., [29 CFR 1915](#)) and a horizontal (e.g., [29 CFR 1910](#)) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.

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

**EXAMPLE 4-1:** When employees are connecting structural steel, [§1926.501\(b\)\(15\)](#) may not be cited for fall hazards above 6 feet since that specific situation is covered by [§1926.760\(b\)\(1\)](#) for fall distances of more than 30 feet.

- c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal (general industry) standard.
- d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.
- e. Hazards found in construction work that are not covered by a specific [29 CFR 1926](#) standard shall not normally be cited under [29 CFR 1910](#) unless that standard has been identified as being applicable to construction. See Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, [58 FR 35076](#) (June 30, 1993).
- f. If a question arises as to whether an activity is deemed construction for purposes of the Act, contact the Director. See [§1910.12](#), Construction Work.

## 5. Violation of Variances.

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in the Act.

- a. In the event that the employer is not in compliance with the requirements of the variance, a violation of the controlling standard shall be cited with a reference in the citation to the variance provision that has not been met.
- b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Director or designee shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition may be issued.

## B. Employee Exposure.

A hazardous condition that violates a PEOSH/OSHA standard or the general duty clause shall be cited only when employee exposure can be documented. The exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled PEOSH, in which case the citation must be issued within six months from the date

when PEOSH learns, or should have known, of the condition. The Director should be consulted in such cases.

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

Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not be the key factor. Determining the employer of exposed employees may be a complex issue, in which case the Director shall be consulted.

**2. Proximity to the Hazard.**

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

**3. Observed Exposure.**

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

**4. Unobserved Exposure.**

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

**a. Past Exposure.**

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

- The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;
- It is reasonably predictable that employee exposure to a hazardous condition could recur when:
  - The employee exposure has occurred in the previous six months;

- The hazardous condition is an integral part of an employer's normal operations; and
- The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

**b. Potential Exposure.**

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

- When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
- When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area; or
- When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work; *however*
- If the inspection reveals an adequately communicated *and* effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

**c. Documenting Employee Exposure.**

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

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



### C. Regulatory Requirements.

Violations of 29 CFR [Part 1903](#) and [Part 1904](#) shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided by agency policy. See also [CPL 02-00-111](#), *Citation Policy for Paperwork and Written Program Violations*, dated November 27, 1995.

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

### D. PEOSH Hazard Communication.

[N.J.A.C. 12:100-7](#) requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See [CPL 02-02-038](#), *Inspection Procedures for the Hazard Communication Standard*, dated March 20, 1998.

### E. Employer/Employee Responsibilities.

#### 1. Employer Responsibilities.

The Act [Section 34:6A-33](#) states: “Every employer shall provide each of his employees with employment and a place of employment which are free from recognized hazards which may cause serious injury, physical harm or death to his employees”.

#### 2. Employee Responsibilities.

a. N.J.S.A. 34:6A-34 of The Act states: “Each employee shall comply with occupational safety and health standards and all regulations promulgated under this Act which are applicable to his own actions and conduct.” The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Director.

c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Act. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

#### 3. Affirmative Defenses.

An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative

defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence to rebut an employer's potential argument supporting any such defenses.

#### 4. **Multi-Employer Worksites.**

On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates a PEOSH/OSHA standard. For specific and detailed guidance, see the multiemployer policy contained in [CPL 02-00-124](#), *Multi-Employer Citation Policy*, dated December 10, 1999.

## II. **Serious Violations-N.J.A.C. 12:110-2.1**

“Serious” violation means a hazard, violation or condition evidencing a substantial probability that death or serious physical harm could result.

### A. **Establishing Serious Violations.**

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

### B. **Four Steps to be Documented.**

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

The first step is to identify the type of potential exposures to a hazard that the violated standard or the general duty clause is designed to prevent.

- a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness **resulting** from a potential accident or hazardous exposure.

- b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that hazard.
- c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

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

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

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

## 2. The Type of Injury or Illness.

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

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

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

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

- c. For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. [CPL 02-02-043](#), *The Chemical Information Manual*, dated July 1, 1991, shall be used to determine both toxicological properties of substances listed and a Health Code Number.

- d. In order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:
- The nature of the operation from which the exposure results;
  - Whether the exposure is regular and on-going or is of limited frequency and duration;
  - How long employees have worked at the operation in the past;
  - Whether employees are performing functions which can be expected to continue; and
  - Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.
- e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are some examples of illnesses that could reasonably result from exposure to a health hazard:

**EXAMPLE 4-7:** If an employee is exposed regularly to methylene chloride at 100 ppm, it is reasonable to predict that cancer could result.

**EXAMPLE 4-8:** If an employee is exposed regularly to acetic acid at 20 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

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

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

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

- a. Injuries that constitute serious physical harm include, but are not limited, to:
- Amputations (loss of all or part of a bodily appendage);

- Concussion;
  - Crushing (internal, even though skin surface may be intact);
  - Fractures (simple or compound);
  - Burns or scalds, including electric and chemical burns;
- Cuts, lacerations, or punctures involving significant bleeding and/or requiring suturing;
  - Sprains and strains; and
  - Musculoskeletal disorders.
- b. Illnesses that constitute serious physical harm include, but are not limited, to:
- Cancer;
  - Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
  - Hearing impairment;
  - Central nervous system impairment;
  - Visual impairment; and
  - Poisoning.
- c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

**EXAMPLE 4-9:** If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

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

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

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

#### 4. Knowledge of Hazardous Condition.

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

- a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation. Examples include the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

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

### III. General Duty Requirements.

[Section 34:6A-33\(a\)](#) of the Act requires that “Every employer shall provide each of his employees with employment and a place of employment which are free from recognized hazards which may cause serious injury, physical harm or death to his employees”.

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

In general, Review Commission and court precedent have established that the following elements are necessary to prove a violation of the general duty clause:

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

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

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

## 1. Definition of a Hazard.

- a. The hazard in a general duty citation is a *workplace condition* or practice to which employees are exposed, creating the *potential for death or serious physical harm* to employees.
- b. These conditions or practices must be **clearly stated in a citation** so as to apprise employers of their obligations and must be ones the employer can reasonably be expected to prevent. The hazard must therefore be defined in terms of the **presence of hazardous conditions or practices** that present a particular danger to employees.

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

- a. General duty clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures but rather addresses the failure to prevent or remove a particular hazard. The general duty clause therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to utilize.
- b. In situations where a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Director shall be consulted for assistance in correctly identifying the hazard.

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

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

**EXAMPLE 4-14:** In a workplace situation involving high-pressure machinery that vents gases next to a work area where the employer has not installed proper high-pressure equipment, has improperly installed the equipment that is in place, and does not have adequate work rules addressing the dangers of high pressure gas, there are three abatement measures the employer has failed to take. However, there is only one hazard (i.e., employee exposure to the venting of high-pressure gases into a work area that may cause serious burns from steam discharges).

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

- a. The occurrence of an accident/incident does not necessarily mean that the employer has violated the general duty clause, although the accident/incident may be evidence of a

hazard. In some cases a general duty clause violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the **hazard in the workplace that existed prior to the accident/incident**, not the particular facts that led to the occurrence of the accident/incident.

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

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

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

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

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

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

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

- a. The employees exposed to the general duty hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a general duty violation if his own employees are not exposed to the hazard.
- b. In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Director shall be consulted to determine the sufficiency of the evidence regarding the employment relationship.



- c. The fact that an employer denies that exposed workers are his/her employees is not necessarily determinative of the employment relationship issue. Whether or not exposed persons are employees of an employer depends on several factors, the most important of which is who controls the manner in which the employees perform their assigned work. The question of who pays employees in and of itself may not be the determining factor to establish a relationship.

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

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

### a. **Employer Recognition.**

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

**NOTE:** CSHOs are to gather as many of these facts as possible to support establishing a general duty violation.

### b. **Industry Recognition.**

- A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a general duty violation. Although

evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Director shall be consulted on this issue. Industry recognition of a hazard can be established in several ways:

- Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);
  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
  - Manufacturers' warnings on equipment or in literature that are relevant to the hazard;
  - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;
  - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
  - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended; and/or
  - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards **cannot** be enforced as PEOSH/OSHA standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.
- In cases where State and local government agencies have codes or regulations covering hazards not addressed by PEOSH/OSHA standards, the Director shall determine whether the hazard is to be cited under general duty or referred to the appropriate local agency for enforcement.

**EXAMPLE 4-18:** A safety hazard on a personnel elevator in a factory is documented during an inspection. It is determined that the hazard may not be cited under [general duty](#), but there is a local code that addresses this hazard and a local agency actively enforces the code. The situation normally shall be referred to the local enforcement agency in lieu of citing 5(a)(1).

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

c. **Common Sense Recognition.**

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

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

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

- a. This element of a general duty violation is virtually identical to the substantial probability element of a serious violation under [Section 17\(k\)](#) of the OSHA Act. Serious physical harm is defined in [Paragraph II.C.3.](#) of this chapter.
- b. This element of a general duty violation can be established by showing that:
  - An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
  - If an accident/incident occurred, the likely result would be death or serious physical harm.

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

- c. In the health context, establishing serious physical harm at the cited levels may be challenging if the potential for illness/harm requires the passage of a substantial period of time. In such cases, expert testimony is crucial to establish there is probability that long-term serious physical harm will occur from such illnesses or harm. It will generally be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death

or serious physical harm when such illness or death will occur only after the passage of time:

- Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;
- An illness reasonably could result from such regular and continuing employee exposures; and
- If illness does occur, its likely result is death or serious physical harm.

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

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

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

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

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

### C. Use of the General Duty Clause.

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

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

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

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

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

#### D. Limitations of Use of the General Duty Clause.

General Duty is to be used only within the guidelines given in this chapter.

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

As discussed above, general duty may not be cited if a PEOSH/OSHA standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Director shall be consulted.

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

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

**EXAMPLE 4-25:** A standard provides for a permissible exposure limit (PEL) of 5 ppm. Even if data establish that a 3 ppm level is a recognized hazard, general duty shall not be cited to require that the lower level be achieved. If the standard has only a time-weighted average permissible exposure level and the hazard involves exposure above a recognized ceiling level, the Director shall be consulted.

**NOTE:** An exception to this rule may apply if it can be proven that “an employer knows a particular safety or health standard is inadequate to protect his employees against the specific hazard it is intended to address.” See, *Int. Union UAW v. General Dynamics Land Systems Division*, 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review.

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

If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, general duty shall not be cited to additionally require medical surveillance. The Director shall evaluate the circumstances of special situations in accord with guidelines stated herein to determine whether a general duty citation can be issued in those special cases.

##### 4. Alternative Standards.

The following standards shall be considered carefully before issuing a general duty citation for a health hazard.

- a. There are a number of general standards that shall be considered rather than general duty in situations where the hazard is not covered by a particular standard. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited. In

general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.

- b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in §1910.1000 in general industry and in §1926.55 for construction.
- c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.
- d. Violations of §1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

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

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

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

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

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

- a. The evidence necessary to establish each element of a general duty violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.
- b. If copies of documents relied on to establish the various general duty elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.
- c. If experts are necessary to establish any element(s) of a general duty violation, such experts and the Director shall be consulted **prior to the citation being issued** and their opinions noted in the file.

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

The Director shall review and approve all proposed general duty citations.

- a. If a standard does not apply and all criteria for issuing a general duty citation are not met, yet the Director determines that the hazard warrants some type of notification, a

Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

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

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

#### **V. Willful Violations.**

A willful violation exists under the Act where an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee safety and health. The Director shall be consulted when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

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

An employer commits an intentional and knowing violation if:

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

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

3. A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard. See the internal [memorandum](#) on Procedures for Significant Cases, and [CPL 02-00-080, Handling of Cases to be Proposed for Violation-by-Violation](#), dated October 21, 1990.

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

##### **B. Plain Indifference Violations.**

1. An employer commits a violation with plain indifference to employee safety and health where:
  - a. Management officials were aware of a PEOSH/OSHA requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.



- b. Management officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

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

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

**NOTE:** *Voluntary employer self-audits that assess workplace safety and health conditions shall not normally be used as a basis of a willful violation. However, once an employer's self-audit identifies a hazardous condition, the employer must promptly take appropriate measures to correct a violative condition and provide interim employee protection. See OSHA's Policy on Voluntary Employer Safety and Health Self-Audits (Federal Register, July 28, 2000 (65 FR 46498)).*

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

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

- 2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.
- 3. CSHOs shall develop and record on the OSHA 1B all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:
  - a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;
  - b. Any precautions taken by the employer to limit the hazardous conditions;
  - c. The employer's awareness of the Act and of its responsibility to provide safe and healthful working conditions; and
  - d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from PEOSH or

officials from other government agencies or an employee safety committee regarding the requirements of a standard.

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

## **VI. Repeated Violations.**

### **A. Identical Standards.**

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

**EXAMPLE 4-28:** A citation was previously issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hardhats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar and therefore a repeated violation would not be appropriate.

### **B. Different Standards.**

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

**EXAMPLE 4-29:** A citation was previously issued for a violation of §1910.28(d)(7) for not installing standard guardrails on a tubular welded frame scaffold platform. A recent inspection of the same employer reveals a violation of §1910.28(c)(14) for not installing guardrails on a tube and coupler scaffold platform. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar, and therefore a repeated violation would be appropriate.

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

### **C. Obtaining Inspection History.**

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

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

- a. When high gravity serious violations are to be cited, the Director shall obtain a history of citations previously issued to this employer at all of its identified establishments statewide.
- b. If these violations have been previously cited within the time limitations as described below and have become final orders of the Review Commission, a repeated citation may be issued.

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

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

**D. Time Limitations.**

1. Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed. A citation will be issued as a repeated violation if:
  - a. The citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later; and
  - b. If the previous citation was contested, within 3 years of the Review Commission's final order or the Court of Appeals final mandate.
2. When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty.

**EXAMPLE 4-30:** An inspection is conducted in an establishment and a violation of [§1910.217\(c\)\(1\)\(i\)](#) is found. That citation is not contested by the employer and becomes a final order of the Commission on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second instance repeated.

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

**E. Repeated v. Failure to Abate.**

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

**F. Director Responsibilities.**

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

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section;
2. Ensure that the case file includes a copy of the citation for the prior violation, the OSHA-1Bs describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not

available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file. The file shall also include all documents showing that the citation is a final order and on what date it became final (i.e., if the case was not contested, the **certified mail card** (final 15 working days from employer's receipt of the citation), **signed Informal Settlement** (final 15 working days from when *both* parties signed) or **Formal Settlement Agreements and Notice of Docketing** (final 30 days after docketing date), or **Judge's Decision and Notice of Docketing** (final 30 days after docketing));

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

The (employer name) was previously cited for a violation of this occupational safety and health standard or its equivalent standard (name previously cited standard), which was contained in OSHA inspection number\_\_\_\_\_, citation number\_\_\_\_\_, item number\_\_\_\_\_ and was affirmed as a final order on (date), with respect to a workplace located at\_\_\_\_\_.

## **VII. De Minimis Conditions.**

De minimis conditions are those where an employer has implemented a measure different than one specified in a standard, that has no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented in the same manner as violations.

### **A. Criteria.**

The criteria for finding a de minimis condition are as follows:

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

**EXAMPLE 4-31:** §1910.27(b)(1)(ii) allows 12 inches as the maximum distance between ladder rungs. Where the rungs are 13 inches apart, the condition is de minimis.

**EXAMPLE 4-32:** §1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

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

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

Professional judgment should be exercised in determining whether noncompliance with a standard constitutes a de minimis condition.

#### **C. Director Responsibilities.**

The Director shall ensure that all proposed de minimis notices meet the criteria set out above.

### **VIII. Citing in the Alternative.**

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

**EXAMPLE 4-33:** The facts which support a violation of [§1910.28\(a\)\(1\)](#) may also support a violation of [§1910.132\(a\)](#), if no scaffolding is provided and the use of safety belts is not required by the employer.

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

### **IX. Combining and Grouping Violations.**

#### **A. Combining.**

Separate violations of a single standard, for example [§1910.212\(a\)\(3\)\(ii\)](#), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the SAVEs of the same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation.

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

## **B. Grouping.**

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

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

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

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

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

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

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

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

If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the OSHA 2.

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

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

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

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

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

### **3. General Duty Clause.**

Because a general duty citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate general duty violations. This policy, however, does not prohibit grouping a general duty violation with a related violation of a specific standard.

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

Violations, which are proposed as instance-by-instance citations, shall not normally be combined or grouped. See [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990.

### **X. Health Standard Violations.**

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

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

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

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

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

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

###### **a. Adequate Ventilation.**

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

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

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

**b. Citation Policy.**

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

- The standard's requirements have not been met, violations of the applicable ventilation standard normally shall be cited as serious.
- If there is no applicable ventilation standard, general duty of the Act shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

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

Current enforcement policy regarding [§1910.95\(b\)\(1\)](#) allows employers to rely on personal protective equipment and a hearing conservation program, rather than engineering and/or administrative controls, when hearing protectors will effectively attenuate the noise to which employees are exposed to acceptable levels. (See Tables G-16 or G-16a of the standard).

1. Citations for violations of [§1910.95\(b\)\(1\)](#) shall be issued when technologically and economically feasible engineering and/or administrative controls have not been implemented; and
  - a. Employee exposure levels are so elevated that hearing protectors alone may not reliably reduce noise levels received to levels specified in Tables G-16 or G-16a of the standard. (e.g., Hearing protectors which offer the greatest attenuation may reliably be used to protect employees when their exposure levels border on 100 dba). See [CPL 02-02-035](#), *29 CFR 1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A*, dated December 19, 1983; or
  - b. The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.
2. When an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees, no additional controls may be necessary. In making this assessment, factors such as exposure levels present, number of employees tested, and duration of the testing program shall be considered.
3. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program, or results of audiometric testing indicate that the employer's existing program is inadequate, the CSHO shall consider whether:
  - a. Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.



- b. An effective hearing conservation program can be established or improvements made in an existing program which could bring the employer into compliance with Tables G-16 or G-16a.
  - c. Engineering and/or administrative controls are both technically and economically feasible.
4. If noise workplace levels can be reduced to the levels specified in Tables G-16 or 16a by means of hearing protectors along with an effective hearing conservation program, a citation for any missing program elements shall be issued rather than for lack of engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot reasonably be expected to reduce exposures, but feasible controls exist to address the hazard, then §1910.95(b)(1) shall be cited.
  5. When hearing protection is required but not used and employee exposures exceed the limits of Table G-16, §1910.95(i)(2)(i) shall be cited and classified as serious (see (8), below) whether or not the employer has instituted a hearing conservation program. §1910.95(a) shall no longer be cited except in the case of the oil and gas drilling industry.

**NOTE:** Citations of §1910.95(i)(2)(ii)(b) shall also be classified as serious.

6. Where an employer has instituted a hearing conservation program and a violation of one or more elements (other than §1910.95(i)(2)(ii)(b) or (i)(2)(ii)(b)) is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dB.
7. If an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for §1910.95(c) only shall be issued.
8. Violations of §1910.95(i)(2)(i) may be grouped with violations of §1910.95(b)(1) and classified as serious when employees are exposed to noise levels above the limits of Table G-16 and:
  - a. Hearing protection is not utilized or is not adequate to prevent overexposures; or
  - b. There is evidence of hearing loss that could reasonably be considered:
    - To be work-related, and
    - To have been preventable, if the employer had been in compliance with the cited provisions.
9. No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented a hearing conservation program.

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

If an inspection reveals the presence of potential respirator violations, [CPL 02-00-120](#), *Inspection Procedures for the Respiratory Protection Standard*, dated September 25, 1998, shall be followed.

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

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

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

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

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

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

Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described earlier in this chapter.

- a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard at any level above the Permissible Exposure Limit

(PEL). Substances in categories 6, 8 and 12, however, are not considered serious at levels where only mild, temporary effects would be expected to occur.

- b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.
- c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where serious a health effect(s) could be expected to occur.
- d. For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no OSHA PEL, a citation for exposure in excess of the recommended value may be considered under general duty of the Act. Prior to citing a general duty violation under these circumstances, it is essential that CSHOs document that a *hazardous exposure* is occurring or has occurred at the workplace, not just that a recognized occupational exposure recommendation has been exceeded. See instructions in this chapter regarding *General Duty Requirements*.
- e. If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.

**NOTE:** *An exception to this may apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his workers against the specific hazard it is intended to address.*

- f. For a substance having an 8-hour PEL with no ceiling PEL but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Director. If no citation is issued, CSHO shall advise employers that a ceiling value is recommended.

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

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

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

The following guidelines apply when citing personal hygiene violations:

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

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

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

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

A citation for exposure to materials that may be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary, but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, a general duty citation may be considered. Engineering or administrative (including work practice) controls may be required in these cases to prevent the hazard. See [§1910.132\(a\)](#).

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

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

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

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

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

### **XIV. Biological Monitoring.**

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

## Chapter 5

### CASE FILE PREPARATION AND DOCUMENTATION

#### I. Introduction.

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

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

All case files must include the following forms and documents.

##### A. OSHA-1.

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

##### B. OSHA-1A.

The OSHA-1A shall list the following:

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

11. Names, Addresses and Phone Numbers of other persons contacted during the inspection, such as the police, coroner, attorney, etc.;
12. Names and Job Titles of any individuals who accompanied the CSHO on the inspection;
13. Calculation of the DART rate (at least three full calendar years and the current year);
14. Discussion clearly addressing all items on the Complaint or Referral;
15. Type of Legal Entity [State, County, Municipality, and/or Utility Authority]
16. Coverage Information.

**C. OSHA-1B.**

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

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



- m. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CSHO. Abatement periods exceeding 30 days shall not normally be offered, particularly for simple safety violations. Situations may arise, however, especially for complex health or program violations, where abatement cannot be completed within 30 days (e.g., ventilation equipment needs to be installed, new parts or equipment need to be ordered, delivered and installed or a process hazard analysis needs to be performed as part of a PSM program). When an initial abatement date is granted that is in excess of 30 calendar days, the reason should be documented in the case file.
3. Records obtained during the course of the inspection which the CSHO determines are necessary to support the violations.
4. For violations classified as repeated, the file shall include a copy of the previous citation(s) on which the repeat classification is based and documentation of the final order date of the original citation.

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

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

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

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

### **V. Health Inspections.**

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

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

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

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

**1. Monitoring.**

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

**2. Medical.**

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

**3. Records Program.**

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

**4. Engineering Controls.**

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

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

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

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

**6. Personal Protective Equipment.**

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

**7. Regulated Areas.**

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

## 8. **Emergency Action Plan.**

CSHOs shall evaluate the employer's emergency action plan when such a plan is required by a specific standard. When standards provide that specific emergency procedures be developed where certain hazardous substances are handled, CSHO's evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

## VI. **Affirmative Defenses.**

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

### A. **Burden of Proof.**

Although employers have the burden of proving any affirmative defenses at the time of a hearing, CSHOs must anticipate when an employer is likely to raise an argument supporting such a defense. CSHOs shall keep in mind all potential affirmative defenses and attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate raising a defense/excuse against the violation(s). CSHOs shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Director or designee.

