

**New Mexico**

**Occupational Health and Safety Bureau's**

**Field Operation Manual**

### **Disclaimer**

This manual is intended to provide instruction regarding some of the internal operations of the New Mexico Occupational Health and Safety Bureau (OHSB), 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 Environment Department or the State of New Mexico. Statements which reflect current Occupational Health and Safety Review Commission or court precedents do not necessarily indicate acquiescence with those procedures.

### **Changes**

October 4, 2011 Minor changes in Chapter 13 to conform to changes in federal Whistleblower Investigations manual.

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# Chapter 1 Introduction

## I. Purpose

This Field Operation Manual (FOM) provides New Mexico Occupational Health and Safety Bureau (OHSB) Compliance Officers (COs) with a reference document for identifying the responsibilities associated with the majority of their inspection duties. It also describes the processes to be used by OHSB staff in the implementation of the OHSB enforcement program.

## II. Scope

This manual applies to all employees of OHSB.

## III. Cancellations

This manual replaces the existing FOM in use by OHSB that contains revision dates of 02/97, 10/00, 05/01, and 06/08.

## IV. Background

### A. Global Changes

This manual is based upon the federal Occupational Safety and Health Administration's [Field Operations Manual](#) issued in January 2009.

Global changes were applied to the federal manual including the following:

In Federal Manual	In New Mexico Manual
Agency	Bureau
Area Director	Compliance Program Manager
Area Office	OHSB or Bureau
Compliance Safety and Health Officer	Compliance Officer
Country	State of New Mexico
CSHO	CO
OSHA	OHSB – only where appropriate
Regional Administrator	Bureau Chief
Regional Solicitor	Office of General Counsel
Regional VPP Manager	Bureau Chief

### B. Specific Changes

In addition, references to federal regulations were changed to New Mexico regulations where appropriate. Other significant differences between the two manuals include:

1. References to federal directives and instructions that were not adopted by New Mexico were removed throughout the manual.
2. Sections on maritime policies were removed from the New Mexico manual because New Mexico does not have employers in this industry.
3. Chapter 1. Significant changes in the introductory chapter were made. Much of the federal introductory material was deemed inapplicable to the New Mexico manual.

4. Chapter 1. A section describing the job responsibilities of Bureau managers was added to this chapter.
5. Chapter 2. An extensive description of the OHSB Consultation Program was removed because it is covered extensively in the Consultation Policies and Procedures Manual.
6. Chapter 2. More guidance was provided for determining when a follow-up or monitoring inspection is required.
7. Chapter 2 and elsewhere. OHSB does not use Site Specific Targeting, so this reference was replaced with an extensive description of OHSB's compliance program planning process.
8. Chapter 2 and elsewhere. References to National Emphasis Programs were replaced with a reference to Local Emphasis Programs.
9. Chapter 3 and elsewhere. References to administrative subpoenas were removed because New Mexico does not have authority to issue them.
10. Chapter 4. Previous history of citations is limited to New Mexico data.
11. Chapter 6. Violation-by-violation policies are different in New Mexico.
12. Chapter 7. OHSB does not follow the federal policy related to Corporate Wide Settlements. Such cases are analyzed and handled on a case-by-case basis.
13. Chapter 8. OSHB does not make changes to informal agreements or post-contest settlement agreements after they have been signed.
14. Chapter 13. This chapter describes the OHSB policies and procedures for handling discrimination complaints. It is modeled after the draft version of the Whistleblower Investigation Manual titled DIS 0-1.0.
15. Chapter 15. The description of Commission processes was removed from the manual. Instead, state regulations that describe the process were referenced.
16. Chapter 16. This chapter on access to employee medical records was added to include the provisions of §1913, which is not currently incorporated into state regulations.

## V. Definitions

### A. The Act

This term refers to the [New Mexico Occupational Health and Safety Act](#), 50-9-1 through 50-9-25 NMSA 1978.

### B. Compliance Officer (CO)

This term refers to Environmental Scientists and Specialists employed by the New Mexico Occupational Health and Safety Bureau and assigned to the compliance program to conduct occupational health and safety inspections and related activities.

### C. Professional Judgment

All OSHB employees are expected to exercise their best judgment as safety and health professionals and as representatives of the New Mexico Occupational Health and Safety Bureau in every aspect of carrying out their duties.

#### **D. 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. These two terms are defined as the “place of employment” in the Act as “any place, area or environment in or about which an employee is required or permitted to work”.

#### **E. Commission and Review Commission**

These terms are used interchangeably within this document. The term refers to the Occupational Health and Safety Review Commission of New Mexico granted authority by [Section 50-9-9 of the Act](#). The powers, duties, and procedures of the Commission are described in [11.5.5 NMAC](#).

#### **F. He/She and His/Hers**

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

#### **G. 29 CFR and §**

The section symbol “§” is used in this manual to refer to the Code of Federal Regulations Title 29. For example, “§1910” refers to the Code of Federal Regulations title 29, section 1910. The reference to this in other manuals is sometimes abbreviated as “29 CFR 1910”. In this manual “§1910” and “Section 1910” mean the same as “29 CFR 1910”.

#### **H. References to Federal Directives**

Throughout this manual, there are numerous references to federal directives. A date is often included as part of the reference description. If a more current version of the directive exists, the latest version of the directive is applicable.

#### **I. IMIS and OIS**

The Integrated Management Information System (IMIS) is referenced throughout this manual. In 2010, the IMIS will be replaced with a new information system called OSHA Information System (OIS). When the switch is made to OIS, all references to IMIS in this manual will refer to OIS.

### **VI. General Responsibilities**

#### **A. Secretary of the Environment Department**

It is the duty of the Secretary, as the administrative head of the Department, to administer and enforce the laws with which the Department is charged, including the Occupational Health and Safety Act and Occupational Health and Safety Regulations. The Secretary determines the Department’s organizational structure and assigns responsibilities to Department staff in fulfillment of her duties, pursuant to the authority provided in the Environmental Improvement Act and the Occupational Health and Safety Act. The Secretary is responsible for assuring that an effective occupational health and safety program is administered and enforced in New Mexico and that the provisions of the Act and regulations promulgated under the Act are being implemented.

## **B. Bureau Chief**

The Occupational Health and Safety Bureau (OHSB) is assigned administration of the New Mexico State Plan, approved by federal OSHA. The Bureau is managed by the Bureau Chief, who is responsible for assuring the obligations imposed by the Act are fulfilled.

### **1. General**

It is the duty of the Bureau Chief to manage, execute, and evaluate all programs of OHSB.

### **2. Responsibilities**

The responsibilities of the Bureau Chief are described in the Act, regulations, Environment Department directives, and in this FOM. Responsibility for activities in the areas of compliance, consultation, and administration are delegated to the appropriate program managers.

### **3. Specific duties.**

- a. Direct the general operation of OHSB, including the supervision of the Program Managers.
- b. Develop the budget, including federal grant requests.
- c. Review discrimination complaints, direct the investigation of these complaints, and make recommendations to the Secretary concerning final action on such complaints.
- d. Review variance requests, direct the investigation of such requests, and make recommendations to the Secretary concerning final actions on such requests.
- e. Serve as the Secretary's contact with federal OSHA concerning all matters of program administration.
- f. Serve as the Secretary's designee in meetings with other state plan states.
- g. Develop occupational health and safety legislation and regulations.
- h. Respond to requests for information pursuant to the [New Mexico Public Records Act](#), Chapter 14, Article 2, NMSA 1978.

## **C. Compliance Program Manager**

### **1. General**

It is the duty of the Compliance Program Manager to plan, develop, and administer the Bureau's compliance programs. This includes the administrative and technical support of all COs.

### **2. Responsibilities**

The Compliance Program Manager shall carry out these responsibilities under the authority and guidance of the Bureau Chief and shall carry out required administrative and operational duties by following the Act and regulations, this FOM, and Environment Department directives. This FOM provides guidelines for the conduct of most compliance operations and activities.

### 3. Duties

In fulfilling the responsibility for the compliance effort throughout New Mexico, the Compliance Program Manager has a wide range of duties including, but not limited to, the following:

- a. Provide supervision of all COs including hiring, initial training, continual training, and job performance review.
- b. Ensure inspections are scheduled within the framework of the OHSB scheduling system described in this manual.
- c. Review inspection reports from COs and issue citations, proposed penalties, and abatement dates when appropriate according to procedures described in this manual and the Act.
- d. Preside as hearing officer during informal administrative reviews with employers and employees who have contested citations or penalties.
- e. Modify citations, proposed penalties, and abatement dates when required under the guidelines described in this manual.
- f. Ensure prompt and appropriate action for the collection of assessed penalties.
- g. Ensure money collected for assessed penalties is transmitted to the state general fund.
- h. Determine the validity of complaints and referrals and ensure appropriate action is taken.
- i. Initiate imminent danger and fatality/catastrophe investigations.
- j. Determine if outside experts are needed for investigations and arrange for their services when required.
- k. Coordinate with the Department's Office of General Council (OGC) when assistance is required for special compliance issues, such as failure to abate, willful violations, refusal of entry, and criminal prosecution.
- l. Direct informal conferences with employers and employees and propose settlements for citations, penalties, and abatement dates when appropriate based upon these informal conferences.
- m. Coordinate with the OGC on processing of contested cases. This involves participating in informal administrative reviews and testifying before the Commission during hearings on these cases.
- n. Provide abatement assistance to employers.
- o. Ensure all required case information is entered accurately into the Integrated Management Information System (IMIS).
- p. Provide input into the development of occupational health and safety legislation and regulations.
- q. Refer whistleblower discrimination cases to the Discrimination Coordinator and provide assistance as requested.

## **D. Compliance Officer**

### **1. General**

It is the duty of the Compliance Officer (CO) to represent OHSB to the public and to perform the policies and procedures of OHSB under the direction of the Compliance Program Manager.

### **2. Responsibilities**

The primary responsibility of the CO is to perform inspections of workplaces to ensure employers are providing a healthy and safe environment for New Mexico workers.

### **3. Duties**

The following activities are required of COs during the performance of their job:

- a. Receive complaints and referrals from employees.
- b. Prepare for inspections as described in Chapter 3 of this manual.
- c. Conduct the inspection according to policies described in Chapter 3 of this manual.
- d. Advise employers and employees of workplace hazards during inspections and suggest abatement procedures.
- e. Promptly complete the case file for all inspections and make recommendations to the Compliance Program Manager regarding any citations, penalties, and abatement dates resulting from the inspection.
- f. Participate in all required training.
- g. Testify in commission hearings on behalf of OHSB.
- h. Promptly inform the Compliance Program Manager when served with a subpoena.
- i. Promptly refer any requests for case file information that is covered by the [Inspection of Public Records Act](#).

## **E. Consultation Program Manager**

### **1. General**

The Consultation Program Manager is responsible for operating and maintaining programs that meet the objectives of the OSHA-funded Consultation Program under the direction of the Bureau Chief. This includes the administrative and technical support of all Consultation Officers.

### **2. Responsibilities**

The Consultation Program Manager responsibilities include directing all consultation programs as described primarily by the Consultation Policies and Procedures Manual (CPPM) and by Environment Department directives. This FOM also defines some activities of the Consultation Program Manager.

### **3. Duties**

The following activities are required of the Consultation Program Manager in the performance of her responsibilities:

- a. Provide supervision of all Consultants including hiring, initial training, continual training, and job performance review.
- b. Supervise Consultants in providing on-site consultation visits at the requests of employers within New Mexico.
- c. Establish and support the Safety and Health Achievement Recognition Program (SHARP) within New Mexico as defined in the CPPM.
- d. Direct Consultants in conducting health and safety training for New Mexico employers and employees.
- e. Promote the Consultation Program within New Mexico by conducting meetings with employers, organizations, associations; and by using public media for outreach activities.
- f. Communicate with the Compliance Program Manager to secure exemption from programmed inspections for those employers who are entitled to such.
- g. Communicate with the Regional Director of Consultation Programs regarding the status of the New Mexico Consultation Programs.
- h. Supervise the accurate and complete entry of all consultative visit information into the IMIS.

## **F. Administrative Manager**

### **1. General**

It is the duty of the Administrative Manager to supervise the performance of general support functions for the Bureau under the direction of the Bureau Chief.

### **2. Responsibilities**

The Administrative Manager is responsible for obtaining federal grants from OSHA, gathering federal statistical data for the Bureau of Labor Statistics (BLS) and OSHA, as well as other general support activities for the Bureau.

### **3. Duties**

The duties of the Administrative Manager include the following:

- a. Provide supervision of the Business Operation Specialists, the Administrative Support person, and the Financial Specialist; including hiring, initial training, continual training, and job performance review.
- b. Prepare and submit annually the grant request to obtain state funding from federal OSHA for Compliance, Consultation, and for providing injury and illness data to OSHA.
- c. Prepare and submit annually the grant request to the BLS for the Survey of Occupational Injuries and Illnesses.
- d. Supervise the data gathering for the annual Survey of Occupational Injuries and Illness data in accordance with the grant from the BLS.
- e. Assure the essential administrative support to the Compliance and Consultation Program sections are provided in an effective and efficient manner.

- f. Direct the Bureau's financial activities. Work with department budget personnel to ensure budgets are prepared, submitted and used in accordance with state and federal requirements.
- g. Prepare annual reports as required by the Bureau Chief.

## Chapter 2 Program Planning

### I. Enforcement Program Scheduling

#### A. General

OHSB's priority system for conducting inspections is designed to allocate available OHSB resources as effectively as possible to ensure that maximum feasible protection is provided to the workers of New Mexico. The Compliance Program Manager will ensure that inspections are scheduled within the framework of this chapter and that the inspections are consistent with the objectives of the Bureau, and that appropriate documentation of scheduling practices is maintained.

The Compliance Program Manager will ensure that OHSB resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the Compliance Program Manager may consider utilizing outside OHSB resources (e.g., the OSHA Health Response Team) to employ more effectively the Bureau's resources. The Bureau will retain control of the inspection.

#### B. Inspection Priority Criteria

Generally, priority of accomplishment and of assigning staff resources for inspection categories will be as shown in Table 1-1 as follows:

**Table 1-1: 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 efficient use of resources, and contribute to the effective protection of workers. An example of such a deviation would be when the Bureau Chief commits a certain percentage of resources to programmed Special Emphasis Program (SEP) inspections such as a National Emphasis Program (NEP), or a Local Emphasis Program (LEP).

##### 2. Follow-up inspections

In cases where follow-up inspections are necessary, they will 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 as other-than-serious.

Follow-up inspections should not be conducted within the 15 working day contest period unless high gravity serious violations were issued.

Follow-up inspections are normally required in the following situations:

- a. Willful, repeated, and high gravity serious violations;
- b. Failure to abate notifications;
- c. Citations related to an imminent danger situation;
- d. When the employer fails to respond to a request for notification of abatement action by letter or other means, after having been contacted several times; and
- e. Whenever the Compliance Program Manager believes that particular circumstances (e.g., the number or the type of violations, past history of the employer, complex engineering controls, etc.) indicate the need for a follow-up.

3. Exceptions to required follow-up inspections

It will not be necessary to conduct a follow-up inspection if any of the following applies:

- a. Unquestionable proof of abatement

A follow-up inspection will not be necessary where unquestionable proof of abatement has been presented; e.g., when the CO observed and documented correction of the cited condition during the inspection.

- b. Compliance Program Manager determination

The Compliance Program Manager may determine that a follow-up inspection is not required. Justification for not conducting follow-up inspections may include statements by the employee or employee representative or other knowledgeable professionals attesting to the correction of the violation. Written, signed statements are preferred. However, verbal communications are acceptable if summarized by OHSB personnel in a written memorandum for the case file.

- c. Administrative closing of case file

The case file normally shall be administratively closed when a required follow-up inspection has not been conducted within 6 months of the final correction date and the case has become a final order of the Commission. All administratively closed case files shall contain verification of abatement, as well as documentation as to the reasons why the required follow-up inspection was not conducted.

- d. Multiple abatement dates

If a follow-up inspection is to be conducted, when an employer has been cited for a number of violations with varying abatement dates, the follow-up inspection normally shall not be scheduled until after most, if not all, of the abatement dates set forth for the more serious violations in the citation(s) have passed. If satisfactory corrective action has been taken by the employer, additional follow-up activity normally shall not be scheduled, unless the Compliance Program Manager believes that complex engineering controls or other special factors involved in the case warrant such activity.

- e. Contested cases

The scheduling of follow-up inspections will be affected in various ways by potential or actual employer contests, depending on the status of the Notice of Contest.

f. Notice of contest not filed

Follow-up inspections may be conducted during the 15-day notice of contest period, provided the employer has not actually filed such a notice. Normally, however, only high-gravity serious hazards shall be scheduled for follow-up during the contest period. If such a follow-up inspection reveals a failure to abate, a Notification of Failure to Abate Alleged Violation (OSHA-2B) shall be issued immediately, without regard to the contest period for the initial citation.

g. Notice of contest filed

When a citation is currently under contest, a follow-up inspection shall not be scheduled regarding the contested items.

h. Final order

When a notice of contest is withdrawn, the proceeding is settled, or the Commission affirms alleged violations that are contested, the abatement period begins, and a follow-up inspection may be scheduled as appropriate after the Compliance Program Manager has received the final order from the Commission.

4. Monitoring inspections

When a monitoring inspection is necessary, the priority is the same as a follow-up inspection. Monitoring inspections are conducted for many reasons.

- a. Monitoring inspections shall be conducted for each petition for modification of abatement date (PMA) on serious, willful, and repeated violations that extends the final abatement date by more than one year from the citation issuance date.
  - (i) These inspections shall be conducted as soon as possible after first contact with the employer, but no later than 15 working days following the receipt of certification of posting, unless an extension is requested and granted by the Review Commission.
  - (ii) Such inspections shall have priority over all programmed inspections and any unprogrammed inspection where the alleged hazards are classified as other-than-serious. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.
- b. Monitoring inspections in response to PMAs for other-than serious violations or for serious, willful, or repeated violations that would result in a final abatement date of one year or less from the citations issuance date, shall be scheduled at the discretion of the Compliance Program Manager, based on the gravity of the violation and on resource availability.
  - (i) These inspections shall be conducted as soon as possible after first contact with the employer, but no later than 15 working days following the receipt of certification of posting, unless an extension is requested and granted by the Review Commission.
  - (ii) Such inspections shall have priority over all programmed inspections and any unprogrammed inspection where the alleged hazards are classified as other-than-serious. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

- c. Monitoring inspections shall be conducted to check on progress made on long-term or multi-step abatement plans, whenever abatement dates extend beyond one year from the issuance date of the citation.
  - (i) These inspections shall be conducted at least every 6 months counted from the date of the final order, until final abatement has been achieved for all cited violations.
  - (ii) If the employer is submitting satisfactory quarterly progress reports, and the Compliance Program Manager agrees that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, a monitoring inspection may be conducted every 12 months counted from the date of the final order.
  - (iii) Such inspections shall have a priority over all programmed inspections and any unprogrammed inspection where the alleged hazards are classified as other-than-serious. The seriousness of the hazards requiring abatement shall determine the priority among monitoring inspections.

5. Employer information requests

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

**C. Effect of Contest**

If an employer has contested a citation 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 items under contest shall be excluded from the inspection unless a potential imminent danger is involved.

**D. Enforcement Exemptions and Limitations**

In providing funding for OSHA, Congress has consistently placed restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries. Congress may place exemptions and limitations on OHSB activities through the annual Appropriations Act.

Before initiating an inspection of an employer in these categories, the Bureau will evaluate whether the Appropriations Act for the fiscal year would prohibit the inspection. When this determination cannot be made beforehand, the CO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspection shall immediately be discontinued.

[Refer to OSHA Instruction [CPL 02-00-051](#) - Enforcement Exemptions and Limitations under the Appropriation Act, dated May 28, 1998, for additional OSHA information.]

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

Section 50-9-23 of the [Act](#) defines the limitations on applicability of the Act. This section states the Act does not apply to working conditions over which other federal agencies exercise statutory responsibility to prescribe standards for safety and health. The determination of preemption by another federal agency is, in many cases, a highly complex matter. The general guidelines are established in the Region VI directive [CSP 01-03-001](#) titled Level of Federal Enforcement in New Mexico.

At times, an inspection may have already begun when the jurisdictional question arises. Any such situations will be brought to the attention of the Compliance Program Manager as soon as they arise, and dealt with on a case-by-case basis.

Memorandums of Understanding (MOUs) exist which may address other agency preemption. An example MOU is the Mine Safety and Health Administration - [Interagency Agreement](#) between the Mine Safety and Health Administration and OSHA, dated March 29, 1979.

## **F. Joint Jurisdiction with other State Agency**

OHSB has established a [Memorandum of Understanding](#) with the New Mexico Department of Agriculture in which joint jurisdiction issues are described.

## **G. United States Postal Service**

The [Postal Employee Safety Enhancement Act of 1998](#) applies the Occupational Safety and Health Act of 1970 to the U.S. Postal Service in the same manner as the OSH Act applies to any private sector employer.

New Mexico OSHA elected not to cover the U.S. Postal Service. Thus, federal OSHA retains authority for coverage of the U.S. Postal Service nationwide. Federal coverage in New Mexico encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service mail operations. Jurisdiction over contractor-operated facilities engaged in mail operations, as well as postal stations in public or commercial facilities, will likewise be exercised by federal OSHA. New Mexico continues to exercise jurisdiction over all other private sector contractors working on U.S. Postal Service sites who are not engaged in U.S. Postal Service mail operations, such as building maintenance and construction workers. [Refer to [Federal Register Vol. 65, p. 38429](#), dated June 21, 2000, for the Final Rule on State Plans Coverage of the U.S. Postal Service.]

## **H. Home Based Worksites**

OHSB will only conduct inspections of home-based worksites, such as home manufacturing operations, when OHSB receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm or that an imminent danger exists. Including reports of a work-related fatality.

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

## **I. Inspection/Investigation Types**

1. Unprogrammed

Inspections scheduled in response to alleged hazardous working conditions identified at a specific worksite are classified as unprogrammed. This type of inspection responds to the following events:

- a. Imminent dangers;
- b. Fatalities/catastrophes;
- c. Complaints; and
- d. Referrals.

It also includes follow-up and monitoring inspections scheduled by the OHSB.

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

[Refer to OSHA Instruction [CPL 02-00-124 - Multi-Employer Worksite Citation Policy](#), dated December 10, 1999, for additional information.]

## 2. Unprogrammed related

Inspections of employers at multi-employer worksites whose operations are not directly affected by the subject of the conditions identified in a complaint, accident, or referral are unprogrammed related.

An example would be a confined space inspection conducted at the unprogrammed worksite when the confined space hazard was not identified in the complaint, accident report, or referral.

## 3. Programmed

Inspections of worksites that have been scheduled based upon objective or neutral selection criteria are programmed inspections. The worksites are selected according to national scheduling plans for safety and for health. Programmed inspections are also scheduled under local and national special emphasis programs.

[Refer to the section on [Programmed Inspections](#) in this chapter for related policy information.]

## 4. Programmed 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.

# II. Un-programmed Activity

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

- [Imminent Danger](#), see Chapter 11
- [Fatality/Catastrophe](#), see Chapter 11
- [Emergency Response](#), see Chapter 11
- [Complaints/Referrals Processing](#), see Chapter 9
- [Whistleblower Complaints](#), see Chapter 17

- [Follow-up Inspections](#), see Chapter 7
- [Monitoring Inspections](#), see Chapter 7

### III. Programmed Inspections

#### A. Scheduling for General Industry

##### 1. Policy

It is OHSB policy that inspections conducted as programmed inspections be primarily in the "high hazard" sectors of employment. Types of high hazard sectors include:

- In the area of safety, the Bureau considers a "high rate" industry to be one within a North American Industry Classification System (NAICS) code having an occupational injury incidence rate equal to or higher than the lowest average rate attained over the last five years within private sector industry as a whole, as published by the BLS.
- In the area of health, the Bureau considers a "high hazard" industry to be one with a previous history of serious OSHA health citations.
- Other specific industries, such as oil and gas extraction, are also high hazard industries, and are frequently scheduled for inspection as special emphasis programs.

##### 2. Description

Both programmed safety inspections and programmed health inspections are scheduled based upon a multiple-step process.

- The initial selection of a particular category of employment (e.g., high rate general industry, oil and gas well drilling, etc.) is made in accordance with annual projections of inspection activity.
- Within a category, establishments are selected for inspection from a NAICS list for that category, and placed in an inspection cycle. For general industry safety and health categories, establishment lists will ordinarily be provided by the OSHA National Office for each NAICS, and corrected as necessary by the Bureau.
- When no list is provided by the national office (e.g., special emphasis programs, public sector, etc.), the Compliance Program Manager shall compile an establishment (worksite) list considering all establishments (worksites) within the area, and using the best available information (manufacturing directories, commercial telephone listings, local knowledge, etc.).
- Within a federal fiscal year, establishments may be inspected in any order that makes efficient use of resources.

##### 3. Guidelines and procedures

Programmed inspections shall be conducted jointly by both safety and health personnel whenever resources are available and it is likely, based on experience in inspecting similar workplaces that both safety and health hazards exist to a significant degree. If an inspection is begun as safety only or as health only, but the CO determines during the course of the inspection that it should be expanded, the CO shall contact the supervisor. A decision will then be made based on the information available, whether the inspection should be expanded and, if so, to what extent. A decision may also be made based on resource availability, to handle the information as a CO referral for inspection later.

4. Inspection scheduling for general industry (safety and health)

The following procedures are to be adhered to in programming general industry safety and health inspections.

a. Industry rank report

The National Office shall provide the Bureau with a statewide Industry Rank Report listing industries by their NAICS codes when available. (See current version of OSHA Instruction [CPL 2.25](#).)

The safety NAICS lists are statewide listings of manufacturing industries within NAICS codes with lost workday injury (LWDI) rates equal to or higher than the lowest BLS published national average for all of private sector industry for the last five years, ranked in order of their LWDI rate (the high rate NAICS List).

The health NAICS list is a statewide listing of industries within NAICS codes with a previous history of serious OSHA health violations.

b. Establishment lists

The national office provides a series of establishment lists for use by the state in programming inspections. Establishments with 10 or fewer employees are deleted from establishment lists provided by the National Office.

The high rate establishment list for safety, a list of all known establishments located within the state for each NAICS code on the high rate NAICS list, is provided by the National Office.

The non-manufacturing list for safety, a list of randomly selected establishments located within the state for each NAICS code on the non-manufacturing NAICS list, is provided by the National Office. Establishments that are exempt from the recordkeeping requirements because of their primary NAICS codes are deleted from the non-manufacturing establishment list.

The health establishment list of all known establishments located within the state for each NAICS code on the health NAICS list is provided by the National Office.

5. Adjustments

Prior to use of establishment lists provided by the National Office for scheduling purposes, the Compliance Program Manager shall make appropriate additions and deletions. Additions are made to insure there is adequate coverage of all areas of the state and that there are enough establishments to fulfill the requirements for all special emphasis programs. The Business Directory or similar programs are used to find establishments that are not on the lists.

Deletions are made from the list for the following reasons:

- a. When previous inspection history indicates the establishment could not be located within New Mexico.
- b. When previous inspection history indicates the establishment was incorrectly coded with a NAICS code that is out of scope.
- c. When any comprehensive programmed or complete un-programmed inspection in the same discipline, i.e. safety or health, has been performed within the last three years.

- d. When the establishment had no more than 10 employees at any time during the previous 12 months.
- e. When the establishment is a duplicate with another already on the list.
- f. When the establishment has been approved for exemption through the consultation program.
- g. When the establishment has been approved for exemption as part of a partnership.
- h. When OHSB does not have jurisdiction.

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

Due to the mobility of the construction industry, the transitory nature of construction worksites, and the fact that construction worksites frequently involve more than one employer, inspections are scheduled from a list of construction worksites rather than construction employers. The University of Tennessee provides to OHSB a randomly selected list of construction projects from identified or known covered active projects. This list contains the projected number of sites the Bureau has reported it plans to inspect during the next month. Projects are selected in accordance with OSHA Instruction [CPL 02-00-141](#) - Inspection Scheduling for Construction, dated July 14, 2006.

## **C. Scheduling for Public Sector**

Inspections are scheduled for state, city, and county employers based upon a random selection from lists compiled by the Bureau. These lists are formed from data compiled by the New Mexico Risk Management Bureau, the New Mexico Municipal League, and the New Mexico Association of Counties. Only employers engaged in the high hazard industries for health and safety are selected. The high hazard industries have been identified as:

1. Public sector high hazard industries for safety include
  - a. Water treatment plants – SIC 4941,
  - b. Wastewater treatment – SIC 4952,
  - c. Sanitation department – SIC 4953;
  - d. Road department – SIC 1611;
  - e. Utility department – SIC 4939;
  - f. Maintenance department – SIC 7538; and,
  - g. Public works SIC 9512.
2. Public sector high hazard industries for health include
  - a. Water treatment plants – SIC 4941;
  - b. Wastewater treatment – SIC 4952;
  - c. Fire department – SIC 9224;
  - d. Sheriff department – SIC 9221; and,
  - e. Medical facilities – SIC 8062.

Public sector employers who have received an inspection within the last three years are excluded from programmed inspections.

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

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

SEPs may also be used to develop and implement alternative scheduling procedures or other departures from national procedures. SEPs can include national emphasis programs and local emphasis programs.

1. Identification of SEPs

The description of the particular SEP shall be identified by one or more of the following:

- a. Specific industry;
- b. Trade/craft;
- c. Substance or other hazard;
- d. Type of workplace operation;
- e. Type/kind of equipment; and
- f. Other identifying characteristics.

2. SEP scope

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

3. Pilot programs

National or local pilot programs may also be established under SEPs. Such programs may be conducted for assessing the actual extent of suspected or potential hazards, determining the feasibility of new or experimental compliance procedures, or for any other legitimate reason.

**E. National Emphasis Programs**

OSHA develops NEPs to focus outreach efforts and inspections on specific hazards in a workplace. OHSB evaluates each NEP to determine the necessity and relevance within New Mexico. After evaluation, OHSB may adopt the NEP and integrate the affected industry within the programmed inspection process.

**F. Local Emphasis Programs**

OHSB normally implements several Local Emphasis Programs (LEPs) each year to focus outreach efforts and inspections on specific hazards in a workplace. The LEPs are established through an OHSB directive issued by the Bureau Chief and approved by the Regional Administrator. The list of Local Emphasis Programs is posted on the Bureau's website location: [http://www.nmenv.state.nm.us/Ohsb\\_Website/LEP.htm](http://www.nmenv.state.nm.us/Ohsb_Website/LEP.htm).

**G. Other Special Programs**

The Bureau may develop other special categories of inspections that are not covered above.

**H. Enforcement Scheduling for Cooperative Program Participants**

1. Employers who participate in voluntary compliance programs may be exempted from programmed inspections and eligible for inspection deferrals or other enforcement incentives. The Compliance Program Manager or designee will determine whether the

employer is actively participating in a program that would influence inspection or enforcement activity at the worksite being considered for inspection. When possible, this determination should be done prior to scheduling the inspection.

2. Information regarding a facility's participation in the following programs should be available prior to scheduling inspection activity. The current list of companies participating in these programs can be found on the Bureau's website location referenced below.

- a. [Voluntary Protection Program](#)
- b. [Pre-SHARP and SHARP Participants](#)
- c. [Oil & Gas Safe Site Program](#)
- d. [CARES](#)
- e. [OHSB Strategic Partnerships](#)
- f. Consultation 90-Day Deferrals

3. Voluntary Protection Program (VPP)

- a. Bureau Chief's Responsibilities

The Bureau Chief must keep the Compliance Program Manager informed regarding VPP applicants and the status of participants in the VPP. This will prevent unnecessary scheduling of programmed inspections at VPP sites and ensure efficient use of resources. The Compliance Program Manager should be informed:

- (i) That the site must be removed from the programmed inspection list. Such removal may occur no more than 75 days prior to the establishment's on-site evaluation;
- (ii) Of the site's approval for the VPP program; and
- (iii) Of the site's withdrawal or termination from the VPP program.

- b. Programmed inspections and VPP Participation

- (i) Inspection Deferral

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

- (ii) Inspection exemption

The exemption from programmed inspections for approved VPP sites will continue for as long as the employer continues to meet VPP requirements. Sites that have withdrawn or been removed from a VPP will be returned to the programmed inspection list, if applicable, at the time of the next inspection cycle.

- c. Unprogrammed enforcement activities at VPP sites

When OHSB receives a complaint or a referral other than from the OHSB VPP on-site team, or is notified of a fatality, catastrophe, or other event requiring enforcement at a VPP site, the Compliance Program Manager must initiate an inspection following normal OHSB enforcement procedures.

If a Compliance Assistance Specialist (CAS) is the first person notified by the site of an event requiring enforcement, the CAS must instruct the site to contact the OHSB Compliance Program Manager.

The inspection will be limited to the specific issue of the unprogrammed activity. If citations are issued as a result of the inspection, a copy of that citation will be sent to the Bureau Chief and the appropriate CAS [Refer to OSHA Instruction [CSP 03-01-003](#) Voluntary Protection Programs (VPP): Policies and Procedures Manual, dated 04/18/2008]

The Compliance Program Manager must send the Bureau Chief and the appropriate CAS a copy of any report resulting from an enforcement case.

#### 4. Consultation

##### a. Visit in progress

If an on-site consultation visit is in progress, it will have priority over an OHSB programmed inspection. An on-site consultative 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 on-site consultative visit is already in progress, it will terminate when one of the following types of OHSB compliance inspections is initiated:

- (i) Imminent danger inspection;
- (ii) Fatality/catastrophe inspection;
- (iii) Complaint inspection; or
- (iv) Other critical inspection as determined by the Bureau Chief.

Other critical inspections may include, but are not limited to, [referrals](#) as defined in Chapter 9. Following an evaluation of the hazards alleged in a referral, if the Compliance Program Manager determines enforcement action is required prior to the end of an abatement period established by the 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 OSHA Instruction 06-05 (CSP 02) - [Consultation Policies and Procedures Manual](#), Chapter 7: Relationship to Enforcement, dated January 18, 2008, clarifies the interface between enforcement and consultation activity at the worksite.

##### (i) Full service on-site consultation visits

While a worksite is undergoing a full service on-site consultation visit for safety and health, programmed enforcement activity may not occur until after the end of the worksite's visit "in progress" status, and is limited to the discipline examined, i.e. safety or health.

##### (ii) Full service safety or health on-site consultation visits

An on-site 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.

(iii) Limited service on-site consultation visits

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

(iv) Enforcement follow-up and monitoring inspections

If an enforcement follow-up or monitoring inspection is to be conducted while a worksite is undergoing an on-site consultation visit, the inspection shall not be deferred. However, the scope of the inspection shall be limited only to those areas covered by the follow-up or monitoring inspection. In these instances, the consultant must interrupt the on-site visit until the enforcement inspection has been completed. In the event OHSB issues a citation as a result of the follow-up or monitoring inspection, an on-site consultation visit may not proceed until it has become part of a final order.

(v) On-site consultation 90-day deferral

If an establishment has requested an initial full service comprehensive consultation visit for safety **and** health from the OHSB Consultation Program, and has a visit scheduled by the Consultation Program, the establishment may be deferred from programmed inspections for 90 calendar days from the date of the notification by the Consultation Program to the Compliance Program Manager. No extension of the deferral beyond the 90 calendar days is possible, unless the consultation visit is "in progress."

OHSB may however, in exercising its authority to schedule compliance inspections, assign a lower priority to worksites where consultation visits are scheduled. Refer to OSHA Instruction CSP 02-00-002 - [Consultation Policies and Procedures Manual](#), Chapter 7: Relationship to Enforcement, dated January 18, 2008, for additional information.

5. Pre-SHARP status

- a. An employer who does not meet the SHARP requirements, but who exhibits a reasonable promise of achieving agreed upon milestones 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 period recommended by the Consultation Program Manager must not exceed a total of 18 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving pre-SHARP status, employers may be granted a deferral from OHSB programmed inspections. The following types of incidents can trigger an OHSB enforcement inspection at pre-SHARP sites:
  - (i) Imminent danger;
  - (ii) Fatality/Catastrophe;

(iii) Complaints; and

(iv) Other critical inspections as determined by the Bureau Chief.

6. Safety and Health Achievement Recognition Program (SHARP)

SHARP is designed to provide incentives and support to those employers that implement and continuously improve an effective safety and health management system at their worksite. SHARP participants are exempted from OHSB programmed inspections.

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 Consultation Program Manager approves an employer's SHARP application. After the initial approval, all SHARP renewals will be for a period of three years.

b. OHSB inspections at SHARP worksites

As noted above, employers that meet all the requirements for SHARP status will have the names of their establishments deleted from OHSB's Programmed Inspection Schedule. However, the following types of incidents can trigger an OHSB enforcement inspection at a SHARP site:

(i) Imminent danger;

(ii) Fatality/catastrophe; or

(iii) Complaints.

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

7. Pre-CARES and Pre-Safe Site deferral status

- a. An employer who does not meet the full requirements for CARES and Safe Site, but who exhibits a reasonable promise of achieving agreed upon milestones for program participation, may be granted inspection deferral status. Participants receive a full service, comprehensive consultation visit that involves a complete safety and health hazard survey, including a comprehensive assessment of the employer's safety and health management system, and visits to an appropriate number of worksites as provided in paragraph 8 below.
- b. The deferral period recommended by the Consultation Program Manager must not exceed a total of 6 months from the expiration of the latest hazard correction due date(s), including extensions. Upon achieving deferral status, employers may be granted a deferral from OHSB programmed inspections. The following types of incidents can trigger an OHSB enforcement inspection at deferred sites:
  - (i) Imminent danger;
  - (ii) Fatality/Catastrophe;
  - (iii) Complaints; and
  - (iv) Other critical inspections as determined by the Bureau Chief.

8. Construction Agreement for Residential Employee Safety (CARES) and Oil and Gas Safe Site exemptions

CARES and Safe Site are designed to provide incentives and support to those employers that implement and continuously improve an effective safety and health management system at their worksites. Participants are exempted from OHSB programmed inspections.

a. Deletion from programmed inspection list for CARES and Safe Site participants

For participants with control of the worksite, an agreement may provide that following an appropriate number of comprehensive on-site consultation visits conducted to meet verification requirements at sites controlled by the participant, other worksites controlled by the participant may be deleted from the programmed inspection list within for up to one year. However, if a serious or imminent danger condition is observed by enforcement personnel, the partner should be inspected and, if appropriate, cited per Bureau policy.

The minimum number of Bureau scheduled on-site consultation visits needed for verification shall be based on the number of active worksites over which the participant has control as shown in Table 2-1.

**Table 2-1 Inspections Required for Verification**

Number of Sites	Number of Visits
2-25	4
26-99	6
100 or more	8

An agreement may provide for a different number of inspections, if the particular circumstances indicate it would be appropriate.

This provision is available only when the participant has an effective safety and health management system fully compliant with OSHA Instruction 06-06 (CSP 02) - [Consultation Policies and Procedures Manual](#), Chapter 8: OSHA's Safety and Health Achievement Recognition Program (SHARP) and pre-SHARP, dated December 14, 2006, the effectiveness of the system is confirmed in the on-site visits, and the participant demonstrates adequate control over safety and health for the worksites visited which are under their control, including work performed by all subcontractors. In these circumstances, deletions should be consistent with employee protection and conserving limited OHSB resources.

For participants without control of the worksite, the requirements differ only slightly from the requirements of participants with worksite control. Verification visits will be conducted at the participant's worksite (rather than at worksites controlled by the participant), provided the controlling employer at the site agrees to the consultation visit. After the verification requirements are met, and the effectiveness of the safety and health management system is confirmed, other worksites of the partner may not be inspected as part of any programmed activity at a multi-employer worksite for up to one year.

b. OHSB inspections at CARES and Safe Site worksites

As noted above, employers that meet all the requirements for exemption status will have the names of their establishments deleted from OHSB's Programmed Inspection Schedule. However, the following types of incidents can trigger an OHSB enforcement inspection an exempted worksite:

- (i) Imminent danger;
- (ii) Fatality/catastrophe;
- (iii) Complaints; or
- (iv) Other critical inspections as determined by the Bureau Chief.

9. OHSB Strategic Partnership Program (OSP) benefits

a. Deferral from programmed inspection list for non-construction OSP

OHSB may offer a deferral from programmed inspections to OSP participants upon their entry into a partnership. During the deferral period, the partner must commit to make workplace safety and health improvements or seek compliance assistance to improve workplace safety and health in accordance with its responsibilities under the Act.

For a majority of OSP agreements, the beginning of the deferral period will be the effective date of the partnership agreement. However, in situations when sites join the partnership on a staggered basis, the deferral period begins at the site's actual entry into the partnership. The partnership agreement should clearly address the issue of OSP participant effective/entry dates.

b. Programmed inspection with a limited scope

At OHSB's discretion, an establishment operated by a partner may receive an inspection in which the focus is limited to hazardous areas, operations, conditions or practices at the establishment. The limited scope inspection must focus on the significant worksite and industry specific hazards based on an analysis of information available, such as:

- (i) BLS injury and illness data;
- (ii) Site and corporate injury and illness data; or
- (iii) Site accident audit and inspection data.

For an inspection with limited scope, the workplace hazards to be addressed will be determined by OHSB with input from the partner. OHSB may expand the scope of the inspection based on information gathered during the inspection process.

To gain a limited scope inspection as a benefit, the establishment must have undergone an on-site non-enforcement verification inspection within one year of the date of the programmed inspection.

c. Deletion from programmed inspection list non-construction

Following a comprehensive on-site enforcement inspection conducted to meet OSP verification requirements, an establishment operated by an OSP partner will be deleted from programmed inspection lists for the period established for deletions in the then-current OHSB general industry list.

If the OSP is designed to address comprehensively a hazard covered by the Act, the Compliance Program Manager may extend the deletion for one year if the partner continues to meet the conditions of the OSP agreement and demonstrates improved performance in areas measured by the OSP.

d. Deletion from programmed inspection list for construction

For OSP partners with control of the worksite, an OSP agreement may provide that following an appropriate number of comprehensive on-site enforcement inspections conducted to meet OSP verification requirements at sites controlled by the partner, other worksites controlled by the partner may be deleted from the programmed inspection list within the OSP's specified geographical boundary for up to one year. However, if a serious or imminent danger condition is observed by enforcement personnel or reported to OHSB, the partner should be inspected and, if appropriate, cited per Bureau policy.

The minimum number of Bureau scheduled on-site enforcement inspections needed for verification shall be based on the number of active worksites over which the partner has control within the specified jurisdictional boundary as shown in Table 2-2.

**Table 2-2 Inspections Required for Verification**

Number of Sites	Number of Inspections
2-25	4
26-99	6
100 or more	8

A partnership agreement may provide for a different number of inspections, if the particular circumstances indicate it would be appropriate.

This provision is available only when the partner has an effective safety and health management system fully compliant with [§1926.20](#) and [§1926.21](#), the effectiveness of the system is confirmed in the on-site enforcement inspections, and the partner demonstrates adequate control over safety and health for the entire worksite, including work performed by all subcontractors. In these circumstances, deletions should be consistent with employee protection and conserving limited OHSB resources.

For OSP partners in construction without control of the worksite, the requirements differ only slightly from the requirements of OSP partners with worksite control. Verification inspections will be conducted at the partner's worksite (rather than at worksites controlled by the partner). After the verification requirements are met, and the effectiveness of the safety and health management system is confirmed, other worksites of the partner may not be inspected as part of any programmed activity at a multi-employer worksite for up to one year.

#### 10. Alliances

Unlike OHSB's OSP, VPP, and SHARP programs, alliances do not require applications, data collection, verification, or evaluation. Alliances also do not offer incentives, such as focused inspections or inspection deferral, to participating employers.

## **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 CO adequately prepare for inspections. Because a wide variety of industries and associated hazards are likely to be encountered, pre-inspection preparation is essential.

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

COs shall carefully review data available at the OHSB Santa Fe office for information relevant to the establishments scheduled for inspection. These may include inspection files and the OSHA extranet. The CO shall also conduct an establishment search by accessing the IMIS database. The CO shall use name variations and address matching in their establishment searches to enhance the probability of finding information on companies that may have changed names or status, e.g., LLC to Inc.

If an establishment has an inspection history, which includes citations received while performing work in another state, the CO shall be aware of this information but will not use it for determining the classification of any violations.

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

The CO shall access the OHSB web page to obtain information on employers who are currently participating in any consultation or other cooperative program. The CO shall verify whether the employer is a current program participant.

#### **C. OHSB Data Initiative (ODI) Data Review**

For all inspections, the CO should obtain any ODI survey information available at [magneto/OHSB Compliance/ODI Company Review.pdf](#). A review of the DART and TRC numbers for the company will provide background information.

#### **D. Safety and Health Issues Relating to COs**

##### **1. Hazard assessment**

The CO should evaluate OSHA material showing the frequently cited violations by industry to assess the possible hazards she might face during the inspection. This information is available at the OSHA web site: [Frequently Cited Violations](#).

##### **2. Respiratory protection**

The CO has the responsibility to wear respirators when and where required, and to care for and maintain the respirators in the manner in which the CO is trained.

##### **a. Pre-inspection**

The CO should conduct a pre-inspection evaluation for potential exposure to air contaminants. Prior to entering any hazardous areas, the CO should identify those work areas, processes, or tasks that require respiratory protection. The CO should review all pertinent information contained in the establishment file and appropriate

reference sources to become knowledgeable about the industrial processes and potential respiratory hazards that may be encountered.

b. Notification

The CO shall contact the Compliance Program Manager for further instruction for any of the following:

- (i) Whenever respiratory protection is required
- (ii) If they have any other concerns regarding respiratory hazards, to which they may be exposed.

3. Safety and health rules and practices

The CO shall comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by OHSB standards or by the employer for the protection of employees.

4. Immunizations and other special entrance requirements

Many pharmaceutical firms, medical research laboratories, and hospitals have areas that have special entrance requirements. These requirements may include proof of up-to-date immunization and the use of respirators, special clothing, or other protective devices or equipment.

- a. The CO shall not enter any area where special entrance restrictions apply until taking the required precautions. It shall be ascertained prior to inspection, if possible, if an establishment has areas with immunization or other special entrance requirements. If the CO cannot make this determination, she may telephone the establishment using the following procedures. Such communication will **not** be considered advance notice.
  - (i) Telephone as far in advance of the inspection as possible. This will make it more difficult for the employer to determine a time relationship between the phone call and the upcoming inspection.
  - (ii) State the purpose of the inquiry and that an inspection may be scheduled in the future. Do not give a specific date.
  - (iii) Determine the type of immunization(s) or special precautions required and the building or area which has restricted access.
- b. If immunization is required, the Compliance Program Manager shall ensure the inspecting CO has the proper immunization and that any required incubation period has been met. Those immunizations necessary to complete inspections will be provided by the Bureau.

**E. Advance Notice**

1. Policy

Section 50-9-24.K of the [Act](#) and [11.5.1.21.B. NMAC](#) contain a general prohibition against the giving of advance notice of inspections, except as authorized by the Secretary or the Secretary's designee. OHSB regulates many conditions that are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Act, in Section 50-9-10, prohibits unauthorized advance notice.

## 2. 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 Compliance Program Manager and only in the following situations:

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

## 3. Delays

Advance notice exists whenever the Compliance Program Manager or his designee sets up a specific date or time with the employer for the CO 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 Bureau Chief or designee. Advance notice generally does not include non-specific indications of potential future inspections.

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

## 4. Documentation

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

# F. Pre-Inspection Compulsory Process

Section 50-9-8 of the [Act](#) authorizes the department to institute legal proceedings to compel compliance with the Act.

Although the Bureau generally does not seek warrants without evidence that the employer is likely to refuse entry, the Bureau Chief or designee may seek compulsory process in advance of an attempt to inspect or investigate whenever circumstances indicate the desirability of such warrants. Examples of such circumstances include evidence of denied entry in previous inspections, or awareness that a job will only last a short time or that job processes will be changing rapidly.

# G. Personal Security Clearance

Some establishments have areas that contain materials or processes that are classified by the U.S. Government in the interest of national security. Whenever an inspection is scheduled for an establishment containing classified areas, the Compliance Program Manager shall assign a CO who has the appropriate security clearances. The Bureau Chief shall ensure that an adequate number of COs with appropriate security clearances is available within the Bureau

and that the security clearances are current. OHSB does not frequently encounter establishments that require special security clearances because federal OSHA has jurisdiction over employers engaged in these types of activities as described in [29 CFR 1952.360](#).

1. Clearance procedures

Appropriate security clearances, such as those required by the Department of Energy (DOE), may be required both at civilian establishments with government contracts requiring security areas, and at government installations that have civilian contractor operations.

The Compliance Program Manager shall select the COs who will obtain security clearances.

The Compliance Program Manager and the Bureau Chief shall review at least annually the security clearance needs of the Bureau.

If the Bureau does not have COs with the proper clearance, and an inspection must be conducted, the case shall be referred to the OSHA Region VI Office for consideration for investigation.

2. Employer resistance

For worksites with limited access subject to Department of Defense (DOD) security regulations, where the CO does not have the necessary clearance, the employer shall be asked to contact immediately the [DOD Regional Industrial Security Office](#), and shall arrange to allow the CO to complete the investigation or inspection without breaching security requirements. Resistance to COs with the proper clearance that can be telephonically checked shall constitute an unwarranted resistance and shall be immediately brought to the attention of the Compliance Program Manager.

3. Classified information and trade secrets

Any classified information or personal knowledge of such information by OHSB personnel shall be handled in accordance with the regulations of the responsible agency. The collection of such information and the number of exposed personnel shall be limited to the minimum necessary for the conduct of such compliance activities.

## **H. Expert Assistance**

The Compliance Program Manager shall arrange for a specialist or specialized training, preferably from within OHSB, to assist in an inspection or investigation when the need for such expertise is identified.

State employees serving as specialists may accompany the CO or perform their tasks separately. A CO must accompany outside consultants. State employee 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, because of professional judgment, not all potentially hazardous conditions or practices are inspected.

## **B. Partial**

A partial inspection is one during which the focus is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. A partial inspection may be expanded based on information gathered by the CO during the inspection process. The determination for expansion of the scope should be made by the CO based upon her professional judgment, on the assessment of the employer's injury rate, and on the number of violations observed during the walkaround.

# **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. The Compliance Program Manager and CO shall determine if alternate work schedules are necessary for inspections.

2. Severe weather conditions

If severe weather conditions cause workplace activities to shut down during an inspection, the inspection shall be discontinued until weather conditions permit the resumption of the inspection.

- a. If work continues during adverse weather conditions but the CO decides the weather interferes with the effectiveness of the inspection, it shall be terminated and continued when conditions improve.
- b. If work continues and the CO decides to continue the inspection in spite of bad weather, conditions created by the weather that create hazards for an employee shall be noted, since they may be related to a citation.

## **B. Presenting Credentials**

1. At the beginning of the inspection, the CO shall attempt to locate the owner representative, operator or agent in charge at the workplace and present her credentials. On construction sites, this will most often be the representative of the controlling contractor.
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 owner, operator or 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 CO is waiting for the employer representative, the workforce may begin to leave the jobsite. In this situation, the CO should contact the Compliance Program Manager 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.
3. The CO should present his credentials upon first contact with management representatives, organized labor representatives, or employees while conducting the inspection or interviews.

## **C. Refusal to Permit "Inspection or Interference"**

Section 50-9-10 of the [Act](#) provides that the CO may enter immediately, and at reasonable times, any establishment covered under the Act for 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 CO seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

Note: On a federal government facility, the following guidelines do not apply. Instead, a representative of the controlling authority shall be informed of the contractor's refusal and asked to take appropriate action to obtain cooperation.

1. Refusal of entry or inspection

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, a tactful attempt shall be made to obtain as much information as possible about the establishment.

If the employer refuses to allow an inspection of the establishment to proceed, the CO shall leave the premises and immediately report the refusal to the Compliance Program Manager. The Compliance Program Manager will consult with the Bureau Chief and the Office of General Counsel (OGC).

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 CO shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections.

In either case, the CO shall advise the employer that the refusal will be reported to the Compliance Program Manager and that the Bureau may take further action, which may include obtaining legal process.

On multiemployer worksites, valid consent for site entry can be granted by the owner, or another employer with employees at the worksite.

2. Employer interference

When entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the CO shall determine whether 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 or videotapes, the inspection of a particular part of the premises, private employee interviews, or the refusal to allow attachment of sampling devices. [See [11.5.1.21 NMAC](#)]

3. Forcible interference with conduct of inspection or other official duties

Whenever an OHSB 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. The Bureau Chief or designee shall be advised by the most expeditious means.
- b. If working at an offsite location, the CO should leave the site immediately to await further instructions from the Compliance Program Manager

4. Obtaining compulsory process

If it is determined upon refusal of entry that a warrant will be sought, the Bureau Chief shall proceed according to the following guidelines and procedures established in the Division for warrant applications. With the approval of the Bureau Chief, the Compliance Program Manager may initiate the process for obtaining a warrant.

To obtain the warrant the Compliance Program Manager shall proceed as described in [Chapter 15, Section I.C](#) of this manual.

5. Conducting inspection with court order

When a court order of warrant is obtained requiring an employer to allow an inspection, the CO is authorized to conduct the inspection in accordance with the provisions of the court order or warrant. All questions from the employer concerning reasonableness of any aspect of the inspection conducted pursuant to compulsory process shall be referred to the Compliance Program Manager.

a. Action to be taken upon receipt of inspection order

The inspection will normally begin within 24 hours of receipt of the inspection order or the date authorized by the inspection order for the initiation of the inspection. Any conflict with this requirement shall be resolved by the Compliance Program Manager.

- (i) The CO shall serve a copy of the compulsory process on the employer and make a separate notation as to the time, place, and name and job title of the individual served.
- (ii) Each order will have a return of service page on which the CO shall enter the dates of the inspection and the circumstances under which the warrant was served and the inspection was made pursuant to the order. Upon completion of the inspection, the CO will complete and sign this form and return it to the Compliance Program Manager.
- (iii) If physical resistance or interference by the employer is anticipated, appropriate action shall be determined. This action may include arranging for a state police officer or Deputy Sheriff to accompany the inspector.

b. Refused entry or interference with a compulsory process

When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, the CO shall specifically inquire as to whether the employer is refusing to comply with the warrant.

If the employer refuses to comply or if consent is not clearly given, the CO shall not attempt to conduct the inspection but shall leave the premises and contact the Compliance Program Manager concerning further action. The CO shall make notations (including all witnesses to the refusal or interference) and fully report all relevant facts. Under these circumstances, the Compliance Program Manager shall contact the Bureau Chief and the OGC to decide what further action shall be taken.

**D. Employee Participation**

The CO shall advise the employer that an employee representative has an opportunity to participate in the inspection.

- 1. The CO shall determine as soon as possible after arrival whether the employees at the workplace are represented and, if so, shall ensure 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 CO, this resistance shall be construed as refusal to permit the inspection. The Compliance Program Manager shall be notified.

## **E. Release for Entry**

The CO shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.

The CO may obtain a pass or sign a visitors register, or any other book or form used by the establishment to control the entry and movement of persons upon its premises. Such signature shall not constitute any form of a release or waiver of prosecution of liability under the Act.

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

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

## **G. Employee Responsibilities**

1. Section 50-9-5.D of the [Act](#) states: "Each employee shall comply with the provisions of the Occupational Health and Safety Act and any rules and orders promulgated pursuant thereto which are applicable to his own actions and conduct in the course of employment." 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 when a CO determines that an employee is systematically refusing to comply with a standard applicable to his own action and conduct, the matter shall be referred to the Compliance Program Manager who shall consult with the Bureau Chief.
3. Under no circumstances is a CO to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CO is to assess whether the employer is using its authority to ensure employee compliance with the Act. A refusal to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

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

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

1. Programmed inspections

Programmed inspections may be deferred during a strike or labor dispute.

2. Unprogrammed inspections

Unprogrammed inspections (complaints, fatalities, referrals, etc.) will be performed during strikes or labor disputes. However, the seriousness and veracity of any complaint shall be thoroughly assessed by the Compliance Program Manager prior to scheduling an inspection.

If there is a picket line at the establishment, the CO shall attempt to locate and inform the appropriate union official of the reason for the inspection prior to initiating the inspection.

During an inspection, the CO will make every effort to ensure their activities are not interpreted as supporting either party to the labor dispute.

## V. Opening Conference

### A. General

The CO shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and shall include any employee representatives. The opening conference shall be kept as brief as possible. 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, the CO will inform both the employer and the employee representative(s) of their rights during the inspection, including the opportunity to participate in the physical inspection of the workplace.

The CO shall request a copy of the employer's job hazard assessment. The CO shall determine if engineering or administrative controls can be implemented during the inspection or if personal protective equipment is required during the inspection.

#### 1. Attendance at opening conference

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

#### 2. Scope of inspection

The CO 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 the inspection, discrimination complaints, and the closing conference(s).

#### 3. Video/audio recording

The CO shall mention during the opening conference that a camera, video camera or an audio recorder may be used to provide a visual or audio record, and that the videotape and the audiotape may be used in the same manner as handwritten notes and photographs are, and have been, in OHSB inspections or investigations.

Note: If the employer is hesitant about permitting taping, the CO must determine whether the employer is refusing to permit the inspection, and follow the FOM procedures accordingly. If an employer refuses to allow videotaping during an inspection, the CO shall treat it as a refusal of entry and shall follow the appropriate procedures in this manual.

#### 4. Immediate abatement

The CO should explain to the employer the advantages of immediate abatement. The employer is not required to provide certification of abatement for a violation if the CO is able to observe and document abatement of the hazard during the inspection.

#### 5. Forms completion

The CO shall obtain available information for the OSHA-1 and other applicable forms.

6. Employees of other employers

During the opening conference, the CO shall determine whether the employees of any other employers are working at the establishment. If these employers may be affected by the inspection, the scope may be expanded to include others or a referral may be made at the discretion of the CO.

At multi-employer sites, copies of complaint(s), if applicable, shall be provided to all employers affected by the alleged hazard(s), and to the general contractor.

If there are such employees and any questions arise as to whether their employers should be included in the inspection, the CO shall contact the Compliance Program Manager to ascertain whether additional inspections shall be conducted and what limitations there may be to such inspection activity.

7. Recordkeeping Rule

- a. The recordkeeping regulation at §1904.40(a) states that once a request is made, an employer must provide the required recordkeeping records within four business hours.
- b. Although the employer has four hours to provide injury and illness records, the compliance officer is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed the CO is to begin the walkaround portion of the inspection.

8. Abbreviated opening conference

An abbreviated opening conference shall be conducted whenever the CO believes that the circumstances at the worksite dictate that the walkaround begin as promptly as possible. In such cases, the opening conference shall be limited to the essentials, namely, identification, purpose of the visit, and a request for employer and employee representatives. The other elements shall be fully addressed in the closing conference. Pursuant to [11.5.1.21.D NMAC](#), the employer and the employee representatives shall be informed of the opportunity to participate in the physical inspection of the workplace

9. Preemption by another agency

During the opening conference, the CO shall determine if any other federal or state agency has statutory responsibility for inspection of working conditions. Any jurisdiction issues shall be brought to the attention of the Compliance Program Manager for resolution or further instruction.

**B. Review of Appropriations Act Exemptions and Limitations**

The CO shall determine if the employer is covered by any of the exemptions or limitations noted in the current Appropriations Act. [Refer to OSHA Instruction [CPL 02-00-051](#), Enforcement Exemptions and Limitations under the Appropriations Act, dated May 28, 1998; or the most current version.]

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

In all programmed safety and health inspections in general industry, the CO shall make a determination as to whether the establishment is covered by the PSM standard.

This determination shall follow the criteria presented at [§1910.119\(a\)](#), including appropriate reference to Appendix A of §1910.119. If it is determined the establishment is covered by the PSM standard and the inspection was not scheduled for a PSM inspection, the CO shall notify the Compliance Program Manager for further guidance.

#### **D. Review of Consultation and Cooperative Programs**

Employers who participate in selected consultation or cooperative programs may be exempted from programmed inspections. The CO shall determine whether the employer falls under such an exemption during the opening conference. The impact on compliance inspections by consultation and cooperative programs is discussed in [Chapter II, Section III.G](#) of this manual.