### B. **Explanations.**

The following are explanations of common affirmative defenses.

#### 1. **Unpreventable Employee or Supervisory Misconduct or "Isolated Event."**

- a. To establish this defense in most jurisdictions, employers must show all the following elements:
  - A work rule adequate to prevent the violation;
  - Effective communication of the rule to employees;
  - Methods for discovering violations of work rules; and
  - Effective enforcement of rules when violations are discovered.
- b. CSHOs shall document whether these elements are present, including if the work rule at issue tracks the requirements of the standard addressing the hazardous condition.

**EXAMPLE 5-1:** An unguarded table saw is observed. The saw, however, has a guard which is reattached while the CSHO watches. Facts to be documented include:

- Who removed the guard and why?

- Did the employer know that the guard had been removed?
- How long or how often had the saw been used without the guard?
- Were there any supervisors in the area while the saw was operated without a guard?
- Did the employer have a work rule that the saw only be operated with the guard on?
- How was the work rule communicated to employees?
- Did the employer monitor compliance with the rule?
- How was the work rule enforced by the employer when it found noncompliance?

## 2. **Impossibility/Infeasibility of Compliance.**

Compliance with the requirements of a standard is impossible or would prevent performance of required work **and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available.**

**EXAMPLE 5-2:** An unguarded table saw is observed. The employer states that a guard would interfere with the nature of the work. Facts to be documented include:

- Would a guard make performance of the work impossible or merely more difficult?
- Could a guard be used some of the time or for some of the operations?
- Has the employer attempted to use a guard?
- Has the employer considered any alternative means of avoiding or reducing the hazard?

## 3. **Greater Hazard.**

Compliance with a standard would result in a greater hazard(s) to employees than would noncompliance **and** the employer took reasonable alternative protective measures, or there are no alternative means of employee protection. Additionally, an application for a variance would be inappropriate.

**EXAMPLE 5-3:** The employer indicates that a saw guard had been removed because it caused the operator to be struck in the face by particles thrown from the saw. Facts to be documented include:

- Was the guard initially properly installed and used?
- Would a different type of guard eliminate the problem?
- How often was the operator struck by particles and what kind of injuries resulted?

- Would personal protective equipment such as safety glasses or a face shield worn by the employee solve the problem?
- Was the operator's work practice causing the problem and did the employer attempt to correct the problem?
- Was a variance requested?

## **VII. Interview Statements.**

### **A. Generally.**

Interview statements of employees or other individuals shall be obtained to adequately document a potential violation. Statements shall normally be in writing and the individual shall be encouraged to sign and date the statement. During management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes whenever possible as these tend to be more credible than later general recollections.

### **B. CSHOs shall obtain written statements when:**

1. There is an actual or potential controversy as to any material facts concerning a violation;
2. A conflict or difference among employee statements as to the facts arises;
3. There is a potential willful or repeated violation; and
4. In accident investigations, when attempting to determine if potential violations existed at the time of the accident.

### **C. Language and Wording of Statement.**

Interview statements shall normally be written in the first person and in the language of the individual when feasible. (Statements taken in a language other than English shall be subsequently translated.) The wording of the statement shall be understandable to the individual and reflect only the information that has been brought out in the interview. The individual shall initial any changes or corrections to the statement; otherwise, the statement shall not be modified, added to or altered in any way. The statement shall end with the wording: "I have read the above, or the statement has been read to me, and it is true to the best of my knowledge." Where appropriate, the statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." Only the individual interviewed may later waive the confidentiality of the statement. The individual shall sign and date the interview statement and the CSHO shall sign it as a witness.

### **D. Refusal to Sign Statement.**

If the individual refuses to sign the statement, the CSHO shall note such refusal on the statement. Statements shall be read to the individual and an attempt made to obtain an agreement. A note to this effect shall be documented in the case file. Recorded statements shall be transcribed whenever possible.

#### **E. Video and Audiotaped Statements.**

Interview statements may be videotaped or audiotaped, with the consent of the person being interviewed. The statement shall be reduced to writing in egregious, fatality/catastrophe, willful, repeated, failure to abate, and other significant cases so that it may be signed. CSHOs are encouraged to produce the written statement for correction and signature as soon as possible, and identify the transcriber.

#### **F. Administrative Depositions.**

When necessary to document or develop investigative facts, a management official or other individual may be administratively deposed.

***NOTE:*** See [Chapter 3](#), Interviews of Non-Managerial Employees, for additional guidance regarding interviews of nonmanagerial employees.

### **VIII. Paperwork and Written Program Requirements.**

In certain cases, violations of standards requiring employers to have a written program to address a hazard or make a written certification (e. g., hazard communication, personal protective equipment, permit required confined spaces and others) are considered paperwork deficiencies. However, in some circumstances, violations of such standards may have an adverse impact on employee safety and health. See [CPL 02-00-111](#), *Citation Policy for Paperwork and Written Program Requirement Violations*.

### **IX. Guidelines for Case File Documentation for Use with Videotapes and Audiotapes.**

The use of videotaping as a method of documenting violations and of gathering evidence for inspection case files is encouraged. Certain types of inspections, such as fatalities, imminent danger and ergonomics shall include videotaping. Other methods of documentation, such as handwritten notes, audiotaping, and photographs, continue to be acceptable and are encouraged to be used whenever they add to the quality of the evidence and whenever videotaping equipment is not available. See [CPL 02-00-098](#), *Guidelines for Case File Documentation for use with Videotapes and Audiotapes*, dated October 12, 1993.

### **X. Case File Activity Diary Sheet.**

All case files shall contain an activity diary sheet, which is designed to provide a ready record and summary of all actions relating to a case. It will be used to document important events or actions related to the case, especially those not noted elsewhere in the case file. Diary entries should be clear, concise and legible and should be dated in chronological order to reflect a timeline of the case development. Information provided should include, at a minimum, the date of the action or event, a brief description of the action or event and the initials of the person making the entry. When a case file is completed, the CSHO must ensure that it is properly organized. See [ADM 03-01-005](#), *OSHA Compliance Records*, dated August 3, 1998.

### **XI. Citations.**

[Section 9](#) of the OSH Act addresses the form and issuance of citations.

Section 9(a) provides: "... Each citation shall be in writing and shall describe with particularity the nature of the violation including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation...."

#### **A. Statute of Limitations.**

[Section 9\(c\)](#) provides. "...No citation may be issued under this Section after the expiration of six months following the occurrence of any violation." Accordingly, a citation shall not be issued where any alleged violation last occurred six months or more prior to the date on which the citation is actually signed, dated and served by certified mail as provided by [Section 10\(a\)](#) of the Act. Where the actions or omissions of the employer concealed the existence of the violation, the six-month issuance limitation is tolled until such time that OSHA learns or could have learned of the violation. The Director shall be consulted in such cases. In some cases, particularly those involving fatalities or accidents, the six- month date begins to run from the date of the incident, not from the opening conference date.

#### **B. Issuing Citations.**

1. Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer, or use of a mail delivery service other than the United States Postal Service, may be used **in addition** to certified mail if it is believed that these methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The circumstances of delivery shall be documented in the diary sheet.
2. Citations shall be mailed to employee representatives after the Certified Mail Receipt card is received by the Office. Citations shall also be mailed to any employee upon request and without the need to make a written request under the Open Public Records Act (OPRA). In the case of a fatality, the family of the victim shall be provided with a copy of the citations without charge or the need to make a written request.

#### **C. Amending/Withdrawing Citations and Notification of Penalties.**

##### **1. Amendment Justification.**

Amendments to, or withdrawal of, a citation shall be made when information is presented to the Director or designee, which indicates a need for such action and may include administrative or technical errors such as:

- a. Citation of an incorrect standard;
- b. Incorrect or incomplete description of the alleged violation;
- c. Additional facts not available to the CSHO at the time of the inspection establish a valid affirmative defense;
- d. Additional facts not available to the CSHO at the time of the inspection establish that there was no employee exposure to the hazard; or

- e. Additional facts establish a need for modification of the abatement date or the penalty, or reclassification of citation items.

## 2. **When Amendment is not Appropriate.**

Amendments to, or withdrawal of, a citation shall not be made by the Director or designee for any of the following:

- a. Timely Notice of Contest received;
- b. The 15 working days for filing a Notice of Contest has expired and the citation has become a Final Order; or
- c. Employee representatives were not given the opportunity to present their views (unless the revision involves only an administrative or technical error).

## D. **Procedures for Amending or Withdrawing Citations.**

The following procedures apply whenever amending or withdrawing citations.

***NOTE:*** *The instructions contained in this section, with appropriate modifications, are also applicable to the amendment of the OSHA-2B, Notification of Failure to Abate Alleged Violation.*

1. Withdrawal of, or modifications to, the citation and notification of penalty, shall normally be accomplished by means of Informal or Formal Settlement Agreements.
2. In exceptional circumstances, the Director or designee may initiate a change to a citation and notification of penalty without an informal conference. If proposed amendments to citation items (individual violations) change the original classification of the items, such as willful to repeated, the original items shall be withdrawn and the new, appropriate items will be issued. The amended Citation and Notification of Penalty Form (OSHA-2) shall clearly indicate that the employer is obligated under the Act to post the amendment to the citation along with the original citation, until the amended violation has been corrected, or for three working days, whichever is longer.
3. The 15 working day contest period for the amended portions of the citation will begin on the day following the day of receipt of the amended Citation and Notification of Penalty.
4. The contest period is not extended for the unamended portions of the original citation. A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is forwarded to the employer.
5. When circumstances warrant, the Director or designee may withdraw a citation and notification of penalty in its entirety. Justification for the withdrawal must be noted in the case file. A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter, signed by the Director or designee, shall refer to the original citation and notification of penalty, state that they are withdrawn and direct that the employer post the letter for three working days in the same location(s) where the original citation was posted. When applicable, a copy of the letter shall also be sent to the employee representative(s) and/or complainant.



## **XII. Inspection Records.**

### **A. Generally.**

1. Inspection records are any record made by a CSHO that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty.
2. All official forms and notes constituting the basic documentation of a case must be part of the case file. All original field notes are part of the inspection record and shall be maintained in the file. Inspection records also include photographs (including digital photographs), negatives of photographs, videotapes, DVDs and audiotapes. Inspection records are the property of the State of New Jersey and not the property of the CSHO and are not to be retained or used for any private purpose.

### **B. Release of Inspection Information.**

The information obtained during inspections is confidential, but may be disclosable or non-disclosable based on criteria established in the OPRA. Requests for release of inspection information shall be directed to the Director or designee.

## Chapter 6

### PENALTIES AND DEBT COLLECTION

#### I. General Penalty Policy.

The penalty structure in N.J.S.A 34:6A-41 of the Act is designed primarily to provide an incentive for preventing or correcting violations voluntarily, not only to the cited employer, but to other employers. While penalties are not designed as punishment for violations, the NJ Legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations. Proposed penalties, therefore, serve the public policy purpose intended under the Act; and criteria approved for such penalties by the Commissioner of Labor are based on effectuating this purpose.

The penalty structure described in this chapter is part of PEOSH's general enforcement policy and shall normally be applied as set forth below. If, in a specific case, the Director determines that it is warranted to depart from the general policy in order to achieve the appropriate deterrent effect, the extent of the departure and the reasons for doing so should be fully explained in the case file.

#### II. Civil Penalties.

##### A. Statutory Authority for Civil Penalties.

[N.J.S.A 34:6A-41](#) provides the Commissioner of Labor with the statutory authority to propose civil penalties for violations of the Act. Civil penalties advance the purposes of the Act by encouraging compliance and deterring violations.

**Proposed penalties** are the penalty amounts PEOSH issues with citation(s).

N.J.S.A 34:6A-41(d) provides the following:

1. If the time for compliance with an order of the Commissioner lapses, and the employer has not made a good faith to comply, a civil administrative penalty of up to \$7,000 per day for each violation shall be imposed
2. Any employer who willfully, or repeatedly violates the requirements of this section or any standard, rule, order or regulation promulgated under the Act shall be assessed a civil administrative penalty of up to \$70,000 for each violation,
3. If the violation is of a continuing nature, each day during which it continues after the date given for compliance in accordance with the order of the commissioner shall constitute an additional separate and distinct offense.

##### B. Minimum Penalties.

The following policies apply:

1. The proposed penalty for any willful violation shall not be less than \$5,000. The \$5,000 penalty is a statutory minimum and not subject to administrative discretion. This minimum penalty applies to all willful violations, whether serious or other-than-serious.
2. When the proposed penalty for a serious violation (citation item) would amount to less than \$500, a \$500 penalty shall be proposed for that violation.
3. When the proposed penalty for an other-than-serious violation (citation item), or a regulatory violation other than a posting violation, would amount to less than \$100, no penalty shall be proposed for that violation.
4. If, however, there is a citation for a posting violation, a penalty shall be proposed even if less than \$250 since penalties for such violations are mandatory under the Act.

**C. Maximum Penalties.**

The civil penalty amounts are generally maximum amounts before any permissible reductions are taken.

Table 6-1 below summarizes the maximum amounts for proposed civil penalties:

**Table 6-1: Maximum Amounts for Civil Penalties**

<b>Type of Violation</b>	<b>Penalty Maximum</b>
Serious	\$7,000 per violation
Other-Than-Serious	\$7,000 per violation
Willful or Repeated	\$70,000 per violation
Posting Requirements	\$7,000 per violation
Failure to Abate	\$7,000 per day unabated beyond the abatement date (generally limited to 30 days maximum)

**III. Penalty Factors.**

[N.J.A.C. 12:110-4.11](#) provides that penalties shall be assessed giving due consideration to the following factors:

- ▶ The **gravity** of the violation;
- ▶ The probability that an injury or illness would result from the continuance of the violation;
- ▶ The **good faith** of the employer to comply;
- ▶ The presence of meaningful safety and health programs; and
- ▶ The employer’s **history** of previous violations.

**A. Gravity of Violation.**

The gravity of the violation is the **primary consideration** in determining penalty amounts. It shall be the basis for calculating the basic penalty for serious and other-than-serious violations. To determine the gravity of a violation, the following two assessments shall be made:

- ▶ The **severity** of the injury or illness which could result from the alleged violation.
- ▶ The **probability** that an injury or illness could occur as a result of the alleged violation.

### 1. **Severity Assessment.**

The classification of an alleged violation as serious or other-than-serious is based on the severity of the potential injury or illness and is the first step. The following categories shall be considered in assessing the severity of potential injuries or illnesses:

#### a. **For Serious:**

- **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.
- **Medium Severity:** Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.
- **Low Severity:** Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

#### b. **For Other-Than-Serious:**

**Minimal Severity:** Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the most serious injury or illness that could reasonably be expected to result from an employee's exposure would not be low, medium or high severity and would not cause death or serious physical harm.

### 2. **Probability Assessment.**

The probability that an injury or illness will result from a hazard has no role in determining the classification of a violation, but does affect the amount of the proposed penalty.

#### a. Probability shall be categorized either as greater or as lesser.

- **Greater Probability:** Results when the likelihood that an injury or illness will occur is judged to be relatively high.
- **Lesser Probability:** Results when the likelihood that an injury or illness will occur is judged to be relatively low.

#### b. **How to Determine Probability.**

The following factors shall be considered, as appropriate, when violations are likely to result in injury or illness:

- Number of employees exposed;
- Frequency of exposure or duration of employee overexposure to contaminants;
- Employee proximity to the hazardous conditions;
- Use of appropriate personal protective equipment;
- Medical surveillance program;
- Youth and inexperience of employees, especially those under 18 years old; and
- Other pertinent working conditions.

**EXAMPLE 6-1:** Greater probability may include an employee exposed to the identified hazard for four hours a day, five days a week. Lesser probability may be present when an employee is performing a non-routine task with two previous exposures within the previous year and no injuries or illnesses are associated with the identified hazard.

c. **Final Probability Assessment.**

All of the factors outlined above shall be considered in determining a final probability assessment.

When adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the assessment may be adjusted at the discretion of the Director as appropriate. Such decisions shall be fully explained in the case file.

3. **Gravity-Based Penalty (GBP).**

- a. The gravity-based penalty (GBP) for each violation shall be determined by combining the severity assessment and the final probability assessment.
- b. GBP is an unreduced penalty and is calculated in accordance with the procedures below.

**NOTE:** *Throughout the FOM when the term “unreduced penalty” is used, it is the same as GBP.*

4. **Serious Violation & GBP.**

- a. The gravity of a violation is defined by the GBP:
  - A **high gravity** violation is one with a GBP of \$5,000 or greater.
  - A **moderate gravity** violation is one with a GBP of \$2,000, \$2,500 or \$3,500.
  - A **low gravity** violation is one with a GBP of \$1,500.

- b. The highest gravity classification (high severity and greater probability) shall normally be reserved for the most serious violative conditions, such as those situations involving danger of death or extremely serious injury or illness.
- c. If the Director determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be proposed instead of \$5,000. Such discretion should be exercised based on the facts of the case. The reasons for this determination shall be fully explained in the case file.
- d. For serious violations, the GBP shall be assigned on the basis of the following scale in Table 6-2:

**Severity + Probability = GBP**

**Table 6-2: Serious Violations**

Severity	Probability	GBP	Gravity	IMIS Code
High	Greater	\$7,000	High	10
Medium	Greater	\$6,000	Moderate	5
Low	Greater	\$5,000	Moderate	5
High	Lesser	\$5,000	Moderate	5
Medium	Lesser	\$4,000	Moderate	5
Low	Lesser	\$3,000	Low	1

**5. Other-Than-Serious Violations & GBP.**

- a. For other-than-serious safety and health violations, there is only minimal severity.
- b. If the Director determines that it is appropriate to achieve the necessary deterrent effect, a GBP of \$7,000 may be proposed. Such discretion should be exercised based on the facts of the specific case. The reasons for this determination shall be fully explained in the case file.

**Table 6-3: Other-Than-Serious Violations**

Severity	Probability	GBP
Minimal	Greater	\$1,000 - \$7,000
Minimal	Lesser	\$0

**6. Exception to GBP Calculations.**

For some cases, a GBP may be assigned without using the severity and the probability assessment procedures outlined in this section when these procedures cannot appropriately be used. In such cases, the assessment assigned and the reasons for doing so shall be fully explained in the case file.

**7. Egregious Cases.**

In egregious cases, violation-by-violation penalties are applied. Such cases shall be handled in accordance with [CPL 02-00-080](#), *Handling of Cases to be Proposed for*

*Violation-By-Violation Penalties*, dated October 21, 1990. Penalties calculated under this policy shall not be proposed without the concurrence of the Commissioner and Attorney General's Office.

## 8. Gravity Calculations for Combined or Grouped Violations.

Combined or grouped violations will be considered as one violation with one GBP. The following procedures apply to the calculation of penalties for combined and grouped violations:

**NOTE:** *Multiple violations of a single standard may be **combined** into one citation item. When a hazard is identified which involves interrelated violations of different standards, the violations may be **grouped** into a single item.*

### a. Combined Violations.

The severity and probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation once the instance with the highest gravity is identified.

### b. Grouped Violations.

The following shall be adhered to:

- **Grouped Severity Assessment**

There are two considerations for calculating the severity of grouped violations:

- The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item; AND
- If the injury or illness that is reasonably predictable from the grouped items is more serious than that from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor.

- **Grouped Probability Assessment**

There are two factors for calculating the probability of grouped violations:

- The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness; AND
- If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment.

## B. Penalty Reduction Factors.

## 1. General

- a. Penalty reductions may exceed 100 percent, depending upon the employer's "size" (number of employees), "good faith," and "history of previous violations."
  - A maximum of 60 percent reduction is permitted for **size**;
  - A maximum of 35 percent reduction for **good faith**;
  - 10 percent reduction may be given for **history**.
  - 15 percent reduction may be given for **quick fix**.
- b. However, no penalty reduction can be more than 100 percent of the initial assessment. Since these reduction factors are based on the general character of an employer's safety and health performance, they shall be calculated only once for each employer.
- c. After the classification (as serious or other-than-serious) and the gravity-based penalty have been determined for each violation, the penalty reduction factors (for size, good faith, history) shall be applied subject to the following limitations:
  - Penalties proposed for violations classified as **repeated** shall be reduced only for size.
  - Penalties proposed for violations classified as **willful**, shall be reduced only for size and history.
  - Penalties proposed for **serious** violations classified as high severity/greater probability **shall be reduced only for size and history**.

## 2. Size Reduction.

- a. A maximum penalty reduction of 60 percent is permitted for small employers. "Size of employer" shall be calculated on the basis of the maximum number of employees of an employer at **all** workplaces town, county or statewide at any one time during the previous 12 months.
- b. The rates of reduction to be applied are as follows.

<b>Employees</b>	<b>Percent reduction</b>
1-25	60
26-100	30
101-250	10
251 or more	None

- c. When an employer with 1-25 employees has one or more serious violations of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the CSHO may recommend that only a partial



reduction in penalty shall be permitted for size. If the Director approves the partial reduction, the justification is to be fully explained in the case file.

### 3. **Good Faith Reduction.**

A penalty reduction is permitted in recognition of an employer's effort to implement an effective safety and health management system in the workplace. The following apply to reductions for good faith:

#### a. **Reduction Not Permitted.**

- No reduction shall be given for **high gravity serious violations**.
- No reduction shall be given if a **willful violation** is found. Additionally, where a willful violation has been documented, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given for **repeated violations**. If a repeated violation is found, no reduction for good faith can be applied to **any** of the violations found during the same inspection.
- No reduction shall be given if a **failure to abate violation** is found during an inspection. No good faith reduction shall be given for any violation in the inspection in which the FTA was found.
- No reduction shall be given to employers being cited under abatement verification for **failure to certify abatement**.
- No reduction shall be given to employers being cited under abatement verification for **failure to notify employees and tagging movable equipment**.
- No reduction shall be given if the employer has **no safety and health management system**, or if there are **major deficiencies** in the program.

#### b. **Twenty-Five Percent Reduction.**

A 25 percent reduction for "good faith" normally requires a written safety and health management system. In exceptional cases, CSHOs may recommend a full 25 percent reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but has not reduced it to writing. To qualify for this reduction, the employer's safety and health management system must provide for:

- Appropriate management commitment and employee involvement;
- Worksite analysis for the purpose of hazard identification;
- Hazard prevention and control measures;
- Safety and health training; and

- Where **young persons** (i.e., less than 18 years old) are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.
- Where **persons who speak limited or no English** are employed, the CSHO's evaluation must consider whether the employer's safety and health management system appropriately addresses the particular needs of such employees, relative to the types of work they perform and the potential hazards to which they may be exposed.