If there is a conflict with a consultation or cooperative program activity, the CO shall contact the Compliance Program Manager for further instruction.

#### **E. Disruptive Conduct**

The CO may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection ([11.5.1.21.D NMAC](#)). If disruption or interference occurs, the CO shall contact the Compliance Program Manager as to whether to suspend the walkaround or take other action. The employee representative shall be advised that during the inspection matters unrelated to the inspection shall not be discussed with employees.

#### **F. Classified Areas**

In areas that contain information classified by an agency of the U.S. Government in the interest of national security, only persons authorized to have access to such information may accompany a CO. The CO must have the proper security clearance to enter these areas.

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

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

##### **1. Collection of data**

The CO shall review the employer's injury and illness records for three prior calendar years.

##### **2. Information to be obtained**

The CO shall request copies of the OSHA 300 Logs, the total hours worked, the average number of employees for each year, and a roster of current employees.

If the CO has questions regarding a specific case on the log, she shall request the OSHA 301s or equivalent form for that case.

The CO will determine if the establishment has an on-site medical facility 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.

#### **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. Recordable work-related injuries and illnesses are those that result in one or more of the following:

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. Criteria for the Specific Cases Noted in [§1904.8](#) through [§1904.11](#).

### **C. Recordkeeping Deficiencies**

1. If recordkeeping deficiencies are suspected, the CO shall gather sufficient information on which to base appropriate citations.
2. Additional sources of information related to this topic
  - a. Refer to OSHA Instruction [CPL 02-00-135](#) - Recordkeeping Policies and Procedures Manual and OSHA Instruction [CPL 02-02-072](#) for policy regarding review of medical and exposure records.

### **D. Other Programs and Records**

1. Other OHSB programs and records will be reviewed including hazard communication, lockout/tag out, emergency evacuation and personal protective equipment.
2. There are numerous standard-specific directives that provide instruction to the CO to request certain records or documents at the opening conference.

## **VII. Walkaround Inspection**

The main purpose of the walkaround inspection is to identify potential safety or health hazards in the workplace. The CO 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**

Those representatives designated to accompany the CO during the walkaround are considered walkaround representatives, and will generally include employer-designated and employee-designated representatives. 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 or employee representative may accompany the CO throughout or during any phase of an inspection if the CO determines that such additional representatives will aid, and not interfere with, the inspection ([11.5.1.21.D NMAC](#)).

1. Employees represented by a certified or recognized bargaining agent.

During the opening conference, the highest-ranking on-site union official or union employee representative shall designate who will participate in the walkaround. 11.5.1.21.D gives the CO the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. 11.5.1.21.D states the representative authorized by the employees shall be an employee of the employer. If in the judgment of the CO, 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 the CO during the inspection.

2. No certified or recognized bargaining agent

When employees are not represented by an authorized representative, when there is no established safety committee, or when employees have not chosen or agreed to an employee representative for OHSB inspection purposes whether or not there is a safety committee, the CO shall determine if any other employees would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, the CO shall conduct interviews with a reasonable number of employees during the walkaround.

3. Safety committee

The employee members of an established plant safety committee or the employees at large may have designated an employee representative for OHSB inspection purposes or agreed to accept as their representative the employee designated by the committee to accompany the CO during an OHSB inspection.

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

The employer's safety and health program shall be evaluated to determine the employer's good faith.

**C. Record all Facts Pertinent to an Apparent Violation**

1. Apparent violations shall be brought to the attention of employer and employee representatives at the time they are documented.
2. The CO shall record, at a minimum, the identity of the exposed employee, the hazard to which the employee was exposed, the employee's proximity to the hazard, the employer's knowledge of the condition, the manner in which important measures were obtained, and how long the condition has existed.
3. The CO 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 is not observed, the CO shall document facts on which the employee exposure determination is made.

**D. Testifying in Hearings**

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

**E. Trade Secrets**

In accordance with Section 50.9.21 of the [Act](#), trade secrets mean the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement that is secret and of value. A trade secret shall be presumed to be secret when the owner takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes. If the employer objects to the taking of photographs or videotapes because trade secrets would or may be disclosed, the CO should advise the employer of the protection against such disclosure afforded by Section 50-9-21 of the [Act](#) and §1903.9. If the employer still objects, the CO shall contact the Compliance Program Manager.

1. Policy

It is essential to the effective enforcement of the Act that the CO and other OHSB personnel preserve the confidentiality of all information and investigations that might reveal a trade secret.

## **2. Restrictions and controls**

It is unlawful for any employee of the Bureau to reveal to any individual, other than another employee of the Bureau, the trade secrets of any employer. An exception can be made in response to an order of a court in an action to which the state is a party and in which the information sought is material to the inquiry.

Trade secret materials shall not be labeled as “Top Secret,” “Secret” or “Confidential,” nor shall these security classifications be used in conjunction with other words unless the trade secrets are also classified by an agency of the U.S. Government in the interest of national security.

## **F. Collecting Samples**

The CO shall determine as soon as possible after the start of the inspection whether sampling, such as air, surface, or other type of sampling, is required by utilizing the information collected during the walkaround and from the pre-inspection review.

Summaries of the results shall be provided upon request to the appropriate employer representatives, employee representatives, and employees, including those exposed or likely to be exposed to a hazard.

## **G. Photographs and Videotapes**

Photographs or videotapes, whether digital or otherwise, shall be taken whenever the CO deems it necessary. Photographs that support violations shall be properly labeled, and may be attached to the appropriate OSHA-1B. The CO shall ensure that any photographs relating to confidential or trade secret information are identified as such.

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 can be stored elsewhere with a reference to which inspection they belong. Videotapes shall be properly labeled.

If the employer objects to the taking of photographs or videotapes because trade secrets would or may be disclosed, the CO should advise the employer of the protection against such disclosure afforded by Section 50-9-21 of the [Act](#). If the employer still objects, the CO shall contact the Compliance Program Manager.

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

If a CO 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 OHSB procedures.

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

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

### **1. Background**

- a. Section 50-9-10 of the [Act](#) authorizes the CO to question any employee privately during regular working hours in the course of an OHSB inspection. The purpose of such interviews is to obtain whatever information the CO deems necessary or useful in carrying out the inspection effectively.
  - 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, the CO should ask about these matters.
  - c. The CO should also obtain information concerning the presence and implementation of a safety and health system to prevent or control workplace hazards.
  - d. If an employee refuses to be interviewed, the CO shall use professional judgment, in consultation with the Compliance Program Manager, in determining the need for the statement.
2. Employee right of complaint

The CO may consult with any employee who desires to discuss a possible violation. Upon receipt of such information, the CO shall investigate the alleged hazard, when possible, and record the findings.
3. Time and location of interview

Interviews shall be conducted in a reasonable manner and normally will be conducted during the walkaround; however, they may be conducted at any time during an inspection. If necessary, interviews may be conducted at locations other than the workplace. If necessary, OHSB may obtain a subpoena to require an employee to appear at our office for an interview.
4. Privacy

The CO shall inform the employer that interviews of non-managerial employees will be conducted in private. The CO is entitled to question such employees in private regardless of the employer preference. Any employer objection to private interviews with employees may be construed as a refusal of entry and the CO should immediately contact the Compliance Program Manager for advice on how to proceed.
5. Conducting employee interviews
  - a. General protocol
    - (i) At the beginning of an interview, the CO should show his credentials to the employee, and provide the employee with a business card. This allows the employee to contact the CO to provide further information later.
    - (ii) The CO should explain to the employee that the reason for the interview is to gather information relevant to a safety and health inspection. It is not appropriate to assume that the employee already knows or understands the Bureau's purpose. Particular sensitivity is required when interviewing a non-English speaking employee. In such instances, the CO should initially determine whether the employee's comprehension of English is sufficient to permit conducting an effective interview. If there is a need for an interpreter, the CO should contact the Compliance Program Manager for advice on how to proceed.

- (iii) The CO should ask each interviewed employee for her name, phone number, and home address. The CO may request identification from each person being interviewed.
- (iv) The CO shall inform the employee that OHSB has the right to interview them in private per Section 50.9.10 of the [Act](#) and of the whistleblower protections afforded them under Section 50-9-25 of the [Act](#).
- (v) In the event an employee requests that a representative of the union be present, the CO shall make a reasonable effort to honor the request.
- (vi) If an employee requests the presence of a personal attorney during the interview, the CO should honor the request and, before continuing with the interview, notify the Compliance Program Manager for guidance.
- (vii) Occasionally, 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. The CO should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have agreed, the CO should consult with the Compliance Program Manager, who will consult with the Bureau Chief.

b. Interview statements

Interview statements of employees or other persons shall be obtained whenever the CO determines that such statements are useful in documenting potential violations. Interviews should normally be reduced to writing in the first person in the language of the individual being interviewed. Employees shall be requested to sign and date the statement.

- (i) Any changes or corrections to the written statement shall be initialed by the interviewee. Statements shall not be otherwise changed or altered in any manner.
- (ii) 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."
- (iii) If the person making the statement refuses to sign and date the statement, the CO shall note the refusal on the statement. The statement shall be read back to the person in an attempt to obtain agreement and such actions shall be noted in the case file.
- (iv) A transcription of any recorded statement shall be made when in the opinion of the Compliance Program Manager it is necessary to support the case.
- (v) If a management employee requests a copy of her interview statement, a copy shall be provided.

c. The informant privilege

- (i) The informant privilege allows OHSB to withhold the identity of individuals who provide information about the violation of laws, including OHSB rules and regulations. The CO shall inform employees that their statements will remain confidential to the extent permitted by law. However, each informant giving a statement should be informed that disclosure of his identity might be necessary in connection with enforcement or court actions.

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

## **J. Multi-employer Worksite Policy**

On multi-employer worksites, more than one employer may be cited for a hazardous condition that violates an OHSB standard. Although OHSB did not adopt the Multi-Employer Citation Policy, [CPL 02-00-124](#), dated December 10, 1999, it may be used for guidance when citing employers at a multi-employer worksite.

## **K. Court Orders**

Whenever there is a reasonable need for records, documents, testimony or other supporting evidence for an inspection scheduled in accordance with any current and approved inspection scheduling system, or for an investigation of any matter properly falling within the statutory authority of the Bureau; the Bureau Chief, in consultation with the OGC, may seek a court order to obtain such records. The statutory authority to obtain a court order is provided by [the Environmental Improvement Act Section 74-1-10](#).

## **L. Employer Abatement Assistance**

### **1. Policy**

The CO shall offer appropriate 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. The CO shall not imply OHSB endorsement of any product or service through naming specific products or companies when recommending abatement measures.

### **2. Disclaimers**

The employer shall be informed that:

- a. The employer is not limited to the abatement methods suggested by OHSB;
- 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 submitting the appropriate documentation in response to any citations.

## **VIII. Closing Conference**

### **A. Participants**

At the conclusion of an inspection, the CO 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 deemed appropriate by the CO. 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 (when the employer has declined to have a joint closing conference with employee representatives), the CO shall normally first hold the conference with employee representatives. This procedure will ensure that worker input is received before the employer is informed of violations and proposed citations.

### **B. Discussion Items**

1. The CO shall discuss the apparent violations and other pertinent issues found during the inspection.
2. The CO shall give the employer the publication, “New Mexico OSHA Closing Conference Guide” which explains the responsibilities and courses of action available to the employer if a citation is issued. The CO 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. The CO shall discuss the strengths and weaknesses of the employer’s occupational safety and health system and any other applicable programs, and shall advise the employer of the benefits of an effective program. Reference to the OHSB web site shall also be made.
4. The employer and the employee representatives shall be advised of their rights to participate in any subsequent conferences, meetings or discussions, and their contest rights.
  - a. The CO shall advise the employer that the citation, the penalty, and/or the abatement date may be contested in cases when the employer does not agree to the citation, penalty, or abatement date or any combination of these.
  - b. The CO shall inform the employer that if they intend to contest, the Bureau Chief must be notified in writing and such notification must be postmarked no later than 15 working days after receipt of the citation.
5. Any unusual circumstances noted during the closing conference shall be documented in the case file.
6. Since the CO 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.
7. The CO shall advise the employee representatives that:
  - a. Under [11.5.5.502 NMAC](#), if the employer contests, the employees have a right to be heard before the Review Commission;
  - b. The employer is required to notify employees if a notice of contest or a petition for modification of abatement date is filed;
  - c. Section 50-9-25 of the [Act](#) provides employees protection against retaliation by the employer; and
  - d. Affected employees have a right to contest the abatement date. Such contest must be in writing and must be filed within 15 working days after receipt of the citation.

### **C. Penalties**

1. The CO should explain that penalties must be paid within 15 working days after the employer receives a citation and notification of penalty. If, however, an employer contests the citation or the penalty, penalties need not be paid for the contested items until the final order date.
2. If the closing conference is being conducted at any agency or political subdivision of the State of New Mexico, the CO should explain that penalties for some classifications of citations would not be collected if the violation is corrected and OHSB is notified of the corrected violation within the time allotted for correction. The type of penalties that will not be collected under these provisions include other-than-serious, serious, and those associated with posting requirements. See Section 50-9.24 of the [Act](#).

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

When applicable, the CO shall discuss control methodology with the employer during the closing conference.

### **1. Definitions**

#### **a. Engineering controls**

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**

Work practice controls are a type of administrative control by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through a variety of methods, such 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 CO shall inform the employer, when appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.

#### **e. Technical feasibility**

Technical feasibility is the existence of materials and methods available or adaptable to specific circumstances that can be applied to a cited violation with a reasonable possibility that employee exposure to occupational hazards will be reduced.

#### **f. Economic feasibility**

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 other employers engaged in the same industry, allegations of economic infeasibility will not be accepted.

### **2. Documenting claims of infeasibility**

The CO shall document the underlying facts that give rise to an employer's claim of infeasibility.

When economic infeasibility is claimed the CO 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.

Complex issues of feasibility should be referred to the Bureau Chief or designee for determination.

#### **E. Reducing Employee Exposure**

Employers shall be advised that, whenever feasible, engineering, administrative, or work practice controls must be instituted. These controls must be instituted even if they are not sufficient to eliminate the hazard or reduce the hazard below permissible exposure limits. Controls, in conjunction with personal protective equipment, are required to reduce employee exposure to the extent feasible.

#### **F. Abatement Verification**

During the closing conference, the CO should thoroughly explain to the employer the abatement verification requirements. See [Chapter 7](#) of this manual for more details.

##### **1. Abatement certification**

Abatement certification is required for all citation items that the employer received except for those citation items that are identified as “Corrected During Inspection.”

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

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

##### **3. Abatement documentation**

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

##### **4. Placement of tags**

The required placement of tags or the citation [§1903.19\(i\)](#) 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**

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

#### **G. Employee Discrimination**

The CO 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 an OHSB 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 hazards are being abated and employees being protected, whenever a long time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of citations for willful violations, failure to abate notifications, repeat violations, high gravity serious violations, or citations related to imminent danger

situations, are examples of prime candidates for follow-up or monitoring inspections. These types 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 falsely represented in a settlement agreement, or the employer has not complied with interim measures within the time specified in a long-term abatement plan.
- b. If previously cited items have not been corrected, a Notice of Failure to Abate Alleged Violation shall normally be issued. If a subsequent inspection indicates the condition has still not been abated, the Compliance Program Manager shall consult the OGC for further guidance.

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

- c. If an originally cited violation has 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, OSHA-1B-1H, or citation can be notated with “corrected” written on it, along with a brief explanation of the abatement measures taken. This information may alternatively 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 inspection reports shall be included with the original (parent) case file.

**B. Construction Inspections**

1. Standards applicability

The standards published as [§1926](#) have been adopted as occupational safety and health standards by [11.5.3.9 NMAC](#). They shall apply to all employment and places of employment of every employee engaged in construction work. The standards shall apply to contract and non-contract employers.

2. Definition

The term “construction work” as defined by §1926.32(g) means work for construction, alteration, 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 Bureau Chief shall be consulted.

3. Employer worksite

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

4. Upon entering the worksite

The CO shall ascertain whether there is a representative of a federal contracting agency at the worksite. If so, the CO shall contact the representative to advise him of the inspection and request the representative's attendance at the opening conference.

If the inspection is being conducted as a result of a complaint, a copy of the complaint shall be furnished to the general contractor and any affected sub-contractors.

5. Closing conference

Upon completion of the inspection, the CO shall confer with the general contractors and all appropriate subcontractors or their representatives, together or separately. The CO shall advise each exposing, creating, correcting and controlling employer of the apparent violations disclosed by the inspection. Employee representatives participating in the inspection shall also be afforded the right to participate in the closing conference(s).

## Chapter 4 Violations

### I. Basis of Violations

#### A. Standards and Regulations

1. Section 50-9-5.B of the [Act](#) states that each employer has a responsibility to comply with occupational safety and health standards promulgated under the Act. The Environmental Improvement Board promulgates the standards using the authority of the Act.
2. The specific standards and regulations are found in Title 11, Chapter 5 of the New Mexico Administrative Code (NMAC) and Title 29 Code of Federal Regulations (CFR) 1900 series incorporated therein. The incorporation of federal regulations includes consensus standards.

For example, the American National Standards Institute (ANSI) standard A92.2–1969, “Vehicle Mounted Elevating and Rotating Work Platforms,” including appendix, is incorporated by reference as specified in [§1910.67](#).

- a. Regulations are subdivided as follows per the preferred NMAC nomenclature:

Subdivision Naming Convention	Example
Title	11
Part	11.5
Subpart	11.5.6
Section	11.5.6.8
Paragraph	11.5.6.8.B
Paragraph	11.5.6.8.B(1)
Paragraph	11.5.6.8.B(1)(a)

- b. Standards are subdivided as follows per the preferred Federal Register nomenclature:

Subdivision Naming Convention	Example
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 subdivision of the standard shall be used for citing violations.

3. Only the mandatory provisions, i.e., provisions containing the word “shall” or other mandatory language of standards incorporated by reference, are adopted as standards under the Act.
4. 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 more general standards applicable to multiple industries. See [§1910.5\(c\)](#) for additional information on the applicability of standards.

## 5. Application of horizontal and vertical standards

If a CO is uncertain whether to cite under a horizontal standard or a vertical standard when both apply, the Compliance Program Manager shall be consulted. The following general guidelines shall be considered:

- a. When a hazard in a particular industry is covered by a vertical standard (e.g., [§1926](#)) and a horizontal standard (e.g., [§1910](#)), the vertical standard shall take precedence. This is true even if the horizontal standard is more stringent.
- b. In situations covered by both a horizontal (general) standard and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical 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 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 CO shall cite the horizontal standard.
- d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CO 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 §1926 standard shall not normally be cited under a §1910 standard unless that standard has been identified as being applicable to construction. See [Incorporation of General Industry Health and Safety Standards Applicable to Construction Work](#) - 61:41738-41739.
- f. If any question arises, as to whether an activity is deemed construction for purposes of the Act, contact the Compliance Program Manager. See [§1910.12](#) Construction work.

## 6. Violation of variances

The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Section 50-9-16 of the [Act](#).

- a. In the event that the employer does not comply 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 the course of a compliance inspection, the CO discovers that the employer has filed an application for a variance regarding a condition that is determined to be an apparent violation of the standard, the CO shall report this to the Compliance Program Manager who will obtain information concerning the status of the variance request. If the variance has not been granted, a citation for the violative condition may be issued.

## B. Employee Exposure

A hazardous condition that violates an OHSB standard or the general duty clause shall be cited only when employee exposure can be documented. Exposure must have occurred within the six

months immediately preceding the issuance of the citation in order to serve as a basis for the violation, except when the employer has concealed the violative condition or misled OHSB, in which case the citation must be issued within six months from the date OHSB learns, or should have known, of the condition.

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 the employees perform their assigned work. The question of who pays these employees may not be the determining factor. Determining the employer of exposed employees may be a very complex question, in which case the Compliance Program Manager shall seek the advice of the OGC through the Bureau Chief.

2. Proximity to the hazard

The actual or potential proximity of the employees to the hazard shall be thoroughly documented through the use of photographs, measurements, and employee interviews as appropriate.

3. Observed exposure

- a. Employee exposure is established if the CO observes the proximity of an employee to the hazardous condition.
- b. The use of personal protective equipment may not adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering or administrative (including work practice) controls, or where the personal protective equipment is inadequate.

4. Unobserved exposure

When employee exposure is not observed by the CO, 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, past employee exposure may be established if the CO determines, through written statements or other evidence that exposure to a hazardous condition occurred at the time of the accident/incident. Additionally, prior exposures may serve as the basis for a violation when:

- (i) The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur; or
- (ii) It is reasonably predictable that employee exposure to a hazardous condition could recur when:
  - (a) The employee exposure has occurred in the previous six months;
  - (b) The hazardous condition is an integral part of an employer's recurring operations; and
  - (c) 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:

- (i) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;
- (ii) When a safety or health hazard would pose a danger to employees simply by employee presence in the area and it is reasonably predictable that an employee could come into the area during the course of the work, to rest or to eat at the jobsite, or to enter or to exit from an assigned work area; or
- (iii) 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 hazardous materials in the course of work.

5. Documenting employee exposure

The CO shall thoroughly document exposure, both observed and unobserved, for every apparent violation. This includes:

- a. 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;
- b. Recorded statements or signed written statements;
- c. Photographs, videotapes, or measurements; and
- d. All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, OSHA 300/301, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies, etc.)

**C. Regulatory Requirements**

Violations of [11.5.1.16 NMAC](#) and 11.5.1.17 NMAC shall be documented and cited when the employer does not comply with posting requirements, recordkeeping requirements, and reporting requirements of the regulations.

Note: If, prior to the elapse of the 8-hour reporting period, the Compliance Program Manager becomes aware of an incident required to be reported under 11.5.1.16 NMAC through some means other than an employer report, a violation for failure to report does not exist.

**D. Hazard Communication**

Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though their own employees may not be 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 OSHA Instruction [CPL 02-02-038](#) - Inspection Procedures for the Hazard Communication Standard, dated March 20, 1998.

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

### **1. Employer responsibilities**

Section 50-9-5.A of the [Act](#) states: “Every employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” Section 50-9-5.B states, “Every employer shall furnish and maintain a place of employment that must comply with the health and safety regulations promulgated by the board.”

### **2. Employee responsibilities**

- a. Section 50-9-5.D of the [Act](#) states: “Each employee shall comply with the provisions of the Occupational Health and Safety Act and any rules and orders promulgated pursuant thereto which are applicable to his own actions and conduct in the course of his employment.” 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 CO 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 Compliance Program Manager who shall consult with the Bureau Chief.
- c. The CO 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 when the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

### **3. Affirmative defenses**

An affirmative defense is any matter, which, if established by the employer, will excuse it from a violation that has otherwise been proven by OHSB. Although affirmative defenses must be proved by the employer at the time of the hearing, the CO should preliminarily gather evidence to rebut an employer’s potential argument supporting any such defenses. Refer to [Chapter 5](#), of this manual for further details.

### **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 an OHSB standard. For specific and detailed guidance, refer to [Chapter 12](#) of this manual.

## **II. Serious Violations**

### **A. Section 50-9-24.F**

Section 50-9-24.F of the [Act](#) provides that “a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition that exists, or from one or more practices, means, methods, operations, or processes that have been adopted or are in use in the place of employment unless the employer did not and could not with the exercise of reasonable diligence know of the presence of the violation.”

## **B. Establishing Serious Violations**

1. The CO shall consider four factors in determining whether a violation is to be classified 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 determines whether the employer knew or could have known of the violative condition.
2. The classification of the violation need not be completed for each instance. It should be done once for each citation item, 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. A potential violation of the general duty clause shall also be evaluated based on these steps to establish whether it could cause death or serious physical harm.

## **C. Four Steps to Be Documented**

1. Type of hazardous exposures

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

- a. The CO need not establish the exact manner in which exposure to a hazard could occur. However, the CO shall note all facts that 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, the CO 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 This regulation requires that the edge of the open-sided floor be guarded by standard guardrail systems. The type of incident that the violated 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 where debris is located in apparent violation of [§1910.22\(a\)\(1\)](#). The type of incident that the violated standard is designed to prevent is an employee 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 permissible exposure limit mandated by the violated standard.

## 2. 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, the CO shall consider all factors that would affect the severity of the injury or illness that could reasonably result from the exposure to the hazard. The CO 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 (9 meters) 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 employee could experience 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 were littered with broken glass or other sharp objects, it would be reasonable to predict that an employee who tripped on debris could suffer a deep cut, which could require suturing.

- c. For conditions involving exposure to air contaminants or harmful physical agents, the CO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. OSHA Instruction [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, the CO 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:
  - (i) The nature of the operation from which the exposure results;
  - (ii) Whether the exposure is regular and on-going or is of limited frequency and duration;
  - (iii) How long employees have worked at the operation in the past;
  - (iv) Whether employees are performing functions which can be expected to continue; and
  - (v) Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.
- e. When such evidence is difficult to obtain or is inconclusive, the CO shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposure could occur, the CO shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are 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 to predict that the illnesses that could result would be irritation to nose, eyes and throat.

### 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 CO 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 the following types of injuries:

- (i) Amputations (loss of all or part of a bodily appendage);
- (ii) Concussion;
- (iii) Crushing (internal, even though skin surface may be intact);
- (iv) Fractures (simple or compound);
- (v) Burns or scalds including electric and chemical burns;
- (vi) Cuts, lacerations, or punctures involving significant bleeding or requiring suturing;
- (vii) Sprains and strains; and
- (viii) Musculoskeletal disorders.

b. Illnesses that constitute serious physical harm include, but are not limited to the following illnesses:

- (i) Cancer;
- (ii) Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
- (iii) Hearing impairment;
- (iv) Central nervous system impairment;
- (v) Visual impairment; and
- (vi) 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, upon falling 15 feet to the ground, suffers broken bones or a concussion, the employee would experience substantial impairment of the usefulness of a part of the body and would require treatment by a medical doctor. This injury would constitute serious physical harm.

Example 4-10. If an employee trips on debris and suffers a deep cut to the hand because of the presence of sharp debris, the use of the hand could be substantially reduced and require suturing by a medical doctor. This injury would be classified as serious physical harm.

Example 4-11. If 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>, breathing capacity would be significantly reduced and his life would be shortened. The 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 determined that the employer actually knew of the hazardous condition that constituted 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. The CO shall record any evidence that establishes employer knowledge of the condition or practice.
- b. If it cannot be determined that the employer had 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. The CO shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence are:
  - (i) The violation/hazard was in plain view and obvious;
  - (ii) The duration of the hazardous condition is not brief;
  - (iii) The employer failed to train and supervise employees regarding the particular hazard.

### III. General Duty Requirement

Section 50-9-5.A of the [Act](#) requires that “Every employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

#### A. Evaluation of Potential General Duty Requirement Situations

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

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

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

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

1. The citation describes the hazard.
  - a. The hazard in a Section 50-9-5.A 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 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. The citation was not for the lack of a particular 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. Section 50-9-5.A 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 when a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Compliance Program Manager shall consult with the Bureau Chief or the OGC for assistance in 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 might 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 gas machinery 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 that may cause serious burns from steam discharges).

3. The hazard was not a particular accident/incident

The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 50-9-5.A, although the accident/incident may be evidence of a hazard. In some cases, a Section 50-9-5.A violation may be unrelated to 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 employee was injured by the fire itself but an employee, disregarding the clear instructions of her supervisor to use an available exit, jumped out of a window and broke her 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 deal with the fire hazard, not with the accident/incident involving the employee who broke her leg.

4. The hazard was reasonably foreseeable

The hazard for which a citation is issued must be reasonably foreseeable. Not all of the factors that could cause a hazard need be present in the same place at the same time in order to prove the hazard is foreseeable, 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 Section 50-9-5.A 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.

It is necessary to establish that a workplace hazard is reasonably foreseeable, rather than document the existence of particular circumstances that led to the accident/incident.

Example 4-17. A titanium dust fire may have spread from one room to another only because an open can of gasoline was in the second room. An employee who usually worked in both rooms was burned in the second room from the gasoline. The presence of gasoline in the second room may be a rare occurrence. It is not necessary to prove that a fire in both rooms was reasonably foreseeable. It is necessary only to prove that the fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

5. The cited employer's employees were exposed to the hazard

- a. The employees exposed to the Section 50-9-5.A hazard must be the employees of the cited employer. An employer who may have created, contributed to, or controlled the hazard normally shall not be cited for a Section 50-9-5.A violation if his own employees are not exposed to the hazard.
- b. In complex situations, such as multi-employer worksites, when it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Compliance Program Manager shall consult with the Bureau Chief and the OGC to determine the sufficiency of the evidence regarding the employment relationship.
- c. The fact that an employer denies that exposed employees are 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 was recognized

Recognition of a hazard can be established based on 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

- (i) 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 OHSB inspection.
- (ii) Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known by the employer, injury and illness reports, or workers’ compensation data, may also show employer knowledge of a hazard.
- (iii) Employer awareness of a hazard may also be demonstrated by prior OHSB inspection history that involved the same hazard.
- (iv) 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.
- (v) 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: The CO is to gather as many as these facts as possible to support establishing a Section 50-9-5.A 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 Section 50-9-5.A violation. Although evidence of recognition by the employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Compliance Program Manager shall consult with the Bureau Chief on this issue. Industry recognition of a hazard may be established in several ways:

- (i) Relevant statements by safety or health experts who are familiar with the industry;
- (ii) Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
- (iii) Manufacturer's warnings on equipment or in literature that are relevant to the hazard;

- (iv) 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;
- (v) Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
- (vi) 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; or
- (vii) If the relevant industry participated on committees that drafted national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), or 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. Private standards cannot be enforced as OHSB standards but they may be used to provide evidence of industry recognition, seriousness of the hazard, or feasibility of abatement methods.

Regulations of federal agencies other than OSHA generally shall not be used. They raise substantial difficulties under Section 50-9-23 of the [Act](#), which provides that OHSB be preempted when such an agency has statutory authority to deal with the working condition in question.

In cases where state and local government agencies not falling under the preemption provisions of Section 50-9-23 have codes or regulations covering hazards not addressed by OHSB standards, the Compliance Program Manager, upon consultation with the Bureau Chief, shall determine whether the hazard is to be cited under Section 50-9-5.A or referred to the appropriate local agency for enforcement.

Example 4-18. A safety hazard on a personnel elevator in a factory may be documented during an inspection. It is determined that the hazard is not clearly citable under Section 50-9-5.A 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 Section 50-9-5.A.