**NOTE:** *One example of an effective safety and health management system is given in Safety and Health Program Management Guidelines; Issuance of Voluntary Guidelines (Federal Register, January 16, 1989 (54 FR 3904)).*

**c. Fifteen Percent Reduction.**

A 15 percent reduction for good faith shall normally be given if the employer has a documented and effective safety and health management system, with only incidental deficiencies.

**EXAMPLE 6-2:** An acceptable program should include minutes of employee safety and health meetings, documented employee safety and health training sessions, or any other evidence of measures advancing safety and health in the workplace.

**d. Allowable Percentages.**

Only these percentages (15%, 25% or 35%) may be used to reduce penalties due to the employer's good faith.

**4. History Reduction.**

**a. Allowable Percent.**

A reduction of 10 percent shall be given to employers who have not been cited by PEOSH for any serious, willful, or repeated violations in the prior five years.

**b. Time Limitation and Final Order.**

The five-year history of no prior citations shall be calculated from the opening conference date of the current inspection. Only Orders to Comply that have become a final order of the Commission within the five years immediately before the opening conference date shall be considered.

**c. Reduction Will Not be Given.**

- For a repeated violation, or

- To employers being cited for failure to certify abatement, or
- To employers being cited for failure to notify employees and tagging movable equipment.

**5. History Increase.**

An employer that has been cited by PEOSH for any high-gravity serious, willful, repeat, or failure-to-abate violations within the previous five years will receive a 10 percent increase in their penalty, up to the statutory maximum.

Employers who have not been inspected and employers who have received citations for serious violations that were not high gravity will receive neither a reduction, nor an increase based on their PEOSH inspection history.

**6. Final Penalty Calculation**

Final penalties will be calculated serially. The penalty adjustment factors will be applied in the following order: History, Good Faith, Quick-Fix, and Size.

Sample Penalty Calculation Comparison: Summed vs. Serially

<b>Sample Data</b>	<b>Summed (10%+15%+15%+30%)</b>	<b>Serially</b>
High/Lesser	\$5,000	\$5,000
History (10%)		\$4,500
Good Faith (15%)		\$3,825
Quick Fix (15%)		\$3,251
Size (30%)		\$2,275
Result:	\$1,500	\$2,275

**7. Total Reduction.**

The total reduction will normally be the sum of the reductions for each factor. Table 6-4 provides an overview of the percent of penalty reductions applicable to serious, other-than-serious, and repeated violations.

**8. Penalty Table.**

Table 6-4 may be used for determining appropriate reduced penalties for serious and other-than-serious violations.

**Table 6-4: Penalty Table**

Percent Reduction	Penalty in Dollars							
	\$1,000	\$1,500	\$2,000	\$2,500	\$3,000	\$3,500	\$5,000	\$7,000
0	\$1,000	\$1,500	\$2,000	\$2,500	\$3,000	\$3,500	\$5,000	\$7,000
10	\$900	\$1,350	\$1,800	\$2,250	\$2,700	\$3,150	\$4,500	\$6,300
15	\$850	\$1,275	\$1,700	\$2,125	\$2,550	\$2,975	\$4,250*	\$5,950*
20	\$800	\$1,200	\$1,600	\$2,000	\$2,400	\$2,800	\$4,000	\$5,600
25	\$750	\$1,125	\$1,500	\$1,875	\$2,250	\$2,625	\$3,750*	\$5,250*
30	\$700	\$1,050	\$1,400	\$1,750	\$2,100	\$2,450	\$3,500	\$7,900
35	\$650	\$975	\$1,300	\$1,625	\$1,950	\$2,275	\$3,250*	\$4,550*
40	\$600	\$900	\$1,200	\$1,500	\$1,800	\$2,100	\$3,000	\$4,200
45	\$550	\$825	\$1,100	\$1,375	\$1,650	\$1,925	\$2,750*	\$3,850*
50	\$500	\$750	\$1,000	\$1,250	\$1,500	\$1,750	\$2,500	\$3,500
55	\$450	\$675	\$900	\$1,125	\$1,350	\$1,575	\$2,250*	\$3,150*
60	\$400	\$600	\$800	\$1,000	\$1,200	\$1,400	\$2,000	\$2,800
65	\$350	\$525	\$700	\$875	\$1,050	\$1,425	\$1,750*	\$2,450*
70	\$300	\$450	\$600	\$750	\$900	\$1,050	\$1,500	\$2,100
75	\$250	\$375	\$500	\$625	\$750	\$875	\$1,250*	\$1,750*
85	\$150	\$225	\$300	\$375	\$450	\$525	\$750*	\$1,050*
95	\$100	\$100	\$100	\$125	\$150	\$175	\$250*	\$350*

\* Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no reduction for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Director has determined a high unreduced penalty amount to be warranted.

#### **IV. Effect on Penalties if Employer Immediately Corrects.**

Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of the violation by the CSHO, the employer immediately corrects or initiates steps to abate the hazard. In limited circumstances, this prompt abatement of a hazardous condition may be taken into account in determining the amount of the proposed penalties under the Quick-Fix penalty reduction.

##### **A. Quick-Fix Penalty Reduction.**

Quick-Fix is an abatement incentive program meant to encourage employers to immediately abate hazards found during an PEOSH inspection and thereby quickly prevent potential employee injury, illness, and death. Quick-Fix does not apply to all violations. However, penalty reductions are permitted in certain circumstances where PEOSH has determined that immediate abatement reduces the gravity of the violation.

##### **B. Quick-Fix Reduction Shall Apply to:**

1. All public employers as defined in N.J.S.A. 34:6A-27(c).
2. All sizes of employers in all Standard Industrial Classification (SIC) codes and North American Industry Classification System (NAICS) codes.

3. Both safety and health violations, provided hazards are immediately abated during the inspection, once identified by the CSHO (e.g., on the day the condition was pointed out to the employer, or within 24 hours of being discovered by the CSHO).
4. Violations classified as other-than-serious, “low gravity serious” or “medium gravity serious.”
5. Individual violations, i.e., not to the Order to Comply as a whole.
6. Corrective actions that are permanent and substantial, not temporary or cosmetic (e.g., installing a guard on a machine rather than removing an employee from the zone of danger, including administrative controls, or other specific measures to abate a violation).

**C. Quick-Fix Reductions Shall Not Apply to:**

1. Violations classified as “high gravity serious,” “willful,” “repeated,” or “failure-to-abate.”
2. Violations related either to a fatal injury or illness, or to any incidents resulting in serious injuries to employees.
3. Blatant violations that are easily corrected (e.g., turning on a ventilation system to reduce employee exposure to a hazardous atmosphere, or putting on hard hats that are readily available at the workplace).

**D. Reduction Amount.**

1. A Quick-Fix penalty reduction of 15 percent shall be applied to an individual violation’s GBP.
2. After the 15 percent Quick-Fix reduction is applied, the reductions for size, good faith, and history will then be applied. Table 6-5, below, provides an overview of the program.

**Table 6-5: Quick-Fix Penalty Reduction Factor**

<b>Reduction Factor</b>	<b>Restrictions</b>	<b>Application</b>	<b>Percent Reduction</b>	<b>Comments</b>
<b>Quick -Fix</b>	No Reduction Factor for: <ul style="list-style-type: none"> <li>• Violations classified as:               <ul style="list-style-type: none"> <li>○ High gravity serious</li> <li>○ Willful</li> <li>○ Repeated</li> <li>○ Failure to Abate penalty</li> </ul> </li> <li>• Violations related to a fatal injury or illness, or a serious incident resulting in serious injuries</li> <li>• Blatant violations that are easily corrected</li> </ul>	<ul style="list-style-type: none"> <li>• All public employers</li> <li>• All sizes of employers in all SIC/NAICS codes</li> <li>• Safety &amp; health violations, provided hazards are immediately abated during the inspection</li> <li>• Violations classified as:               <ul style="list-style-type: none"> <li>○ Other-than serious</li> <li>○ Low gravity serious</li> <li>○ Medium gravity serious</li> </ul> </li> <li>• Only to individual</li> </ul>	After the GBP has been calculated, a 15% reduction is applied.  <b>After the 15% Quick-Fix reduction is applied, the reductions for size, good faith, and history are applied.</b>	No penalty for a serious violation shall be less than \$100

		violations <ul style="list-style-type: none"> <li>• Only to a corrective action that is permanent and substantial</li> </ul>		
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**V. Repeated Violations.**

**A. General.**

1. Each repeated violation shall be evaluated as serious or other-than-serious, based on current workplace conditions, and not on hazards found in the prior case.
2. A Gravity-Based Penalty (GBP) shall then be calculated for repeated violations based on facts noted during the current inspection.
3. Only the reduction factor for size, appropriate to the facts at the time of the re-inspection, shall be applied.

**NOTE:** *N.J.S.A. 34:6A-41(d) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than \$70,000 for each violation.*

**B. Penalty Increase Factors.**

The amount of any increase to a proposed penalty for repeated violations shall be determined by the size of the employer’s business.

**1. Small Employers.**

For employers with 250 or fewer employees, the GBP shall be multiplied by a factor of 2 for the first repeated violation and multiplied by 5 for the second repeated violation. The GBP may be multiplied by 10 in cases where the Director determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file.

**2. Large Employers.**

For employers with more than 250 employees, the GBP shall be multiplied by a factor of 5 for the first repeated violation and, by 10 for the second repeated violation.

**C. Other-than-Serious, No Initial Penalty.**

For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$200 shall be proposed for the first repeated violation, \$500 for the second repeated violation, and \$1,000 for a third repetition.

**NOTE:** *These penalties shall not be subject to the Penalty Increase factors as discussed in Paragraph V.B. of this chapter.*

**D. Regulatory Violations.**

1. For calculating the GBP for regulatory violations, see Paragraph [III.A.5.](#) and [Section X.](#)
2. For repeated instances of regulatory violations, the initial penalty shall be multiplied by 2 for the first repeated violation and multiplied by 5 for the second repeated violation. If the Area Director determines that it is necessary to achieve the proper deterrent effect, the initial penalty may be multiplied by 10.

**VI. Willful Violations.**

[N.J.S.A. 34:6A-41\(d\)](#) provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$7,000 for each violation. See *Minimum Penalties* at [Paragraph II.C.](#) of this chapter.

**A. General.**

1. Each willful violation shall be classified as serious or other-than-serious.
2. There shall be no reduction for good faith.
3. In no case shall the proposed penalty for a willful violation (serious or other-than-serious) after reductions be less than \$5,000.

**B. Serious Willful Penalty Reductions.**

The reduction factors for size for serious willful violations shall be applied as shown in the following chart. This chart helps minimize the impact of large penalties for small employers with 50 or fewer employees. However, in no case shall the proposed penalty be less than the statutory minimum, i.e., \$5,000 for these employers.

**NOTE:** For violations that are not serious willful, use the size chart in [Paragraph III.B.2.](#)

<b>Employees</b>	<b>Percent reduction</b>
10 or fewer	80
11-20	60
21-30	50
31-40	40
41-50	30
51-100	20
101-250	10
251 or more	0

The reduction factor for history shall be applied.

The proposed penalty shall then be determined from Table 6-6.

**Table 6-6: Penalties to be Proposed for Serious Willful Violations**

<b>Total percent reduction for size and/or history</b>	<b>High Gravity</b>	<b>Moderate Gravity</b>	<b>Low Gravity</b>
0%	\$70,000	\$55,000	\$40,000
10%	\$63,000	\$49,500	\$36,000
20%	\$56,000	\$44,000	\$32,000
30%	\$49,000	\$38,500	\$28,000
40%	\$42,000	\$33,000	\$24,000
50%	\$35,000	\$27,500	\$20,000
60%	\$28,000	\$22,000	\$16,000
70%	\$21,000	\$16,500	\$12,000
80%	\$14,000	\$11,000	\$8,000
90%	\$7,000	\$5,500	\$5,000

**C. Willful Regulatory Violations.**

1. For calculating the GBP for regulatory violations, see [Paragraph III.A.5.](#) and [Section X](#) for other-than-serious violations.
2. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than \$5,000.

**VII. Penalties for Failure to Abate.**

**A. General.**

1. Failure to Abate penalties shall be proposed when:
  - a. A previous Order to Comply issued to an employer has become a final order; and
  - b. The condition, hazard or practice found upon re-inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous).
2. The Order to Comply has to have become a final order of the Review Commission. Orders to Comply become a final order of the Review Commission when the abatement date for that item passes, if the employer has not filed a notice of contest prior to that abatement date.
3. See [Chapter 15, Legal Issues](#), for information on determining final dates of uncontested citations, settlements and Review Commission decisions.

**B. Calculation of Additional Penalties.**

**1. Unabated Violations.**



A GBP for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon reinspection. This recalculated GBP, however, shall not be less than that proposed for the item when originally cited.

- a. EXCEPTION: When the CSHO believes and documents in the case file that the employer has made a good faith effort to correct the violation and had an objective reasonable belief that it was fully abated, the Director may reduce or eliminate the daily proposed penalty.
- b. For egregious cases see [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

## 2. **No Initial Proposed Penalty.**

In instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Director. In no case shall the GBP be less than \$1,000 per day.

## 3. **Size Only Permissible Reduction Factor.**

Only the reduction factor for size – based upon the circumstances noted during the reinspection – shall be applied to arrive at the daily proposed penalty.

## 4. **Daily Penalty Multiplier.**

The daily proposed penalty shall be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:

- a. The number of days unabated shall be counted from the day following the abatement date specified in the Order to Comply or the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection.
- b. At the discretion of the Director, a lesser penalty may be proposed. The reasoning for the lesser penalty shall be fully explained (e.g., achievement of an appropriate deterrent effect) in the case file.
- c. If a penalty in excess of the normal maximum amount of **30** times the amount of the daily proposed penalty is deemed necessary by the Director to deter continued non-abatement, the case shall be treated pursuant to the violation-by-violation (egregious) penalty procedures established in [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

## C. **Partial Abatement.**

1. When an Order to Comply has been partially abated, the Director may authorize a reduction of 25 to 75 percent to the amount of the proposed penalty calculated as outlined above.

2. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty shall take into consideration the extent of the abatement efforts.

**EXAMPLE 6-3:** Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined above, without regard to any partial abatement) may be reduced by 60 percent.

## **VIII. Violation-by-Violation (Egregious) Penalty Policy.**

### **A. Penalty Procedure.**

Each instance of noncompliance shall be considered a separate violation with individual proposed penalties for each violation. This procedure is known as the egregious or violation-by-violation penalty procedure.

### **B. Case Handling.**

Such cases shall be handled in accordance with [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, dated October 21, 1990.

### **C. Calculation of Penalties.**

Penalties calculated using the violation-by-violation policy shall not be proposed without the concurrence of the Assistant Commissioner.

## **IX. Significant Enforcement Actions.**

### **A. Definition.**

A significant enforcement action (aka significant case) is one which results from an investigation in which the total proposed penalty is \$100,000 or more.

### **B. Multi-employer Worksites.**

Several related inspections involving the same employer, or involving more than one employer in the same location (such as multi-employer worksites) and submitted together, may also be considered to be a significant enforcement action if the total aggregate penalty is \$100,000 or more.

### **C. Assistant Commissioner Concurrence.**

The Assistant Commissioner's concurrence is normally required for issuing citations in significant enforcement cases.

## **X. Penalty and Citation Policy for Part 1903 and 1904 Regulatory Requirements.**

[N.J.S.A. 34:6A-41](#) of the Act provides that any employer who violates any of the posting requirements shall be assessed a civil penalty of up to \$7,000 for each violation (this includes recordkeeping violations). Gravity-Based Penalties (GBPs) for regulatory violations, including

posting requirements, shall be reduced for size and history (excluding willful violations, see [Chapter 4, Section V, Willful Violations](#)).

#### **A. Posting Requirements.**

Penalties for violation of posting requirements shall be proposed as follows:

##### **1. Failure to Post the PEOSH Notice (Poster) – N.J.A.C. 12:110-3.5(c)**

A citation for failure to post the PEOSH Notice is warranted if:

- a. The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the PEOSH Act; AND
- b. Interviews show that employees are unaware of their rights under the Act; OR
- c. The employer has been previously cited or advised by PEOSH of the posting requirement. If the criteria above are met and the employer has not displayed (posted) the notice furnished by PEOSH as prescribed in **N.J.A.C. 12:110-3.5(c)**, an other-than-serious citation shall normally be issued. The GBP for this alleged violation shall be \$1000.

##### **2. Failure to Post an Order to Comply N.J.A.C. 12:110-4.10(c).**

- a. If an employer received an Order to Comply that was not posted as prescribed in **N.J.A.C. 12:110-4.10(c)** an other-than-serious citation shall normally be issued. The GBP shall be \$3000.
- b. For information regarding the NJOSH-300A form, see [CPL 02- 00-135](#), *Recordkeeping Policies and Procedures Manual*, December 30, 2004.

#### **B. Advance Notice of Inspection – N.J.A.C. 12:110-4.3**

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by [§1903.6](#), an other-than-serious citation shall be issued. The violation shall have a GBP of \$200.

#### **C. Injury and Illness Records and Reporting under Part 1904.**

1. [Part 1904](#) violations are always other-than-serious.
2. Repeated and Willful penalty policies in paragraphs V.D. and VI.C., respectively, of this Chapter, may be applied to recordkeeping violations.
3. PEOSH's egregious penalty policy may be applied to recordkeeping violations. See [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.
4. See [CPL 02-00-135](#), *Recordkeeping Policies and Procedures Manual*, dated December 30, 2004; specifically Chapter 2, Section II, *Inspection and Citation Procedures*.

## **XI. Failure to Provide Access to Medical and Exposure Records – §1910.1020.**

### **A. Proposed Penalties.**

If an employer is cited for failing to provide access to records as required under [§1910.1020](#) for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of \$100 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP of \$7,000 may be proposed for such violations. See [CPL 02-02-072](#), *Rules of Office Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007.

**EXAMPLE 6-4:** If the evidence demonstrates that an authorized employee representative requests both exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for six instances (i.e., one medical record and one exposure record (total two) for each of three employees) of a violation of [§1910.1020](#), with a GBP of \$6,000.

### **B. Use of Violation-by-Violation Penalties.**

The above policy does not preclude the use of violation-by-violation or per employee penalties where higher penalties are appropriate. See [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-By-Violation Penalties*, October 21, 1990.

## **XII. Criminal Penalties.**

If a criminal penalty is warranted for any of the following cases, PEOSH will refer the matter to the NJ Office of the Attorney General:

1. Willful violation of a PEOSH standard, rule, or order causing the death of an employee;
2. Giving unauthorized advance notice;
3. Knowingly giving false information; and
4. Killing of a CSHO while engaged in the performance of investigative, inspection or law enforcement functions.

## **XIII. Handling Monies Received from Employers.**

### **A. Responsibility of the Director.**

Pursuant to its statutory authority, it is PEOSH policy to collect all penalties owed to the government. The Director is responsible for:

1. Informing employers of PEOSH's debt collection procedures;
2. Collecting assessed penalties from employers;
3. Reporting penalty amounts collected and those due;

4. Referring cases with uncollected penalties to the Office of the Attorney General for judgment docket;
5. Transferring selected cases to the Office of the Attorney General for legal action and subsequently tracking such cases;
6. Mailing collected monies in accordance with the procedures set forth in this chapter and in other PEOSH Instructions; and

## **B. Receiving Payments.**

The Director shall be guided by the following with regard to penalty payments:

### **1. Methods of Payment.**

Employers assessed penalties shall remit the total payment to the Office by certified check, postal money order, bank draft or bank money order, payable to **NJLWD-PEOSH**. Payment in cash shall not be accepted. Upon request of the employer and for good cause, alternate methods of payment are permissible, such as payments in installments.

### **2. Identifying Payment.**

The Inspection Number(s), **MUST BE PLACED** in the upper left or lower left hand corner of the face of the payment instrument. The date of receipt **MUST BE STAMPED** on the face of the check and in the upper right corner if possible.

### **3. Incorrect, Unhonored, or Foreign Payments.**

a. Incorrectly dated payments shall be handled as follows:

- If the payment instrument is dated 10 days or more after the date of receipt, it is to be returned to the employer.
- If the payment instrument is dated less than 10 but more than 3 days after the date of receipt, it is to be held for deposit on the day it is dated.
- If the payment instrument is dated more than six months prior to the current date, it is to be returned to the employer via certified mail.

b. Payment instruments which have been returned to the NJ LWD PEOSH without payment, due to insufficient funds, shall be returned to the employer via certified mail.

### **4. Records.**

A copy of the penalty payment instrument shall be included in the case file. Additional accounting records shall also be included in the case file in accordance with current procedures.

## **C. Refunds.**

In cases of later penalty modifications by PEOSH or by the Commission or a court, refunds to the employer shall be made by the NJLWD.

#### **XIV. Debt Collection Procedures.**

##### **A. Policy.**

Penalties imposed under section N.J.A.C. 12:110-4.11 may be recovered with costs in a civil action commenced by the Commissioner by a summary proceeding under The Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. in the Superior Court, county district court, or a municipal court, all of which have shall have jurisdiction to enforce the Penalty Enforcement Law in connection with the Act.

##### **B. Time Allowed for Payment of Penalties.**

The date when penalties become due and payable depends on whether or not the employer contests.

###### **1. Uncontested Penalties.**

When an Order to Comply and/or proposed penalties are uncontested, the penalties are due and payable 30 working days following the employer's receipt of the Penalty Order to Comply or, in the case of Informal Settlement Agreements, 30 working days after the date of the last signature unless a later due date for payment of penalties is agreed upon in the settlement.

###### **2. Contested Penalties.**

When an Order to Comply and/or proposed penalties are contested, the date penalties are due and payable will depend upon whether the case is resolved by a settlement agreement, an administrative law judge decision, a Review Commission decision, or a court judgment. See [Chapter 15, Section XIII.](#), *Citation Final Order Dates*, for additional information.)

###### **3. Partially Contested Penalties.**

When only part of an Order to Comply and/or a proposed penalty is contested, the due date for payment as stated in paragraph [XIV.B.1.](#), *Uncontested Penalties*, shall be used for the uncontested items and the due date stated in [Paragraph XIV.B.2.](#), *Contested Penalties*, for the contested items.

**NOTE:** *This provision notwithstanding, formal debt collection procedures will not be initiated in partially contested cases until a final order for the outstanding citation items has been issued.*

##### **C. Notification Procedures.**

It is PEOSH policy to notify employers that debts are payable and due, and to inform them of PEOSH's debt collection procedures prior to assessing any applicable delinquent charges. A copy of the "Notice" stating PEOSH's debt collection policy, including assessment of interest,

additional charges for nonpayment and administrative costs, shall be included with each Penalty Order to Comply sent to employers.

#### D. Notification of Overdue Debt.

The Director shall send a demand letter to the employer when the debt has become delinquent and shall retain a copy of the demand letter in the case file. A debt becomes delinquent **30 calendar days after the due date**, which is the same as the **final order date** as stated in [Chapter 15, Section XIII.](#), *Citation Final Order Dates*.

##### 1. Uncontested Case with Penalties.

If payment of any applicable penalty is not received by the expiration date of the 30 working day contest period, or 30 working days after the date of the last signature (unless a later due date for payment of penalties is agreed upon in the settlement) if an Informal Settlement Agreement has been signed, a demand letter shall be mailed.

##### 2. Contested Case with Penalties.

If payment of any applicable penalty is not received within 30 calendar days after the Review Commission's **Order** approving a Formal Settlement Agreement, 60 calendar days after the **Notice of Docketing**, 90 calendar days after the **Notice of Commission Decision**, or 120 calendar days after date of the judgment of a N.J.. Court of Appeals, and no appeal of the case has been filed by either PEOSH or the employer, the Director shall either send a demand letter or a letter notifying the employer that the PEOSH fine is past due.

##### 3. Exceptions to Sending the Demand Letter.

The demand letter will not be sent in the following circumstances:

- a. The employer is currently making payments under an approved installment plan or other satisfactory payment arrangement. Such plan or arrangement shall be set forth in writing and signed by the employer and the Director.

***NOTE:*** *If the employer enters into a **written** plan establishing a set payment schedule within one calendar month of the due date, but subsequently fails to make a payment within one calendar month of its scheduled due date, a payment default letter shall be sent to the employer. If the employer fails to respond satisfactorily to that letter within one month, the unpaid portion of the debt shall be handled in accordance with [Paragraph XIV.F.](#), Assessment Procedures.*

- b. The employer has partially contested the case (even if the penalty has not been contested). In such circumstances a demand letter shall not be sent until a final order has been issued.

#### E. Uncollectible Penalties.

There may be cases where a penalty cannot be collected, regardless of any action that has been or may be undertaken. In such cases, the Director **shall notify** the Office of the Attorney General who will then advise what action is appropriate.

## Chapter 7

### POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

#### I. Contesting Orders to Comply, Notifications of Penalty or Abatement Dates.

CSHOs shall advise the employer that the citation, the penalty and/or the abatement date may be contested in cases where the employer does not agree to the Order to Comply, penalty or abatement date or any combination of these.

##### A. Notice of Contest.

CSHOs shall inform employers that if they intend to contest, the Director must be notified in writing and such notification must be postmarked no later than the 15th working day after receipt of the Order to Comply and notification of penalty (working days are Monday through Friday, excluding federal and state holidays), otherwise the Order to Comply becomes a final order.

PEOSH has no authority to modify the contest period. Employers may also be apprised that their notice of contest can be sent electronically via email to PEOSH within the 15 working day period and provide employers the email address(es). It shall be emphasized that oral notices of contest do not satisfy the requirement to give written notification.

***NOTE:*** Upon receipt of all electronic notices of contest, the Director or his designee ***shall print copies of the email notice and include it in the documents and files to be transmitted to the Review Commission. Contest emails are not to be electronically forwarded to the Commission. PEOSH's acceptance of notices of contest via email shall not be interpreted to mean that the Office has consented to, or accepted, the electronic service of documents in litigation pursuant to Commission Rule §2200.7.***

1. An employer's Notice of Intent to Contest must clearly state what is specifically being contested. It must identify which item(s) of the Order to Comply, penalty, the abatement date, or any combination of these is being objected to. CSHOs shall ask the employer to read the N.J.A.C. 12:110 and 12:112 for additional details.
  - a. If the employer only requests a later abatement date and there are valid grounds to consider the request, the Director should be contacted. The Director may issue an amended citation changing an abatement date prior to the expiration of the 15 working day period.
  - b. If the employer contests only the penalty or some of the citation items, all uncontested items must still be abated by the dates indicated on the citation and the corresponding penalties paid within 15 days of notification.
2. CSHOs shall inform the employer that the Act provides that employees or their authorized representative(s) have the right to contest in writing any or all of the abatement dates set for a violation if they believe the date(s) to be unreasonable.

##### B. Contest Process.



The CSHO shall explain that when a Notice of Intent to Contest is properly filed (i.e., received in the office and postmarked as described in the [note to A.1.](#) of this chapter), the Director is required forward the case to the Occupational Safety and Health Review Commission at which time the case is considered to be in litigation.

1. PEOSH will normally cease all investigatory activities once an employer has filed a notice of contest. Any action relating to a contested case must first have the concurrence of the Assistant Commissioner.
2. Upon receipt of the Notice of Intent to Contest, the Review Commission assigns the case to an administrative law judge, who will schedule a hearing in a public place close to the workplace.

## **II. Informal Conferences.**

### **A. General.**

1. Pursuant to [N.J.A.C. 12:110-4.13](#), the employer, any affected employee, or the employee representative may request an informal conference for the purpose of discussing any issues raised by an Order to Comply or notice of intention to contest.
2. The informal conference will be conducted within 30 days of the receipt of a request or an appeal. The conference or any request for such a conference shall not operate as a stay of the 15 working day contest period.
3. If the employer's intent to contest is not clear, the Director or designated representative will make an effort contact the employer for clarification.
4. Informal conferences may be held by any means practical, but meeting in person is preferred.

### **B. Assistance of Counsel.**

In the event that an employer is bringing its attorney to an informal conference, the Director or his or her designee may contact the Office of the Attorney General and ask for the assistance of counsel.

### **C. Opportunity to Participate.**

1. If an informal conference is requested by the employer, an affected employee or his representative shall be afforded the opportunity to participate. If the conference is requested by an employee or an employee representative, the employer shall be afforded an opportunity to participate.
2. If the affected employee or employee representative chooses not to participate in the informal conference, an attempt will be made to contact that party and to solicit their input prior to the informal conference. Attempts to contact the party should be noted in the case file.

**NOTE:** *In the event of a settlement, it is not necessary to have the employee representative sign the informal settlement agreement.*

3. If any party objects to the attendance of another party or the Director believes that a joint informal conference would not be productive, separate informal conferences may be held.
4. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests.

**D. Notice of Informal Conferences.**

The Director shall document in the case file notification to the parties of the date, time and location of the informal conference. In addition, the Case File Diary Sheet shall indicate the date of the informal conference.

**E. Posting Requirement.**

1. The Director will ask the employer at the beginning of the informal conference whether the Informal Conference notice indicating the date, time, and location of the conference has been posted as required.
2. If the employer has not posted the form, the Director may postpone the informal conference until such action is taken.

**F. Conduct of the Informal Conference.**

The informal conference will be conducted in accordance with the following guidelines:

**1. Conference Subjects.**

- a. Purpose of the informal conference;
- b. Rights of participants;
- c. Contest rights and time constraints;
- d. Limitations, if any;
- e. Potential for settlements of citations; and
- f. Other relevant information (e.g., if no employee or employee representative has responded, whether the employer has posted the notification form regarding the informal conference, etc.).

**2. Subjects Not to be Addressed.**

- a. No opinions regarding the legal merits of an employer's case shall be expressed during the informal conference.

- b. There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Attorney General's Office for criminal prosecution under the Act.

### 3. **Closing Remarks.**

- a. At the conclusion of the conference, all main issues and potential courses of action will be summarized and documented.
- b. A copy of the summary, together with any other relevant notes of the discussion made by the Director, will be placed in the case file.

## **III. Petition for Modification of Abatement Date (PMA).**

An employer may file a petition for modification of abatement date when it has made a good faith effort to comply with abatement requirements, but such abatement has not been completed due to circumstances beyond its control. See [§1903.14a](#). If the employer requests additional abatement time after the 15 working day contest period has passed, the following procedures for PMAs are to be observed:

### **A. Filing.**

A PMA must be filed in writing with the Director who issued the Order to Comply no later than the close of the next working day following the date on which abatement was originally required.

1. If a PMA is submitted orally, the employer shall be informed that PEOSH cannot accept an oral PMA and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements below for late filing of the petition.
2. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

### **B. Where Filing Requirements Are Not Met.**

If the employer's written PMA does not meet all the requirements of [§1903.14a\(b\)\(1\)-\(5\)](#), the employer shall be contacted within 10 working days and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact.

1. If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed that if it fails to respond in a timely or adequate manner, the PMA will not be granted and the employer may be found to not have abated.
2. If the employer responds satisfactorily by telephone and the Director determines that the requirements for a PMA have been met, that finding shall be documented in the case file.
3. Although PEOSH policy is to handle PMAs as expeditiously as possible, there may be cases where the Director's decision may be delayed because of deficiencies in the PMA,

the need to conduct a monitoring inspection. Requests for additional time (e.g., 45 days) for the Director to reach a decision shall be sent to the Review Commission. A letter conveying this request shall be simultaneously sent to the employer and the employee representatives.

### **C. Approval of PMA.**

After the expiration of 15 working days following the posting of a PMA, the Director shall agree with or objecting to the request within 10 working days, if additional time has not been requested from the Review Commission. In the absence of a timely objection, the PMA shall be deemed granted even if not explicitly approved. The following action shall be taken:

1. If the PMA requests an abatement date that is two years or less from the issuance date of the citation, the Director has the authority to approve or object to the petition.
2. Any PMA requesting an abatement date that is more than two years from the issuance date of the Order to Comply requires the approval of the Assistant Commissioner as well as the Director.
3. If the PMA is approved, the Director shall notify the employer and the employee representatives by letter.
4. The Director or Assistant Commissioner (as appropriate) after consultation with a Deputy Attorney General, shall object to a PMA where the evidence supports non-approval (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith). In such cases, all relevant documentation shall be sent to the Review Commission in accordance with [N.J.A.C. 12:112](#). Both the employer and the employee representatives shall be notified of this action by letter, with return receipt requested.
  - a. Letters notifying the employer or employee representative of the objection shall be mailed on the same date that the Office objection to the PMA is sent to the Review Commission.
  - b. When appropriate, after consultation with the Office of the Attorney General, a failure to abate notification may be issued in conjunction with the objection to the PMA.

### **D. Objection to PMA.**

Affected employees or their representatives may file a written objection to an employer's PMA with the Director within 10 working days of the date of posting of the PMA by the employer or its service upon an authorized employee representative.

1. Failure to file such a written objection with the 10 working day period constitutes a waiver of any further right to object to the PMA.
2. If an employee or an employee representative objects to the extension of the abatement date, all relevant documentation shall be sent to the Review Commission.
  - a. Confirmation of this action shall be mailed (return receipt requested) to the objecting party as soon as it is accomplished.

- b. Notification of the employee objection shall be mailed (return receipt requested) to the employer on the same day that the case file is forwarded to the Commission.

#### **IV. PEOSH's Abatement Verification**

##### **A. Important Terms and Concepts.**

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

- a. Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by PEOSH during an inspection.
- b. For each inspection, except follow-up inspections, PEOSH shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until the Office is satisfied that abatement has occurred. If abatement was not completed, annotate the circumstances or reasons in the case file and enter the proper code in the IMIS.
- c. The PEOSH Chief is responsible for determining if abatement has been accomplished. When abatement is not accomplished during the initial inspection or the employer does not notify the Office by letter of the abatement, verification shall be determined by a follow-up inspection by a CSHO within 5 days of the abatement date for each violation.

###### **2. Abatement Verification.**

Abatement verification includes abatement certification, documents, plans, and progress reports.

###### **3. Abatement Certification.**

Employers must certify that abatement is complete for each cited violation. The written certification must include: the employer's name and address; the inspection number; the citation and item numbers; a statement that the information submitted is accurate; signature of the employer or employer's authorized representative; the date and method of abatement for each cited violation; and a statement that affected employees and their representatives have been informed of the abatement.

###### **4. Abatement Documents.**

Documentation submitted must establish that abatement has been completed, and include evidence such as the purchase or repair of equipment, photographic or video evidence of abatement or other written records verifying correction of the violative condition.

###### **5. Affected Employee.**

Affected employee means those employees who are exposed to the hazards(s) identified as violations(s) in a citation.

## 6. **Final Order Dates.**

### a. **Uncontested Citation Item.**

For an uncontested Order to Comply item, the final order date is the day following the fifteenth working day after the employer's receipt of the Order to Comply.

### b. **Contested Citation Item.**

For a contested Order to Comply item, the final order date is as follows:

- The thirtieth day after the date on which a decision or order of a Review Commission administrative law judge has been docketed with the Commission, unless a member of the Commission has directed review; or
- Where review has been directed, the thirtieth day after the date on which the Commission issues its decision or order disposing of all or pertinent part of a case; or
- The date on which a state appeals court issues a decision affirming the violation in a case in which a final order of Review Commission has been stayed.

### c. **Informal Settlement Dates.**

The final order date is when, within the 15 working days to contest a citation, the ISA is signed by **both** parties. See also [Chapter 15, Section XIII, Citation Final Order Dates](#).

## 7. **Abatement Dates.**

### a. **Uncontested Orders to Comply.**

For uncontested Orders to Comply, the abatement date is the later of the following dates:

- The abatement date identified in the citation;
- The extended date established as a result of an employer's filing for a Petition for Modification of Abatement (PMA) : or
- The date established by an informal settlement agreement.

### b. **Contested Citations.**

For contested citations for which the Review Commission has issued a final order, the abatement date is the later of the following dates:

- The date identified in the final Order for abatement;

- Where there has been a contest of a violation or abatement date (not penalty), the date computed by adding the period allowed in the Order to Comply for abatement to the final order date; or
- The date established by a formal settlement agreement.

c. **Contested Penalty Only.**

Where an employer has contested only the proposed penalty, the abatement period continues to run unaffected by the contest. The abatement period is subject to the time periods set forth above.

8. **Movable Equipment.**

- Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is moved within or between worksites.
- Hand-held equipment is equipment that is hand-held when operated and can generally be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.

9. **Worksite.**

- For the purpose of enforcing the Abatement Verification regulation, the worksite is the physical location specified within the “Alleged Violation Description” of the citation.
- If no location is specified, the worksite shall be the inspection site where the cited violation occurred.

B. **Written Certification.**

The Abatement Verification Regulation, [§1903.19](#), requires those employers who have received a citation(s) for violation(s) of the Act to certify in writing that they have abated the hazardous condition for which they were cited and to inform affected employees of their abatement actions.

C. **Verification Procedures.**

The verification procedures to be followed by an employer depend on the nature of the violation(s) identified and the employer's abatement actions. The abatement verification regulation establishes requirements for the following:

1. Abatement Certification
2. Abatement Documentation
3. Abatement Plans
4. Progress Reports

## 5. Tagging for Movable Equipment

### D. Supplemental Procedures.

Where necessary, PEOSH supplements these procedures with follow-up inspections and onsite monitoring inspections. For additional information see [Section XII](#) of this chapter, *OnSite Visits: Procedures for Abatement Verification and Monitoring*.

### E. Requirements.

Except for the application of warning tags or citations on movable equipment ([§1903.19\(i\)](#)), the abatement verification regulation does not impose any requirements on the employer until an Order to Comply item has become a final order of the Review Commission.

## V. Abatement Certification.

### A. Minimum Level.

Abatement certification is the minimum level of abatement verification and is required for all violations once they become Review Commission final orders. An exception exists where the CSHO observed abatement during the onsite portion of the inspection and the violation is listed on the citation as “Corrected During Inspection (CDI)” or “Quick-Fix.” See [Paragraph VI.D.](#) of this chapter, *CSHO Observed Abatement*.

### B. Certification Requirements.

The employer's written certification that abatement is complete must include the following information for each cited violation:

1. The date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement;
2. The employer's name and address;
3. The inspection number to which the submission relates;
4. The citation and item numbers to which the submission relates;
5. A statement that the information submitted is accurate; and
6. The signature of the employer or the employer's authorized representative.

A non-mandatory example of an abatement certification letter is available in [Appendix A](#) of the Abatement Verification Regulation ([§1903.19](#)).

### C. Certification Timeframe.

1. All Order to Comply items which have become final orders, regardless of their characterizations, require written abatement certification within 10 calendar days of the abatement date.



2. A PMA received and processed in accordance with the guidance of the FOM will suspend the 10-day time period for receipt of the abatement certification for the item for which the PMA is requested.
  - a. Thus, no citation will be issued for failure to submit the certification within 10 days of the abatement date.
  - b. If the PMA is denied, the 10-day time period for submission to PEOSH begins on the day the employer receives notice of the denial.

## **VI. Abatement Documentation.**

More extensive documentation of abatement is required for the most serious violations. When a violation requires abatement documentation, in addition to certifying abatement, the employer must submit documents demonstrating that abatement is complete.

### **A. Required Abatement Documentation.**

Pursuant to [§1903.19](#), documentation of abatement is required for the following:

1. Willful violations;
2. Repeat violations; and
3. Serious violations where PEOSH determines that such documentation is necessary as indicated on the Order to Comply. For further information see [Paragraph VI.C.](#) of this chapter, *Abatement Documentation for Serious Violations*.

### **B. Adequacy of Abatement Documentation.**

1. Abatement documentation must be accurate and describe or portray the abated condition adequately. It may be submitted in electronic form, if approved by the Director.
2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.
3. The adequacy of the abatement documentation submitted by the employer will be assessed by PEOSH using the information available in the Order to Comply and the Office's knowledge of the employer's workplace and history.
4. Examples of documents that demonstrate that abatement is complete include, but are not limited to:
  - a. Photographic or video evidence of abatement;
  - b. Evidence of the purchase or repair of equipment;
  - c. Evidence of actions taken to abate;
  - d. Bills from repair services;

- e. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;
  - f. Documentation from the manufacturer that the article repaired is within the manufacturer's specifications;
  - g. Records of training completed by employees if the citation is related to inadequate employee training; and
  - h. A copy of program documents if the citation was related to a missing or inadequate program, such as a deficiency in the employer's respirator or hazard communication program.
5. Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with [ADM 03-01-005](#), *PEOSH Compliance Records*, dated August 3, 1998.

### **C. Abatement Documentation for Serious Violations.**

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

- a. PEOSH policy is generally that all high gravity serious violations will require abatement documentation.
- b. Where, in the opinion of the Director, abatement documentation is not required for a high gravity serious violation, the reasons for this must be set forth in the case file.

#### **2. Moderate or Low Gravity Serious Violations.**

Moderate or low gravity serious violations should not normally require abatement documentation, except that the Director will require evidence of abatement for moderate and low gravity serious violations under the following circumstances:

- a. If the establishment has been issued a citation for a willful violation or a failure-to-abate notice for any standard which has become final order in the previous three years; or
- b. If the employer has any history of a violation that resulted in a fatality or an NJOSH-300 log entry indicating serious physical harm to an employee in the past three years. The standard being cited must be similar to the standard cited in connection with the fatality or serious injury or illness.

### **D. CSHO Observed Abatement.**

- 1. Employers are not required to certify abatement for violations which they promptly abate during the onsite portion of the inspection and observed by the CSHO.
  - a. The Director may use their discretion in extending the "24 hour" time limit to document abated conditions during the inspection.

- b. Observed abatement will be documented on the Violations Summary Form (OSHA-1B and/or OSHA-1B(IH)), for each violation and must include the date and method of abatement.
2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, the documentation in the case file must also indicate that abatement is complete. Where suitable, the CSHO may use photographs or video evidence. For additional information regarding adequacy of abatement documentation, see [Paragraph VI.B.](#) of this chapter, *Adequacy of Abatement Documentation*.
3. When the abatement has been witnessed and documented by the CSHO, a notation reading “Corrected During Inspection” shall be made on the citation. Immediate abatement of some violations may qualify for penalty reductions under PEOSH’s “Quick-Fix” incentive program. These incentives are discussed with the employer during the opening conference. See [Chapter 6, Paragraph IV.A.](#), *Quick-Fix Penalty Adjustment*.
4. Notations stating “Corrected during inspection” or “Employer has abated all hazards” shall not be made on the Order to Comply in cases where there is evidence of a continuing violative practice by an employer that may be subject to a summary enforcement order under the Act (i.e., failure to provide fall protection is a recurring condition based on citation history or other indications suggesting widespread violations of the same or similar standards at other establishments or worksites).

## **VII. Monitoring Information for Abatement Periods Greater than 90 Days.**

### **A. Abatement Periods Greater than 90 Days.**

For abatement periods greater than 90 calendar days, the regulation allows the Director flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be specifically associated to the citation item to which they relate.
2. Progress reports may not be required unless abatement plans are specifically required.
3. Note that Paragraphs (e) and (f) of [§1903.19](#) have limits: the Director is not allowed to require an abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.
4. The regulation places an obligation on employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. One way of ensuring that interim protection is included in the abatement plan is to note this requirement on the citation. See [§1903.19, Non-Mandatory Appendix B](#), for a sample of an Abatement Plan and Progress Report.

### **B. Abatement Plans.**

1. The Director may require an employer to submit an abatement plan for each qualifying cited violation.

- a. The requirement for an abatement plan must be indicated in the Order to Comply.
  - b. The Order to Comply may also call for the abatement plan to include interim measures.
2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, where necessary, the methods for protecting employees from exposure to the hazardous conditions in the interim until the abatement is complete (§1903.19(e)(2)).
  3. In cases where the employer can not prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

### **C. Progress Reports.**

1. An employer that is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:
  - a. That periodic progress reports are required and the citation items for which they are required;
  - b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after the due date of an abatement plan;
  - c. Whether additional progress reports are required; and
  - d. The date(s) on which additional progress reports must be submitted.
2. For each violation, the progress report must identify in a single sentence if possible, the action taken to achieve abatement and the date the action was taken. There is nothing in this policy or the regulation prohibiting progress reports as a result of settlement agreements.

### **D. Special Requirements for Long-Term Abatement.**

1. Long-term abatement is abatement which will be completed more than one year from the Order to Comply issuance date.
2. The Director must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.
3. Progress reports are mandatory and must be required at a minimum every six months. More frequent reporting may be required at the discretion of the Director.

## **VIII. Employer Failure to Submit Required Abatement Certification.**

### **A. Actions Preceding Citation for Failure to Certify Abatement.**

1. If abatement certification, or any required documentation, is not received within 13 calendar days after the abatement date (the regulation requires filing within 10 calendar

days after the abatement date; and another 3 calendar days is added for mailing), the following procedures should be followed:

- a. Remind the employer by telephone of the requirement to submit the material and tell the employer that a citation will be issued if the required documents are not received within 7 calendar days after the telephone call.
  - b. During the conversation with the employer, determine why it has not complied and document all communication efforts in the case file. Discuss PEOSH's PMA policy and explain that a late petition to modify the abatement date can be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.
  - c. Issue a follow-up letter to the employer the same day as the telephone call.
  - d. The employer may be allowed to respond via fax or email where appropriate.
2. If the certification and/or documentation are not received within the next 7 calendar days, a single other-than-serious citation will be issued.
  3. Normally citations for failure to submit abatement certification for violations of [§1903.19\(c\)](#) shall not be issued until the above procedures have been followed and the employer has been provided additional opportunity to comply. These pre-citation procedures also apply when abatement plans or progress reports are not received within 13 days of the due date.