References that may be used to supplement other evidence to help demonstrate industry recognition include the following:

- (a) National Institute for Occupational Safety and Health (NIOSH) criteria documents;
- (b) Environmental Protection Agency publications;
- (c) National Cancer Institute and other agency publications;
- (d) OSHA hazard alerts;
- (e) OSHA technical manual; and
- (f) Common sense recognition

If industry or employer recognition of the hazard cannot be established, hazard recognition can still be established if it is concluded that a dangerous condition is so obvious that any reasonable person would have recognized it. This theory of recognition shall be used only in flagrant cases.

Example 4-19. In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to dump bricks from an unenclosed chute into an alleyway between buildings 26 feet below and in which unwarned employees work. In construction, Section 50-9-5.A could not be cited in this situation because [§1926.252](#) or [§1926.852](#) apply. In the context of a chemical processing plant, common sense recognition was established when hazardous substances were vented into a work area.

7. The hazard was causing or was likely to cause death or serious physical harm
  - a. This element of a Section 50-9-5.A violation is virtually identical to the substantial probability element of a serious violation.
  - b. This element of a Section 50-9-5.A violation can be established by showing that:
    - (i) An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
    - (ii) If an accident/incident occurred in the future, 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) would likely result.

- c. In a health context, establishing serious physical harm at the cited levels may be challenging if the potential illness/harm requires the passage of substantial time. In such cases, expert testimony is crucial to establish there is probability that long-term serious physical harm will occur. It will generally be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death or serious physical harm when such illness or death will occur only after the passage of a substantial period:
    - (i) Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;
    - (ii) An illness reasonably could result from such regular and continuing employee exposures; and
    - (iii) If illness did occur, its likely result would be death or serious physical harm.
8. The hazard could have been corrected by a feasible and useful method
  - a. To establish a Section 50-9-5.A violation, the Bureau must also identify the existence of measures that are 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 Section 50-9-5.A citation may be issued. A citation will not be issued merely because the Bureau is aware of an abatement method different from that implemented by 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 documented on the OSHA 1b and OSHA 2b using language such as "Among other methods, one feasible and acceptable means of abatement would be to \_\_\_\_ (fill in the blank with your specific abatement recommendation)."

- c. Examples of such feasible and acceptable abatement methods include, but are not limited to the following:
  - (i) The employer's own abatement method which existed prior to the inspection but was not implemented;
  - (ii) The implementation of feasible abatement measures by the employer after the accident/incident or inspection;
  - (iii) The implementation of abatement measures by other companies; and
  - (iv) Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as the suggested abatement methods contained in trade journals, national consensus standards and individual employer work rules. National consensus standards shall not be relied upon to mandate specific abatement methods.

Example 4-21: An ANSI standard deals with 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 issue a citation alleging that the employer failed to prevent the buildup of materials that could create the gas and failed to provide a ventilation system as both of these are abatement methods, not hazards.

- d. Evidence provided by expert witnesses may be used to demonstrate feasibility of the abatement methods. Although it is not necessary to establish that the industry recognizes a particular abatement measure, such evidence may be used.

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

1. The general duty clause shall be cited only when there is no standard that applies to the particular hazard involved, as outlined in [11.5.1.13 NMAC](#). The general duty clause may be applied in situations when 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 install properly 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 install properly reinforcing steel in a floor in accordance with industry standards 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 tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty clause.

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 on use of the General Duty Clause**

Section 50-9-5.A is to be used only within the guidelines specified in this chapter.

1. Section 50-9-5.A shall not be used when a standard applies to a hazard

Section 50-9-5.A may not be cited if an OHSB standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Compliance Program Manager shall consult with the Bureau Chief. The OGC may assist the Bureau Chief in determining the applicability of a standard.

Example 4-24: Section 50-9-5.A must not be cited for electrical hazards because standards [§1910.303\(b\)](#) and [§1926.403\(b\)](#) require that electrical equipment must be free from recognized hazards that are likely to cause death or serious physical harm to employees.

If there is a question as to whether a standard applies, the Compliance Program Manager shall consult with the Bureau Chief. Section 50-9-5.A may be cited in the alternative when a standard is also cited to cover a situation if there is any uncertainty that the standard applies to the hazard.

2. Section 50-9-5.A shall normally not be used to impose a stricter requirement than that required by the standard

Example 4-24. The standard provides for a permissible exposure limit (PEL) of 5 ppm. Even if data establish that a 3-ppm level is a recognized hazard, Section 50-9-5.A 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 Compliance Program Manager shall consult with the Bureau Chief, who may discuss any proposed citation with the OGC.

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 her employees against the specific hazard it is intended to address." [International Union UAW v. General Dynamics Land Systems Division](#), 815 F.2d 1570 (D.C. Cir. 1987).

3. Section 50-9-5.A shall normally not be used to require additional abatement methods not set forth in an existing standard

The general duty clause cannot be used to augment or fill in any requirements that may be missing in a standard. If, for example, a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 50-9-5.A shall not be cited to require medical surveillance.

4. Alternative standards

The following standards shall be considered carefully before issuing a Section 50-9-5.A citation for a health hazard:

- a. There are a number of general standards that shall be considered rather than Section 50-9-5.A in situations when 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 when 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 when appropriate. If those particular standards do not apply, other standards may be applicable, e.g., the air containment levels contained in [§1910.1000](#) in general industry and [§1926.55](#) for construction.
- c. Another standard which may possibly be cited is [§1910.134\(a\)](#) which deals with the hazards of breathing harmful air contaminants not covered under [§1910.1000](#) or another specific standard and requires the use of feasible engineering controls or respirators when engineering controls are not feasible.
- 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\(a\)](#) may be cited when 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 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 Section 50-9-5.A Enforcement**

To ensure that all 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 Section 50-9-5.A 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 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 Section 50-9-5.A 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 needed to establish any elements of the Section 50-9-5.A violation, such experts shall be consulted before the citation is issued and their opinions noted in the file.

## 2. Pre-citation review

The Compliance Program Manager shall review and approve all proposed Section 50-9-5.A citations. These citations shall undergo additional pre-citation review as follows:

- a. The Bureau Chief shall be consulted prior to the issuance of all Section 50-9-5.A citations when complex issues or exceptions to the outlined procedures are involved; and
- b. If a standard does not apply, and not all criteria for issuing a Section 50-9-5.A citation are met, but the Compliance Program Manager determines that the hazard warrants some type of notification, a letter shall be sent to the employer and the employee representative describing the hazard and suggesting corrective action.

## IV. Other-Than-Serious Violations

This type of violation shall be cited in situations when the accident/incident or illness that would be most likely to 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 when an employer has demonstrated either an intentional disregard for the requirements of the Act or a plain indifference to employee health or safety. The following guidance and procedures apply whenever there is evidence that a willful violation may exist.

### A. Intentional Disregard Violations

An employer has committed 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 aware of a condition or practice in violation of that requirement.

Note: Good faith efforts made by the employer to minimize or abate the hazard may sometimes preclude the issuance of a willful violation. In such cases, the CO should consult with the Compliance Program Manager.

3. A willful citation also may be issued when an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard.
- 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 has committed a violation with plain indifference to employee safety and health if:
  - a. Management officials were aware of an OHSB requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees;
  - b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring;

Example 4-27. The employer was aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past but did nothing to abate the hazard.

- c. An employer was not aware of any legal requirement, but was aware that a condition or practice in the workplace presented a serious hazard to the safety or health of employees and made little or no effort to determine the extent of the problem or to take 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, media coverage, or, in some cases, 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 correct the violative condition and provide interim employee protection. Refer to Federal Register, Vol. 65, p. 46498-46503 for OSHA's policy on [Voluntary Employer Safety and Health Self-Audits](#).

- 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 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. The CO shall develop and record on the OSHA-1B all available evidence that indicates employer knowledge of the requirements of a standard, and any reasons 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 which 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 the responsibility to provide safe and healthful working conditions; and
  - d. Whether similar violations or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, or warnings from OHSB, officials from other government agencies, or an employee safety committee regarding the requirements of the 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. Criminal/Willful Violations

Section 50-9-24.J of the [Act](#) provides that: “Any employer who willfully violates any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act causing death to any employee by that violation shall, upon conviction, be punished by a fine of not more than ten thousand dollars ( \$10,000) or by imprisonment for not more than 6 months or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for less than one year or by both.” Note that this guidance does not apply to willful Section 50-9-5.A violations.

See Chapter 15 of this manual for more information regarding criminal matters.

## VII. Repeated Violations

An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard and the citation has become a final order of the Review Commission. A citation may become a final order by operation of law when an employer does not contest it, or pursuant to court decision or settlement.

### A. Identical Standard

Generally, similar conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated. 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 found were 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 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 establishment 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 found 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 Compliance Program Manager shall obtain a history of citations previously issued to this employer by OHSB, within the same two-digit SIC or three-digit NAICS code.
  - b. If these violations have been previously cited within the time limitations described in Section [VII.D](#) below, and have become final orders of the Review Commission, a repeated citation may be issued.
  - c. Under special circumstances, the Compliance Program Manager, in consultation with the OGC, may also issue citations for repeated violations without regard for the SIC code.
2. Violations of lesser gravity

When violations are of lesser gravity than high gravity serious, the Bureau policy is to encourage the Compliance Program Manager to obtain OHSB history whenever the circumstances of the current inspection will result in multiple serious, repeat, or willful citations. This is particularly essential if the employer is known to have multiple establishments within the OHSB jurisdiction and has been subject to a significant case at another worksite.

### **D. Time Limitations**

1. Although there are no statutory limitations upon the length of time that a citation may serve as a basis for a repeated violation, the following policy shall be used.

A citation will be issued as a repeated violation if the citation is issued within three years of the final order date of the previous citation or the citation is issued within three years of the final abatement date of the previous citation, whichever is later. If the previous citation was contested, the docketed decision date becomes the final order date.
2. When a violation is found during an inspection and a citation for a repeated violation 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 was conducted in an establishment and a violation of [§1910.217\(c\)\(1\)\(i\)](#) was found. The citation was not contested by the employer and became a final order of the Commission on October 17, 2006. On December 8, 2008, a citation for a repeated violation of the same standard was issued. Any violation of the same standard that is cited within the periods specified in paragraph D.1 above may be cited as a second instance repeated violation.
3. In cases of multiple prior repeated citations, the Bureau Chief shall be consulted for guidance.

### **E. Repeated Versus 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 the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation.

#### **F. Compliance Program Manager Responsibilities**

After a CO makes the initial recommendation to cite the violation as “repeated,” the Compliance Program Manager shall:

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section;
2. Ensure that the case file includes a copy of the citation for the prior violation, the 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 be adequately documented in the case file. The file shall also include all documents (i.e. signed Informal or Formal Settlement Agreements and Notice of Docketing, or Review Commission Final Order) showing that the citation is a final order and on the date on which it became final;
3. Ensure that IMIS information is not the sole means utilized to establish that a prior violation has been issued.
4. In circumstances where it is not clear that the violation meets the criteria outlined in this section, consult with the Bureau Chief before issuing a repeated citation; and

If a repeated citation is issued, the Compliance Program Manager shall ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation, either by telephone or by notation in the 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 *previously cited standard* which was contained in OHSB inspection number *number*, citation number *citation number*, item number *item number* affirmed as a final order on *date*, with respect to a workplace located at *location*.”

### **VIII. De Minimis Violations**

De minimis violative conditions exist when an employer has implemented a measure different from one specified in a standard, but the condition 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. Description**

Common types of de minimis violations are:

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

Example 4-31. [§1910.27\(b\)\(1\)\(ii\)](#) allows 12 inches (30 centimeters) as the maximum distance between ladder rungs. When the rungs are 13 inches (33 centimeters) 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 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 OSHA national office or OSHA regional office.
4. An employer's workplace protections are "state of the art" and technically more enhanced than the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

#### **B. Compliance Program Manager Responsibilities**

The Compliance Program Manager shall ensure that any de minimis violative notices issued to an employer are consistent with the definition and descriptions provided in this section.

### **IX. 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 when it should be and the use of safety belts is not required by the employer.

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

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

#### **A. Combining**

Separate violations of a single standard (e.g., [§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 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 the identified source of a hazard 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. The overall classification shall normally be based on the most serious item.

2. Grouping other-than-serious violations when grouping results in a serious violation

When two or more individual 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. When grouping results in higher gravity other-than-serious violation

When the CO 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/incident involving the hazardous conditions.

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. Circumstances Under Which Violations may not Be Grouped or Combined**

1. Multiple inspections

Violations discovered during multiple inspections of a single establishment or worksite may not be grouped. When only one OSHA 1 form 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 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, simultaneously or at different times. The violations shall not be grouped.

3. General duty clause violations

Because a Section 50-9-5.A citation covers all aspects of a serious hazard when no standard exists, there shall be no grouping of separate Section 50-9-5.A violations. This policy, however, does not prohibit grouping a Section 50-9-5.A 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. Refer to OSHA Instruction [CPL 02 -00-080](#) - Handling of Cases to be Proposed for Violation-by-Violation Penalties, dated October 21, 1990.

## XI. Health Standard Violations

### A. Citation of Ventilation Standards

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

#### 1. Health-related ventilation standards

When 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.

Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. When 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:

- (i) The requirements of the specific standard have been met; and
- (ii) The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

##### b. Citation policy

If the concentration of flammable vapors exceeds 25 percent of the LEL 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, Section 50-9-5.A. of the Act shall be cited in accordance with the guidelines provided in Section III of this chapter.

### B. Violation 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 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 violation of [§1910.95](#)(b)(1) shall be issued when technologically and economically feasible engineering 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 that offer the greatest attenuation may reliably be

used to protect employees when their exposure levels border on 100dba. See [CPL 02-02-035](#), §1910.95(b)(1), Guidelines for Noise Enforcement; Appendix A, dated December 19, 1983); or

- b. The costs of implementing engineering 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 dB 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 CO shall consider whether:
  - a. Reliance on an effective hearing conservation program would be less costly than engineering or administrative controls;
  - b. An effective hearing conservation program can be established or improvements can be made in an existing program to bring the employer into compliance with Tables G-16 or G-16a; and
  - c. Engineering 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 G-16a by means of hearing protectors along with an effective hearing conservation program, a citation shall be issued for any missing program elements 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 exposure, 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(b)(1) shall be cited and classified as serious (see item 8 below) whether or not the employer has instituted a hearing conservation program. Section §1910.95(b)(1) shall not be cited except in cases involving the oil and gas drilling industry.

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

6. When an employer has instituted a hearing conservation program and a violation of one or more elements (other than §1910.95(i)(2)(i) 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 overexposure; or
  - b. There is evidence of hearing loss that could reasonably be considered to be

- (i) Work-related, and
  - (ii) Preventable, if the employer had complied with the cited provisions.
9. No citation shall be issued when, 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.

## XII. Violations of Respiratory Protection Standard

If an inspection reveals the presence of potential respirator violations related to [§1910.134](#), [CPL 02-00-120](#), Inspection Procedures for the Respiratory Protection Standard, dated September 25, 1998 shall be followed.

## XIII. Violations of Air Contaminant Standard

### A. Requirements Under the Standard

1. Sections [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 instances when workplace conditions require employers to 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 or administrative and work practice controls in any combination, provided the selected control mechanisms eliminate the overexposure.
5. When engineering 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 when 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

When 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 based 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 exposure could cause impairment to the body as described in [Paragraph II.C.3](#) of this chapter.

- a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard at any level above the PEL. Substances in categories 6, 8, and 12, however, are not considered serious at levels when 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 health effects could be expected to occur.
- d. For a substance having an American Conference of Industrial Hygienist (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 Section 50-9-5.A of the [Act](#). Prior to citing a Section 50-9-5.A violation under these circumstances, it is essential that the CO 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 [Section III](#) of this chapter.
- 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. The CO shall advise the employer that a reduction of the PEL has been recommended.

Note: An exception to this guidance may apply if it can be documented that an employer knows a particular safety or health standard fails to protect her 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 Bureau Chief in accordance with [Paragraph III.D.2](#) of this chapter. If no citation is issued, the CO shall advise the employer that a ceiling value is recommended.

## 2. Additive and synergistic Effects

Substances which have a known additive effect and therefore result in a greater probability/severity or 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.

If the CO suspects that synergistic effects are possible, the CO shall consult with the Compliance Program Manager and Bureau Chief. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to reflect accurately severity or penalty.

## XIV. Citing Improper Personal Hygiene Practices

The following guidelines apply when citing personal hygiene practices.

## **A. Ingestion Hazards**

A citation under [§1910.141\(g\)\(2\)](#) and (4) shall be issued when 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. When, 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 Section 50-9-5.A of the [Act](#).

## **B. Absorption Hazards**

A citation for exposure to materials that may be absorbed through the skin or that can cause a skin effect (e.g., dermatitis) shall be issued when 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, Section 50-9-5.A 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 measurement 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 as demonstrated by one of the following:
  - a. A potential for an illness, such as dermatitis, 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 the substance has properties and exists in quantities that pose a serious hazard.

## **XV. Biological Monitoring**

If an employer has conducted biological monitoring, the CO 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 guidelines are provided to assist the CO 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, using means deemed appropriate by the CO (including but not limited to notes, audio/videotapes, photographs, employer and employee interviews and employer maintained records). The CO shall develop detailed information for the case file to establish the specific elements of each violation.

The CO and the Compliance Program Manager shall initiate consultation procedures with the OGC when an inspection involves important or novel facts or when consultation is necessary in the professional judgment of the Bureau Chief. If consultation is necessary, such consultation shall be conducted at the earliest possible stage of the inspection.

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

All case files must include the following forms and documents.

#### **A. OSHA-1**

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

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

The OSHA-1A shall include 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. The Compliance Officer's evaluation of the employer's safety and health program, 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 documentation of any unusual circumstances encountered
10. Any other relevant comments/information the CO feels may be helpful, based on their 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 CO on the inspection
13. Calculation of the employer's DART rate for at least three full calendar years and the current year

14. Discussion clearly addressing all items on the complaint or referral, if applicable
15. Indication of the type of legal entity, i.e., whether the employer is a corporation, partnership, sole proprietorship
16. The name of the parent corporation if the employer is a subsidiary.

### **C. OSHA-1B**

1. A separate OSHA-1B should normally be completed for each alleged violation. Describe the observed hazardous conditions, operation, or practices, and the essential facts that explain how or why a standard is allegedly violated. Specifically identify the hazard to which employees have been or could be exposed. Describe the type of injury or illness that the violated standard was designed to prevent, or note the name and exposure level of any contaminant or harmful physical agent to which employees are, have been, or could be exposed. If employee exposure was not actually observed during the inspection, state the facts on which the determination was made (e.g., 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, if any (describe how measurements were taken, identify the measuring techniques and equipment used, identify those who were present and observed the measurements being made, and include calibration dates of equipment used)
  - f. For contaminants and physical agents, any additional facts which clarify the nature of employee exposure. A representative number of Material Safety Data Sheets should be collected for hazardous chemicals to which employees may potentially be exposed
  - g. Names, addresses, phone numbers, and job titles of exposed employees
  - h. Approximate length of time the hazard has existed and frequency of exposure to the hazard
  - i. Any facts which establish that the employer knew of the hazardous condition or, if the employer did not know the hazardous condition existed, 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 conclusive statements such as “reasonable diligence” to establish employer knowledge. See [Chapter 4](#) for additional information.
    - (i) In order to establish that a violation may be potentially classified as willful, facts shall be documented to show either the employer knew of the applicable legal requirements and intentionally violated them or the employer showed plain indifference to employee safety or health. For example, document that the employer knew the condition existed and the employer was required to take

additional steps to abate the hazard. Such evidence could include prior OHSB citations, previous warnings by a CO, insurance company, or city/state inspector regarding the requirements of the standard, the employer's familiarity with the standard(s), contract specifications requiring compliance with applicable standards, or warnings by employees or the employee safety committee of the presence of a hazardous condition and what protections are required by OSHA standards.

- (ii) Include any facts showing that even if the employer was not consciously or intentionally violating the Act, the employer acted with such plain disregard 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 when an employer was aware of an employee exposure to an obviously hazardous condition and made no reasonable effort to eliminate it.
    - (iii) Any relevant comments made by the employer or employee during the walk-around or closing conference, including any employer comments regarding why it violated the standard, which may be characterized as admissions of the specific violations described.
  - j. Include any other facts that may assist in evaluating the situation or in reconstructing the total inspection picture in preparation for testimony in possible legal actions.
  - k. Appropriate and consistent abatement dates should be assigned and reasons for abatement periods longer than 30 days should be documented. 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 CO during an inspection, the abatement period shall be listed on the citation as "Corrected During Inspection".
  - l. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the CO. Abatement periods exceeding 30 days shall not normally be offered, particularly for simple safety violations. Situations may arise, however, especially for health violations, when 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 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 that the CO determines are necessary to support the violations should be placed in the case file.
  - 4. For violations classified as "repeat", the file shall include a copy of the previous citation(s) on which the repeat classification is based. Documentation of the final order date of the original citation shall be included.

### III. Inspection Conducted, no Citations Being 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 and a general narrative/statement that at the time of the inspection no conditions that violated a standard were observed. If the inspection was conducted in response to a complaint or referral, a

complaint/referral response letter that clearly addresses all items mentioned in the complaint or referral shall be sent to the employer and a copy shall be placed in the case file.

#### IV. No Inspection

For “No Inspections”, the CO 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, the CO shall document all relevant information concerning potential exposures to chemical substances or physical agents. Such information could include the collection and evaluation of applicable Material Safety Data Sheets; symptoms experienced by employees; the duration and frequency of the exposure to the hazard; employee interviews; sources of potential health hazards; types of engineering or administrative controls implemented by the employer; and personal protective equipment provided by the employer and used by the employees.

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

The CO 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. The CO 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

The CO 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

The CO 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

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

5. Work practice and administrative controls

The CO shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, and 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

Employer's personal protective equipment. 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

The CO 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

The CO 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, the CO's evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees, and a written training plan exists for the protection of affected employees, including the use and maintenance of personal protective equipment.

## VI. Affirmative Defenses

An affirmative defense is a claim that, if established by the employer and found to exist by the CO, will excuse the employer from a violation 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, OHSB must anticipate when an employer is likely to raise an argument supporting such a defense. The CO shall keep in mind all potential affirmative defenses and attempt to gather contrary evidence, particularly when an employer makes an assertion that would indicate intent to raise a defense/excuse against a potential citation. The CO shall bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the Compliance Program Manager.

### B. Explanations

The following are explanations of common affirmative defenses.

1. Unpreventable employee or supervisory misconduct or "isolated event"

a. To establish this defense, employers must show all the elements of the defense:

- (i) A work rule adequate to prevent the violation;
- (ii) Effective communication of the rule to employees;
- (iii) Methods for discovering violations of work rules; and

(iv) Effective enforcement of rules when violations are discovered.

- b. The CO 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 that is reattached while the CO watches. The facts that the CO shall document include:

- (i) Who removed the guard and why?
- (ii) Did the employer know that the guard had been removed?
- (iii) How long or how often had the saw been used without the guard?
- (iv) Were there any supervisors in the area while the saw was operated without a guard?
- (v) Did the employer have a work rule that the saw only be operated with the guard on?
- (vi) How was the work rule communicated to employees?
- (vii) Did the employer monitor compliance with the rule?
- (viii) 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 functionally impossible or would prevent performance of required work, and the employer took reasonable alternative steps to protect employees, or there were 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. The facts that the CO shall document include:

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

3. Greater hazard

Compliance with a standard would result in greater hazards to employees than would noncompliance, and the employer took reasonable alternative 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. The facts that the CO shall document include:

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

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

## VII. Interview Statements

### A. General Requirements

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

### B. Written Statements

The CO shall obtain written statements when:

- 1. There is an actual or potential controversy as to any material facts concerning a violation;
- 2. If a conflict or significant 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. Statements taken in a language other than English shall be translated into English. 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 and had the opportunity to correct this statement consisting of 'xx' handwritten pages, and these facts are true and correct to the best of my knowledge" When requested, the statement shall also include the following: "I request that this statement be held in confidence to the extent provided by law." Only the individual interviewed may later waive confidentiality. The individual shall sign and date the statement and the CO shall sign it as a witness. The CO shall document the identity of the person who served as translator during the interview.

### D. Refusal to Sign Statement

If the individual refuses to sign the statement, the CO shall note such refusal on the statement. The statement 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. The CO

will attempt to produce the written statement for correction and signature as soon as possible. The CO shall document the identity of the transcriber in the case file.

## 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 OSHA Instruction [CPL 02-00-111](#), Citation Policy for Paperwork and Written Program Requirement Violations.

## IX. 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. The diary sheet 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 made 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 diary sheet entry. When a case file is completed, the CO must insure it is properly organized.

## X. Citations

Section 50-9-17 of the [Act](#) addresses the form and issuance of citations.

Section 50-9-17.A of the Act states in part, "...the department shall send prompt notice of the violation by certified mail to the employer believed to be in violation. The citation shall describe with particularity the provision of the Occupational Health and Safety Act or rule alleged to have been violated."

### A. Statute of Limitations

Section 50-9-17.A of the Act states in part, "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 when any violation alleged therein last occurred six months or more prior to the date on which the citation is actually signed and dated. When the actions or omissions of the employer concealed the existence of the violation, the time limitation is suspended until such time that OHSB learns or could have learned of the violation. The OGC shall be consulted in such cases.

### 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 as an alternative to certified mailing if it is believed that such methods would effectively give the employer notice of the citation. A signed receipt shall be obtained whenever possible. The method and any unusual circumstances of delivery shall be documented in the diary sheet.
2. Citations shall be mailed to employee representatives no later than one day after the citation is sent to the employer. Citations shall also be mailed to any employee upon request and without the need to make a written request under the [Inspection of Public Records Act](#). In the case of a fatality, if the family of the victim requests a copy of the

citations, a copy shall be provided without charge and without the need to make a written request.

### **C. Amending/Withdrawing Citations and Notifications of Penalty**

#### **1. Amendment justification**

Amendments to, or withdrawal of, a citation shall be made when information is presented to the Compliance Program Manager that indicates a need for such action. Justification for amendment or withdrawal 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 CO at the time of the inspection establish a valid affirmative defense;
- d. Additional facts not available to the CO at the time of the inspection establish that there was no employee exposure to the hazard;
- 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 justified**

Amendments to, or withdrawal of, a citation shall not be made by the Compliance Program Manager for reasons such as 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;
- 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 to the amendment or withdrawal of 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 an informal or formal settlement agreement.
2. In exceptional circumstances, the Compliance Program Manager 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 repeat, the original citation items shall be withdrawn and the new, appropriate citation items 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 portions of the original citation that were not amended.
5. When circumstances warrant, the Compliance Program Manager may withdraw a citation and notification of penalty in its entirety. Justification for the withdrawal shall 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 Compliance Program Manager, 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) or complainant.

## **XI. Inspection Records**

### **A. Disposition of Inspection Records**

Inspection records are any records made by a CO that concern, relate to, or are part of, any inspection, or are part of any performance of any official duty.

All official forms and notes constituting the basic documentation of a case must be part of the case file. Inspection records also include photographs (including digital photographs), videotapes, DVDs and audiotapes. These records are the property of the State of New Mexico and not the property of the CO and are not to be retained for any private purpose.

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

The information obtained during inspections is confidential. The Inspection of Public Records Act, [Article 2](#), Section 14.2.1 defines the criteria for releasing information. Requests for release of inspection information shall be directed to the Compliance Program Manager. If it is determined that a request for information is not a routine request, but one covered by the Inspection of Public Records Act, the request shall be immediately referred to the designated disclosure official.

### **C. Classified and Trade Secret Information**

1. Any classified or trade secret information or personal knowledge of such information by OHSB personnel shall be handled in accordance with Section 50-9-21 of the [Act](#). The collection of such information and the number of persons with access to it shall be limited to the minimum necessary for the conduct of compliance activities. The CO shall specifically identify any classified and trade secret information in the case file. Section 50-9-21.C of the Act makes it unlawful for any employee of the department to reveal to any other individual the trade secrets of the employer.
2. It is essential to the effective enforcement of the Act that the CO and all OHSB personnel preserve the confidentiality of all information and investigations that might reveal a trade secret. When the employer identifies an operation or condition as a trade secret, it shall be treated as such.
3. Under Section 50-9-21 of the Act, any information reported to or obtained by the CO in connection with any inspection or other activity that contains or may reveal a trade secret shall be kept confidential. Such information shall not be disclosed except to other OHSB officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

4. Section 50-9-24.M of the Act provides criminal penalties for any person who reveals a trade secret. These penalties include a fine up to \$10,000 and imprisonment for up to one year.
5. Trade secret materials shall not be labeled as “Top Secret,” “Secret,” or “Confidential,” nor shall these security classification designations be used in conjunction with other words unless the trade secrets are also classified by an agency of the U. S. government in the interest of national security.
6. If the employer objects to the taking of photographs or videotapes because trade secrets would or may be disclosed, the CO should advise the employer of the protection against such disclosure afforded by Section 50-9-21 of the Act and [11.5.1.21.F. NMAC](#). If the employer still objects, the CO shall contact the Compliance Program Manager for guidance.

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

Chapter 6 has been revised and updated. The new revision of Chapter 6 is available at:

Penalty Policy

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

### **I. Informal Conferences**

#### **A. General**

Pursuant to [11.5.1.26 NMAC](#) the employer, any affected employee, or the employee representative may request an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of penalty, proposed penalty, proposed petition for modification of abatement date or proposed petition for variance.

See Chapter 8, Section I for policies and procedures related to [Informal Conferences](#).

### **II. Contesting Citations, Notifications of Penalty or Abatement Dates**

The bureau has no authority to modify the contest period. See [Chapter 15, Section IV](#) of this manual for more information regarding the contest process.

#### **A. Notice of Contest**

1. An employer's Notice of Contest must clearly state what is specifically being contested. It must identify which item(s) of the citation, penalty, the abatement date, or any combination of these, is being contested.
  - a. If the employer only requests a later abatement date and there are valid grounds to consider the request, the Compliance Program Manager should be contacted. An informal conference can be held to change an abatement date prior to the expiration of the 15-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 must be paid.