#### **B. Citation for Failure to Certify.**

1. Citations for failure to submit abatement verification (certification, documentation, abatement plans or progress reports) can be issued without formal follow-up activities by following the procedures identified below.
2. A single other-than-serious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation.
  - a. This "other" citation will be issued under the same inspection number which contained the original violations cited.
  - b. The abatement date for this citation shall be set 30 days from the date of issuance.

**NOTE:** Each violation of [§1903.19\(c\)](#), [\(d\)](#), [\(e\)](#), or [\(f\)](#) with respect to each original citation item is a separate item.

3. For those situations where the abatement date falls within the 15 day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation's characterization or abatement period is to be modified.

4. For those rare instances where the reminder letter is returned to the Office by the Post Office as undeliverable and telephone contact efforts fail, the Director has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certification.

### **C. Certification Omissions.**

1. An initial minor or non-substantive omission in an abatement certification (e.g., lack of a definitive statement stating that the information being submitted is accurate) should be considered a de minimis condition of the regulation.
2. If there are minor deficiencies, such as omitting the inspection number, signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Office can serve as the date on the document.
3. A certification with an omitted signature should be returned to the employer to be signed.

### **D. Penalty Assessment for Failure to Certify.**

The penalty provisions of [the PEOSH Act](#) apply to all citations issued under this regulation. See [Chapter 6, Penalties and Debt Collection](#), for additional information.

## **IX. Tagging for Movable Equipment.**

### **A. Tag-Related Citations.**

Tag-related citations must be observed by CSHOs prior to the issuance of a citation for failure to initially tag cited movable equipment.

1. See [§1903.19, Non-mandatory Appendix C](#), for a sample warning tag. PEOSH must be able to prove the employer's initial failure to act (tag the movable equipment upon receipt of the citation).
2. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation using [§1903.19\(i\)\(6\)](#).

### **B. Equipment Which is Moved.**

Tags are intended to provide an interim form of protection to employees through notification for those who may not know of the citation or the hazardous condition.

1. For non hand-held equipment, CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement ([§1903.19\(i\)](#)) because the tagging provision is triggered upon *movement* of the equipment.

2. For hand-held equipment, employers must attach a warning tag or copy of the citation *immediately* after the employer's receipt of the citation. The attachment of the tag is not dependent on any *subsequent* movement of the equipment.

**X. Failure to Notify Employees by Posting.**

**A. Evidence.**

Like tag-related citations, CSHOs shall investigate an employer's failure to notify employees by posting.

**B. Location of Posting.**

Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees (§1903.19(g)(2)) the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives. Employers may also communicate by other means with affected employees and their representatives regarding abatement activities.

**C. Other Communication.**

The CSHO must determine not only whether the documents or summaries were appropriately posted, but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.

**XI. Abatement Verification for Special Enforcement Situations.**

**A. Construction Activity Considerations.**

1. Construction activities pose situations requiring special consideration.
  - a. Construction site closure or hazard removal due to completing of the structure or project will only be accepted as abatement without certification where the CSHO verifies the site closure/completion and where closure/completion effectively abates the condition cited.
  - b. In all other circumstances, the employer must certify to PEOSH that the hazards have been abated by the submission of an abatement certification. In rare cases the verification may have to cease and the abatement action closed through cessation of work or verification with the employer to verify abatement.
2. Equipment-related and all program-related (e.g., crane inspection, hazard communication, respirator, training, competent person, qualified persons, etc.) violations *will always* require employer certification of abatement regardless of construction site closure.
3. Where the violation specified in a citation is the employer's general practice of failing to comply with a requirement (e.g., the employer routinely fails to provide fall protection at its worksites), closure/completion of the individual worksite will not be accepted as abatement.

4. Where a follow-up inspection to verify abatement is deemed necessary, PEOSH will determine the most efficient and mutually beneficial approach to conducting the inspection.

#### **B. Follow-Up Policy for Employer Failure to Verify Abatement under §1903.19.**

Follow-up or monitoring inspections would not normally be conducted when evidence of abatement is provided by the employer or employee representatives. For further information on exceptions for Enhanced Enforcement Program (EEP) cases, see [CPL 02-00-145](#), *Enhanced Enforcement Program (EEP) Directive*, dated January 1, 2008.

**NOTE:** For further information on extended abatement periods, see [Section VII](#), Monitoring Information for Abatement Periods Greater than 90 Days, and [Section XIII](#), Monitoring Inspections, both of this chapter.

1. Where the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Area Director has discretion to conduct a follow-up inspection.
2. Submission of inadequate documents may also be the basis for a follow-up inspection.
3. This inspection should not generally occur before the end of the original 15 day contest period except in unusual circumstances.

## **XII. OnSite Visits: Procedures for Abatement Verification and Monitoring.**

### **A. Follow-Up Inspections.**

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected.

### **B. Initial Follow-Up.**

1. The initial follow-up is the first follow-up inspection after issuance of the citation.
2. If a violation is found not to have been abated, the CSHO shall inform the employer that the employer is subject to a Notification of Failure to Abate Alleged Violation and proposed additional daily penalties while such failure or violation continues.
3. Failure to comply with enforceable interim abatement dates involving multi-step abatement shall be subject to a Notification of Failure to Abate Alleged Violation.
4. Where the employer has implemented some controls, but the control measures were inadequate during follow-up monitoring, and other technology was available which would have brought the process into compliance, a Notification of Failure to Abate Alleged Violation normally shall be issued. If the employer has exhibited good faith, a late PMA for extenuating circumstances may be considered.
5. Where an apparent failure to abate by means of engineering controls is found to be due to technical infeasibility, no failure to abate notice shall be issued; however, if proper



administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.

**C. Second Follow-Up.**

1. Any subsequent follow-up after the initial follow-up inspection dealing with the same violations is considered a second follow-up.
  - a. After the Notification of Failure to Abate Alleged Violation has been issued, the Director shall allow a reasonable time for abatement of the violation before conducting a second follow-up. The employer must ensure that employees are adequately protected by other means until the violations are corrected.
  - b. If the employer contests the proposed additional daily penalties, a follow-up inspection shall still be scheduled to ensure correction of the original violation.
2. If a second follow-up inspection reveals the employer still has not corrected the original violations, a second Notification of Failure to Abate Alleged Violation with additional daily penalties shall be issued if the Director believes it to be appropriate.
3. If a Notification of Failure to Abate Alleged Violation and additional daily penalties are not to be proposed because of an employer's flagrant disregard of a citation or an item on a citation, the Director shall immediately contact the Commissioner, in writing, detailing the circumstances so the matter can be referred to the Attorney General's Office.

**D. PEOSH Act Section 34:6A-44 Restraining Orders.**

There may be times during the initial follow-up when, because of an employer's flagrant disregard of a citation or other factors, it will be apparent that traditional enforcement actions would be inappropriate or ineffective. In such cases, The Attorney General, at the request of and on behalf of the commissioner, may bring an action in the Superior Court to restrain any conditions or practices in any workplace which the commissioner determines, in accordance with N.J.S.A 34:6A-41, are such that a danger exists which could reasonably be expected to cause death or serious physical harm.

**E. Follow-Up Inspection Reports.**

1. Follow-up inspection reports shall be included with the original initial inspection case file. The applicable identification and description sections of the OSHA-1B/1B(IH) Form shall be used for documenting correction of willful, repeated, and serious violations and failure to correct items during follow-up inspections.
2. If Serious, Willful, or Repeat violation items were appropriately grouped in the OSHA-1B/1B(IH) in the original case file, they may be grouped on the follow-up OSHA-1B; otherwise, individual OSHA-1B/1B(IH) forms shall be used for each item. The correction of other-than-serious violations may be documented in the narrative portion of the case file.
3. **Documentation of Hazard Abatement by Employer.**

- a. The hazard abatement observed by the CSHO shall be specifically described in the OSHA-1B/1B(IH) form, including any applicable dimensions, materials, specifications, personal protective equipment, engineering controls, measurements or readings, or other conditions.
- b. Brief terms such as “corrected” or “in compliance” will not be accepted as proper documentation for violations having been corrected.
- c. When appropriate, this written description shall be supplemented by a photograph and/or a videotape to illustrate correction circumstances.
- d. Only the item description and identification blocks need be completed on the follow-up OSHA-1B/1B(IH) with an occasional inclusion of an applicable employer statement concerning correction under the employer knowledge section, if appropriate.

#### **4. Sampling.**

- a. CSHOs conducting a follow-up inspection to determine abatement of violations of air contaminant or noise standards, shall decide whether sampling is necessary and if so, what kind (i.e., spot sampling, short-term sampling, or full-shift sampling).
- b. If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, full-shift sampling is required to verify exposure limits based on an 8-hour time weighted average.

#### **5. Narrative.**

The CSHO must include in the narrative the findings pursuant to the inspection, along with recommendations for action. In order to make a valid recommendation, it is important to have all the pertinent factors available in an organized manner.

#### **6. Failure to Abate.**

In the event that any item has not been abated, complete documentation shall be included on an OSHA-1B.

### **XIII. Monitoring Inspections.**

#### **A. General.**

Monitoring inspections are conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance. Such inspections may be scheduled, among other reasons, as a result of:

- Abatement dates in excess of one year.
- A petition for modification of abatement date (PMA).

- A Settlement Agreement.
- To ensure that terms of a permanent variance are being carried out.
- At the request of an employer requesting technical assistance granted by the director.

**B. Conduct of Monitoring Inspection (PMAs and Long-Term Abatement).**

Monitoring inspections shall be conducted in the same manner as follow-up inspections. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one or more of the following purposes:

- ▶ Determine the progress an employer is making toward final correction.
- ▶ Ensure that the target dates of a multi-step abatement plan are being met.
- ▶ Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.
- ▶ Ensure that the employees are being properly protected until final controls are implemented.
- ▶ Ensure that the terms of a permanent variance are being carried out.
- ▶ Provide abatement assistance for items under citation.

**C. Abatement Dates in Excess of One Year.**

1. Monitoring visits shall be scheduled to check on progress made whenever abatement dates extend beyond one year from the issuance date of the citation.
2. These inspections shall be conducted approximately every six months, counted from the citation date, until final abatement has been achieved for all cited violations.
  - a. If the case has been contested, the final order date shall be used as a starting point, instead of the citation date.
  - b. A settlement agreement may specify an alternative monitoring schedule.
3. If the employer is submitting satisfactory quarterly progress reports and the Director agrees after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every twelve months.
4. Such inspections shall have priority equal to that of serious formal complaints. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

#### **D. Monitoring Abatement Efforts.**

1. The Director shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.
2. Where engineering controls have been cited or required for abatement, a monitoring inspection shall be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
3. Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from PEOSH, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
4. Monitoring inspections shall be scheduled as soon as possible after initial contact with the employer and shall not be delayed until actual receipt of the PMA.
5. CSHOs shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent; i.e., spot sampling, short-term sampling, or full-shift sampling.
6. CSHOs shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The factors to be considered may include, but are not limited to the following:
  - a. Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and/or management skills, accuracy of information reported by the employer, and timeliness of progress reports.
  - b. The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants, and/or the employer's insurance company.
  - c. Other documentation collected by PEOSH personnel including verification of progress reports, success and/or failure of abatement efforts, and assessment of current exposure levels of employees.
  - d. Employer and employee interviews.
  - e. Specific reasons for requesting additional time including specific plans for controlling exposure and specific calendar dates.
  - f. Personal protective equipment.
  - g. Medical programs.
  - h. Emergency action plans.

#### **XIV. Notification of Failure to Abatement.**

##### **A. Violation.**

A Notification of Failure to Abate an Alleged Violation (OSHA-2B) shall be issued in cases where violations have not been corrected as required, as verified by an onsite inspection or follow-up inspection.

**B. Penalties.**

Failure to abate penalties shall be applied when an employer has not corrected a previously cited violation which had become a final order of the Commission.

**C. Calculation of Additional Penalties.**

1. A Gravity Based Penalty (GBP) for unabated violations is to be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon re-inspection.
2. Detailed information on calculating failure to abate (FTA) penalties is included in [Chapter 6, Penalties and Debt Collection](#).

**XV. Case File Management.**

**A. Closing of Case File Without Abatement Certification.**

The closing of a case file without abatement certification(s) must be justified through a statement in the case file by the Director or his/her designee, addressing the reason for accepting each uncertified violation as an abated citation.

**B. Review of Employer-Submitted Abatement.**

PEOSH will review employer-submitted abatement verification materials as soon as possible but no later than 30 days after receipt. If the review will be delayed, notify the employer that the material will be reviewed by a certain date, and that the case will be closed if appropriate, after that time.

**C. Whether to Keep Abatement Documentation.**

Abatement documentation (photos, employer programs, etc.) shall be retained in accordance with OSHA Instruction [ADM 03-01-005, OSHA Compliance Records](#), dated August 3, 1998.

**XVI. Abatement Services Available to Employers.**

Employers requesting abatement assistance shall be informed that PEOSH is willing to work with them even after citations have been issued and provides incentives for immediate onsite abatement of certain types of violations. For further information see [Chapter 6, Section IV, Effect on Penalties if Employer Immediately Corrects](#).

## Chapter 8

### SETTLEMENTS

#### I. Settlement of Cases by the Director.

The Director is granted settlement authority and shall follow these instructions when negotiating settlement agreements.

##### A. General.

1. Except for egregious cases, or cases that affect other jurisdictions, The Director may enter into Informal Settlement Agreements with employers prior to the employer filing a written notice of contest.

***NOTE:*** After the employer has filed a written notice of contest, the Director may proceed toward a Formal Settlement Agreement with the concurrence and participation of PEOSH counsel.

2. The Director may amend abatement dates, reclassify violations (e.g., willful to serious, serious to other-than-serious), and modify or withdraw a penalty, a citation, or a citation item, where evidence establishes during the informal conference that the changes are justified.
3. The Director may actively negotiate the amount of proposed penalties, depending on the circumstances of the case and the particular improvements in employee safety and health that can be obtained.
4. Employers shall be informed that they are required by [§1903.19](#) to post copies of all amendments or changes to citations resulting from informal conferences. Employee representatives must also be provided with copies of any agreements.
5. Cases or issues relating to potential settlements shall be handled in accordance with established Office procedures.

##### B. Pre-Contest Settlement (Informal Settlement Agreement).

Pre-contest settlement discussions will generally occur during or immediately following the information conference and prior to the expiration of the 15 working day contest period.

1. In the event that an employer is bringing an attorney to an informal conference, the Director or his designees are encouraged to contact the Attorney General's Office and ask for the assistance of counsel.
2. If a settlement is reached during the informal conference, an Informal Settlement Agreement (ISA) shall be prepared and the employer will be asked to sign it. It will be effective upon signature of both the employer and the Director (**who shall sign last**), provided the contest period has not expired. Both parties will date the documents on the day of actual signature.

3. If the employer is not present to sign the ISA, the Director shall send the agreement to the employer for signature. After signing, the employer must return the agreement to the Director by hand delivery or via facsimile within the 15 day contest period.
  - a. In every case, the Director shall give employers notice in writing that the citation will become final and unreviewable at the end of the contest period, unless the employer signs the proposed agreement or files a written notice of contest.
  - b. If an employer wishes to make any changes to the text of the agreement, the Director must agree to and authorize the proposed changes prior to the expiration of the contest period.
    - If the changes proposed by the employer are acceptable to the Director, the exact language written into the agreement shall be mutually agreed upon. Employers shall be instructed to incorporate the agreed-upon language into the agreement, sign it, and return to PEOSH by hand delivery or via facsimile.
    - Annotations incorporating the exact language of any changes authorized shall be made to the retained copy of the agreement and signed and dated by the Director.
  - c. Upon receipt of the ISA signed by the employer, the Director will ensure, prior to his/her signature, that any modifications to the agreement are consistent with the notations made in the case file.
    - In these cases, the citation record will then be updated in IMIS in accordance with current procedures.
    - If an employer's changes substantially alter the original terms, the agreement signed by the employer will be treated as a notice of contest and handled accordingly. The employer will be informed of this as soon as possible.
  - d. A reasonable time will be allowed for return of the agreement from the employer.
    - If an agreement is not received within the 15 day contest period, the Director will presume the employer did not sign the agreement, and the citation will be treated as a final order.
    - The employer will be required to certify that the informal settlement agreement was signed prior to the expiration of the contest period.
4. If settlement efforts are unsuccessful and the employer contests the citation, the Director will state the terms of the final settlement offer in the case file.

#### **C. Procedures for Preparing the Informal Settlement Agreement.**

The ISA shall be prepared and processed in accordance with current PEOSH policies and practices. For guidance in determining final dates of settlement and Review Commission orders, see [Chapter 15, Section XIII, Citation Final Order Dates](#).

#### **D. Post-Contest Settlement (Formal Settlement Agreement).**

Post-contest settlements will normally occur before the complaint is filed with the Review Commission.

1. Following the filing of a notice of contest, the Director shall (unless other procedures have been agreed upon) notify the Deputy Attorney General when it appears that negotiations with the employer may produce a settlement. This notification shall occur at the time the notice of contest transmittal memorandum is sent to the Office of Administrative Law (OAL).
2. If a settlement is later requested by the employer, the Director will communicate the proposed terms to the OAL, who will then draft and execute the agreement.

**E. Agency Wide Settlement Agreement.**

Agency-wide Settlement Agreements may be entered into under special circumstances to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control.



## Chapter 9

### COMPLAINT AND REFERRAL PROCESSING

#### I. Safety and Health Complaints and Referrals.

##### A. Definitions.

###### 1. Complaint

Notice of an alleged safety or health hazard (over which PEOSH has jurisdiction), or a violation of the Act, submitted by a current employee or representative of employees.

###### 2. Formal Complaint

Complaint made by a current employee or a representative of employees that meets all of the following requirements:

- a. Asserts that an imminent danger, a violation of the Act, or a violation of a PEOSH/OSHA standard exposes employees to a potential physical or health harm in the workplace;
- b. Is reduced to writing or submitted on a complaint form; and
- c. Is signed by at least one current employee or employee representative.

###### 3. Non-formal Complaint.

Any complaint alleging safety or health violations that does not meet all of the requirements of a formal complaint identified above and does not come from one of the sources identified under the definition of Referral, below.

###### 4. Inspection.

An onsite examination of an employer's worksite conducted by a PEOSH compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in the section on Criteria Warranting an Inspection, below.

###### 5. Inquiry.

A process conducted in response to a complaint or a referral that does not meet one of the identified inspection criteria. It does not involve an onsite inspection of the workplace, but rather the employer is notified of the alleged hazard(s) or violation(s) by telephone, fax, email, or by letter if necessary. The employer is then requested to provide a response, and PEOSH will notify the complainant of that response via appropriate means.

###### 6. Permanently Disabling Injury or Illness.

An injury or illness that has resulted in permanent disability or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

## 7. **Referral.**

An allegation of a potential workplace hazard or violation received from one of the sources listed below.

- a. **CSHO referral** – information based on the direct observation of a CSHO.
- b. **Safety and health agency referral** – from sources including, but not limited to: OSHA, NIOSH, consultation, and state or local health departments, as well as safety and/or health professionals in other agencies.
- c. **11(c) complaint referral** – made by a whistleblower investigator when an employee alleges that he or she was retaliated against for complaining about safety or health conditions in the workplace, refusing to do an allegedly imminently dangerous task, or engaging in other activities related to occupational safety or health.
- d. **Other government agency referral** – made by other Federal, State, or local government agencies or their employees, including local police and fire departments. (As appropriate, Code 14A – E. *Other Federal Agency*, or G. *State/Local Government*.)
- e. **Media report** – either news items reported in the media or information reported directly to OSHA by a media source. (Code 14A – H. *Media*.)
- f. **Employer report** – of accidents other than fatalities and catastrophes. (Code 14A – I. *Other*.)

## 8. **Representative of Employees.**

Any of the following:

- a. An authorized representative of the employees bargaining unit, such as certified or recognized labor organization.
- b. An attorney acting for an employee.
- c. Any other person acting in a bona fide representative capacity, including, but not limited to, members of the clergy, social workers, spouses and other family members, and government officials or nonprofit groups and organizations acting upon specific complaints and injuries from individuals who are employees.

**NOTE:** *The representative capacity of the person filing complaints on behalf of another should be ascertained unless it is already clear. In general, the affected employee should have requested, or at least approved, the filing of the complaint on his or her behalf.*

## B. **Classifying as a Complaint or a Referral.**

Whether the information received is classified as a complaint or a referral, an inspection of a workplace is normally warranted if **at least one** of the conditions in the section *Criteria Warranting an Inspection* is met.

### C. **Criteria Warranting an Inspection.**

An inspection is normally warranted if **at least one** of the conditions below is met.

1. A valid formal complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on a complaint form, be signed by a current employee or representative of employees, and state the reason for the inspection request with reasonable particularity. Additionally, there must be reasonable grounds to believe either that a violation of the Act or PEOSH/OSHA standard that exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists, as provided in the Act.
2. The information alleges that a permanently disabling injury or illness has occurred as a result of the complained of hazard(s), and there is reason to believe that the hazard or related hazards still exist.
3. The information alleges that an imminent danger situation exists.
4. The information concerns an establishment and an alleged hazard covered by a local emphasis program, the Site-Specific Targeting Plan.
5. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s).
6. The establishment that is the subject of the information has a history of egregious, willful, failure-to-abate, or repeated citations within the Office's jurisdiction during the past three years. However, if the employer has previously submitted adequate documentation for these violations demonstrating that they were corrected and that programs have been implemented to prevent a recurrence of hazards, the Director will normally determine that an inspection is not necessary.
7. A whistleblower investigator requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
8. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled via inquiry is received, that complaint or referral may, at the Director's discretion, be incorporated into the scheduled or ongoing inspection. If such a complaint is formal, the complainant must receive a written response addressing the complaint items.
9. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, an onsite inspection will be initiated if the information relates to construction, manufacturing,

agriculture, or other industries as determined by the Director. A referral to Wage and Hour should also be initiated.

**NOTE:** *The information does not need to allege that a child labor law has been violated.*

10. The information received is a signed, written complaint from a current employee or employee representative that alleges a recordkeeping deficiency that indicates the existence of a serious safety or health violation.