#### **B. Contest Process**

When a Notice of Contest is properly filed, the Bureau Chief is required to forward the case to the Review Commission within five working days, at which time the case is considered to be in litigation.

1. OHSB will normally cease all investigatory activities once an employer has filed a notice of contest.
2. Upon receipt of the Notice of Contest, the Department will initiate an [Informal Administrative Review](#) (See Chapter 15, Section II.)

### **III. Petition for Modification of Abatement Date (PMA)**

A petition for modification of abatement period may be filed by any responsible employer, any affected employee, or any representative of affected employees. A petition for modification of abatement period filed by a responsible employer shall be based upon allegations that the responsible employer has made a good faith effort to comply with the abatement.

#### **A. Filing Deadlines**

A petition for modification of abatement date must be filed with the bureau:

1. On or before the originally required abatement date, if the petition is filed by an employer; or
2. Within 15 working days after posting of the citation, if the petition is filed by an employee or a representative of affected employees.

**B. When Filing Requirements are not met**

1. Within five days of receiving the PMA, the Bureau Chief shall forward the request to the Review Commission without regard to its timeliness or format.
2. The Review Commission should dismiss any petition that does not meet the filing deadline, unless the Commission finds that the late filing was caused by some action of the Department. See [11.5.5.303 NMAC](#) for details.
3. Dismissal of a petition for untimeliness as to one or more abatement periods shall not affect the validity of the petition as to any abatement periods for which the petition is timely.

**C. Informal Administrative Review**

The Department should promptly initiate an informal administrative review to be conducted by the Compliance Program Manager. The following actions should be conducted concerning the review:

1. When the respondent is notified of any action pertaining to the review, the employer must comply with posting requirements so that employees will have the opportunity to participate. See [11.5.5.306 NMAC](#) for details.
2. In addition to the Bureau and the respondent, any affected employees or employee representatives may participate in the informal administrative review.
3. A settlement may be reached during the review that grants an extension of the abatement date.
4. If an agreement is not reached during the informal administrative review, the petitioner may request a hearing before the Commission to resolve the PMA.

**D. Administrative Complaint**

When a settlement is not reached during the informal administrative review, the Bureau Chief shall request that the OGC file an administrative complaint before the Review Commission for dismissing the PMA. See [11.5.5.402 NMAC](#) for more details.

**IV. Abatement Verification Regulation**

**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 OHSB during an inspection.
  - b. For each inspection, except follow-up inspections, OHSB shall open an employer specific case file. The case file remains open throughout the inspection process and is not closed until the Compliance Program Manager is satisfied abatement has occurred. If abatement is not completed, the CO shall annotate the circumstances or reasons in the case file and enter the proper code in IMIS.

- c. Employers are required to verify that they have abated cited conditions, in accordance with § 1903.19.
2. 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.
3. Abatement verification

Abatement verification includes abatement certificates, abatement documents, abatement plans, and progress reports.
4. Abatement documentation

Documentation submitted must establish that abatement has been completed, and include evidence such as receipts for 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 a violation(s) in a citation.
6. Final order dates
  - a. Uncontested citation item

For an uncontested citation item, the final order date is the fifteenth working day after the employer's receipt of the citation.
  - b. Contested citation item

For a contested citation item, the final order date is:

    - (i) Twenty days after filing of a settlement agreement as described in 11.5.5.503.F. NMAC; or
    - (ii) Fifteen days after the date on which the Review Commission files its ruling as described in [11.5.5.804.E. NMAC](#).
7. Abatement dates
  - a. Uncontested citations

For uncontested citations, the abatement date is the latest of the following dates:

    - (i) The abatement date identified in the citation;
    - (ii) The extended date established as a result of an employer's filing for a PMA; or
    - (iii) 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 latest of the following dates:

- (i) The date identified in the final order for abatement;
- (ii) When there has been a contest of a violation or abatement date but not the penalty, the date computed by adding the period allowed in the citation for abatement to the final order date; or
- (iii) The date established by a formal settlement agreement.

c. Contested penalty only

When an employer has contested only the proposed penalty, the abatement period is the period specified in the citation.

8. Movable equipment

- a. Movable equipment means a hand-held or non-hand-held machine or device, powered or non-powered, that is used to do work and is moved within or between worksites.
- b. Hand-held equipment is equipment that is hand-held when operated. Hand-held equipment is generally equipment that can be picked up and operated with one or two hands, such as a hand grinder, circular saw, portable electric drill, nail gun, etc.

9. Worksite

- a. For enforcing the Abatement Verification regulation, the worksite is the physical location specified within the "Alleged Violation Description" in the citation.
- b. If no location is specified, the worksite is the inspection site where the cited violation occurred.

**B. Written Certification**

The Abatement Verification Regulation, [§1903.19](#), requires employers who have received a citation(s) for violation(s) of the Act to certify 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 requires the following:

- 1. Abatement certification;
- 2. Abatement documentation;
- 3. Abatement plans;
- 4. Progress reports; and
- 5. Tagging for movable equipment.

**D. Supplemental Procedures**

When necessary, OHSB supplements these procedures with follow-up inspections and onsite monitoring inspections.

**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 a citation item has become a final order of the Review Commission. For movable hand-held equipment, the warning tags or citation must be attached immediately after the employer

receives the citation. For other movable equipment, the warning tag or citation must be attached prior to moving the equipment within or between worksites.

## V. Abatement Certification

### A. Minimum Level

Abatement certification is required for all violations once they become a final order of the Review Commission. An exception exists when the CO 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.”

### 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 sample abatement certification letter is included in Appendix A of the Abatement Verification Regulation [§1903.19](#).

### C. Certification Timeframe

1. All citation items that are affirmed or modified by a final order of the Review Commission require written abatement certification within 10 calendar days of the abatement date.
2. A PMA received and processed in accordance with [11.5.5.503 NMAC](#) will suspend the 10-day time for receipt of the abatement certification for the item for which the PMA is requested.
  - a. For all items covered by the PMA, the bureau will not issue a citation 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 OHSB begins on the day the employer receives notice of the denial.

## VI. Abatement Documentation

Documentation of abatement is required for 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 when Compliance Program Manager determines that such documentation is necessary and has so indicated on the citation.

## **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 Compliance Program Manager.
2. The abatement regulation does not mandate a particular type of documentary evidence for any specific cited conditions.
3. The adequacy of the abatement documentation submitted by the employer shall be assessed by the Compliance Program Manager using the information available in the citation and the bureau's knowledge of the employer's workplace and history.
4. Examples of documents that may demonstrate that abatement is complete include, but are not limited to, the following:
  - a. Photographic or video evidence of abatement;
  - b. Evidence of the purchase or repair of equipment;
  - c. Evidence of actions taken to abate;
  - d. Reports or evaluations by safety and health professionals describing the abatement of the hazard or a report of analytical testing;
  - e. Documentation from the manufacturer that the article repaired meets the manufacturer's specifications;
  - f. Records of training completed by employees if the citation is related to inadequate employee training; and
  - g. 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. The decision of whether to include abatement documentation in the case file is left to the discretion of the Compliance Program Manager, subject to statutes and regulatory requirements. The regulatory requirement that documentation be submitted by the employer is extended primarily to assist the Compliance Program Manager in assuring that identified hazards have been abated.

## **C. Abatement Documentation for Serious Violations**

1. High gravity serious violations
  - a. OHSB policy is generally that all high gravity serious violations will require abatement documentation.
  - b. When, in the opinion of the Compliance Program Manager, abatement documentation is not required for a high gravity serious violation, the reasons shall be documented in the case file.
2. Moderate or low gravity serious violations

Moderate or low gravity serious violations should not normally require abatement documentation. The Compliance Program Manager will normally only require evidence of

abatement for moderate and low gravity serious violations under the following circumstances:

- a. The employer has been issued a citation for a willful violation or a failure-to-abate notice for any standard and the citation has become final order in the previous three years; or
- b. The employer has any history of a violation that resulted in a fatality or an OSHA 300 log entry indicating serious physical harm to an employee in the previous three years. The standard being cited must be similar to conditions associated with the fatality or serious injury or illness.

#### **D. CO Observed Abatement**

1. Employers are not required to certify abatement for violations that they promptly abated during the onsite portion of the inspection if the CO observed the abatement.
  - a. The Compliance Program Manager may use her discretion in determining the time limit to document abated conditions during the inspection.
  - b. Observed abatement shall be documented on the Violations Summary Form (OSHA 1-B or OSHA 1-B/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. When suitable, the CO may use photographs or video evidence. For additional information regarding adequacy of abatement documentation, refer to [Section VI.B](#) of this chapter.
3. When the abatement has been witnessed and documented by the CO, a notation reading “Corrected During Inspection” shall be made on the citation. Immediate abatement of some violations may qualify for penalty reductions under OHSB’s “Quick-Fix” incentive program. These incentives shall be discussed with the employer during the opening conference.
4. Notations stating, “Corrected During Inspection” or “employer has abated all hazards” shall not be made on the citation in cases when there is evidence of a continuing violative practice by the employer.

### **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 Compliance Program Manager flexibility in either requiring or not requiring monitoring information.

1. The requirement for abatement plans and progress reports must be indicated for the citation item to which they relate.
2. Progress reports shall not be required unless abatement plans are specifically required.
3. Note that Paragraphs (e) and (f) of [§1903.19](#) have limits. The Compliance Program Manager is not allowed to require an abatement plan for abatement periods less than 91 days or for citations characterized as other-than-serious.
4. The regulation places an obligation on employers, when necessary, to identify how employees are to be protected from exposure to the violative condition during the

abatement period. One way to ensure that interim protection is included in the abatement plan is to note this requirement on the citation. Refer to [§1903.19](#), Non-Mandatory Appendix B, for a sample Abatement Plan and Progress Report.

#### **B. Abatement Plans**

1. The Compliance Program Manager may require an employer to submit an abatement plan for each qualifying cited violation.
  - a. The requirement for an abatement plan must be indicated in the citation.
  - b. The citation may also call for the abatement plan to include interim measures.
2. Within 25 calendar days from the final order date, the employer must submit an abatement plan for each violation that identifies the violation and the steps to be taken to achieve abatement. The abatement plan must include a schedule for completing the abatement and, when necessary, the methods for protecting employees from exposure to the hazardous conditions until the abatement is complete. See [§1903.19\(e\)\(2\)](#).
3. In complex cases when the employer cannot prepare an abatement plan within the allotted time, a PMA must be submitted by the employer to amend the abatement date.

#### **C. Progress Reports**

1. An employer that is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. In such cases, the citation must indicate:
  - a. That periodic progress reports are required and the citation items for which they are required;
  - b. The date on which an initial progress report must be submitted, which may be no sooner than 30 calendar days after the 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 briefly describe 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 because of settlement agreements.

#### **D. Special Requirements for Long-Term Abatement**

1. Long-term abatement is abatement that will be completed more than one year from the citation issuance date.
2. The Compliance Program Manager must require the employer to submit an abatement plan for every violation with an abatement date in excess of one year.
3. Progress reports are mandatory and must be submitted at a minimum every six months. More frequent reporting may be required at the discretion of the Compliance Program Manager.

### **VIII. Employer Failure to Submit Required Abatement Certification**

#### **A. Actions Preceding Citation for Failure to Certify Abatement**

1. If abatement certification, or any required documentation, is not received within 13 calendar days after the abatement date (the regulation requires filing within 10calendar

days after the abatement date, and another three 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 seven calendar days after the telephone call.
  - b. During the conversation with the employer, determine why it has not complied and document all communications and attempted communications in the case file.
  - 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 e-mail when appropriate.
2. If the certification or documentation is not received within the next seven calendar days, a citation shall 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 an 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 combining all the individual instances when the employer has not submitted abatement certification or abatement documentation shall be issued.
  - a. This “other” citation shall be issued under the same inspection number that 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 classification or abatement period is to be modified.
4. For those rare instances when the reminder letter is returned to the Bureau by the post office as undeliverable and telephone contact efforts fail, the Compliance Program Manager has the discretion to cease 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 violation of the regulation.
2. If there are minor deficiencies such as omitting the 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 Bureau can serve as the date on the document.

3. An unsigned certification shall be returned to the employer to be signed.

#### **D. Penalty Assessment for Failure to Certify**

The penalty provisions of Section 50-9-24 of the [Act](#) apply to all citations issued under this regulation.

### **IX. Tagging of Movable Equipment**

#### **A. Tag-Related Citation**

1. Tag-related citations must be observed by the CO prior to the issuance of a citation for failure to tag cited movable equipment.
2. Refer to [§1903.19](#), Non-Mandatory Appendix C, for a sample warning tag. OHSB must be able to prove the employer's initial failure to act (i.e., failure to tag the movable equipment upon receipt of the citation).
3. When 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 as required by [§1903.19](#)(i)(6).

#### **B. Equipment That 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, the CO should provide as much detail as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement because the tagging provision is triggered upon movement of the equipment.
2. For hand-held equipment, the employer must attach a warning tag or copy of the citation immediately after 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, the CO shall investigate an employer's failure to notify employees by posting required documents.

#### **B. Location of Posting**

When an employer claims that posting at the location where the violation occurred would ineffectively inform employees (see [§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 about abatement activities.

#### **C. Other Communication**

The CO must determine not only whether the documents or summaries were appropriately posted, but also whether alternative 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 completion of the structure or project will only be accepted as abatement without certification when a CO directly verifies the site closure/completion and when closure/completion effectively abates the condition cited.
  - b. In all other circumstances, the employer must submit a certificate of abatement to OHSB stating that the hazards have been abated. In rare cases, where abatement action is completed through cessation of work, the general contractor of the site may be contacted to verify abatement.
2. All equipment-related and 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 closures.
3. When a 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 shall not be accepted as abatement.

### **B. Follow-up Policy for Employer Failure to Verify Abatement**

Follow-up or monitoring inspections shall not normally be conducted when evidence of abatement is provided by the employer or employer representatives.

1. When the employer has not submitted the required abatement certification or documentation within the time permitted by the regulation, the Compliance Program Manager has discretion to conduct a follow-up inspection.
2. Submission of inadequate documentation may also serve as the basis for a follow-up inspection.
3. A follow-up inspection should not 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. Severe Violator Enforcement Program (SVEP) Follow-up**

1. For any inspection that results in a SVEP case, a follow-up inspection will normally be conducted even if abatement of the cited violations has been verified. The primary purpose of follow-up inspections is to assess both whether the cited violation(s) were abated and whether the employer is committing similar violations.
2. If there is a compelling reason not to conduct a follow-up inspection, the reason must be documented in the case file. The Bureau Chief and the Regional Administrator must be notified of this decision.
3. Grouped and combined violations shall be counted as one violation for SVEP purposes.

4. For further information on exceptions for Severe Violator Enforcement Program (SVEP) cases, refer to OSHA Instruction [CPL 02-00-149](#) dated June 18, 2010.

### **C. Initial Follow-up Inspection**

1. The initial follow-up inspection is the first follow-up inspection after issuance of the citation.
2. If a violation is found to have not been abated, the CO 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. When the employer implements some controls, but determines that the control measures were inadequate during follow-up monitoring and other technology was available which would have attained 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. When an apparent failure to abate by means of engineering controls is due to technical infeasibility, no failure to abate notice shall be issued. However, if appropriate administrative controls, work practices or personal protective equipment are not utilized, a Notification of Failure to Abate Alleged Violation shall be issued.

### **D. Second Follow-up Inspection**

1. Any subsequent inspection after the initial follow-up inspection that addresses the same violations is a second follow-up.
  - a. After the Notification of Failure to Abate Alleged Violation has been issued, the Compliance Program Manager shall allow a reasonable time for abatement of the violation before conducting a second follow-up inspection. The employer must ensure 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 Compliance Program Manager, after consultation with the Bureau Chief and the OGC, 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 Compliance Program Manager shall immediately contact the Bureau Chief, in writing, detailing the circumstances so the matter can be referred to the OGC for action.

### **E. State Court Enforcement**

There may be times following the initial follow-up inspection when, because of an employer's flagrant disregard of a citation or an item on a citation, or other factors, it will be apparent that additional administrative enforcement actions will be futile. In such cases, action shall be initiated under [Section 74-1-10 of the Environmental Improvement Act NMSA 1978](#). The Compliance Program Manager shall notify the Bureau Chief, in writing, of all the particular circumstances of the case for referral to the OGC.

## **F. Follow-up Inspection Reports**

1. Follow-up inspection reports shall be included with the original initial inspection case file. The applicable identification and description sections of the 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 CO 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” are not acceptable as proper documentation for violations having been corrected.
  - c. When appropriate, the CO’s written description shall be supplemented by a photograph or a videotape to illustrate corrective actions.
  - d. Only the item description and identification blocks need to be completed on the follow-up OSHA-1B/1B-IH. Applicable employer statements concerning correction under the employer knowledge section may be included, if appropriate.
4. Sampling
  - a. The CO 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 CO 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 is needed for an employer to come into compliance. Such inspections may be scheduled if:

1. An abatement date exceeds 90 days;
2. A PMA is filed;
3. The employer has signed a Corporate Wide Settlement Agreement. OHSB will evaluate each settlement agreement on a case-by-case basis;
4. It is necessary to ensure that terms of a permanent variance are being carried out; or
5. The employer's request for technical assistance is granted by the Compliance Program Manager.

#### **B. Conduct of Monitoring Inspections**

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:

1. To determine the progress an employer is making toward final correction;
2. To ensure that the target dates of a multi-step abatement plan are being met;
3. To ensure that an employer's petition for the modification of abatement dates was made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible;
4. To ensure that the employees are being properly protected until final controls are implemented;
5. To ensure that the terms of a permanent variance are being carried out; or
6. To provide abatement assistance for cited items.

#### **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 (6) 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 Compliance Program Manager agrees after careful review, that these reports reflect adequate progress on implementation of control measures and adequate interim protection for employees, the interval between monitoring inspections may be extended to 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 Compliance Program Manager shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.

2. When 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. When no engineering controls have been cited but more time is needed for other reasons not requiring assistance from OHSB, such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
4. Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer and shall not be delayed until actual receipt of the PMA.
5. The CO 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. The CO 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 indicators of the employer's good faith, demonstrating effective use of technical expertise 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, or the employer's insurance agency;
  - c. Other documentation collected by Bureau personnel, including verification of progress reports, success 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; and
  - h. Emergency action plans.

#### **E. Monitoring Corporate Settlement Agreements**

Corporate-wide Settlement Agreements (CSAs) extend abatement requirements to all covered locations of a company. These agreements may require baseline, periodic and follow-up monitoring.

### **XIV. Notification of Failure to Abate**

#### **A. Violation**

A Notification of Failure to Abate an Alleged Violation (OSHA-2B) shall be issued in cases when 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 that had become a final order of the Review Commission.

### **C. Calculation of Additional Penalties**

1. A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation based on the facts noted upon re-inspection.
2. Detailed information on calculating failure to abate (FTA) penalties is included in [Chapter 6](#) of this manual, and the bureau's policy regarding partial abatement.

## **XV. Case File Management**

### **A. Closing of Case File Without Abatement Certification**

A case file shall not be closed without abatement certification(s) unless the Compliance Program Manager or his designee justifies in writing the reason for accepting each uncertified violation as an abated citation.

### **B. Review of Abatement Material**

The Bureau is encouraged to 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. Retention**

The Bureau shall keep all case file information for a period of three years as described by the [1.18.607.171 NMAC](#) regulation governing record retention.

## **XVI. Abatement Services Available to Employers**

Employers requesting abatement assistance shall be informed that OHSB is willing to work with them even after citations have been issued.

## **Chapter 8 Settlement of Cases**

### **I. Informal Conferences**

Pursuant to [11.5.1.26 NMAC](#), the employer, any affected employee, or the employee representative may request an informal conference. When an informal conference is conducted, it will be conducted within the 15 working day contest period. If the employer's intent to contest is not clear, the Compliance Program Manager will contact the employer for clarification.

In the event an employer is bringing an attorney to an informal conference, the Bureau Chief or designee is encouraged to contact the OGC for assistance of counsel.

#### **A. Informal Conference Procedures**

##### **1. Requesting an informal conference**

At the request of an employer, affected employee, or representative of employees, the Bureau Chief or his designee may hold an informal conference for discussing any issues raised by an inspection, citation, proposed penalty, proposed petition for modification of abatement date or proposed petition for variance. Informal conferences may be held by any means practical with a preference for a meeting in person.

##### **2. Employer/employee participation**

When the conference is requested by the employer, an affected employee or representative shall be afforded an opportunity to participate, at the discretion of the Bureau Chief or his designee. When the conference is requested by an employee or representative of employees, the employer shall be afforded an opportunity to participate, at the discretion of the Bureau Chief.

##### **3. Separate conferences**

If the adjustments involve abatement date extensions, the Compliance Program Manager shall attempt to contact the affected employees or employee representative. If any party objects to the attendance of the other party or the Compliance Program Manager believes a joint informal conference would not be productive, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions will be permitted if either party so requests. .

##### **4. Employer posting requirements**

When an informal conference is scheduled, the Compliance Program Manager shall transmit to the employer a posting form. The employer must complete and post this form indicating the date, time, and location of the informal conference. The form will remain posted until after the informal conference has been held.

The Compliance Program Manager's actions notifying the parties of the date, time, and location of the informal conference shall be documented and placed in the case file. In addition, a notation of the date of the informal conference shall be placed on the case file diary sheet.

##### **5. Participation by OHSB officials**

At the discretion of the Compliance Program Manager, the inspecting CO(s) may be notified of an upcoming informal conference and, if practicable, may be given the opportunity to participate in the informal conference. If the Compliance Program Manager

anticipates that only a penalty adjustment will result, the presence of the CO(s) is unnecessary.

At the discretion of the Compliance Program Manager, one or more additional OHSB employees (in addition to the Compliance Program Manager) may be present at the informal conference. In cases in which proposed penalties total \$100,000 or more, the Bureau Chief shall be notified.

The Compliance Program Manager will document and maintain records reflecting the basis for any decisions resulting from the informal conference.

6. Conduct of the informal conference

The Bureau Chief or his designee shall conduct the informal conference in accordance with the following guidelines:

a. Opening remarks

The opening remarks shall include discussions of the following:

- (i) Purpose of the informal conference;
- (ii) Rights of participants;
- (iii) Contest rights and time restraints;
- (iv) Limitations, if any;
- (v) Settlements of cases; and
- (vi) Other relevant information.

If the Bureau Chief or his designee states any views on the legal merits of the employer's contentions, they will explicitly state that those views are personal opinions only.

b. Closing remarks

At the conclusion of the discussion, the main issues and potential courses of action will be summarized and documented. A copy of the summary, together with any other relevant notes of the discussion made by the Bureau Chief or his designee shall be placed in the case file.

c. Decisions

At the end of the informal conference, the Bureau Chief or his designee shall propose a decision as to the appropriate action in the light of facts brought up during the conference. The Bureau Chief shall review and approve the decision before it is presented to the employer.

7. Citation amendments

a. Bureau initiated changes

The Compliance Program Manager may amend citations, penalties, or abatement dates to correct errors in the citation process.

b. Changes made through the informal settlement process

The Compliance Program Manager may propose other changes to the citations, penalties, or abatement dates based on new information obtained during the informal conference. The Compliance Program Manager shall present these proposed changes

to the Bureau Chief. Together, the Bureau Chief and Compliance Program Manager may decide to make these changes using an informal settlement agreement.

c. Case File Documentation

The Compliance Program Manager shall document in the case file any changes that are made to citations, including reductions in severity classifications or penalties. A brief description of the reasons for the changes to the citations shall be included when deemed appropriate by the Compliance Program Manager.

## II. Informal Settlement Agreement

The Bureau Chief is granted settlement authority and shall follow these instructions when negotiating settlement agreements.

### A. General

1. The Bureau Chief may enter into an informal settlement agreement with employers provided a notice of contest has not been filed.
2. The Bureau Chief may amend abatement dates, reclassify violations, and modify or withdraw a penalty, a citation, or a citation item, when evidence presented during the informal conference justifies the change.
3. The Bureau Chief may actively negotiate the amount of proposed penalties, depending upon the circumstances of the case and the particular improvements in employee safety and health that can be obtained.
4. Employees shall be informed that they are required by [§1903.19](#) to post copies of all amendments or changes resulting from informal settlements. Employee representatives must also be provided with copies of all agreements.
5. OHSB shall not consider modifying willful or repeat citations as “unclassified” during the informal settlement agreement process.

### B. Informal Settlement Procedures

1. Bureau Chief’s approval

When an informal conference results in a settlement agreement, the Compliance Program Manager shall obtain the Bureau Chief’s approval as soon as possible.

2. Employer timely signature

The Compliance Program Manager shall explain that it is the employer’s responsibility to sign the settlement agreement prior to the expiration of the contest period; and that failure to sign the agreement or file a timely notice of contest will result in the citation becoming a final order.

3. Extensions

If the employer representative requests more time to consider the agreement, and if there is sufficient time remaining in the 15 working day period, the Bureau Chief shall sign the agreement and provide the signed original for the employer to consider. A letter explaining the conditions under which the agreement will become effective shall be given by appropriate means (including fax, electronic mail, personal delivery, overnight delivery service, or mailed by certified mail, return receipt requested) to the employer and a record of the actions taken shall be entered in the case file.

#### 4. Records

If the signed agreement is provided to the employer, a copy shall be kept in the case file and the employer shall be informed in writing that no changes are to be made to the original without explicit prior authorization from the Bureau Chief.

5. Posting

Employers shall be informed that they are required to post copies of all amendments to the citation(s) resulting from the informal conference. Employee representatives shall also be provided with copies of such documents. Regulation [11.5.1.24 NAMC](#) covers amended citations, citation withdrawals, and settlement agreements.

6. OHSB receipt of the informal settlement agreement

If the Bureau has not received a signed copy of the settlement agreement from the employer by close of business on the day before the last day of the contest period, the Compliance Program Manager shall make every effort to contact the employer to determine her intention.

The employer shall be reminded that the agreement must be signed by both parties prior to the expiration of the contest period if it is to be valid. If the employer representative does not wish to sign the agreement, the Compliance Program Manager shall point out that the citation will become a final order unless the employer files a timely notice of contest. If time is limited and the situation allows, the signed and dated agreement can be faxed to the Compliance Program Manager by the employer.

Note: A notation shall be entered on the diary sheet documenting the efforts made to contact the employer.

7. Verification of content

Upon receipt of the Informal Settlement Agreement signed by the employer, the Compliance Program Manager will ensure the text of the agreement is in accordance with the agreed upon settlement. If so, the citation record will be updated in IMIS in accordance with current procedures. If not, and if the variations substantially change the terms of the agreement, the agreement signed by the employer will be considered as a notice of contest and handled accordingly. If there is any question as to whether any variation is substantive, the Compliance Program Manager shall contact the Bureau Chief for guidance.

8. Failure to Abate

If the informal conference involves an alleged failure to abate, the Compliance Program Manager shall set a new abatement date in the informal settlement agreement and document in the case file the time that has passed since the original citation, the steps that the employer has taken to inform the exposed employees of their risk and to protect them from the hazard, and the measures that will have to be taken to correct the condition. If the abatement has been completed prior to the informal conference, this will be documented in the case file.

9. Posting

Employers shall be informed that they are required to post copies of all amendments or changes to the original citations resulting from informal settlements. Employee representatives shall also be provided with copies of such documents. This requirement covers amended citations, citation withdrawals and settlement agreements.

## C. Provisions

1. Settlements that are consistent with the provisions of the [Act](#) can be negotiated with an employer. The process and format of the informal settlement are described in [11.5.5.503 NMAC](#).

2. Penalty reduction

The Compliance Program Manager has authority to negotiate a penalty reduction, as justified by the circumstances of the case, and in return for improvements in the employer's safety and health program.

3. Exculpatory language

In limited circumstances, it may be appropriate to consider the employer's request for exculpatory language. If the Bureau Chief decides to grant the employer's request, language such as the following should be used:

*Employer's consent to the entry of a final order pursuant to this Informal Settlement Agreement does not constitute an admission by Respondent of violations of the Act in any proceedings other than proceedings brought directly under the provisions of the New Mexico Occupational Health and Safety Act, including, but not limited to, any citations issued or penalties proposed by the Environment Department under the provisions of the Act.*

4. Enhanced Settlement Provisions

Most settlement agreements require that the employer abate all violations and pay a penalty. In some settlements, however, particularly those in egregious cases and other significant enforcement actions, OHSB can insist that employers take steps to address systemic compliance problems or to provide OHSB with information that will enable it to take follow-up action.

- a. Court orders

In situations where potential legal action may be appropriate, the Bureau Chief shall coordinate with the OGC to make greater use of settlement provisions designed to ensure future compliance.

Note: An employer's obligation to abate a cited violation arises when there is a final order of the Review Commission upholding a citation. Section 50-9-8.D of the [Act](#) authorizes OHSB to obtain court orders to enforce final Commission orders. Factors to consider when deciding whether legal action is appropriate include:

- (i) The employer's citation history and other indications of serious compliance problems, such as widespread violations at multiple establishments or construction worksites. The IMIS database should be searched for the employer's history of violations;
- (ii) Employer statements indicating reluctance or refusal to abate significant hazards, or employer behavior that demonstrates indifference to employee safety;
- (iii) Repeated violations of the Act, particularly of the same standard, which continue undeterred by the traditional remedies of civil money penalties and Review Commission orders to abate;
- (iv) Repeated refusal to pay penalties;

- (v) Filing false or inadequate abatement verification reports; and
- (vi) Disregard of a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

b. Enhanced enforcement case

For all employers that are the subject of an enhanced enforcement program case and are seeking a settlement with the department, the Compliance Program Manager shall consider including some or all of the following provisions in the settlement agreement:

- (i) Requiring the employer to hire a consultant to develop and implement, with management support, an effective safety and health program;
- (ii) Applying the agreement company-wide;
- (iii) In construction (and when appropriate, in general industry), using settlement agreements to obtain from employers a list of active and future job sites;
- (iv) Requiring the employer to submit to OHSB its Log of Occupational Injuries and Illnesses on a quarterly basis, and to consent to OHSB conducting an inspection based on the report;
- (v) Requiring the employer to notify OHSB of any serious injury or illness requiring medical attention and to consent to an inspection based on such notifications; and
- (vi) Obtaining employer consent to entry of a court enforcement order under Section 50-9-8.D of the Act. See also the Henshaw/Scalia memorandum of September 18, 2002.

Note: These enhanced settlement terms may also be considered in cases that do not meet the EEP criteria.

#### **D. Corporate-Wide Settlement Agreements**

Corporate-Wide Settlement Agreements (CSAs) 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. The Compliance Program Manager shall obtain the Bureau Chief's approval for all Corporate-Wide Settlement Agreements. Guidelines, policies and procedures for entering into CSA negotiations may be found in OSHA Instruction [CPL 02-00-090](#), Guidelines for Administration of Corporate-Wide Settlement Agreements, dated June 3, 1991.

## Chapter 9 Complaint and Referral Processing

### I. Safety and Health Complaints and Referrals

#### A. Definitions

##### 1. Complaint

A complaint is a notice of an alleged safety or health hazard (over which OHSB has jurisdiction), or a violation of the Act, submitted by a present employee or representative of employees that:

- a. Asserts with reasonable particularity that an imminent danger, a violation of the Act, or a violation of an OHSB standard exists in the workplace and is exposing employees to physical harm;
- b. Is reduced to writing or is submitted on an OSHA-7 form; and
- c. Is signed by at least one current employee or employee representative.

##### 2. Complaint or referral inspection

A complaint or referral inspection is an onsite examination of an employer's worksite conducted by an OHSB compliance officer, initiated as the result of a complaint or referral, and meeting at least one of the criteria identified in [subsection B](#) of this chapter.

##### 3. Inquiry

An inquiry is a process conducted in response to a complaint or a referral that does not meet one of the inspection criteria listed in [subsection B](#) of this chapter. An inquiry does not involve an onsite inspection of the workplace, but rather OHSB advises the employer of the alleged hazard(s) or violation(s) by telephone, fax, e-mail, or by letter if necessary. The employer is requested to provide a response, and the Bureau shall notify the complainant of that response via appropriate means.

##### 4. Electronic complaint

An electronic complaint is a complaint submitted via OSHA's public webpage. Allegations of hazards submitted via OSHA's public webpage are initially classified as referrals rather than complaints since the submittal is not signed by the employee or employee representative.

##### 5. Permanently disabling injury or illness

A permanently disabling injury or illness is an injury or illness that has resulted in permanent disability or an illness that is chronic or irreversible. Permanently disabling injuries or illnesses include, but are not limited to amputation, blindness, a standard threshold shift in hearing, lead or mercury poisoning, paralysis or third-degree burns.

##### 6. Referral

A referral is an allegation of a potential workplace hazard or violation received from one of the sources listed below.

- a. CO referral - information based on the direct observation of a CO.
- b. Safety and health agency referral – from sources including, but not limited to: NIOSH; state programs; OHSB consultation; state or local health departments; local

police and fire departments; medical doctors; and safety or health professionals in federal agencies.

- c. Discrimination complaint referral – made by a discrimination investigator when an employee alleges that she was retaliated against for complaining about safety or health conditions in the workplace, for refusing to perform an allegedly imminent dangerous task, or for 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.
  - e. Media report – either news items reported in the media or information reported directly to OHSB by a media source.
  - f. Employer report – notification of accidents other than fatalities or catastrophes.
7. Representative of employees

A representative of employees is:

- a. An authorized representative of the employee bargaining unit, such as a certified or recognized labor organization;
- b. An attorney acting for an employee; or
- c. Any other person acting in a bona fide representational capacity, including 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 employees.

The representational capacity of the person filing complaints on behalf of an employee should be ascertained if that person's status is not clear. In general, the affected employee should have requested or approved of the filing of the complaint on his behalf.

## **B. Criteria Warranting an Inspection**

An inspection is normally warranted if at least one of the conditions below is met.

- 1. A valid complaint is submitted. Specifically, the complaint must be reduced to writing or submitted on an OSHA-7 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 OHSB standard that exposes employees to physical harm exists, or that an imminent danger of death or serious injury exists.
- 2. The information received in a signed, written complaint from a current employee or employee representative alleges a recordkeeping deficiency that indicates the existence of a potentially serious safety or health violation.
- 3. The information alleges that a permanently disabling injury or illness has occurred as a result of an existing hazard.
- 4. The information alleges that an imminent danger situation exists.
- 5. The information concerns an establishment and an alleged hazard covered by a local emphasis program or the Bureau's current strategic plan.

Exception: When an OHSB Strategic Partnership participant has been deleted from programmed inspections in accordance with Chapter 2, Section III.G.7, the participant

shall be provided an opportunity to respond through inquiry as provided in subsection G below.

6. The employer fails to provide an adequate response to an inquiry, or the individual who provided the original information provides further evidence that the employer's response is false or does not adequately address the hazard(s).
7. The establishment that is the subject of the allegation has a history of egregious, willful, failure-to-abate, or repeat citations within OHSB's jurisdiction during the past three years, or is an establishment or related establishment in the Enhanced Enforcement Program. However, if the employer has previously submitted adequate abatement documentation for these violations demonstrating that they have been corrected and that programs have been implemented to prevent a recurrence of hazards, the Compliance Program Manager may determine that an inspection is not necessary.
8. A discrimination investigator requests that an inspection be conducted in response to an employee's allegation that the employee was discriminated against for complaining about safety or health conditions in the workplace, refusing to perform an allegedly dangerous job or task, or engaging in other activities related to occupational safety or health.
9. If an inspection is scheduled or has begun at an establishment and a complaint or referral that would normally be handled via inquiry is received, that complaint or referral may, at the Compliance Program Manager's discretion, be incorporated into the scheduled or ongoing inspection.
10. If the information gives reasonable grounds to believe that an employee under 18 years of age is exposed to a serious violation of a safety or health standard or a serious hazard, an onsite inspection shall be initiated if the information relates hazardous occupations described in the United States Department of Labor [regulation](#) titled "Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being". Limitations placed on OHSB's activities in agriculture by Appropriations Act provisions shall be observed. [Refer to OSHA Instruction [CPL 02-00-051](#) (2-0.51J) - Enforcement Exemptions and Limitations under the Appropriations Act, dated November 20, 2006, or most current version.]

Note: The information need not allege that a child labor law has been violated.

### **C. Scheduling an Inspection of an Employer in an Exempt Industry**

Before scheduling an inspection of an employer in an exempt industry classification, as specified by Appropriations Act provisions, see OSHA Instruction [CPL 02-00-051](#) (2-0.51J) - Enforcement Exemptions and Limitations under the Appropriations Act, dated November 20, 2006, or most current version.

### **D. Electronic Complaints**

Electronic complaints may be received through the OSHA public website or by an OHSB Compliance Section staff member.

1. Electronic complaints submitted via the OSHA public website are automatically forwarded via e-mail to the Compliance Program Manager.
2. When a CO receives an email complaint, the complaint shall be forwarded to the Compliance Program Manager.

3. The Compliance Program Manager shall manage a “complaints” mailbox and process electronic complaints according to internal complaint processing procedures. The complaints mailbox shall be monitored daily and every incoming complaint shall be reviewed for jurisdiction.
  - a. If the complaint falls within the jurisdiction of OHSB, a referral shall be entered into IMIS and processed as usual.
  - b. If the complaint falls within the jurisdiction of the OSHA Lubbock Area Office, the complaint shall be transferred appropriately.
4. The Compliance Program Manager shall ensure completion of an OSHA-90 form or an OSHA – 7 form for all complaint information received.

Appendix 1 of this chapter contains a flow chart describing the process of responding to these complaints and to written referrals.

#### **E. Information Received by Telephone.**

1. During the course of telephone contact with the caller, OHSB staff shall 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, as the individual receiving the information must determine, to the extent possible, whether the information received describes an apparent violation of the ACT or OHSB standards;
  - c. The employer’s name, address, telephone and fax numbers, as well as the name of a contact person at the worksite; and
  - d. The name, address, telephone number, and e-mail address of any union or employee representative at the worksite.

Appendix 3 of this chapter is a sample questionnaire that can be used to guide the CO while obtaining information from a telephone caller.

2. As appropriate, OHSB staff shall:
  - a. Describe to the caller the OHSB 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 rights and protections that accompany filing a formal complaint. These rights and protections include:
    - (i) The right to request an onsite inspection;
    - (ii) Notification in writing if an inspection is deemed unnecessary because there are no reasonable grounds to believe that a violation or danger exists; and
    - (iii) The right to obtain review of a decision not to inspect by submitting a request for review in writing.
3. If appropriate, OHSB staff shall inform the complainant of the right to confidentiality and ask whether the complainant wishes to exercise this right. When confidentiality is requested, the identity of the complainant shall be protected to the extent allowed by law.
4. OHSB staff shall explain Section 50-9-25 whistleblower protection rights to the caller.

Appendix 2 of this chapter contains a flow chart describing the process of responding to a telephone referral.

#### **F. Procedures for an Inspection**

1. Upon receipt of a complaint or referral, the Compliance Program Manager (or her designee) shall evaluate all available information and exercise professional judgment as to whether there are reasonable grounds to believe that a violation or hazard exists.
  - a. If necessary, reasonable attempts shall 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.
  - b. The Compliance Program Manager may decide not to inspect a facility if she has a substantial reason to believe that the condition that generated the complaint is being or has been abated.
2. Despite the existence of a complaint, if the Compliance Program Manager believes there are no reasonable grounds to support the existence of a violation or hazard, no inspection or inquiry shall be conducted.
  - a. When a formal complaint has been submitted, the complainant shall be notified in writing of OHSB's intent not to conduct an inspection, the reasoning behind the determination, and the appeal rights provided under [NMAC 11.5.1.20](#). The justification for not inspecting shall be noted in the case file.
  - b. When a referral has been submitted, the individual who provided the information shall, if possible, be notified of OHSB's intent not to conduct an inquiry or inspection. The justification for not inspecting shall 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 [subsection B](#), and there are reasonable grounds to believe that a violation or hazard exists, the Bureau is authorized to conduct an inspection.
  - a. If appropriate, OHSB staff shall inform the individual providing the information that an inspection will be scheduled and that she will be advised of the results.
  - b. After the inspection, OHSB staff shall send the individual a letter that addresses each information item, with reference to any citation(s) issued or a detailed explanation as to why a citation was not issued.
4. If an inspection is warranted, it shall be initiated as soon as resources permit. Inspections resulting from formal complaints of serious hazards shall normally be initiated within five working days of receipt of the complaint.

#### **G. Procedures for an Inquiry.**

1. If a complaint or referral does not meet the criteria for initiating an onsite inspection, an inquiry shall be conducted. OHSB staff shall promptly contact the employer to notify it of the complaint or referral and its allegation(s).
2. If a referral is submitted 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 to OHSB to sign the complaint, or mail or fax a signed complaint letter to OHSB. Additionally, an OSHA-7 form may be mailed or faxed to the complainant, if appropriate.

- b. If the complaint is not made formal after five working days, the Compliance Program Manager shall proceed with the inquiry process.
- 3. The Compliance Program Manager shall assign the inquiry for an employer response.
  - a. In cases where assignment is made for a letter to the employer, administrative staff will normally track the letter for an employer response.
  - b. In cases where assignment is made for a phone, fax or email to the employer, a CO will be assigned to track the employer response; or, in cases where the employer is an OSP participant as described in paragraph B.5 above, a CAS will normally be assigned to track the employer response.
- 4. In cases assigned for phone, fax or email response, the CO or CAS shall advise the employer of the information needed to answer the inquiry and shall encourage the employer to respond by fax or e-mail. The CO or CAS shall encourage the employers to:
  - a. Immediately investigate and determine whether the complaint or referral information is valid and make any necessary corrections or modifications;
  - b. Advise the Compliance Program Manager either in writing or via e-mail within five working days of the results of the investigation into the alleged complaint or referral information. At the discretion of the Compliance Program Manager, the response time may be longer or shorter than five working days, depending on the circumstances. Additionally, although the employer is requested to respond within five working days, the employer may not be able to complete abatement action during that time, but is encouraged to do so;
  - c. Provide the Compliance Program Manager with supporting documentation of the findings, including any applicable measurements or monitoring results, and photographs 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; and
  - d. If there is a recognized employee union or safety and health committee in the facility, notify it of the referral allegations and the employer's response.
- 5. If the Compliance Program Manager deems email an acceptable means of response, he shall so advise the employer and provide the appropriate email address in the letter.
- 6. If no employer response or an inadequate employer response is received after the allotted time, the Compliance Program Manager may contact the employer before an inspection is scheduled. If the employer provides no response or an inadequate response, or if the Compliance Program Manager determines from other information that the condition has not been or is not being corrected, an inspection shall be scheduled.
- 7. The Compliance Program Manager shall advise the complainant of the employer's response, and of the complainant's right to dispute that response, and, if the alleged hazard persists, of the right to request an inspection. When OHSB 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.
- 8. 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 in order to meet the requirements of a complaint.

- a. If the employee disagreement takes the form of a written and signed complaint, an inspection shall be performed.
  - b. If the employee disagreement does not take the form of a written and signed complaint, some discretion is allowed in situations when the information does not warrant an onsite inspection. In such situations, the complainant shall be notified of OHSB's intent to not conduct an inspection and the reasoning behind the determination. The reasons for this decision shall be documented in the case file.
9. If a signed complaint is received after the complaint inquiry process has begun, the Compliance Program Manager shall determine whether the alleged hazard is likely to exist based on the employer's response and by contacting the complainant. The complainant shall be informed that the inquiry has begun and that the complainant retains the right to request an onsite inspection if she disputes the results and believes the hazard still exists.
  10. The complaint shall not be closed until OHSB confirms that the hazard has been abated.

## **H. Complainant Protection**

### **1. Identity of the complainant**

Upon request of the complainant, his identity shall be withheld from the employer in accordance with Section 50-9-10 of the [Act](#). No information shall be given to the employer that would allow the employer to identify the complainant.

### **2. Discrimination protection**

Section 50-9-25 of the Act provides protection for employees who believe they have been the subject of an adverse employment action in retaliation for engaging in activities related to workplace safety and health. Any employee who believes that she has been discharged or otherwise retaliated against by any person because of engaging in such activities may file a discrimination complaint. Such a complaint must be filed within 30 days of the discharge or other discrimination.

Complainants should always be advised of their rights and protections under Section 50-9-25 of the Act upon initial contact with OHSB 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. Refer to OSHA [Instruction 03-06 \(IRT 01\)](#) (03-06 (ADM 01)), the IMIS Enforcement Data Processing Manual dated June 23, 2006.

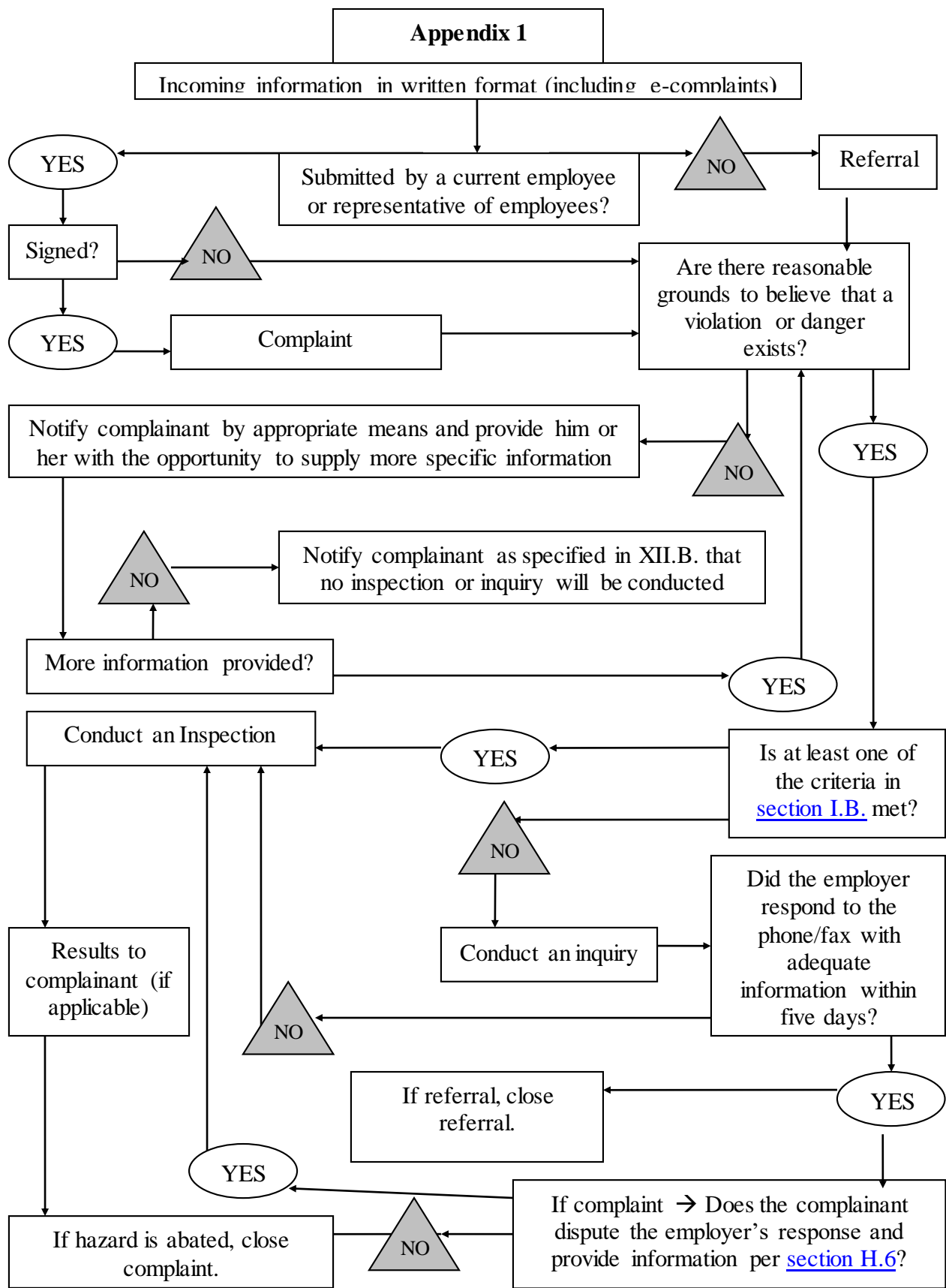
## **II. Decision Trees**

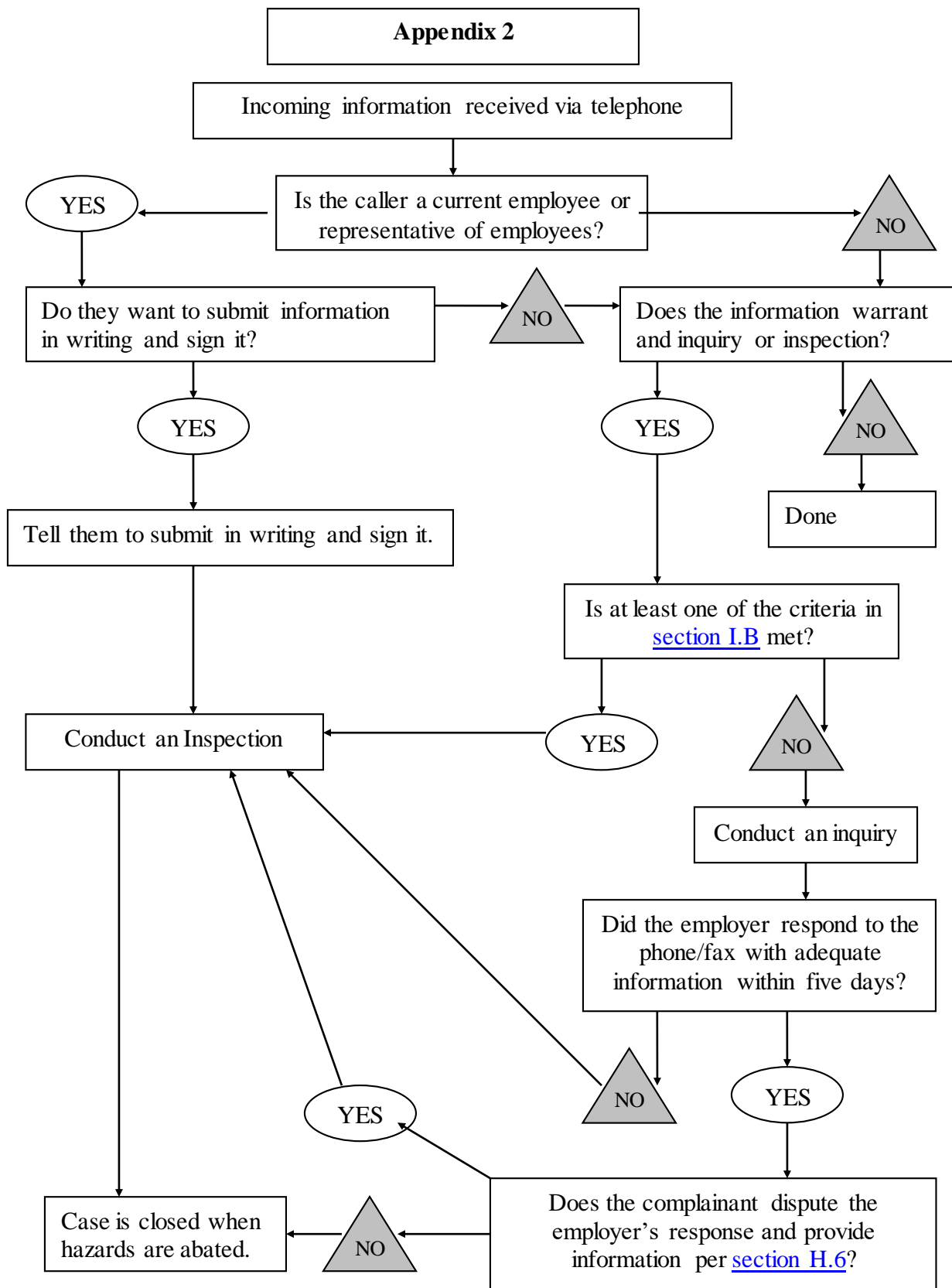
### **A. Decision Tree When Information is Obtained in Writing**

The decision tree shown in Appendix 1 provides guidance on appropriate enforcement actions or consultation activities when incoming information is provided in writing.

### **B. Decision Tree When Information is Obtained Verbally**

The decision tree shown in Appendix 2 provides guidance on appropriate enforcement actions or consultation activities when incoming information is provided verbally via the telephone.





### **Appendix 3**

#### **Referral Questionnaire**

Obtain information from the caller by asking the following questions, when relevant.

1. What is the hazard?
2. How are workers exposed to this hazard? Describe the unsafe or unhealthful working conditions; identify location.
3. 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?
4. With what frequency are workers 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, what actions were taken? What were the results?
5. How many shifts are there? What time do they start? On which shift does the hazardous condition exist?
6. 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.
7. How many people work in the establishment? How many are exposed to the hazardous conditions? How many do they get to the hazard?

8. Is there an employee representative or a union in the establishment? Include the name, address, and telephone number of the union or the employee representative(s).

For Health Hazards:

9. Has the employer administered any tests to determine employee exposure levels to the hazardous condition or substance? Describe these tests. Can the employees get the results (as required by the standard)? What were the results?

10. 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 that may reduce exposure to the hazard?

11. What administrative or work practice controls has the employer put in place?

12. 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?

13. Have there been any “near-miss” incidents?

14. Are respirators worn to protect against health hazards? If so, what kind? What exposures are they protected against?

15. If the complaint is related to noise, what, if any, hearing protection is provided to and worn by employees?

16. Do employees receive audiograms on a regular basis?

For Safety Hazards:

17. Under what adverse or hazardous conditions are employees required to work? This should include conditions contributing to stress and other probability factors.

18. Have any employees been injured because of this hazardous condition? Have there been any "near miss" incidents?

## Chapter 10 Industry Sectors

### I. Agriculture

#### A. Introduction

Special situations arising in the agriculture industry, which is regulated under [11.5.4 NMAC](#) (which incorporates standards from §1928) and the General Duty Clause, are discussed in this section. OHSB's jurisdiction in this industry includes, but is not limited to, egg farms, poultry farms, livestock grain and feed lot operations, dairy farms, horse farms, hog farms, fish farms, and fur-bearing animal farms. It should be noted that OHSB has very few standards that are applicable to this industry. Therefore, the use of the General Duty Clause will be required to address hazards not covered by the standards.

#### B. Definitions.

##### 1. Agricultural establishment

This term is defined in 11.5.4 NMAC as a business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants, or parts of plants. An agricultural employer is defined as any person who owns or operates an agricultural establishment or on whose premises or in whose interest an agricultural establishment is operated and any person who is responsible for the management and condition of an agricultural establishment or who acts directly or indirectly in the interest of an employer in relation to any employee.

##### 2. Farming operation.

This term is frequently used in the Department of Labor Appropriations Act, and has been defined in OSHA [Instruction CPL 02-00-051](#), Enforcement Exemptions and Limitations under the Appropriations Act, to mean any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on a site such as a farm, ranch, orchard, dairy or similar farming operation. These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 Farm Management Services).

##### 3. Post-harvesting processing.

This is a term that is used in CPL 02-00-051 in discussing enforcement guidance for small farming operations. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider or sauces, etc) or a higher degree of packaging versus field sorting for size in a shed.

#### C. Appropriations Act Exemptions for Farming Operations

##### 1. Exempt farming operations

OHSB is usually limited by provisions in the Appropriations Act as to which employers it may inspect. Under the Appropriations Act exemption for small farms, federal and state matching grant funds cannot be used for activities at worksites classified as farming operations which:

- a. Employs 10 or fewer employees currently and at all times during the last 12 months; and
- b. Has not had an active temporary labor camp during the proceeding 12 months.

To conduct activity at an exempt worksite requires that the activity be conducted with 100% state funding. Contact the Compliance Program Manager for further guidance in this situation.

## 2. Non-exempt farming operations

A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months **is not** exempt from inspection.

## 3. Enforcement guidance for small farming operations

The Appropriations Act exempts qualifying small farming operations from enforcement or administration of all rules, regulations, standards or orders under the Occupational Safety and Health Act, including rules affecting consultation and technical assistance or education and training services.

The Table 10-1 below provides an at-a-glance reference to OSHA activities under its funding legislation.

**Table 10-1: Department of Labor Appropriations Act Exception for Farming Operations**

OSHA Activity	Farming operations with 10 or fewer employees and no TLC activity within 12 months.	Farming operations with more than 10 employees or with a TLC with 12 months.
Programmed safety inspections	Not permitted	Permitted
Programmed health inspections	Not permitted	Permitted
Employee complaint	Not permitted	Permitted
Fatality or two or more hospitalizations	Not permitted	Permitted
Imminent danger	Not permitted	Permitted
Whistleblower Investigation	Not permitted	Permitted
Consultation and technical assistance	Not permitted	Permitted
Education and training	Not permitted	Permitted
Conduct Surveys and Studies	Not permitted	Permitted

## **D. Standards Applicable to Agriculture**

OHSB has very few standards that apply to employers engaged in agricultural operations. [11.5.4 NMAC](#) has specific requirements and also incorporates § 1928. Activities that take place after harvesting are considered general industry operations and are covered by OHSB's general industry standards.

### **1. Agricultural standards (§ 1928)**

- a. Roll-over protective structures (ROPS) for tractors - [§ 1928.51](#), [§ 1928.52](#), and [§ 1928.53](#) ;
- b. Guarding of moving machinery parts of farm field equipment, farmstead equipment, and cotton gins - [§ 1928.57](#) ; and
- c. Field sanitation - [§ 1928.110](#).

### **2. General industry standards (§ 1910)**

As stated in [§ 1928.21](#), the following seven general industry standards shall apply to agricultural operations:

- a. Temporary labor camps - [§ 1910.142](#). (See Chapter 15.);
- b. Storage and handling of anhydrous ammonia - [§ 1910.111](#) (a) and (b);
- c. Logging operations - [§ 1910.266](#) ;
- d. Signs for slow-moving vehicles - [§ 1910.145](#)(d)(10);
- e. Hazard communication - [§ 1910.1200](#) and as amended in 11.5.4 NMAC;
- f. Cadmium - [§ 1910.1027](#); and
- g. Retention of Department of Transportation markings, placards and labels for hazardous materials received by the employer - [§ 1910.1201](#)

Except to the extent specified above, the standards contained in Subparts B through T and Subpart Z of § 1910 do not apply to agricultural operations.

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

As in any situation where no standard is applicable, Section 50-9-5.A of the Act may be used if all the elements for a Section 50-9-5.A citation are met. See Chapter 4, Violations – [General Duty](#).

### **4. Tools for weeding and thinning crops**

As stated in [11.5.4.10 NMAC](#), New Mexico agricultural establishments are prohibited from using hoes, knives, or forks less than four feet in length.

### **5. Field sanitation**

As stated in 11.5.4.11 NMAC, New Mexico agricultural establishments must follow specific guidelines for providing access to potable drinking water, toilet and hand washing facilities.

### **6. Emergency medical care**

Regulation 11.5.4.12 NMAC contains specific requirements for providing emergency medical care for agricultural employees.

## E. Pesticides

### 1. Coverage

- a. Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ([FIFRA](#)), the New Mexico Department of Agriculture (NMDA), under the provisions of the Environmental Protection Agency, has jurisdiction over worker protection relating to pesticides (which also includes herbicides, fungicides and rodenticides). The EPA Worker Protection Standard (WPS) protects employees on farms, forests, nurseries, and greenhouses from occupational exposure to agricultural pesticides. The WPS includes standards for personal protective equipment, labeling, worker notification, safety training, safety posters, decontamination supplies, emergency assistance, and restricted field entry. See [40 CFR Part 170](#).
- b. The regulation covers two types of employees:
  - (i) Pesticide handlers  
Those who mix, load, or apply agricultural pesticides; clean or repair pesticide application equipment; or assist with the application of pesticides in any way.
  - (ii) Agricultural workers  
Those who perform tasks related to the cultivation or harvesting of plants on farms or in greenhouses, nurseries, or forests (such as carrying nursery stock, repotting plants, or watering) related to the production of agricultural plants on an agricultural establishment.
- c. For all pesticide use, including uses not covered by 40 CFR 170, it is a violation of FIFRA to use a registered pesticide in a manner inconsistent with its labeling. Thus, OHSB has no authority to issue any citations related to pesticide exposures, pursuant to Section 50-9-23 of the [Act](#). In the event that a CO should encounter any cases of pesticide exposures or the lack of an appropriate pesticide label on containers, a referral shall be made to the local [EPA office](#) or to the [NMDA](#).
- d. EPA also has jurisdiction in non-agriculture situations where pesticides are being applied by pest control companies. This includes, but is not limited to, applications in and around factories, warehouses, office buildings, and personal residences. OHSB cannot cite its hazard communication standard in such situations.