#### **D. Electronic Complaints Received.**

1. Information received electronically from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can send or fax a signed copy of the information, request that a complaint form be sent, or sign the information in person at the Office. Normally a complainant has five working days to formalize an electronic complaint; the Office must actively follow-up on information received electronically in order to provide the employee with the opportunity to formalize the complaint.
2. All complaint-related material received electronically should be printed and date stamped with the date the material was submitted and received. When these dates are not the same, the Director will determine the appropriate date for the incoming material.

#### **E. Information Received by Telephone.**

1. While speaking with the caller, PEOSH personnel will attempt to obtain the following information:
  - a. Whether the caller is a current employee or an employee representative.
  - b. The exact nature of the alleged hazard(s) and the basis of the caller's knowledge. The individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of PEOSH/OSHA standards or the Act.
  - c. The employer's name, address, email address, telephone and fax numbers, as well as the name of a contact person at the worksite.
  - d. The name, address, telephone number, and email address of any union and/or employee representative at the worksite.
2. As appropriate, PEOSH will provide the caller with the following information:
  - a. Describe the complaint process, and if appropriate, the concepts of "inquiry" and "inspection", as well as the relative advantages of each.
  - b. If the caller is a current employee or a representative of employees, explain the distinction between a formal complaint and a non-formal complaint, and the rights and protections that accompany filing a formal complaint. These rights and protections include:

- The right to request an onsite inspection.
  - Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists.
  - The right to obtain review of a decision not to inspect by submitting a request for review in writing.
3. Information received by telephone from a current employee is considered a non-formal complaint until that individual provides a signed copy of the information. The employee can send or fax a signed copy of the information, request that a complaint form be sent, or sign the information in person at the Office. Normally a complainant has five working days to formalize an electronic complaint.
  4. If appropriate, inform the complainant of rights to confidentiality in accordance with the Act and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant is protected regardless of the formality of the complaint.
  5. Explain the rights of employees against reprisal and discrimination.

**F. Procedures for an Inspection.**

1. Upon receipt of a complaint or referral, the Director (or his or her designee) will evaluate all available information to determine whether there are reasonable grounds to believe that a violation or hazard exists.
  - a. If necessary, reasonable attempts will be made to contact the individual who provided the information in order to obtain additional details or to clarify issues raised in the complaint or referral. See the [Complaint Questionnaire](#) section at the end of this Chapter.
  - b. The Director may determine not to inspect a facility if he/she has a substantial reason to believe that the condition complained of is being or has been abated.
2. Despite the existence of a complaint, if the Director believes there are no reasonable grounds that a violation or hazard exist, no inspection or inquiry will be conducted.
  - a. Where a formal complaint has been submitted, the complainant will be notified in writing of PEOSH's intent not to conduct an inspection, the reasoning behind the determination, and the right to have the determination reviewed under [§1903.12](#). The justification for not inspecting will be noted in the case file.
  - b. In the event of a non-formal complaint or referral, if possible, the individual providing the information will be notified by appropriate means of PEOSH's intent not to conduct an inquiry or inspection. The justification for not inspecting will be noted in the case file.

3. If the information contained in the complaint or referral meets at least one of the inspection criteria listed in [Paragraph I.C.](#) of this chapter, *Criteria Warranting an Inspection*, and there are reasonable grounds to believe that a violation or hazard exists, the Office is authorized to conduct an inspection.
  - a. If appropriate, the Office will inform the individual providing the information that an inspection will be scheduled and that he or she will be advised of the results.
  - b. After the inspection, the Office will send the individual a letter addressing each information item, with reference to the citation(s) or a sufficiently detailed explanation for why a citation was not issued.
4. If an inspection is warranted, it will be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards will normally be initiated within five working days of formalizing.

#### **G. Procedures for an Inquiry.**

1. If the complaint or referral does not meet the criteria for initiating an onsite inspection, an inquiry will be conducted. PEOSH will promptly contact the employer to notify it of the complaint or referral and its allegation(s), and fax or email a confirming letter.
2. If a non-formal complaint is submitted by a current employee or a representative of employees that does not meet any of the inspection criteria, the complainant may be given five working days to make the complaint formal.
  - a. The complainant may come into the Office and sign the complaint, or mail or fax a signed complaint letter to PEOSH. Additionally, a complaint form can be mailed or faxed to the complainant, if appropriate.
  - b. If the complaint is not made formal after five working days, after making a reasonable attempt to inform the complainant of the decision, PEOSH will proceed with the inquiry process.
3. The employer will be advised of what information is needed to answer the inquiry and encouraged to respond by fax or email. Employers are encouraged to do the following:
  - a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications.
  - b. Advise the Director either in writing or via email within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Director, the response time may be longer or shorter than five working days, depending on the circumstances. Additionally, although the employer is requested to respond within the above time frame, the employer may not be able to complete abatement action during that time, but is encouraged to do so.
  - c. Provide the Director with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs and/or videos that the

employer believes would be helpful, as well as a description of any corrective action the employer has taken or is in the process of taking.

- d. Post a copy of the letter from PEOSH where it is readily accessible for review by all employees.
  - e. Return a copy of the signed Certificate of Posting to the Office.
  - f. If there is a recognized employee union or safety and health committee in the facility, provide it with a copy of PEOSH's letter and the employer's response.
4. As soon as possible after contacting the employer, a notification letter will be faxed to the employer, or mailed where no fax is available. Sample letters to complainants and employers are provided on the NCR. If email is an acceptable means of responding, this should be indicated in the notification letter and the proper email address should be provided.
  5. If no employer response or an inadequate employer response is received after the allotted five working days, additional contact with the employer may be made before an inspection is scheduled. If the employer provides no response or an inadequate response, or if PEOSH determines from other information that the condition has not been or is not being corrected, an inspection will be scheduled.
  6. The complainant will be advised of the employer's response, as well as the complainant's rights to dispute that response, and if the alleged hazard persists, of the right to request an inspection. When PEOSH receives an adequate response from the employer and the complainant does not dispute or object to the response, an onsite inspection normally will not be conducted.
  7. If the complainant is a current employee or a representative of employees and wishes to dispute the employer's response, the disagreement must be submitted in writing and signed, thereby making the complaint formal.
    - a. If the employee disagreement takes the form of a written and signed formal complaint, see [Paragraph I.F.](#) of this chapter, *Procedures for an Inspection*.
    - b. If the employee disagreement does not take the form of a written and signed formal complaint, some discretion is allowed in situations where the information does not justify an onsite inspection. In such instances, the complainant will be notified of PEOSH's intent not to conduct an inspection and the reasoning behind the determination. This decision should be thoroughly documented in the case file.
  8. If a signed complaint is received after the complaint inquiry process has begun, the Director will determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant will be informed that the inquiry has begun and that the complainant retains the right to request an onsite inspection if he/she disputes the results and believes the hazard still exists.
  9. The complaint must not be closed until PEOSH verifies that the hazard has been abated.

## **H. Complainant Protection.**

### **1. Identity of the Complainant.**

Upon request of the complainant, his or her identity will be withheld from the employer in accordance with the Act. No information will be given to the employer that would allow the employer to identify the complainant.

### **2. Whistleblower Protection.**

- a. The Act provides protection for employees who believe that they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety or health. Any employee who believes that he or she has been discharged or otherwise retaliated against by any person as a result of engaging in such activities may file a whistleblower complaint. The complaint must be filed within thirty days of the discharge or other retaliation.
- b. Complainants should be advised of their rights and protections upon initial contact with PEOSH and whenever appropriate in subsequent communications.

## **I. Recording in IMIS.**

Information about complaint inspections or inquiries must be recorded in IMIS following current instructions given in the IMIS manual. See OSHA Instruction IRT 01-00-007, *the IMIS Enforcement Data Processing Manual for Use with the NCR Computer System* (Table of Contents and Chapters 1 through 7), dated September 20, 1993.

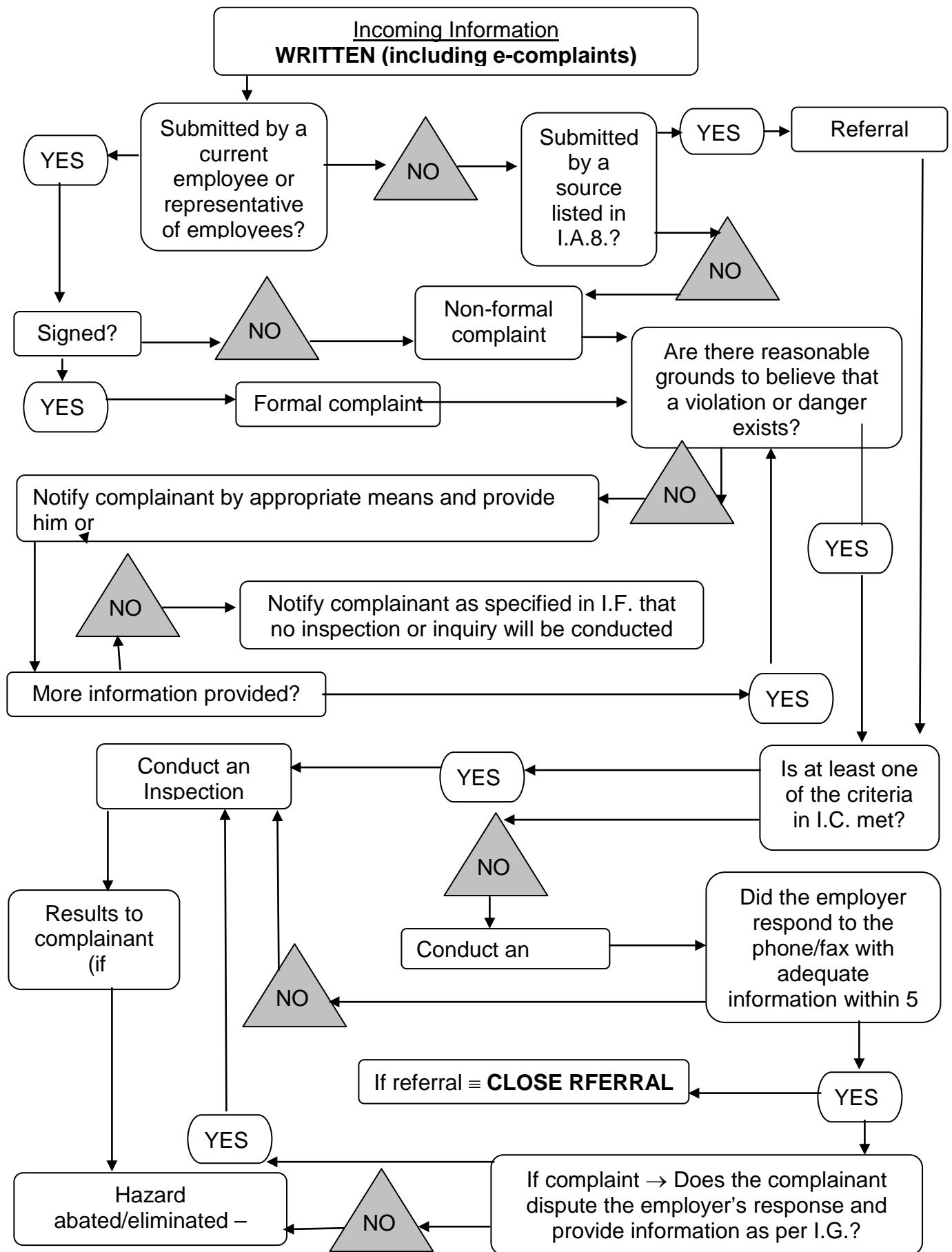
## **II. Whistleblower Complaints.**

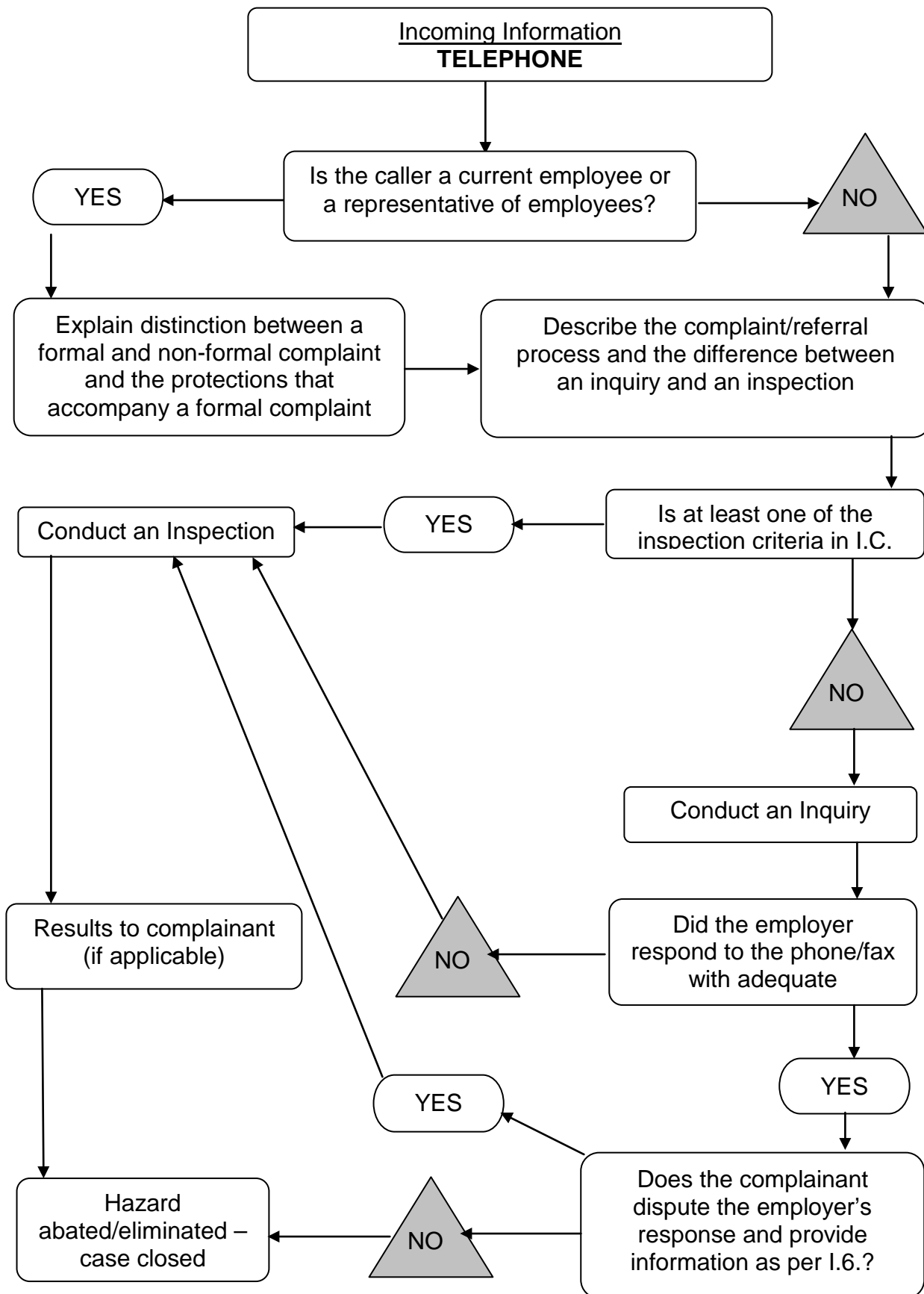
- A. PEOSH enforces the whistleblower or anti-retaliation provisions of the Act. The Act provides that employers may not discharge or otherwise retaliate against an employee because the employee has reported an alleged violation related to the statute to an employer or a government agency, or otherwise exercised any rights provided to employees.
- B. When a retaliation complaint is made under the whistleblower statutes enforced by POESH other than the OSH Act, the complainant should be referred promptly to the Regional Supervisory Investigator or Team Leader because the requirements for filing complaints under those statutes vary from those of the OSH Act. They should also be advised that there are statutory deadlines for filing these complaints.
- C. In the context of a PEOSH enforcement action or a consultation activity, the complainant will be advised of the protection against retaliation afforded by the Act. A discrimination complaint may be in any form, including an oral complaint made to a CSHO. Thus, if a person alleges that he has suffered an adverse action because of activity protected under the Act, CSHOs will record that person's identifying information and the date and time of this initial contact on an OSHA-87 form and forward for processing.

## **III. Decision Trees.**



- A. See tree on following page for PEOSH enforcement action or consultation activity when information is obtained in writing.
- B. See tree on following page for PEOSH enforcement action or consultation activity when information is obtained orally.





## Complaint Questionnaire

Obtain information from the caller by asking the following questions, where relevant.

### For All Complaints:

1. What is the specific safety or health hazard?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
2. Has the hazardous condition been brought to the employer's attention? If so, when? How?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
3. How are employees exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify the location.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
4. What work is done in the unsafe/unhealthful area? Identify, as well as possible, the type and condition of equipment in use, the materials (e.g., chemicals) being used, the process/operation involved, and the kinds of work being done near the hazardous area. Have there been any recent chemical spills, releases, or accidents?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
5. With what frequency are employees doing the task that leads to the exposure? Continuously? Every day? Every week? Rarely? For how long at one time? How long has the condition existed (so far as can be determined)? Has it been brought to the employer's attention? Have any attempts been made to correct the condition, and, if so, who took these actions? What were the results?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
6. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
  
7. What personal protective equipment (e.g., hearing protection, gloves or respirators) is required by the employer relevant to the alleged exposure? Is it used by employees? Include all PPE and describe it as specifically as possible. Include the manufacturer's name and any identifying numbers.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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8. How many people work in the establishment? How many are exposed to the hazardous conditions? How near do they get to the hazard?

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9. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union and/or the employee representative(s).

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**For Health Hazards**

10. Has the employer administered any tests to determine employee exposure levels to the hazardous conditions or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

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11. What engineering controls are in place in the area(s) in which the exposed employees work? For instance, are there any fans or acoustical insulation in the area which may reduce exposure to the hazard?

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12. What administrative or work practice controls has the employer put in place?

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13. Do any employees have any symptoms that may have been caused by exposure to hazardous substances? Have any employees ever been treated by a physician for a work related disease or condition? What was it?

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14. Have there been any “near-miss” incidents?

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15. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protecting against?

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16. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by the employees?

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17. Do employees receive audiograms on a regular basis?

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**For Safety Hazards:**

18. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and “other” probability factors.

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19. Have any employees been injured as a result of this hazardous condition? Have there been any “near-miss” incidents?

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## **Chapter 10**

### **INDUSTRY SECTORS**

**Federal Office Programs [Reserved]**

## Chapter 11

### IMMINENT DANGER, FATALITY, CATASTROPHE, AND EMERGENCY RESPONSE

#### I. Imminent Danger Situations.

##### A. General.

###### 1. Definition of Imminent Danger.

N.J.A.C. 12:110-2.1 defines imminent danger as "...any conditions or practices in any workplace which is such that a danger exists which could reasonably be expected to cause death or serious physical harm."

###### 2. Conditions of Imminent Danger.

The following conditions must be present in order for a hazard to be considered an imminent danger:

- a. Death or serious harm must be threatened; AND
- b. It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

*NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life or be immediately dangerous to life and health (IDLH) or cause substantial reduction in physical or mental efficiency or health, even though the resulting harm may not manifest itself immediately.*

##### B. Pre-Inspection Procedures.

###### 1. Imminent Danger Report Received by the Field.

- a. After the Chief or his/her designee receives a report of imminent danger, he or she will evaluate the inspection requirements and assign a CSHO to conduct the inspection.
- b. Every effort will be made to conduct the imminent danger inspection on the same day that the report is received. In any case, the inspection will be conducted no later than the day after the report is received.
- c. When an immediate inspection cannot be made, the Chief or his designee will contact the employer immediately, obtain as many pertinent details as possible about the situation, and attempt to have any employee(s) affected by the imminent danger voluntarily removed, if necessary.
  - i. A record of what steps, if any, the employer intends to take in order to eliminate the danger will be included in the case file.



- ii. This notification is considered an advance notice of inspection to be handled in accordance with the advance notice procedures described below.

## **2. Advance Notice.**

- a. [N.J.A.C. 12:110-4.3](#) authorizes advance notice of an inspection of potential imminent danger situations in order to encourage employers to eliminate dangerous conditions as quickly as possible.
- b. Where an immediate inspection cannot be made after PEOSH is alerted to an imminent danger condition and advance notice will speed the elimination of the hazard, the Chief, Assistant Chief or CSHO, at the direction of the Director, will give notice of an impending inspection to the employer.
- c. Where advance notice of an inspection is given to an employer, it shall also be given to the authorized employee representative, if present. If the inspection is in response to a formal complaint, the complainant will be informed of the inspection unless this will cause a delay in speeding the elimination of the hazard.

## **C. Imminent Danger Inspection Procedures.**

All alleged imminent danger situations brought to the attention of or discovered by CSHOs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

### **1. Scope of Inspection.**

CSHOs may consider expanding the scope of an imminent danger inspection based on additional hazards discovered or brought to their attention during the inspection.

### **2. Procedures for Inspection.**

- a. Every imminent danger inspection will be conducted as expeditiously as possible.
- b. CSHOs will offer the employer and employee representatives the opportunity to participate in the worksite inspection, unless the immediacy of the hazard makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.
- c. As soon as reasonably practicable after discovery of existing conditions or practices constituting an imminent danger, the employer shall be informed of such hazards. The employer shall be asked to notify affected employees and to remove them from exposure to the imminent danger hazard. The employer should be encouraged to voluntarily take appropriate abatement measures to promptly eliminate the danger.

## **D. Elimination of the Imminent Danger.**

### **1. Voluntary Elimination of the Imminent Danger.**

#### **a. How to Voluntarily Eliminate a Hazard.**

- Voluntary elimination of the hazard has been accomplished when the employer:
  - Immediately removes affected employees from the danger area;
  - Immediately removes or abates the hazardous condition; and
  - Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.
- Satisfactory assurance can be evidenced by:
  - After removing the affected employees, immediate corrective action is initiated, designed to bring the dangerous condition, practice, means or method of operation, or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or
  - A good faith representation by the employer that permanent corrective action will be taken as soon as possible, **and** that affected employees will not be permitted to work in the area of the imminent danger until the condition is permanently corrected; or
  - A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

*NOTE: Through onsite observations, CSHOs shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.*

**b. Where a Hazard is Voluntarily Eliminated.**

If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

- No imminent danger legal proceeding shall be instituted;
- The OSHA-8, Notice of an Alleged Imminent Danger, does not need to be completed;
- An appropriate citation(s) and notice(s) of penalty will be proposed for issuance with an appropriate notation on the OSHA-1B to document corrective actions; and
- CSHOs will inform the affected employees or their authorized representative(s) that, although an imminent danger had existed, danger has been eliminated. They will also be informed of any steps taken by the employer to eliminate the hazardous condition.