### 2. OHSB's hazard communication standard

Although OHSB will not cite employers covered under EPA's WPS with regard to hazard communication requirements for pesticides, agricultural employers otherwise covered by OHSB are still responsible for having a hazard communication program for hazardous chemicals that are not considered pesticides.

## II. Construction (Reserved)

## **Chapter 11**

### **Imminent Danger, Fatality, Catastrophe and Emergency Response**

#### **I. Imminent Danger Situations**

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

###### **1. Definition of imminent danger**

Section 50-9-14 of the [Act](#) defines imminent danger as “...any conditions or practices in any place of employment which are such that a danger exists that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Occupational Health and Safety Act...”

###### **2. Conditions of imminent danger**

The following conditions must exist before a hazard can be considered an imminent danger:

- a. Death or serious physical harm must be threatened; and
- b. It must be reasonably likely that a serious accident could occur immediately, or before abatement would otherwise be implemented.

Note: For a health hazard, exposure to the toxic substance or other health 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 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 Compliance Program Manager receives a report of imminent danger, she shall evaluate the inspection requirements and assign a CO to conduct the investigation.
- b. Every effort shall be made to conduct the imminent danger inspection on the same day 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 Compliance Program Manager shall 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 the steps the employer intends to take to eliminate the danger shall 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. Regulation [11.5.1.21 NMAC](#) 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. When an immediate inspection cannot be made after the Compliance Program Manager is alerted of an imminent danger condition and advance notice will speed the elimination of the hazard, the CO, at the direction of the Compliance Program Manager, shall give notice of an impending inspection to the employer.
- c. When advance notice of an inspection is given to an employer, it shall also be given to the identified authorized employee representative. If the inspection is in response to a complaint, the complainant shall be informed of the inspection unless this will cause a delay in eliminating the hazard.

### **C. Imminent Danger Inspection Procedures**

All alleged imminent danger situations identified by a CO while conducting any inspection shall be inspected immediately. Additional inspection activity shall take place only after the imminent danger condition has been resolved.

#### **1. Scope of inspection**

The CO may consider expanding the scope of an imminent danger inspection based on additional hazards discovered or alleged during the inspection.

#### **2. Procedures for inspection**

- a. Every imminent danger inspection will be conducted as expeditiously as possible.
- b. The CO shall 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 inspection in order to afford any or all of the representatives time to reach the area of the alleged imminent danger.
- c. As soon as practicable after discovery of an imminent danger condition, the employer shall be informed of such hazards. The employer shall then be asked to control the hazard by eliminating the hazardous condition or by removing employees from the danger area.

### **D. Elimination of the Imminent Danger**

#### **1. Voluntary hazard elimination**

If an employer voluntarily and completely eliminates the imminent danger without unreasonable delay:

- a. No imminent danger legal proceeding shall be instituted;
- b. The OSHA-8, Notice of an Alleged Imminent Danger, does not need to be completed;
- c. An appropriate citation(s) and notices of penalty shall be proposed for issuance with an appropriate notation on the OSHA-1B to document corrective actions; and
- d. The CO shall inform the affected employees or their authorized representative(s) that, although an imminent danger had existed, such danger has been eliminated. They shall also be informed of the steps taken by the employer to eliminate the hazardous condition.

#### **2. Voluntary elimination of the imminent danger hazard occurs when the employer controls the hazard by:**

- a. Immediately removes employees from the danger area; or

- b. Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area. Satisfactory assurance can be evidenced by:
      - (i) 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;
      - (ii) 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
      - (iii) A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. When personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.
- 3. Refusal to eliminate the imminent danger
  - a. If the employer does not or cannot voluntarily eliminate the hazard or remove employees from the exposure and the danger is immediate, the CO shall immediately consult with the Compliance Program Manager or designee and obtain permission to post an OSHA-8, Notice of an Alleged Imminent Danger.
  - b. The Compliance Program Manager or designee shall then contact the Bureau Chief and determine whether to consult with the OGC to obtain a Temporary Restraining Order (TRO).
  - c. The employer shall be advised that Section 50-9-14 of the [Act](#) gives the authority to district courts to restrain any condition or practice that is an imminent danger to employees.  
  
 Note: The department has no authority to order the closing of the operation or to direct employees to leave the area of the imminent danger or the workplace.
  - d. The CO shall notify affected employees and the employee representative that an OSHA-8 has been posted and shall advise them of their discrimination protection under the Section 50-9-25 of the Act. Employees will be advised they have the right to refuse to perform work in the area where the imminent danger exists.
  - e. The Compliance Program Manager, in consultation with the OGC, shall assess the situation and, if warranted, arrange for the expedited initiation of court action, or instruct the CO to remove the OSHA-8.
- 4. When harm will occur before abatement is required
  - a. If the CO has clear evidence that harm will occur before abatement is required (i.e., before a final order of the Commission in a contested case or a TRO can be obtained), he shall confer with the Compliance Program Manager 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 such finding may occur after further evaluation of the case file or receipt 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/Catastrophe Investigations

### A. Definitions

1. Fatality means 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 means 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 means being admitted as an inpatient to a hospital or equivalent medical facility.
4. Incident requiring a coordinated federal or state response is 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

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:

1. The Compliance Program Manager shall 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, not all items on the OSHA-36 need be completed at the time of this initial report. Whenever possible, the age of the victim should be provided, because this information is used for research by OSHA and other agencies.
2. The Compliance Program Manager shall fax an OSHA-36 for each event that will be investigated to the OSHA National Office and to OSHA Region VI office within 48 hours of receipt.

### C. Investigation Procedures

1. All fatalities and catastrophes within OHSB's jurisdiction will be thoroughly investigated in an attempt to determine the cause of the event. An investigation will also determine any effect the violation(s) had on the accident.
2. The investigation should be initiated as soon as possible after receiving report of the incident, ideally within one working day, by an appropriately trained and experienced CO assigned by the Compliance Program Manager or designee. The Compliance Program Manager shall determine the scope of the fatality/catastrophe investigation.
3. Inspections following fatalities or catastrophes may include videotaping when appropriate.
4. Under no circumstances should OHSB personnel conducting fatality/catastrophe investigations be unprotected against a hazard encountered during the course of an investigation. OHSB personnel shall use appropriate personal protective equipment and take all necessary precautions to prevent occupational exposure to potential hazards that may be encountered.

## **D. Interview Procedures**

1. Identify and interview persons
  - a. The CO shall attempt to identify and interview all persons with first-hand knowledge of the incident, including first responders, police officers, medical responders, other employees performing similar tasks, 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, she can serve as a resource by assisting in identifying employees who might have information relevant to the investigation.
  - c. The CO shall conduct employee interviews privately, outside the presence of the employer, in accordance with [11.5.1.21.E. NMAC](#). Employees are not required to inform their employer that they provided a statement to OHSB.
  - d. When interviewing the CO shall:
    - (i) Document the contact information of each interviewee in case a follow-up interview with a witness is necessary.
    - (ii) Reduce interviews to writing and have the interviewee sign the document. Transcribe video-and audiotaped interviews and have the witness sign the transcription.
    - (iii) Read the statement to the interviewee and attempt to obtain written acknowledgement that the statement is accurate. Note any refusal to sign or initial the statement.
    - (iv) Ask the interviewee to initial any changes or corrections made to his statement.
    - (v) Advise the interviewee of OHSB whistleblower protections.
2. Informant privilege
  - a. The informant privilege allows the government to withhold the identity of individuals who provide information about the violation of laws, including OHSB rules and regulations. The identity of witnesses will remain confidential to the extent possible. However, the CO shall inform each interviewee that disclosure of her identity may be necessary in connection with enforcement or court actions.
  - b. The informant privilege also protects the contents of statements to the extent that disclosure would reveal the interviewee's identity. When the contents of a statement will not disclose the identity of the informant (i.e., statements that do not reveal the interviewee's 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. The CO shall inform each interviewee that their interview statement may be released if they authorize such a release or if they voluntarily disclose the statement to others, resulting in a waiver of the privilege.
  - d. The CO shall inform interviewees in a tactful and non-threatening manner that making a false statement to a CO during the course of an investigation could be a

criminal offense. Section 9-50-24.L provides that the maximum penalty for making a false statement, upon conviction, is a fine of \$10,000 and six months in jail.

#### **E. Investigation Documentation**

COs shall thoroughly document all fatality and catastrophe investigations.

1. Personal data of victim

Potentially applicable items to be documented may include name, address, telephone number, age, sex, job title, date of employment, time in position, job being done at the time of the incident, training for job being performed at the time of the incident, employee deceased/injured, nature of injury, and prognosis of injured employee.

2. Incident data

Items that should be documented, if possible, include:

- a. An assessment of how and why the incident occurred;
- b. Sketches and drawings of the physical layout of the worksite, equipment, and location of personnel at the time of the incident;
- c. Measurements of the worksite and equipment, if applicable;
- d. Video/audio/photographs to identify key elements of the worksite and individuals interviewed; and
- e. An assessment as to whether the accident was work-related.

3. Equipment or process involved

Potential items to be documented may include:

- a. Equipment type;
- b. Equipment manufacturer;
- c. Equipment model;
- d. Equipment manufacturer's instructions;
- e. Kind of process;
- f. Condition of equipment;
- g. Misuse of equipment or process;
- h. Maintenance program;
- i. Equipment inspection logs or reports;
- j. Warning devices or detectors;
- k. Tasks performed;
- l. Frequency of equipment use;
- m. Energy sources and disconnecting means identified; and
- n. Supervision or instruction provided to employees involved in the accident.

4. Witness statements

Potential witnesses include, but are not limited to:

- a. The general public;

- b. Employees;
  - c. Managers;
  - d. Emergency responders; and
  - e. Medical personnel.
5. Safety and health management system
- Potential questions include:
- a. Does the employer have a safety or health management system?
  - b. Does the system address the type of hazard that resulted in the fatality/catastrophe?
  - c. How are the elements of the system 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 may include:
- a. Disciplinary Records,
  - b. Training Records, and
  - c. Next of kin information.

## **F. Potential Criminal Violations in Fatality and Catastrophe Cases**

1. Criminal penalties
- a. Section 50-9-24.J of the [Act](#) provides criminal penalties for an employer who willfully violates any provision of the Act or any order promulgated pursuant to the Act which results in the death of an employee. Section 50-9-24.L provides for criminal penalties for an employer who knowingly makes false statements during the course of an OHSB investigation.
  - b. The circumstances surrounding all occupationally related fatalities shall 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 Compliance Program Manager, 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:
    - (i) A fatality has occurred,
    - (ii) There is evidence that a violation contributed to the death, and
    - (iii) There is reason to believe that the employer was aware of the requirements of the Act or standard and knew that it was in violation of the Act or standard, or that the employer was plainly indifferent to employee safety.

If the Bureau Chief agrees with the Compliance Program Manager or designee's assessment of the case, the Bureau Chief shall notify the OGC to discuss referring the case to the Attorney General's Office for investigation of possible criminal violations.

#### **G. Families of Victims**

##### **1. Contacting family members**

Family members of employees involved in fatal or catastrophic occupational incidents shall be contacted early in the investigation and given the opportunity to discuss the circumstances of the incident. OHSB staff who contact 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) or the next of kin within five 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. 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. 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 complete. 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 the family that it is necessary so that potential litigation is not compromised.

#### **H. Public Information Policy**

OHSB's public information policy regarding response to fatalities and catastrophes is to explain OHSB presence to the news media. It is not to issue periodic updates on the progress of the investigation. The Bureau Chief will normally handle response to media inquiries.

## **I. Recording and Tracking for Fatality/Catastrophe Investigations**

### **1. Fatality/Catastrophe Report Form (OSHA-36)**

- a. If additional information relating to the event becomes available that affects the decision to investigate, the OSHA-36 is to be updated and re-submitted via fax to the Regional Office.

### **2. Investigation Summary Report (OSHA-170)**

- a. The OSHA-170 is used to summarize the results of investigations of all events that involve fatalities or catastrophes. An OSHA-170 must be opened, logged into IMIS, and saved as *final* as soon as possible following a workplace fatality within its jurisdiction. The information on this form enables the Bureau to summarize the circumstances surrounding the event.
- b. For fatality/catastrophe investigations, the OSHA-170 shall be:
  - (i) Modified as needed during the investigation to account for updated information.
  - (ii) 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 OSHA-170 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 shall be submitted for an event, regardless of how many inspections ensue. If a subsequent event occurs during the course of an inspection, a new OSHA-170 for that event shall be submitted.

Example: A fatality occurs in an employer's facility in August. Both a safety inspection and a health inspection result from that fatality. 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 to document 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 Compliance Program Manager is responsible for reviewing all fatality/catastrophe investigation case files to ensure the case has been properly developed and documented.

2. The Compliance Program Manager is responsible for ensuring that an OSHA-170 is reported in IMIS for each incident.
3. The Compliance Program Manager is responsible for reviewing all proposed violation-by-violation penalties in accordance with [Section VIII](#) of Chapter 6 of this manual.

#### **K. Post-Citation Procedures/Abatement Verification**

The regulation governing abatement verification is found at [§1903.19](#). OHSB's enforcement policies and procedures for this regulation are outlined in [Chapter 7](#) of this manual.

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 Compliance Program Manager should obtain abatement verification from the employer, along with an assurance 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 when a CO directly verifies that closure. Otherwise, certification by the employer is required. Follow-up inspections are not required if the CO has verified abatement during the inspection or if the employer has provided other proof of abatement.
3. When the worksite continues to exist, OHSB will normally conduct a follow-up inspection if serious citations have been issued.
4. Abatement language, and safety and health system implementation language, should be included in any settlement agreement.
5. If there is a violation that requires abatement certification, the date of abatement certification must be completed in the OSHA-1B form.
6. If the case is an Enhanced Enforcement Program case, follow-up inspections shall be conducted in accordance with the [Enhanced Enforcement Directive](#) 09-15 adopted December 11, 2008. Follow-up inspections will normally be conducted even if abatement of cited violations has been verified through abatement verification.

#### **L. Audit Procedures**

The State Internal Evaluation Program shall be used to evaluate compliance with, and the effectiveness of, fatality/catastrophe investigation procedures.

#### **M. Relationship of Fatality and Catastrophe Investigations to Other Programs**

1. Homeland security

OSHA's National Emergency Management Plan (NEMP), as contained in Instruction [HSO 01-00-001](#), clarifies the procedures and policies for OSHA's national office and state offices during responses to incidents of national significance. Generally, OHSB will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health. When the President makes an emergency declaration under the Stafford Act, the National Response Plan (NRP) is activated. The NEMP can then be activated by the Assistant Secretary, the Deputy Assistant Secretary, or by request from a Bureau Chief. Whether OHSB 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 that is also classified as a repeat or willful, related to the death;
- b. A fatality inspection in which there is at least one serious violation related to the death, and the employer has a history of violations similar to the violation that led to the current fatality and that consisted of at least one serious, willful, or repeated violation within the last three years;
- c. 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;
- d. An inspection that results in three or more serious violations that are also classified as willful or repeat, and the employer has a history of violations similar in kind to one or more of the serious violations found in the current inspection consisting of at least one serious, willful, or repeat violation within the last three years;
- e. An inspection that results in at least one failure-to-abate penalty notice when the underlying violations were classified as serious;
- f. Any egregious case.

In cases, the instructions outlined in OHSB's [EEP directive](#) shall be followed closely 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, thorough documentation is necessary to sustain legal sufficiency.
- b. In cases involving a fatality or catastrophe, the Compliance Program Manager shall inform the Bureau Chief who shall review the case to determine if the OGC or others within the Environment Department need to be notified.

## 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, the investigation and the inspection may be conducted either concurrently or separately.

## 5. Consultation programs

If the fatality or catastrophe occurred at a VPP site or OSP site, the Bureau Chief, as well as the Consultation Program Manager shall be notified. When enforcement activity has concluded, the Consultation Program Manager shall be informed so that the site can be reviewed for program issues.

## **N. Special Issues Related to Workplace Fatalities**

### **1. Death by natural causes**

The employer must report workplace fatalities caused by natural causes, including heart attacks, to OHSB. The Compliance Program Manager shall decide whether to investigate the incident, depending on the circumstances.

### **2. Workplace violence**

The employer must report fatalities caused by incidents of workplace violence to OHSB. The Compliance Program Manager shall determine whether the incident will be investigated.

### **3. Motor vehicle accidents**

- a. OHSB does not have jurisdiction over 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 OSHA 300 Log of Work Related Injuries and Illnesses, OHSB does not investigate such accidents. See [§1904.39.\(b\)\(3\)](#).

## **III. Rescue Operations and Emergency Response**

### **A. OHSB's Authority to Direct Rescue Operations**

#### **1. Direction of rescue operations**

OHSB has no authority to direct rescue operations. Such operations are the responsibility of the employer or local political subdivisions or state agencies.

#### **2. Monitoring and inspecting working conditions of rescue operations**

OHSB does have the authority to monitor and inspect working conditions of covered employees engaged in rescue operations to ensure that all necessary procedures are in place to protect the lives of the rescuers, and to provide technical assistance when appropriate.

### **B. Voluntary Rescue Operations Performed by Employees**

OHSB recognizes that an employee may choose to place himself heroically at risk to save the life of another person. The following provides guidance on OHSB's citation policy toward employers whose employees perform, or attempt to perform, rescues of individuals in life-threatening danger.

#### **1. Imminent danger**

The OHSB Bureau Chief shall make a decision regarding the issuance of citations for those instances when imminent danger existed during the course of a voluntary rescue operation by an employee. Factors that may cause a citation to be issued in these circumstances are:

- 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 a workplace operation 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.

### **C. Emergency Response**

#### **1. Role in emergency operations**

While it is OHSB's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, OHSB does not have authority to direct emergency operations.

#### **2. Response to catastrophic events (Note: these are not requirements of the Act)**

OHSB 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. OHSB's role**

- a. For inspections of an ongoing emergency response or post-emergency response operation when there has been a catastrophic event, or when OHSB is acting under the National Emergency Management Plan ([NEMP](#)), the Bureau Chief shall determine the overall role that OHSB will play. Refer to [CPL 02-02-073](#) Inspection Procedures for Emergency Response to Hazardous Substance Releases.
- b. During an event that is covered by the NEMP, OHSB has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the federal on-scene coordinator.
- c. For details on OHSB'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, refer to [CPL 02-00-094](#), OSHA Response to Significant Events of Potentially Catastrophic Consequences.

#### **4. Incidents of national significance**

For detailed procedures on how to proceed during incidents of national significance when OSHA is the primary federal agency for the coordination of technical assistance and consultation for emergency response and recovery worker health and safety, refer to the [NEMP](#), the [Worker Safety and Health Support Annex](#), and the State of New Mexico [All Hazard Emergency Operations Plan](#) of July 2007.

## Chapter 12 Specialized Inspection Procedures

### I. Multi-Employer Workplace/Worksite [Reserved]

This section shall be completed after receiving the section from federal OSHA.

### II. Temporary Labor Camps

#### A. Introduction

The temporary labor camp standard, [§1910.142](#) is applicable to both agricultural and non-agricultural workplaces.

#### B. Definitions

Section 1910.142 does not contain a definition section. The following definitions reflect OHSB's interpretation of the standard.

##### 1. Temporary

The term "temporary" in §1910.142 refers to employees who enter into an employment relationship for a discrete or defined time. As a result, the term "temporary" refers to the length of employment, and not to the physical structure housing employees.

##### 2. Temporary labor camp housing

Temporary labor camp housing is required employer-provided housing that, due to company policy or practice, necessarily renders such housing a term of condition of employment.

##### 3. New construction

All agriculture housing construction started on or after April 3, 1980, including totally new structures and additions to existing structures, will be considered new construction. Cosmetic remodeling work on pre-1980 structures will not be considered new construction and should be treated as existing housing.

#### C. Enforcement of Temporary Labor Camp Standards for Agriculture

##### 1. Choice of standards on construction prior to April 3, 1980

Prior to walkaround inspections of temporary labor camps built before April 3, 1980, employers providing the housing will be asked to specify their preference of applicable departmental standards. Choices shall be limited to Subpart E of [Part 654](#) or [§1910.142](#), or provisions contained in variances from these standards. If an employer has been issued a variance, it shall produce copies upon request. See Housing for Agricultural Employees, [§500.132](#).

- a. In instances when Subpart E of Part 654 is specified as the governing standard for existing housing, hazardous conditions violating both the Employment and Training Administration (ETA) and OHSB requirements shall be cited under the OSHA standard. Hazardous conditions found in violation of ETA standards, but in compliance with §1910.142 shall not be cited.
- b. In instances where conditions are deemed in violation of the ETA standard and not covered by the OSHA standard, either Section 50-9-5 of the Act shall be cited (only serious violations) or such deficiencies shall be brought to the employer's attention and correction shall be encouraged.

- c. In instances where [§1910.142](#) is selected by the employer as the governing standard for the existing facility or are applicable in the case of "new construction," all requirements of that standard shall apply and shall be cited when violations are found.
  - d. Under no circumstances shall Subpart E of Part 654 be cited by the CO, since no authority exists within the Act to cite standards not adopted under the Act.
2. Informing employers

Prior to the inspection of an agriculture housing facility, employers shall be made aware of the foregoing policy and procedures during the opening conference. This policy applies to all employment-related agriculture housing covered by OHSB, regardless of whether or not employees housed in the facility are recruited through the U.S. Employment Service's inter-intrastate clearance system.

3. Agriculture worksites under OHSB responsibility

For agriculture worksites under OHSB jurisdiction, [§1928.21](#) provides for the application of the §1910 applicable standards.

#### **D. OHSB Enforcement for Non-Agriculture Worksites**

1. For non-agricultural worksites other §1910 standards may be cited for hazards that are not covered under [§1910.142](#). For non-agricultural worksites, the Temporary Labor Camp standard has no provisions that specifically apply to fire protection, so those standards are not explicitly pre-empted by the Temporary Labor Camp standard. The same is true for [§1910.36](#) and [§1910.37](#) (exit routes). However, [§1910.38](#) (emergency action plans) applies only when an emergency action plan is required by a particular OSHA standard, so it cannot be used with temporary labor camps.
2. Examples of temporary labor camp housing for non-agricultural worksites would be for the construction industry and garment industry in the Pacific territories. Such housing for these industries may also be found in large cities and rural areas in various parts of the United States.
3. The choice of standards issue, discussed in Paragraph D.1, does not apply to non-agricultural temporary housing.

#### **E. Employee Occupied Housing**

Generally, inspections shall be conducted when housing facilities are occupied and as soon as feasible so that any hazards identified may be corrected early in the work season.

1. Since employees may not speak English, or may only speak English as a second language, every effort shall be made to send a bi-lingual CO on the inspection or have a bi-lingual person accompany the CO to translate conversations with employees.
2. The CO shall conduct inspections in a way that minimizes disruptions to those living in the housing facilities. If an occupant of a dwelling unit refuses entry for inspection purposes, the CO shall not insist on entry and shall continue the rest of the inspection unless the lack of access to the dwelling unit involved would substantially reduce the effectiveness of the inspection. In that case, valid consent should be obtained from the owner of the unit. If the owner also refuses entry, the procedures for refusal of entry shall be followed. See Chapter 15, Legal Issues. The same shall apply in cases when employers refuse entry to the housing facility or to the entire worksite.
3. During inspections, the CO shall encourage employers to correct hazards as quickly as possible. Particular attention shall be paid to identifying instances of failure to abate and

repeated violations from season to season or past occupancy. These violations shall be cited in accordance with normal procedures.

## **F. Primary Concerns**

When conducting a housing inspection, the CO shall be primarily concerned with those facilities or conditions that most directly relate to employee safety and health. Accordingly, all housing inspections shall address at least the following:

1. Site
  - a. Review the location of the site for adequate drainage in relation to periodic flooding, swamps, pools, sinkholes, and other surfaces where water may collect and remain for extended periods.
  - b. Determine whether the site is adequate in size to prevent overcrowding and whether it is located within 500 feet of livestock.
  - c. Evaluate the site for cleanliness and sanitation, i.e., free from rubbish, debris, wastepaper, garbage, and other refuse.
2. Shelter
  - a. Determine whether the shelter provides protection against the elements; has the proper floor elevation and floor space; whether rooms are used for combined purposes of sleeping, cooking and eating; and whether all rooms have proper ventilation and screening.
  - b. Determine which rooms are used for sleeping purposes, the number of occupants, size of the rooms, and whether beds, cots, or bunks and lockers are provided.
  - c. Determine what kind of cooking arrangements or facilities are provided, and whether all heating, cooking and water heating equipment is installed in accordance with state and local codes.
3. Water supply

Determine whether the water supply for drinking, cooking, bathing and laundry is adequate and convenient, and has been approved by the appropriate local health authority.
4. Toilet facilities

Determine the type, number, location, lighting, and sanitary conditions of toilet facilities.
5. Sewage disposal

Determine, in camps where public sewers are available, whether all sewer lines and floor drains are connected.
6. Laundry, hand washing and bathing facilities
  - a. Determine the number, kind, locations and conditions of these facilities, and whether there is an adequate supply of hot and cold running water.
  - b. Determine also whether such facilities have appropriate floors, walls, partitions and drains.
7. Lighting
  - a. Determine whether electric service is available, and if so, if appropriate light levels, number of ceiling-type light fixtures, and separate floor- or wall-type convenience outlets are provided.

- b. Determine also whether the light fixtures, floor and wall outlets are properly grounded and covered.
8. Refuse disposal and insect and rodent control  
Determine the type, number, locations and conditions of refuse disposal containers, and whether there are any infestations of animal or insect vectors or pests.
9. First-aid facilities  
Determine whether adequate first-aid facilities are available and maintained for emergency treatment.

## **G. Dimensions**

The relevant dimensions and ratios specified in [§1910.142](#) are mandatory; however, the CO may exercise discretion to not cite minor variations from specific dimensions and ratios when such violations do not have an immediate or direct effect on safety and health. In those cases in which the standard itself does not make reference to specific dimensions or ratios but instead uses adequacy as the test for the cited conditions and facilities, the Bureau Chief shall make the determination as to whether a violation exists on a case-by-case basis considering all relevant factors.

## **H. Documentation for Housing Inspections**

The following facts should be documented:

1. The age of the dwelling unit, including any additions. For recently built housing, date the construction was started.
2. Number of dwelling units and the number of occupants in each unit.
3. Approximate size of the area where the housing is located and the distance between dwelling units and water supply, toilets, livestock and service buildings.

## **I. Condition of Employment**

The Act covers only housing that is a term and condition of employment. Factors that determine whether housing is a term and condition of employment include situations when:

1. Employers require employees to live in the housing.
2. The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.
3. Additional factors include, but are not limited to:
  - a. Cost of the housing to the employee. Is it provided free or at a low rent?
  - b. Ownership or control of the housing. Is the housing owned or controlled or provided by the employer?
  - c. Distance to the worksite from the camp, and distance to the worksite from other non-camp residences. Is alternative housing reasonably accessible (distance, travel, cost, etc.) to the worksite?
  - d. Benefit to the employer. Does the employer make the camp available in order to ensure that the business is provided with an adequate supply of labor?
  - e. Relationship of the camp occupants to the employer. Are those living in the camp required to work for the employer upon demand?

## **Chapter 13    Discrimination Complaints**

### **I.    General**

#### **A.    Statutory Background**

1. Section 50-9-25.A of the [Act](#) provides that "No person or employer shall discharge or in any manner discriminate against any employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the . . . Act or has testified or is about to testify in any such proceedings or because of the exercise by the employee on behalf of himself or others of any right afforded by the . . . Act."
2. Section 50-9-25.B of the Act provides a procedural mechanism for employees who believe they have been discriminated against in violation of Section 50-9-25.A.
3. In addition to the federal equivalent of Section 50-9-25 of the [Act](#), there are 16 other whistleblower statutes that are administered by federal OSHA. OHSB is responsible only for screening initial calls from protected employees covered by one of these other statutes and referring them to the Region VI Discrimination Office. [Table 13-1](#) of this manual contains a listing of all the federal whistleblower statutes.

#### **B.    Interpretations**

The general policy of the Bureau is to protect employee rights to the maximum extent permissible by law. In general, the Bureau shall abide by and apply the interpretations that OSHA has adopted in applying virtually identical provisions of the federal Act. Those interpretive rulings are contained in [§1977](#). Unless otherwise specified, those interpretations apply to the Bureau's enforcement of the Act.

Section 12(b)(1) of §1977 specifically states, "...there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." Section 12(b)(2) of §1977 does state that occasions may arise when the employee would be protected from refusing to expose himself to serious injury or death arising from a hazardous condition at the workplace. However, an employee who walks off the job is only protected by the Act if the condition causing the employee's apprehension of death or injury is of such a nature that a reasonable person would conclude that there is a real danger of death or serious injury and that there is insufficient time to eliminate the danger through statutory enforcement channels.

#### **C.    Responsibilities**

1. The Discrimination Coordinator shall be the first option for receiving complaints and shall assign the investigation of the complaint to a Discrimination Investigator. The Discrimination Coordinator shall also be responsible for making sure the case is docketed appropriately and shall monitor the status of active cases to ensure deadlines are met.
2. The Discrimination Investigators shall take complaints, conduct investigations, make recommendations for proper adjudication of complaints, assist in legal adjudication when necessary, and assist in negotiating settlement agreements.
3. The Bureau Chief shall be responsible for the overall performance of the Discrimination Investigators and the Discrimination Coordinator. These duties include reviewing discrimination complaint case files and making the final determination on case merit when such authority is delegated by the Department Secretary.

4. The Environment Protection Division Director shall be responsible for ruling on appeals filed by complainants when such authority is delegated by the Department Secretary.
5. The OGC will assist in interpretation of the regulations governing the application of the Act and will, when requested provide assistance in obtaining court enforcement of the Act's provisions.