## 2. **Refusal to Eliminate an Imminent Danger.**

- a. If the employer does not or cannot voluntarily eliminate the hazard or remove affected employees from the exposure and the danger is immediate, CSHOs will immediately consult with the Chief or his designee and obtain permission to post an OSHA-8, Notice of an Alleged Imminent Danger.
- b. The Chief or his designee will then contact the Director and determine whether to consult with a Deputy Attorney General to obtain a Temporary Restraining Order (TRO).
- c. The employer will be advised that [Section 34:6A-44](#) of the Act gives the New Jersey Superior court the authority to restrain any condition or practice that poses an imminent danger to employees.

*NOTE: The Office has no authority to order the closing of a worksite or to order affected employees to leave the area of the imminent danger or the workplace.*

- d. CSHOs will notify affected employees and the employee representative that an OSHA-8 has been posted and will advise them of the [Section 34:6A-45](#) discrimination protections under the PEOSH Act. Employees will be advised that they have the right to refuse to perform work in the area where the imminent danger exists.
- e. The Director or designee and the Assistant Commissioner in consultation with the Office of the Attorney General, will assess the situation and, if warranted, make arrangements for the expedited initiation of court action, or instruct the CSHO to remove the PEOSH-8.

## 3. **When Harm Will Occur Before Abatement is Required.**

- a. If CSHOs have clear evidence that harm will occur before abatement is required (i.e., before a final order of the Commission in a contested case or before a TRO can be obtained), they will confer with the Director or designee to determine a course of action.

*NOTE: In some cases, the evidence may not support the finding of an imminent danger at the time of the physical inspection, but rather after further evaluation of the case file or presence of additional evidence.*

- b. As appropriate, an imminent danger notice may be posted at the time citations are delivered or even after the notice of contest is filed.

## **II. Fatality and Catastrophe Investigations.**

### **A. Definitions.**

#### **1. Fatality.**

An employee death resulting from a work-related incident or exposure; in general, from an accident or an illness caused by or related to a workplace hazard.

## 2. **Catastrophe.**

The hospitalization of three or more employees resulting from a work-related incident or exposure; in general, from an accident or an illness caused by a workplace hazard.

## 3. **Hospitalization.**

Being admitted as an **inpatient** to a hospital or equivalent medical facility for examination, observation or treatment.

## 4. **Incident Requiring a Coordinated State and/or Federal Response.**

An incident involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or one that presents potential employee injury and generates widespread media interest.

### **B. Initial Report.**

1. The Fatality/Catastrophe Report Form (OSHA-36) is a preinspection form that must be completed for all fatalities or catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. The purpose of the OSHA-36 is to provide PEOSH with enough information to determine whether or not to investigate the event. It is also used as a research tool by PEOSH and other agencies.
2. If, after the initial report, PEOSH becomes aware of information that affects the decision to investigate, the OSHA-36 should be updated. If the additional information does not affect the decision to investigate, or the investigation has been initiated or completed, the OSHA-36 need not be updated.
3. See additional details on completing the OSHA-36 in [Paragraph II.I.](#) of this chapter, *Recording and Tracking for Fatality/Catastrophe Inspections*.

### **C. Investigation Procedures.**

1. All fatalities and catastrophes will be thoroughly investigated in an attempt to determine the cause of the event, whether a violation of OSHA and PEOSH safety and health standards, regulations, or the general duty clause occurred, and any effect the violation had on the accident. The Director will establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.
2. The investigation should be initiated as soon as possible after receiving an initial report of the incident, ideally within one working day, by an appropriately trained and experienced compliance officer assigned by the Chief or designee. The Director or designee determines the scope of the fatality/catastrophe investigation. All investigations must be completed in an expeditious manner.
3. Inspections following fatalities or catastrophes should include videotaping as a method of documentation and gathering evidence when appropriate. The use of photography is also encouraged in documenting and evidence gathering.

4. As in all inspections, under no circumstances should PEOSH personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. PEOSH personnel must use appropriate personal protective equipment and take all necessary precautions to avoid and/or prevent occupational exposure to potential hazards that may be encountered.

#### D. Interview Procedures.

##### 1. Identify and Interview Persons.

- a. Identify and interview all persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.
- b. If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.
- c. Conduct employee interviews privately, outside the presence of the employer. Employees are not required to inform their employer that they provided a statement to PEOSH.
- d. When interviewing:
  - Properly document the contact information of all parties because follow-up interviews with a witness are sometimes necessary.
  - When appropriate, reduce interviews to writing and have the witness sign the document. Transcribe video and audio-taped interviews and have the witness sign the transcription.
  - Read the statement to the witness and attempt to obtain agreement. Note any witnesses' refusal to sign or initial his/her statement.
  - Ask the interviewee to initial any changes or corrections made to his/her statement.
  - Advise interviewee of PEOSH whistleblower protections.
- e. See [Chapter 3, \*Inspection Procedures\*](#), for additional information on conducting interviews.

##### 2. Informer's Privilege.

- a. The informer's privilege allows the government to withhold the **identity** of individuals who provide information about the violation of laws, including OSHA and PEOSH rules and regulations. The identity of witnesses will remain confidential to the extent possible. However, inform each witness that disclosure of his/her identity may be necessary in connection with enforcement or court actions.

- b. The informer's privilege also protects the contents of statements to the extent that disclosure would reveal the witness' identity. When the contents of a statement will not disclose the identity of the informant (i.e., statements that do not reveal the witness' job title, work area, job duties, or other information that would tend to reveal the individual's identity), the privilege does not apply and such statements may be released.
- c. Inform each witness that his/her interview statements may be released if he or she authorizes such a release or if he or she voluntarily discloses the statement to others, resulting in a waiver of the privilege.
- d. Inform witnesses in a tactful and nonthreatening manner that making a false statement to a CSHO during the course of an investigation could be a criminal offense. Making a false statement, upon conviction, is punishable by up to \$10,000 or six months in jail, or both.

#### **E. Investigation Documentation.**

Document all fatality and catastrophe investigations thoroughly.

##### **1. Personal Data – Victim.**

Potential items to be documented include: Name; Address; Email address; Telephone; Age; Sex; Nationality; Job Title; Date of Employment; Time in Position; Job being done at the time of the incident; Training for job being performed at time of the incident; Employee deceased/injured; Nature of injury – fracture, amputation, etc.; and Prognosis of injured employee.

##### **2. Incident Data.**

Potential items to be documented include: How and why did the incident occur; the physical layout of the worksite; sketches/drawings; measurements; video/audio/photos to identify sources, and whether the accident was work-related.

##### **3. Equipment or Process Involved.**

Potential items to be documented include: Equipment type; Manufacturer; Model; Manufacturer's instructions; Kind of process; Condition; Misuse; Maintenance program; Equipment inspection (logs, reports); Warning devices (detectors); Tasks performed; How often equipment is used; Energy sources and disconnecting means identified; and Supervision or instruction provided to employees involved in the accident.

##### **4. Witness Statements.**

Potential witnesses include: the Public; Fellow employees; Management; Emergency responders (e.g., police department, fire department); and Medical personnel (e.g., medical examiner).

##### **5. Safety and Health Program.**

Potential questions include: Does the employer have a safety and/or health program? Does the program address the type of hazard that resulted in the fatality/catastrophe? How are the elements of the program specifically implemented at the worksite?

#### **6. Multi-Employer Worksite**

Describe the contractual and in practice relationships of the employer with the other employers involved with the work being performed at the worksite.

#### **7. Records Request.**

Potential records include: Disciplinary Records; Training Records; and Next of Kin information.

*NOTE: Next of kin information should be gathered as soon as possible to ensure that condolence letters can be sent in a timely manner.*

### **F. Potential Criminal Penalties in Fatality and Catastrophe Cases. (Adoption of criminal penalty procedures pending)**

#### **1. Criminal Penalties.**

- a. The Act provides criminal penalties for an employer who is convicted of having willfully violated an OSHA or PEOSH standard, rule or order when the violation results in the death of an employee. However, this does not apply to violations of the general duty clause. When there are violations of an OSHA or PEOSH standard, rule or order, or a violation of the general duty clause, criminal provisions relating to false statements and obstruction of justice may also be relevant.
- b. The circumstances surrounding all occupationally-related fatalities will be evaluated to determine whether the fatality was caused by a willful violation of a standard, thus creating the basis for a possible criminal referral. The evidence obtained during a fatality investigation is of paramount importance and must be carefully gathered and considered.
- c. Early in the investigation, the Director or designee, in consultation with the investigator, should make an initial determination as to whether there is potential for a criminal violation. The decision will be based on consideration of the following:
  - A fatality has occurred.
  - There is evidence that an PEOSH standard has been violated and that the violation contributed to the death.
  - There is reason to believe that the employer was aware of the requirements of the standard and knew it was in violation of the standard, or that the employer was plainly indifferent to employee safety.

- If the Assistant Commissioner agrees with the Director or designee's assessment of the case, the Director will notify the Deputy Attorney General. At the discretion of the Director or designee, and dependent upon PEOSH procedures in place, a team or trained criminal investigator may assist in or perform portions of an investigation.
- When there is a potential criminal referral in a case, it is essential that the Director involve the Attorney General's Office in the early stages of the investigation during the evidence gathering process.

## 2. **Additional Prosecution.**

In addition to criminal prosecution under the PEOSH Act, employers may potentially face prosecution under a number of other sections of the United States and New Jersey Code, including, but not limited to:

- a. Crimes and Criminal Procedures, for actions such as conspiracy, making false statements, fraud, obstruction of justice, and destruction, alteration or falsification of records during a federal investigation.
- b. The Clean Water Act.
- c. The Clean Air Act.
- d. The Resource Recovery and Conservation Act (RCRA).
- e. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

## 3. **Procedures for Criminal Referral.**

When a case is forwarded to the Attorney General's Office for criminal review, the Commissioner of Labor shall be advised.

## G. **Families of Victims.**

### 1. **Contacting Family Members.**

Family members of employees involved in fatal or catastrophic occupational accidents or illnesses shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the accident or illness. PEOSH staff contacting family members must exercise tact and good judgment in their discussions.

### 2. **Information Letter.**

The standard information letter will normally be sent to the individual(s) listed as the emergency contact on the victim's employment records (if available) and/or the otherwise determined next of kin within 5 working days of determining the victim's identity and verifying the proper address where communications should be sent.



*NOTE: In some circumstances, it may not be appropriate to follow these exact procedures; i.e., in the case of a small business, the owner or supervisor may be a relative of the victim. Modify the form letter to take any special circumstances into account or do not send the letter, as appropriate.*

### **3. Letter to Victim's Emergency Contact.**

In addition to the standard information letter sent by the Director or designee, the Assistant Commissioner also sends a letter to the victim's emergency contact or otherwise verifiable next of kin.

### **4. Interviewing the Family.**

- a. When taking a statement from families of the victim(s), explain that the interview will be handled following the same procedures as those in effect for witness interviews. Sensitivity and professionalism are required during these interviews. Carefully evaluate the information received and attempt to corroborate it during the investigation.
- b. Maintain follow-up contact with key family members or other contact persons so that these parties can be kept up-to-date on the status of the investigation. Provide family members or their legal representatives with a copy of all citations, subsequent settlement agreements or Review Commission decisions as these are issued, or as soon thereafter as possible. However, such information will only be provided to family members after it has been provided to the employer.
- c. The releasable portions of the case file will not be made available to family members until after the contest period has passed and no contest has been filed. If a contest is filed, the case file will not be made available until after the litigation is completed. Additionally, if a criminal referral is under consideration or has been made, the case file may not be released to the family. Notify the family of these policies and inform them that this is necessary so that any potential litigation is not compromised.

## **H. Public Information Policy.**

PEOSH's public information policy regarding response to fatalities and catastrophes is to explain State presence to the news media. It is not to issue periodic updates on the progress of the investigation. The Public Information Officer and his or her designee will normally handle response to media inquiries.

## **I. Recording and Tracking for Fatality/Catastrophe Investigations.**

### **1. Fatality/Catastrophe Report Form (PEOSH-36).**

The OSHA-36 is a pre-inspection form that must be completed for all fatalities and catastrophes unless knowledge of the event occurs during the course of an inspection at the establishment involved. Processing of the OSHA-36 shall be as follows:

- a. PEOSH office staff will complete and enter into IMIS an OSHA-36 for all fatalities and catastrophes as soon as possible after learning of the event. As much information as is known at the time of the initial report should be provided; however, all items on

the OSHA-36 need not be completed at the time of this initial report. Wherever possible, the age of the victim(s) should be provided, because this information is used for research by OSHA and other agencies.

- b. In addition, the Director will promptly notify the Commissioner of the of major events, such as those likely to generate significant public or government interest.

## 2. Investigation Summary Report (OSHA-170).

- a. The OSHA-170 is used to summarize the results of investigations of all events that involve fatalities, catastrophes, amputations, hospitalizations of two or more days, have generated significant publicity, and/or have resulted in significant property damage. An OSHA-170 must be opened, logged into IMIS, and saved as final as soon as PEOSH becomes aware of a workplace fatality and determines that it is within its jurisdiction, even if most of the data fields are left blank. The information on this form enables the Office to track fatalities and summarizes circumstances surrounding the event.

*NOTE: The two-day hospitalization criterion is a cutoff to preclude completing an OSHA-170 for events that may not be serious. There is no relationship between this criterion and the definition of hospitalization in [Section II. A.](#) of this chapter, Definitions.*

- b. For fatality/catastrophe investigations, the OSHA-170 will be:
  - Opened in IMIS at the beginning of the investigation and saved as *final*, even if most of the data fields are left blank, so that OSHA can track fatality/catastrophe investigations in a close to “real time” fashion.
  - Modified as needed during the investigation to account for updated information.
  - Updated with all data fields completely and accurately completed at the conclusion of the investigation, including a thorough narrative description of the incident.
- c. The OSHA-170 narrative should not be a copy of the summary provided on the OSHA-36 pre-inspection form. The narrative must comprehensively describe the characteristics of the worksite; the employer and its relationship with other employers, if relevant; the employee task/activity being performed; the related equipment used; and other pertinent information in enough detail to provide a third party reader of the narrative with a mental picture of the fatal incident and the factual circumstances surrounding the event.
- d. Only one OSHA-170 should be submitted for an event, regardless of how many inspections take place. If a subsequent event occurs during the course of an inspection, a new OSHA-170 for that event should be submitted.

**EXAMPLE 11-1:** A fatality occurs in employer’s facility in August. Both a safety and health inspection are initiated. One OSHA-170 should be filed to summarize the results of the inspections that resulted from the August fatality. However, in September, while the employer’s facility is still undergoing the inspections, a second fatality occurs. In

this case, a *second* OSHA-170 should be submitted for the second fatality and an additional inspection should be opened.

### 3. **Related Event Code (REC).**

The OSHA-1B provides specific supplemental information documenting hazards and violations. If any item cited is directly related to the occurrence of the fatality or catastrophe, the related event code “A” shall be entered in block 13. If multiple related event codes apply, the only code that has priority over relation to a fatality/catastrophe (“A”) is relation to an imminent danger (“I”).

## J. **Pre-Citation Review.**

1. Because cases involving a fatality may result in civil or criminal enforcement actions, the Director is responsible for reviewing all fatality and catastrophe investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here.
2. The Chief is responsible for ensuring that an OSHA-170 is reported to IMIS for each incident (see [Paragraph II.I.2.](#) of this chapter, *Investigation Summary Report (OSHA-170)*).
3. Review all proposed violation-by-violation penalties in accordance with [CPL 02-00-080](#), *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990.
4. The Director should establish a procedure to ensure that each fatality or catastrophe is thoroughly investigated and processed in accordance with established policy.

## K. **Post-Citation Procedures/Abatement Verification.**

The regulation governing abatement verification is found at [§1903.19](#), and PEOSH’s enforcement policies and procedures for this regulation are outlined in [Chapter 7](#), *Post-Citation Procedures and Abatement Verification*.

1. Due to the transient nature of many of the worksites where fatalities occur and because the worksite may be destroyed by the catastrophic event, it is frequently impossible to conduct follow-up inspections. In such cases, the Director should obtain abatement verification from the employer, along with an assurance that appropriate safety and health programs have been implemented to prevent the hazard(s) from recurring.
2. While site closure due to the completion of the cited project is an acceptable method of abatement, it can only be accepted as abatement without certification where a CSHO directly verifies that closure; otherwise, certification by the employer is required. Follow-up inspections need not be conducted if the CSHO has verified abatement during the inspection or if the employer has provided other proof of abatement.
3. Where the worksite continues to exist, PEOSH will normally conduct a follow-up inspection if serious citations have been issued.

4. Include abatement language and safety and health system implementation language in any subsequent settlement agreement.
5. If there is a violation that requires abatement verification, field 22 on the OSHA1-B must be completed with the date of abatement verified.

#### **L. Audit Procedures.**

The following procedures will be implemented to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures:

1. PEOSH will incorporate the review and analysis of each fatality/catastrophe file into their audit functions. The review and analysis will address the following:
  - a. *Inspection Findings.* Ensure that hazards have been appropriately addressed and violations have been properly classified. Also ensure that criminal referrals are made when appropriate.
  - b. *Documentation.* Ensure that the OSHA-170 narrative and data fields and the OSHA-1B narrative have been completed accurately and detailed enough to allow for analysis at the federal level of the circumstances of fatal incidents.
  - c. *Settlement Terms.* Ensure that settlement terms are appropriate, including violation reclassification, penalty reductions, and additional abatement language.
  - d. *Abatement Verification.* Ensure that abatement verification has been obtained.
  - e. Review IMIS reports to identify any trends or cases that may indicate that a further review of those cases may be necessary.

#### **M. Relationship of Fatality and Catastrophe Investigations to Other Programs and Activities.**

##### **1. Homeland Security.**

OSHA's *National Emergency Management Plan (NEMP)*, as contained in [HSO 01-00-001](#), dated December 18, 2003, clarifies the procedures and policies for OSHA's National Office and Regional Offices during responses to incidents of national significance. PEOSH, under the direction of OSHA, will assist as necessary. Whether PEOSH will conduct a formal fatality or catastrophe investigation in such a situation will be determined on a case-by-case basis.

##### **2. Enhanced Enforcement Program.**

Inspections that result in citations being issued for at least one of the following are considered Enhanced Enforcement cases:

- a. A fatality inspection in which there is at least one serious violation related to the death, **and** the employer has a PEOSH history of violations similar to the violation that led to

the current fatality that consisted of at least one serious, willful, or repeated violation within the last three years;

- b. A fatality inspection in which there is at least one serious violation related to the death, **and** another fatality has occurred within the last three years;
- c. An inspection that results in three or more serious violations that are also classified as willful or repeated, **and** the employer has a PEOSH history of violations similar in kind to one or more of the violations found in the current inspection consisting of at least one serious, willful, or repeated violation within the last three years;
- d. An inspection that results in at least one failure-to-abate penalty notice where the underlying violation was classified as serious;
- e. Any egregious case. In such cases, the instructions outlined in [CPL 02-00-145](#), *Enhanced Enforcement Program (EEP)*, dated January 1, 2008, shall be followed to ensure that the proper measures are taken regarding classification, coding and treatment of the case.

### 3. **Significant Enforcement Cases.**

- a. Significant enforcement cases are defined as inspection cases with initial proposed penalties over \$100,000. An inspection resulting from an employee fatality or a workplace catastrophe may well be a significant enforcement case and, therefore, particularly thorough documentation is necessary to sustain legal sufficiency.
- b. In cases involving a fatality or catastrophe, the procedures outlined in OSHA's [memorandum](#) dated March 24, 2004, to Regional Administrators from Deputy Assistant Secretary R. Davis Layne regarding Procedures for Significant Enforcement Cases should be closely followed.

### 4. **Special Emphasis Programs.**

If a fatality or catastrophe investigation arises with respect to an establishment that is also in the current inspection cycle to receive a programmed inspection under any Site Specific Targeting program, the investigation and the inspection may be conducted either concurrently or separately.

### 5. **Cooperative Programs.**

If a fatality or catastrophe occurs at a Safety and Health Achievement Recognition Program (SHARP) site, the PEOSH Director and the Assistant Director of Occupational Safety & Health (OSH) who administers the SHARP will be notified. When enforcement activity has concluded, the Assistant Director of OSH will be informed so that the site can be reviewed for program issues.

## N. **Special Issues Related to Workplace Fatalities.**

### 1. **Death by Natural Causes.**

Workplace fatalities caused by natural causes, including heart attacks, must be reported by the employer. The Director or designee will then decide whether to investigate the incident.

## **2. Workplace Violence.**

As with heart attacks, fatalities caused by incidents of workplace violence must be reported to PEOSH by the employer. The Director or designee will determine whether or not the incident will be investigated.

## **3. Motor Vehicle Accidents.**

- a. PEOSH does not require reporting motor vehicle accidents that occur on public roads or highways, unless the accident occurs in a construction work zone.
- b. Although employers who are required to keep records must record vehicle accidents in their PEOSH-300 Log of Work-Related Injuries and Illnesses, PEOSH may review the circumstances to determine if an investigation is warranted.

# **III. Rescue Operations and Emergency Response.**

## **A. PEOSH's Authority to Direct Rescue Operations.**

### **1. Direction of Rescue Operations.**

PEOSH has no authority to direct rescue operations. These are the responsibility of the employer and/or local political subdivisions or the appropriate state agencies.

### **2. Monitoring and Inspecting Working Conditions of Rescue Operations.**

PEOSH may monitor and inspect working conditions of covered employees engaged in rescue operations to ensure compliance with standards that protect rescuers, and to provide technical assistance where appropriate.

## **B. Voluntary Rescue Operations Performed by Employees.**

PEOSH recognizes that an employee may choose to place himself/herself at risk to save the life of another person. The following provides guidance on PEOSH citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

### **1. Imminent Danger.**

[Section 1903.14\(f\)](#) provides that no citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger [i.e., the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated] unless:

- a. Such employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations, AND the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or
- b. Such employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties, AND the employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or
- c. Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; AND such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual; AND the employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

## 2. Citation for Voluntary Actions.

If an employer has trained his or her employees in accordance with [§1903.14](#), no citation will be issued for an employee's voluntary rescue actions, regardless of whether they are successful.

## C. Emergency Response.

### 1. Role in Emergency Operations.

While it is PEOSH's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, PEOSH does not have authority to direct emergency operations.

### 2. Response to Catastrophic Events (Note: these are *not* PEOSH Act requirements).

PEOSH responds to catastrophic events promptly and acts as an active and forceful protector of employee safety and health during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

### 3. PEOSH's Role.

- a. For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where PEOSH is acting under the National Emergency Management Plan (NEMP), OSHA Administrators will determine the overall role that PEOSH will play.

- b. During an event that is covered by the NEMP, PEOSH will coordinate with OSHA to assist as needed in the response.
- c. For details on PEOSH's response to occupationally-related incidents involving multiple fatalities, extensive injuries, massive toxic exposures, extensive property damage, or potential employee injury that generates widespread media interest, PEOSH will follow [CPL 02-00-094](#), *OSHA's Response to Significant Events of Potentially Catastrophic Consequences*, dated July 22, 1991.

4. **Incidents of National Significance.**

PEOSH, under the direction of OSHA or other jurisdictional government agencies, will assist in incidents of national significance as requested.

*Note: These documents apply when activated.*



**CHAPTER 12**  
**SPECIALIZED INSPECTION PROCEDURES**  
**Federal Office Programs [Reserved]**

**CHAPTER 13**  
**FEDERAL OFFICE SAFETY AND HEALTH PROGRAMS**  
**Federal Office Programs [Reserved]**

**CHAPTER 14**  
**HEALTH INSPECTION ENFORCEMENT PROGRAMS**  
**Federal Office Programs [Reserved]**

## Chapter 15

### LEGAL ISSUES

#### I. Administrative Subpoenas.

##### A. When to Issue.

An Administrative Subpoena may be issued whenever there is a need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within PEOSH's authority.

1. PEOSH, through the Office of Administrative Law (OAL), has the authority to issue subpoenas, and are also authorized and encouraged to delegate to Area Directors the authority to issue routine administrative subpoenas.
2. The issuance of an administrative subpoena requires the Director's or Assistant Commissioner's signature.

##### B. Two Types of Subpoenas.

There are two types of subpoenas used to obtain evidence during an PEOSH investigation:

1. A *Subpoena Duces Tecum* is used to obtain documents. It orders a person or organization to appear at a specified time and place and produce certain documents, and to testify to their authenticity. Employers are not required to create a new record in order to respond to these types of subpoenas.
2. A *Subpoena Ad Testificandum* commands a named individual or corporation to appear at a specified time and place, such as the Area Office, to provide testimony under oath. A verbatim transcript is made of this testimony.

##### C. Director Delegated Authority to Issue Administrative Subpoenas.

1. The Director may issue administrative subpoenas for any record or document relevant to an inspection or investigation under the Act, including:
  - a. Injury and illness records such as the NJ OSH-301 and the NJ OSH-300 See OSHA [CPL 02-02-072](#), *Rules of Office Practice and Procedure Concerning OSHA Access to Employee Medical Records*, dated August 22, 2007, and [29 CFR 1913.10\(b\)\(6\)](#);
  - b. Hazard communication program;
  - c. Lockout/tagout program; and
  - d. Safety and health program.
2. Information shall be requested from the employer or holder of records, documents, or other information-containing materials.

- a. If this person/entity refuses to provide requested information or evidence, the PEOSH representative serving the subpoena shall explain the reason for the request.
  - b. If there is still a refusal to produce the information or evidence
3. The official issuing the subpoena is responsible for evaluating the circumstances and deciding whether to issue a subpoena.

**D. Administrative Subpoena Content and Service.**

1. Model administrative subpoenas for use by PEOSH are provided at the end of this chapter. If the Director believes that there is reason for any departure from the models due to circumstances of the case, a Deputy Attorney General shall be consulted.
2. The subpoena shall be prepared for the appropriate party and will normally be served by personal service (delivery to the party named in person). Leaving a copy at a place of business or residence is not personal service.
  - a. In exceptional circumstances, service may be by certified mail with return receipt requested.
  - b. Where no individual's name is available, the subpoena can be addressed to an employer's "Custodian(s) of Records."
3. Examples of language for a routine *Subpoena Duces Tecum* are provided below. This language should be expanded when requesting additional or more detailed information for accident, catastrophe, referral or fatality investigations.
  - a. "Copies of any and all documents, including information stored electronically, which reflect training procedures for the lockout/tagout procedures and hazard communication program in effect at the [insert site name] in [insert city], during the period [insert month/day/year], to present."
  - b. "Copies of the NJ OSH-300 and the NJ OSH-301 forms, for the entire site, during calendar years [insert year] and [insert year]."
  - c. "Copies of any and all documents, including information stored electronically, such as safety and health program handbooks, minutes of safety and health meetings, training certification records, audits and reprimands for violations of safety and health rules by employees of the [insert site name] in [insert city], that show [insert employer's name] had and enforced safety rules relating to the use of trench boxes during the period [insert month/day/year], to present."

*NOTE: Where particular information is being sought, a subpoena's description should be narrow and specific in order to increase the likelihood for prompt compliance with the request.*

4. A copy of the subpoena, signed by the Director, shall be forwarded as soon as possible to the Assistant Commissioner and shall also be maintained at the Office.

- a. Copies of subpoenas may be forwarded to the OAL as practicable.
- b. The Director shall establish procedures to track all administrative subpoenas issued. These procedures shall include instructions for completing the return of service.

#### **E. Compliance with the Subpoena.**

The person/entity served may comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.

1. With respect to any record required to be made or kept pursuant to any statute or regulation, the subpoena shall normally allow **three days** from the date of service for production of the required information although a shorter period may be appropriate.
2. With respect to other types of records or information, such as safety programs or incident reports, the subpoena shall normally allow at least **five working days** from the date of service for production of the required information.
3. Separate subpoenas for items 1 and 2 above may be necessary.
4. Any witness fees or mileage costs potentially associated with administrative subpoenas should be discussed with the Assistant Commissioner prior to the issuance.

#### **F. Refusal to Honor Subpoena.**

1. If the person/entity served refuses to comply with (or only partially honors) the subpoena, the compliance officer shall document all relevant facts and advise the Director before taking further action.
2. To enforce a subpoena, the Director shall follow the procedures outlined for obtaining warrants, and shall refer the matter, through the Assistant Commissioner, to the OAL for appropriate action.

#### **G. Anticipatory Subpoena.**

Generally, PEOSH policy is to seek voluntary production of evidence before an administrative subpoena is issued. However, a subpoena may be executed and served without making a prior request where there is reason to believe that the employer and/or person from whom information is sought will not voluntarily comply, or where there is an urgent need for the information. Anticipatory subpoenas require consultation with the OAL.

*NOTE: For example, pre-inspection preparation of subpoenas for issuance at the opening conference is appropriate in cases where the employer has previously denied access to records or where complex inspections, involving extensive review of records, are planned.*

## **II. Service of Subpoena on PEOSH Personnel.**

### **A. Proceedings to which the Commissioner of Labor is a Party.**

If any PEOSH personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Commissioner of Labor is a party, they shall immediately contact the Deputy Attorney General for instructions regarding the manner in which to respond. If a CSHO is served with a subpoena, they shall notify the Chief immediately who shall then refer the matter to the OAL.

*NOTE: Review Commission rules provide that any person served with a subpoena, whether to testify in any Commission hearing or to produce records and testify in such hearing shall, within **five days** after date of service, move to revoke the subpoena if the person does not intend to comply with its terms. See §2200.57(c). Therefore, expeditious handling of any subpoena served on PEOSH employees is essential. When any such subpoena is served, the OAL must immediately be notified by telephone or email.*

#### **B. Proceedings to which the Commissioner of Labor is Not a Party.**

1. If any PEOSH personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Commissioner of Labor is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), they shall immediately contact the OAL.
2. N.J. Department of Labor regulations prohibit Department employees from participating in, or from providing information for, proceedings in which the Commissioner of Labor is not a party without explicit permission from the Department of Labor Legal Counsel. This applies to demands to disclose or provide:
  - a. Any material contained in the files of the Department;
  - b. Any information relating to material contained in the files of the Department; or
  - c. Any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his/her official duties or because of his/her official status.
3. The Department Counsel is responsible for responding to such requests and will take appropriate steps to have the subpoena quashed or provide the necessary permission, as appropriate, to allow an employee to comply with an issued order.

### **III. Obtaining Warrants.**

#### **A. Warrant Applications.**

1. Upon refusal of entry, or if there is reason to believe an employer will refuse entry, the Director shall proceed according to guidelines and procedures established for warrant applications. The Director may initiate the compulsory process with approval of the OAL.
2. Warrant applications for establishments where consent has been denied for a limited scope inspection (i.e., complaint, referral, accident investigation) shall normally be limited to the specific working conditions or practices forming the basis of the inspection. However, a broad scope warrant may be sought if there is evidence of potentially pervasive violative

conditions or if the establishment is on a current list of establishments targeted for a comprehensive inspection.

**B. General Information Necessary to Obtain a Warrant.**

If the warrant is to be obtained, the Director shall inform the Assistant Commissioner in writing within **48 hours** after the determination is made and provide all information necessary to obtain a warrant, including:

1. PEOSH Office, telephone number, and name of Director or designee involved;
2. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items or both;
3. Legal name(s) of establishment and address, including City and County. Include site location if different from mailing address;
4. Estimated number of employees at inspection site;
5. Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) Code and high hazard ranking for that specific industry, as obtained from statistics provided by the NJ Department of Labor, Bureau of Labor Statistics;
6. Summary of all facts leading to the refusal of entry or limitation of inspection, including:
  - a. Date and time of entry/attempted entry;
  - b. Date and time of denial;
  - c. Stage of denial (entry, opening conference, walkaround, etc.);
7. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:
  - a. Full name and title of the person(s) to whom CSHO presented credentials;
  - b. Full name and title of person(s) who refused entry;
  - c. Reasons stated for the denial by person(s) refusing entry;
  - d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.
8. Any information related to past inspections, including copies of previous citations.
9. Any previous requests for warrants. Attach details, if applicable.
10. All completed information related to the current inspection report, including documentation of any observations of violations in plain view discovered prior to denial.

11. If a construction site involving work under contract from any Office of the State Government, the name of the Office, the date of the contract, and the type of work involved.
12. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.
13. Investigative procedures that may be required during the proposed inspection, e.g., interviewing of employees/witnesses, personal sampling, photographs, audio/videotapes, examination of records, access to medical records, etc.

**C. Specific Warrant Information Based on Inspection Type.**

Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

**1. Imminent Danger.**

- a. Description of alleged imminent danger situation;
- b. Date information received and source of information;
- c. Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and
- d. Whether all current imminent danger investigative procedures have been followed.

**2. Fatality/Catastrophe.**

The OSHA-36 Form should be completed with as much detail as possible.

**3. Complaint or Referral.**

- a. Original complaint or referral and copy of typed complaint or referral;
- b. Reasons PEOSH believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;
- c. Whether all current complaint or referral processing procedures have been followed; and
- d. Any additional information pertaining to the evaluation of the complaint or referral.

**4. Programmed.**

- a. Targeted safety – general industry, maritime, construction;
- b. Targeted health; and/or

- c. Special emphasis program.

**5. Follow-up.**

- a. Date of initial inspection;
- b. Details and reasons follow-up was conducted;
- c. Copies of previous citations which served as the basis for initiating the follow-up;
- d. Copies of settlement agreements and final orders, if applicable; and/or
- e. Previous history of failure to correct, if any.

**6. Monitoring.**

- a. Date of original inspection;
- b. Details and reasons monitoring inspection is to be conducted;
- c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or
- d. Petition for Modification of Abatement Date (PMA) request, if applicable.

**D. Warrant Procedures.**

Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the Director or his designee and the OAL.

**1. Action Taken Upon Receipt of Warrant (Compulsory Process).**

- a. The inspection will normally begin within 24 hours of receipt of a warrant or from the date authorized by the warrant for initiating the inspection.
- b. Upon completion of the inspection, if the warrant includes a return of service space for entering inspection dates, CSHOs shall complete the return of service on the original warrant, sign and forward it to the Director or designee for appropriate action.

**2. Serving a Subpoena for Production of Records.**

Where appropriate, even where the scope of an inspection is limited by a warrant or an employer's consent to specific conditions or practices, any subpoena for production of records shall be served in accordance with the section on administrative subpoenas in this chapter.

**E. Second Warrant.**



Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review or "plain view" observations of other potential violations discovered during a limited scope walkaround.

**F. Refused Entry or Interference.**

1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.
2. If the employer refuses to comply or if consent is not clearly given, CSHOs shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the Chief or designee regarding further action.
  - a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).
  - b. The Director shall then contact the Assistant Commissioner and OAL, who shall jointly decide the action to be taken.

**G. N.J. State Police Assistance.**

In unusual circumstances, a N.J.State Trooper may be asked to accompany a CSHO when a warrant is presented. A request for a State Trooper's assistance shall be made only by the Director after consultation with the Assistant Commissioner and the OAL, and only when there is a potential for violence, harassment and/or interference with the inspection, or reason to believe that the presence of a State Trooper will assist with compliance with the warrant.

**IV. Notice of Contest.**

The NJ Occupational Safety and Health Review Commission is an independent State Office created to decide contests of citations or penalties resulting from PEOSH inspections. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions by its Administrative Law Judges (ALJs). The Act states that the Review Commission operate as an independent Office (i.e., not part of another State department) to ensure that parties to Office cases receive impartial hearings.

**A. Time Limit for Filing a Notice of Contest.**

1. The Act provides employers fifteen working days following its receipt of a notice of a citation to notify PEOSH of the employer's desire to contest a citation and/or proposed assessment of penalty.
2. Where a notice of contest was not mailed, i.e., postmarked, within the 15 working day period allowed for contest, the Director shall follow the instructions for Late Notices of Contest. A copy of any untimely notice of contest shall be retained in the case file.

**B. Contest of Abatement Period Only.**

If the notice of contest is submitted to the Director after the 15 working day period, but contests only the reasonableness of the abatement period, it shall be treated as a Petition for Modification of Abatement and handled in accordance with PMA procedures.

**C. Communication Where the Intent to Contest is Unclear.**

1. If a written communication is received from an employer containing an objection, criticism or other adverse comment as to a citation or proposed penalty, but which does not clearly appear to contest the citations, the Chief or designee shall contact the employer to clarify the intent of the communication.
  - a. After receipt of the communication, any clarification should be obtained within the 15 working day contest period, so that if a determination is made that it is a notice of contest, the file may be timely forwarded to the Review Commission.
  - b. In cases where PEOSH receives a written communication from an employer requesting **an informal conference that also states an intent to contest**, the employer must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer still wants to pursue an informal conference, it must first present or send a letter expressing that intent and rescinding the contest. All documents pertaining to such communications shall be retained in the case file.
2. If the Chief determines that the employer intends the document to be a notice of contest, it shall be transmitted to the OSHRC. If contact with the employer reveals a desire for an informal conference, the employer shall be informed that the conference does not stay the running of the 15 working day contest period.

*NOTE: Settlement is permitted at any stage of Commission proceedings.*

**V. Late Notice of Contest.**

**A. Failure to Notify PEOSH of Intent to Contest.**

If the employer fails to notify PEOSH of its intent to contest a citation or penalty within fifteen working days following the receipt of a citation, the citation and proposed penalties become final orders of the Review Commission.

**B. Notice Received after the Contest Period.**

1. In every case where PEOSH receives notice of an employer's intent to contest a citation and/or proposed assessment of penalty beyond the 15 working day period, the Chief shall inform employers in writing that PEOSH will not accept the untimely notice of contest, but that they may transmit the late filed notice of contest to the Commission.
2. **The letter from the Chief will also indicate the following:**
  - a. Inspection number;
  - b. Citation number(s);

- c. Corresponding proposed penalties;
- d. Date on which PEOSH believes the employer received the notice of a violation (and proposed penalty, if applicable);
- e. Date on which PEOSH received the employer's notice of contest, as well as any additional information the Chief believes to be pertinent.

*NOTE: The postmarked envelope containing the late filed notice of contest date is to be retained. A copy of the letter and envelope shall be sent to OAL.*

### **C. Retention of Documents.**

1. PEOSH shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the employer's notice of contest was received, as well as any additional information pertinent to demonstrating failure to file a timely notice of contest.
2. Written or oral statements from the employer or its representative explaining the employer's reason for missing the filing deadline shall also be maintained (notes shall be taken to memorialize oral communications).

## **VI. Contested Case Processing Procedures.**

The notice of contest and related documents must be sent to the OSHRC within 15 working days of receipt of the employer's notification. See [N.J.A.C 12:110-4.12](#). The OAL shall be consulted in any questionable cases.

### **A. Transmittal of Notice of Contest to Commission.**

#### **1. Documents to Executive Secretary.**

In most cases, the envelope sent to the OSHRC Executive Secretary will contain the following three documents:

- a. Employer's original letter contesting PEOSH's action;
- b. One copy of the Order to Comply and Notification of Penalty Form (OSHA-2) or of the Notice of Failure to Abate Form (OSHA-2B); and
- c. Certification form.

#### **2. Notices of Contest.**

The original notice of contest shall be transmitted to the Commission and a copy retained in the case file. The envelope containing the notice of contest shall be retained in the case file with the postmark intact.

#### **3. Contested Citations and Notice of Proposed Penalty or Notice of Failure to Abate.**

A signed copy of each of these documents shall be sent to the Commission and a copy retained in the case file.

#### 4. **Certification Form.**

- a. The certification form shall be used for all contested cases and a copy retained in the case file. It is essential that the original of the certification form, properly executed, be transmitted to the Commission.
  - Insert "C" in the CSHO Job Title block if a safety CSHO or "I," if a health CSHO.
  - Item 3 of the form shall be filled by inserting only the word " employer" or "employee" in the space provided. This shall be done even where the notice of contest is filed by an attorney for the party contesting the action. An item "4" shall be added where other documents, such as additional notices of contest, are sent to the Commission.
  - Insert the correct date for each item in the document list in the column headed "Date."
  - Insert the name and address of the OAL attorney who will handle the case, in the box containing the printed words "FOR THE COMMISSIONER OF LABOR." The Commission notifies this person of the hearing date and other official actions on the case.
- b. The documents are to be transmitted within the 15 working day time limit to the Chairman of the NJ Occupational Safety and Health Review Commission.

#### B. **Transmittal of File to OAL.**

1. Under the Commission's Rules of Procedure, the Commissioner of Labor is required to file a complaint with the Commission within **20 calendar days** after the Secretary's receipt of a notice of contest.
2. Immediately after receiving a notice of contest, the Chief shall send to the OAL by U.S. mail (or other mutually agreeable manner) the notice of contest, which the Director or designee will later transmit to the Commission, along with the complete investigative file (including photos and video).

### VII. **Communications while Proceedings are Pending before the Commission.**

#### A. **Consultation with OAL.**

1. After a notice of contest is filed and the case is within the jurisdiction of the Commission, there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations, without prior clearance from the OAL.
2. Once a notice of contest has been filed, all inquiries relating to the Citation and Notification of Penalty shall be referred promptly to the OAL. This includes inquiries from

the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other Government agencies, attorneys, and any other party.

**B. Communications with Commission Representatives while Proceedings are Pending before the Commission.**

CSHOs, Assistant Chiefs, the Chief, Director, or other field personnel shall not have any direct or indirect communication relevant to the merits of any open case with Administrative Law Judges, employees of the Commission, or any of the parties or interveners. All inquiries and communications shall be handled through the OAL.

**VIII. Commission Procedures.**

**A. Two Levels of Adjudication.**

OSHRC's Rules of Procedure provide for two levels of adjudication. The first level is before the Review Commission members. Should the OSHRC decide that a decision can only be obtained by a hearing, the case will be forwarded to the OAL for a hearing before an Administrative Law Judge pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

**B. Rules of Procedure.**

1. The OSHRC Rules of Procedure are found in [N.J.A.C. 12:112](#). These rules govern two types of ALJ proceedings.
  - a. The more conventional proceeding involves the use of pleadings, discovery, a hearing and post-hearing briefs.
  - b. Simplified Proceedings are less formal hearings that employ fewer legal procedures and are used in less complex cases (few citation items, no willful or repeat violation or fatality) and can be requested by either party or by the ALJ. In Simplified Proceedings, pleadings are generally not required and early discussion among the parties to narrow the disputed issues is required.

**2. Receipt of Case.**

Upon receipt of a case by the assigned ALJ, a hearing date is set and a site selected as close as possible to where the alleged violation(s) occurred. The hearing is an administrative trial conducted in accordance with the Commission's Rules of Procedure.

**3. Hearing Evidence.**

- a. Review includes a new examination of all of the evidence, as well as briefs submitted by the parties.
- b. Upon hearing all of the evidence, the judge will issue a written decision, including both findings of fact and conclusions of law.

- c. The OSHRC then issues a decision affirming, modifying or vacating the citations and penalties proposed by PEOSH.
- d. The decision becomes final in **30 days** unless, within that period, one of the Commissioners directs that the case be reviewed.

#### 4. **Review of ALJ's Decision.**

If one of the parties requests review of the ALJ's decision, but review is not directed by the Commission, the petitioning party may request review by the appropriate U.S. Circuit Court of Appeals. Review by a Court of Appeals must be sought within **60 days** after the Commission's decision becomes final.

#### 5. **Availability of Commission Decisions.**

Commission decisions, including Administrative Law Judge decisions, are available from the Review Commission website, [www.oshrc.gov](http://www.oshrc.gov).

### **IX. Discovery Methods.**

Once a legal proceeding has been initiated, each party has the opportunity to “discover” evidence in the possession of an opposing party. Traditionally, discovery methods include:

- ▶ Request for Admissions,
- ▶ Interrogatories,
- ▶ Requests for Production of Documents, and
- ▶ Depositions.

An attorney from the Attorney General's Office will represent the Office in responding to discovery requests. It is essential that all PEOSH personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

#### **A. Interrogatories.**

CSHOs shall draft and sign answers to interrogatories, with a DAG's assistance. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The DAG shall sign any objections to the interrogatories. CSHOs should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

#### **B. Production of Documents.**

1. If a request for production of documents is served on the DAG and that request is forwarded to the CSHOs or staff member, they should immediately make all documents relevant to that discovery demand available to the DAG.
2. While portions of those materials may be later withheld based on governmental privileges or doctrine (e.g., statements that would reveal the identity of an informer), CSHOs must not withhold any information from the DAG.

3. It is the DAG's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

**C. Depositions.**

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other PEOSH personnel may be required to offer testimony during a deposition. In such cases, a DAG will be present with the witness.

**X. Testifying in Hearings.**

While instructions provided by the DAG takes precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

**A. Review Documents and Evidence.**

In consultation with a DAG, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding so that when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

**B. Attire.**

Wear appropriate clothing that reflects PEOSH's respect for the court or other tribunal before which you are testifying. This also applies when appearing before a magistrate to seek an administrative warrant.

**C. Responses to Questions.**

Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

**D. Judge's Instruction(s).**

Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by DAG counsel, follow the judge's instruction.

## Chapter 16

### DISCLOSURE UNDER THE OPEN PUBLIC RECORDS ACT (OPRA)

- I. Reference: N.J.S.A. 47:1A-1 et seq., *Open Public Records Act*