#### **D. Investigative Records**

Investigative materials or records include interviews, notes, work papers, memoranda, e-mails, documents, and audio or video recordings received or prepared by an investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties related to an investigation. Such original materials are records that are the property of the State of New Mexico and must be included in the case file. The Bureau shall keep all case file information for a period of three years as described by the [1.18.607.171 NMAC](#) regulation governing record retention.

The issue of trade secrets related to an investigation are the same as for a compliance investigation and are described in Chapter 3, Section VII.E.

The disclosure of information contained in whistleblower case files is governed by the same regulations as for other enforcement case files, as described in Chapter 5, Section XI.

## **II. Pre-Investigation Procedures**

### **A. Complaint Processing**

1. Section 50-9-25.B provides that "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such alleged violation occurs, file a complaint with the secretary in writing and acknowledged by the employee, alleging such discrimination."
2. The Bureau's policy is to be as accessible as possible to employees who have legitimate discrimination complaints. Any employee or employee representative is permitted to file a discrimination complaint with any of the following OHSB staff members:
  - a. Discrimination Coordinator,
  - b. Discrimination Investigator,
  - c. COs, or
  - d. Managers.
3. Through this broad access to the procedures and rights provided under the Act, employees are provided sufficient opportunity to file complaints and seek redress for alleged discrimination.
4. At a minimum, when an oral complaint is filed, the complainant's name, address and telephone number shall be obtained.
5. All complaints shall be recorded to ensure that the date of filing is properly documented.
6. Any OHSB employee receiving a discrimination complaint orally shall:
  - a. If the complainant is physically present in the office, inform a Discrimination Investigator immediately so that the complainant can be interviewed; or
  - b. If the complaint is received by telephone, obtain and report the name, address, and telephone number at which the complainant can be reached. The Discrimination

Investigator shall contact the complainant as soon as possible after receipt of this information.

## **B. Screening Complaints**

The requirements for accepting a complaint for investigation vary depending upon the type of employer. For all except those covered by 50-9-25 of the [Act](#), the complaint shall be forwarded to the OSHA Region VI Whistleblower Investigator. The complainant need not explicitly state the statute in the complaint. Table 13.1 shown below describes the various whistleblower statutes that provide for employee protection.

<b>Table 13-1 Whistleblower Statutes</b>				
<b>Act</b>	<b>Days to File</b>	<b>Form</b>	<b>Coverage</b>	<b>Days to appeal</b>
<b><u>Section 50-9-25 of the State Act.</u></b> Section 50-9-25 protection for employees who exercise a variety of rights guaranteed under the Act, such as filing a S & H complaint with OHSB, participating in an inspection, etc.	30	Written	Public and private sector	15
<b><u>Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA).</u></b> [15 USC §2651] protection for individuals who report violations of environmental laws relating to asbestos in elementary and secondary school systems, whether public or private.	90	Any	Public and private sector	5
<b><u>Section 7 of the International Safe Container Act of 1977 (ISCA).</u></b> [46 App USC §1506] protection for employees who report an unsafe intermodal cargo container.	60	Any	Private sector	15
<b><u>Section 405 of the Surface Transportation Assistance Act of 1982 (STAA).</u></b> [49 USC §31105] protections for drivers and other employee relating to the safety of commercial motor vehicles. Coverage includes all buses (for hire), hazardous material vehicle placarded, and freight trucks with a gross vehicle weight of 10,001 pounds.	180	Any	Private sector transporting hazardous material	30
<b><u>Section 1450 of the Safe Drinking Water Act of 1974 (SDWA).</u></b> [42 USC §300j-9(i)] protection for employees who report potential violations regarding all waters actually or potentially designed for drinking use, whether from above ground or underground sources.	30	Written	Private and public (except federal)	30
<b><u>Section 507 of the Federal Water Pollution Control Act, Amendments of 1972 (FWPCA).</u></b> [33 USC §1367] Also called the Clean Water Act, protection for employees who report potential violations regarding discharges of pollutants into the waters of the United States.	30	Written	Private sector	30
<b><u>Section 23 of the Toxic Substances Control Act of 1976 (TSCA).</u></b> [15 USC §2622] protection for employees who report potential violations regarding industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act ( <u>EPCRA</u> ).	30	Written	Public and private sector	30
<b><u>Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA).</u></b> [42 USC §6971] Also called the Resource Conservation and Recovery Act (RCRA), protection for employees who report potential violations regarding the disposal of solid and hazardous waste at active and future facilities, see CERCLA for abandoned or historical sites.	30	Written	Public and private sector	30
<b><u>Section 322 of the Clean Air Act, Amendments of 1977 (CAA).</u></b> [42 USC §7622] protection for employees who report potential violations regarding air emissions from area, stationary, and mobile sources.	30	Written	Public and private sector	30
<b><u>Section 10 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).</u></b> [42 USC §9610] a.k.a. “Superfund,” protection for employees who report potential violations regarding clean up of uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment.	30	Written	Public and private sector	30
<b><u>Section 211 of the Energy Reorganization Act of 1974 (ERA).</u></b> [42 USC §5851] protection for employees who report potential violations regarding facilities licensed by the Nuclear Regulatory Commission.	180	Written	Employees of nuclear licenses or DOE	30
<b><u>Section 519 of the Wendell H. Ford Aviation Investment</u></b>	90	Written	Private sector	30

<a href="#"><u>and Reform Act for the 21st Century (AIR 21)</u></a> , [49 USC §42121] protection for employees who report potential violations of air carrier			employees in airline industry	
<a href="#"><u>Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX)</u></a> , [18 USC § 1514A] protection for employees who report potential violations of mail, wire, or bank fraud, or the Securities Exchange Act or any other federal law relating to fraud against shareholders.	90	Written	Private sector	30
<a href="#"><u>Section 6 of the Pipeline Safety Improvement Act of 2002 (PSIA)</u></a> , [49 USC §60129] protection for employees who report violations of federal law regarding pipeline safety and security or who refuse to violate such provisions. It includes a provision for levying up to \$1,000 civil penalties against the employer.	180	Written	Private and non-federal public sector employees in pipeline industry	60
<a href="#"><u>Federal Rail Safety Act (FRSA)</u></a> , as amended by § 1521 of the 9/11 Act of 2007, Public Law 110-53. Provides protection to employees of railroads who report a violation of any federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of federal grants or other public funds intended to be used for railroad safety or security; reporting, in good faith, a hazardous safety or security condition; refusing to violate or assist in the violation of any federal law, rule, or regulation relating to railroad safety or security; refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties (under imminent danger circumstances).	180	Written	Private and public sector employees in railroad industry	30
<a href="#"><u>National Transit Security Systems Act (NTSSA)</u></a> [Public Law 110-53] (Public Transportation Employee Protections). Provides protection to employees who report a violation of any federal law, rule, or regulation relating to public transportation safety or security, or fraud, waste, or abuse of federal grants or other public funds intended to be used for public transportation safety or security; refusing to violate or assist in the violation of any federal law, rule, or regulation relating to public transportation safety or security; reporting a hazardous safety or security condition; refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties (under imminent danger circumstances).	180	Any	Public sector employees in public transportation	30
<a href="#"><u>Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. Section 2087</u></a> To establish consumer product safety standards and other safety requirements for children's products and to reauthorize and modernize the Consumer Product Safety Commission.	180	Any	Public or private sector employees in manufacturing, labeling, distribution, or retailing.	30
<a href="#"><u>Affordable Care Act (ACA), 29 U.S.C. Section 208</u></a> Provides protection from retaliation for employees who receive compensation under, or who provide information about employers who violate laws covered by, the healthcare reform act.	180	Any	Public or private sector employee.	30

### C. Requirements for Filing a 50-9-25 (Whistleblower) Complaint

Note: The remainder of this chapter deals only with 50-9-25 complaints.

Generally, in order for a complaint to be accepted for whistleblower investigation, it must:

1. Be filed by an employee or an employee representative (the complainant);
2. Be filed in writing;
3. Be filed with the Bureau within the 30-day period immediately following the date of the alleged violation;
4. Be signed and acknowledged by the employee;
5. Contain allegations of discrimination in violation of Section 50-9-25.A; and
6. Be filed against a person (respondent) operating within the jurisdiction of OHSB.
  - a. Section 50-9-25 of the [Act](#) states “No person or employer shall discriminate.” A “person” is defined in Section 50-9-3.A as “any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency or any other legal entity or their legal representatives, agents or assigns.” Thus, the complaint can be filed against agents other than an employer.
  - b. Section 50-9-3.B of the Act defines an “employee” as “an individual who is employed by an employer, but does not include a domestic employee or a volunteer non-salaried firefighter.”

Note: When the complainant has notified the Bureau orally within the 30-day period, the Bureau shall proceed with the investigation and shall obtain a written, signed complaint later.

#### **D. Docketing the Case**

If the complaint meets the basic requirements of [Section C](#) above, the Discrimination Investigator shall enter the case into a case log that shall contain the name of the case, the date the complaint was received, the date the case was closed, and how the case was resolved. The case log is located at this address: [P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\DiscCases10.xls](#). The last two digits of the file name represent the calendar year and will change yearly.

The local case number will be a number in the format YY-XX, where “YY” is the current year and “XX” is a sequential number.

The Discrimination Investigator should also record the case in the IMIS.

#### **E. Extension of the 30-day Filing Requirement**

There may be circumstances that would justify extending the 30-day period for filing, but in no case will the filing period be extended beyond 90 days. Reasons for extending the filing deadline include:

1. When the employer has actively concealed, or misled the employee regarding the existence of the adverse action or the retaliatory grounds for the adverse action;
2. When the employee is unable to file within 30 days due to debilitating illness or injury.
3. When the employee is unable to file within 30 days due to a natural disaster such as a snowstorm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with the Bureau within the filing period; or

4. When the employee mistakenly filed a timely retaliation complaint with another agency that does not have the authority to grant relief.

#### **F. Reasons for not Extending the Filing Deadline**

The following are some of the conditions that will not justify an extension of the filing period:

1. Ignorance of the statutory filing period;
2. Filing of unemployment compensation claims;
3. Filing a worker's compensation claim;
4. Filing a private negligence or damage suit; or
5. Filing a grievance or arbitration action.

#### **G. Processing Oral Complaints**

When the Discrimination Investigator determines that the basic requirements of a discrimination case exist but a written claim has not been met, the officer shall send the complainant a packet containing two letters and a form that prompts the complainant to submit the pertinent required information. This packet may be found in the document located here: [P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\discrimination\\_packages \(letters\)\Initial Packet.doc](P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\discrimination_packages (letters)\Initial Packet.doc).

#### **H. Processing Complaints not Meeting Requirements**

1. Any complaints not meeting the formality requirements of Section 50-9-25.A shall be returned in writing to the complainant with a description of the deficiencies in the complaint. This return will not prejudice the filing of a new or amended complaint. When questions arise concerning the formality requirements, the OGC shall be consulted. A complaint that has been returned for this reason shall be deemed to meet the 30-day time limitation if the original complaint met the time limit.
2. Inappropriate for investigation  

Complaints are considered inappropriate for investigation if they are not filed in time without suitable mitigating circumstances, if the respondent is outside of OHSB jurisdiction, if there is no coverage for the employee under the OHS Act, or if there is no protected activity. If the case is inappropriate for investigation as set forth above, the complainant shall be specifically informed via a certified letter as to the reasons for such a finding.

  - a. If the complainant does not agree with the finding and does not agree to administrative closure of the case, it shall be processed until a finding of merit or non-merit can be issued.
  - b. If the complainant accepts the reasons as to why the complaint is not acceptable, it shall be administratively closed. However, no complaint involving protected activity may be closed without a merit or non-merit decision unless the complainant indicates she does not desire to pursue her complaint. The Discrimination Investigator may not solicit withdrawal of any complaint involving protected activity. All complaints closed by administrative closure or withdrawal shall be confirmed by letter to the complainant stating the reasons the case is inappropriate for further action.

#### **I. Processing Complaints Meeting Requirements**

1. If the complaint meets the formality requirements, the Discrimination Investigator shall notify the complainant via a certified letter of the acceptance of the complaint and that an investigation will result. A sample acceptance letter is located at this site: <P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\Samples\ComplaintReceived.doc>
2. Enforcement of the provision of Section 50-9-25 is not only a matter of protecting the rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the investigation. Jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. However, a voluntary and un-coerced request from a complainant to withdraw her complaint shall be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure.
3. Prima facie complaints

If the allegations show prima facie evidence of a violation, the discrimination investigation shall proceed as follows:

  - a. All such complaints shall be assigned by the Discrimination Coordinator to a Discrimination Investigator for investigation; and
  - b. Based on the evaluation of the allegation, an early attempt at a resolution of the complaint shall be undertaken.

### III. Field Investigation

If the complaint meets the threshold requirements, the investigation shall begin as soon as possible.

#### A. General

1. The investigation shall be conducted in a manner that will most appropriately result in an informed determination, including but not limited to taking interview statements, investigation at the workplace, and a review of the complainant's personnel files.
2. It should be made clear to all parties that OHSB does not represent either the complainant or respondent, and that the complainant's allegation and the respondent's proffered non-retaliatory reason for the alleged adverse action must be tested. It is on this basis that relevant and sufficient evidence should be identified and collected in order to reach an appropriate determination of the case. It is not the complainant's responsibility to prove his or her allegation, nor is it the responsibility of the respondent to disprove the allegation.

Rather, the investigator must bear in mind during all phases of the investigation that he or she, not the complainant or respondent, is the expert regarding the information required to satisfy the elements of a violation of the statutes administered by OHSB. This applies not only to complainants and respondents but to other witnesses as well; quite often they are unaware they have knowledge that would help resolve a jurisdictional issue or establish an element. This is solely the responsibility of the investigator, although it assumes the cooperation of the complainant. If, having interviewed the parties and relevant witnesses and examined relevant documentary evidence, the investigator is unable to prove, by a preponderance of the evidence, the elements of a prima facie allegation, then the case should be dismissed.

3. The Discrimination Investigator shall take a statement from the complainant and his witnesses. If there is prima facie evidence of a violation, the Discrimination Investigator shall notify the respondent of the allegation.
  - a. A copy of the complaint shall be sent with this notification. Names of all witnesses shall be redacted from the copy sent to the respondent.
  - b. This contact with the respondent shall be made by certified mail, return receipt requested, or by hand delivery, with signed receipt of the delivery.
  - c. The sample letter used to notify the respondent of the complaint and to ask for information from the respondent is located at: <P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\Samples\RespondentNotification.doc>
  - d. The Discrimination Investigator shall record the beginning elements of the case in IMIS.
4. The investigating officer shall advise the Bureau Chief of any novel, complex, or policy related issues that arise during the course of the investigation. If such issues arise, the Discrimination Investigator shall maintain direct contact with the OGC or Bureau Chief for advice and direction.

#### **B. Case File**

A case file containing the following elements shall be maintained for all discrimination investigations:

1. Diary

A diary of activity related to the case shall be maintained using a word processing document. The date of each important interaction with any party shall be recorded to maintain a timeline of investigative activity.
2. Intake worksheet

The information obtained in the original call or document which initiated the investigation shall be recorded on the intake worksheet. A copy of the worksheet can be found at: <P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\Samples\Intake.doc>
3. Complaint notification

This is a copy of the packet sent to the complainant asking for her written statement of the complaint.
4. Original complaint

A copy of the written complaint from the complainant shall be kept in the case file.
5. Respondent notification

This is a copy of the letter sent to the respondent notifying him of the complaint.
6. Miscellaneous correspondence

Any other letters, emails, faxes, including copies of certified mailing documents shall be maintained in the case file.
7. Interview sheets

When interviews are conducted, the Discrimination Investigator shall record important information for inclusion in the case file. Audio recordings of interviews should be obtained whenever possible and maintained in the case file. For ease of reviewing the case file, important findings discovered from audio interviews should be reduced to writing.

8. Respondent's response to the complaint and any supporting documents shall be maintained in the case file.

9. Timeline

An event timeline should be created in all cases and included in the case file. This is not a timeline of the investigation, rather a timeline of the events surrounding the adverse action. Critical details that substantiate the basic elements of protected activity, adverse action, employer knowledge, and nexus should be included on the timeline.

10. Analysis Spreadsheet

An analysis spreadsheet should be created and maintained in the case file. The purpose of the analysis spreadsheet is to evaluate the basic elements of a prima facie allegation to assist in making a decision of merit or non-merit. An example can be found at:

<P:\Occupational Health & Safety Bureau\Whistleblower\Discrimination Information\Samples\Analysis Spreadsheet.xls>.

11. Complainant's supporting documents

If the complainant is a member of a union, the union representative shall be contacted to determine if he conducted an investigation on behalf of the complainant. If so, a written copy of his findings shall be requested and maintained in the case file. Any other documents supplied by the complainant shall also be retained in the case file.

12. Determination letters

Copies of the letters sent to the respondent and complainant upon final determination shall be maintained in the case file.

13. Report of Investigation

A copy of the Discrimination Investigator's findings and recommendations shall be maintained in the case file.

## **C. Burden of Proof**

During all phases of the investigation, the Discrimination Investigator must look for evidence dealing with the following elements of a violation:

1. Protected activity

It must be established that the complainant engaged in activity protected by Section 50.9.25 of the Act. Protected activity generally falls into four broad categories:

- a. Providing information to a governmental agency, a supervisor, a union, a health department, a fire department, or other government employee;
- b. Filing a complaint or instituting a proceeding provided for by law, for example a formal complaint with OHSB.
- c. Testifying in proceedings such as trials or hearings before the Review Commission.

- d. Refusal to perform an assigned task. OSHA's refusal to work provision described in [29 CFR 1977.12](#) provides an employee the right to refuse to perform an assigned task if the employee:
  - (i) Has a reasonable apprehension of death or serious injury, and
  - (ii) Refuses in good faith, and
  - (iii) Has no reasonable alternative, and
  - (iv) There is insufficient time to eliminate condition through regular statutory enforcement channels, and
  - (v) The employee, where possible, sought from his employer, and was unable to obtain, a correction of the dangerous condition.

## 2. Employer knowledge

It must be shown that the respondent was aware, or suspected, that the complainant engaged in protected activity. For example, one of the respondent's managers need not have specific knowledge that the complainant contacted a OHSB if his previous internal complaints would cause the respondent to suspect an OHSB action was initiated by the complainant. The investigator is also not required to prove that the person who made the decision to take the adverse action had knowledge of the protected activity, only that someone who provided input that led to the decision had knowledge of the protected activity.

If the respondent could reasonably deduce who filed the complaint, it is referred to as *inferred knowledge*. Examples of inferred knowledge include, but are not limited to:

- a. An OHSB complaint is about the only lathe in a plant, and the complainant is the only lathe operator.
- b. A complaint is about unguarded machinery and the complainant was recently injured on an unguarded machine.
- c. A union grievance is filed over a lack of fall protection and the complainant had recently insisted that his foreman provide him with a safety harness.
- d. In a small company or small work group where everyone knows each other, knowledge can be attributed to the employer.

## 3. Adverse action

The evidence must demonstrate that the complainant suffered some form of adverse action, including, but not limited to, discharge, demotion, reprimand, harassment, lay-off, reduced hours, blacklisting, job transfer, change in duties or responsibilities, denial of overtime, reduction in pay, denial of benefits, intimidation, failure to hire, failure to promote, or constructive discharge.

Constructive discharge is when the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person would have felt compelled to resign.

It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as adverse, in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action "materially adverse." Specifically, the evidence must

show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation. The investigator can test for material adversity by interviewing coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

#### 4. Nexus

A causal link between the protected activity and the adverse action must be established by a preponderance of the evidence. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus toward the complainant, proximity in time between the protected activity and the adverse action, disparate treatment of the complainant compared to other similarly situated employees, false testimony or manufactured evidence, and pretextual defenses by the respondent.

Questions that will assist the investigator in testing the respondent's position include:

- a. Did the respondent follow its own progressive disciplinary procedures as explained in its internal policies, employee handbook, or collective bargaining agreement?
- b. Did the complainant's productivity, attitude, or actions change after the protected activity?
- c. Did the respondent discipline other employees for the same infraction and to the same degree?

#### 5. Employer defense

After the prima facie case is established, the respondent must, in order to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason, e.g., poor work, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, OHSB or the complainant must show by a preponderance of the evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pretextual. For example, the non-safety related misconduct did not occur, other employees engaged in similar misconduct known to management were not similarly punished (disparate treatment), the misconduct played no role in the adverse action, "but for" the protected activity the adverse action would not have occurred, or the misconduct was minor in nature.

#### 6. Dual motive

If it is determined that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, the dual motive test becomes applicable. The dual motive analysis may be based on either direct or circumstantial evidence of a link between an improper motive and the challenged employment decision.

- a. Direct evidence is evidence that does not require any deductions or inferences to establish the conclusion, such as statements by management that express hostility towards the complainant for engaging in protected activity.
- b. Circumstantial evidence is not based on personal knowledge, but on other facts from which deductions are drawn which indirectly show the facts. An example of circumstantial evidence would be a respondent's statement shown to be false in a manner that supports the allegations of the complainant.

Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision despite the protected activity.

7. To successfully develop the essential elements of the case, the Discrimination Investigator will generally:
  - a. Determine the complainant's allegations,
  - b. Corroborate the allegations through witnesses and other evidence,
  - c. Determine the respondent's answers to the allegations and defenses,
  - d. Corroborate the respondent's response,
  - e. Determine the complainant's answer to the respondent's defense, and
  - f. Corroborate the complainant's answer to resolve discrepancies.

#### **D. Early Dismissal**

At any time during the investigation, the case can be dismissed before obtaining all information from all witnesses. Two reasons for doing this are listed below:

1. If direct evidence indicates the claim does not meet any of the first four items listed in Section C above.
2. If the complainant is not cooperative in returning phone calls or in providing evidence. Attempts should be made to contact the complainant during evening hours if phone contact cannot be made during the day. Before dismissing a case, the Discrimination Investigator shall send a letter to the last known address of the complainant, providing the complainant with 10 days to respond.
3. The complainant and respondent shall be notified via certified letters when the case is dismissed.

#### **E. Amended Complaints**

After filing a retaliation complaint with OHSB, a complainant may wish to amend the complaint to add additional allegations and/or additional respondents. It is OHSB's policy to permit the liberal amendment of complaints, provided the investigation has not yet been concluded. Amendments to the complaint can be provided orally or in writing. If the amendment is oral, the investigator shall document the amendment in writing for the case file. The respondent should be provided a copy of any amendments.

If the amendment involves a new or separate adverse action, the investigator may decide to open a new complaint, instead of amending the original complaint.

#### **F. On-site Investigations**

Personal interviews and collection of documentary evidence should be conducted on-site whenever possible. The respondent's designated representative has the right to be present for all interviews with currently-employed managers, but interviews of non-management employees are to be conducted in private. The witness may request that an attorney or other personal representative be present and this is to be allowed. Signed witness statements are also encouraged and allowed. Telephone interviews can serve as a part of the investigation when they are deemed practical by the investigator.

#### **G. Contact With Complainant**

1. The Discrimination Investigator may decide to interview the complainant in person or via telephone to obtain as much information as possible about the case. The complainant shall be encouraged to provide as many witnesses as possible who have direct or indirect knowledge of the pertinent facts.
2. The complainant shall be encouraged to produce all documentation relevant to the case including:
  - a. Copies of the discharge notice, reprimands, or other personnel actions;
  - b. Performance appraisals;
  - c. Earnings and benefits statements;
  - d. Grievances;
  - e. Unemployment benefits claims and determinations;
  - f. Job position descriptions;
  - g. Company employee and policy handbooks;
  - h. Copies of any charges or claims filed with other agencies or personal attorneys;
  - i. Medical records; and
  - j. Collective bargaining agreements.
3. In all cases, the complainant shall be asked what restitution the complainant is seeking. If terminated or laid off by the respondent, the complainant shall be advised of his obligation to search for work and to keep records of interim earnings. The complainant shall also be advised to retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.

#### **H. Contact With Respondent**

1. All contact with the respondent shall be logged in the case diary and notes taken during conversations shall be maintained in the case file.
2. The letter sent to the respondent informing him of the complaint normally requests a written response to various items pertinent to the case. The information contained in the response does not constitute evidence. Rather the information shall be corroborated by other witnesses.
3. The respondent may retain legal counsel and may designate the counsel as the point of contact for the case. The Discrimination Investigator retains the right to interview non-management personnel without the presence of the legal counsel.
4. If the investigator feels the state would be better represented in the investigation by the inclusion of the department legal counsel, a request for legal support should be made and signed by the Bureau Chief, to obtain legal assistance.
5. Management personnel who have knowledge of the case may be interviewed with legal counsel present.
6. If the respondent at any time suggests the possibility of an early settlement, the Discrimination Investigator shall immediately explore an appropriate settlement.
7. If the respondent fails to cooperate or refuses to respond, the Discrimination Investigator shall evaluate the case and make a determination based on all other gathered information.

#### **I. Contact With Witnesses**

1. The Discrimination Investigator shall conduct interviews with as many witnesses as possible. If witnesses are reluctant to provide a response, they shall be reminded that the Act provides protection from retaliation.
2. When possible, written statements should be obtained from witnesses. The Discrimination Investigator shall specifically ask if they request confidentiality. If so, a notation shall be made on the interview form or written document noting the request. When confidentiality is requested, the Discrimination Investigator shall explain to potential witnesses their identity will be kept in confidence to the extent allowed by law, but that if they are required to testify in a proceeding, the court may require the disclosure of the statement. Furthermore, they shall be advised that their identity might be disclosed to another government agency, under a pledge of confidentiality from that agency.
3. The Discrimination Investigator shall document all witness interviews. If the Discrimination Investigator is unable to contact a witness, the actions taken in an attempt to contact the witness shall be documented in the case file.
4. The Investigator has the right to interview non-management personnel without having the respondent's attorney being present. A witness may have a personal representative or attorney present at any time. See Chapter 3.VII.I for the procedure for dealing with private interviews of witnesses.

#### **J. Resolving Discrepancies**

The Discrimination Investigator shall attempt to resolve any discrepancies in the testimony by re-interviewing the complainant, witnesses, and respondent.

#### **K. Analysis**

After having gathered all relevant evidence available, the Discrimination Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in [Section C](#) above.

#### **L. Case Determination**

1. The Discrimination Investigator shall make a determination of non-merit or merit in the case. The final investigative report explaining the reasons for the determination shall be prepared and included in the case file.
2. The case file shall be presented to the Bureau Chief for review. If the Bureau Chief determines further investigation is required, the Discrimination Investigator shall complete the additional investigation and re-submit the case file to the Bureau Chief for review.
3. Every effort shall be made to reach a final determination within 60 days of receipt of the complaint as required in Section 50-9-25.B. If the determination is not made within 60 days, the case shall not be dismissed. Instead, the Bureau Chief shall provide additional resources for a quick completion of the investigation.
4. The Discrimination Investigator shall enter all required investigation information into the IMIS.

#### **M. Cases Dismissed as Non-Merit**

If the Bureau Chief determines the case should be dismissed due to non-merit, the following actions shall be taken:

1. A closing conference shall be held with the complainant, either in person or via telephone. The complainant shall be told the preponderance of evidence indicates she has not been discriminated against and the investigation is being closed with a finding of non-merit.
  - a. The reasons for the determination shall be explained.
  - b. The complainant should be allowed to ask questions and receive answers to the questions. I
  - c. If the complainant offers new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant and might change the determination of the case. If the investigator decides further investigation is required he should perform the additional investigation and perform further analysis to decide if a different determination is warranted.

If the investigator determines the new information does not warrant further investigation, the complainant shall be told of this decision.
  - d. The complainant shall be told she will be receiving a letter describing the finding with instructions on how to appeal the finding if she desires to do so.
  - e. Any relevant notes from the closing conference shall be documented in the case file.
  - f. Witness names shall not be disclosed during the closing conference.
2. A letter shall be sent to the complainant describing the final determination. The letter shall include instructions on how the complainant can file an appeal. A sample of this letter can be found at: P:\Bureau\Discrimination Information\discrimination packages (letters)\DeterminationLetterComplainant.doc
3. A letter shall be sent to the respondent describing the final determination. A sample of this letter can be found at: P:\Bureau\Discrimination Information\discrimination packages (letters)\DeterminationLetterRespondent.doc. A copy of this letter shall be sent to the Director of the Environmental Protection Division.

## **N. Merit Cases**

The Department favors voluntary resolution of disputes, and the Bureau is encouraged to assist the parties in reaching an agreement. It is the OHSB's policy to seek settlement of all cases determined to be meritorious prior to referring the case for court enforcement. OHSB shall not enter into or approve settlements that do not provide fair and equitable relief for the complainant.

If the Bureau Chief agrees with the complainant and decides the respondent has retaliated against the complainant, the following activities shall be performed:

1. The Bureau Chief and Discrimination Investigator shall contact the respondent to notify the respondent of the finding. This contact can be either in person, in writing, or via the telephone; and
2. The Bureau shall present to the respondent the terms of settlement requested by the complainant, assuming these requests are reasonable. Reasonable items that may be contained in a settlement include one or more of the following depending upon the findings of the case:
  - a. Reinstatement to the same or equivalent job, including restoration of accumulated seniority and benefits;

- b. Front pay, i.e., an agreed upon cash settlement in lieu of reinstatement. If the respondent does not agree to this type of payment, it should only be demanded when the employment relationship is so poisoned that no reasonable person could return to work;
- c. Wages lost due to the adverse action. The amount of lost wages is normally calculated from the date of the last earnings until the settlement date. The amount of lost wages should be offset by any earnings the complainant has accumulated during this time;
- d. Removal of warnings, reprimands, or derogatory references resulting from the protected activity that may have been placed in the complainant's personnel file;
- e. Respondent's agreement to provide to the complainant a favorable or neutral reference to potential employers;
- f. Posting of a notice to employees indicating the respondent agreed to comply with the discrimination statute and the complainant has been awarded appropriate relief;
- g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, or property losses resulting from missed payments;
- h. Pain and suffering. Such damages need factual support, such as medical bills, the loss of a home, etc.; and
- i. One lump sum payment to be made at the time of the signing of the settlement agreement.
- j. Punitive damages may be considered for the following reasons:
  - (i) When a management official involved in the adverse action knew about the relevant whistleblower statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation);
  - (ii) When the respondent's conduct is egregious, e.g. when a discharge is accompanied by previous harassment or subsequent blacklisting;
  - (iii) When the complainant has been discharged because of his association with a whistleblower;
  - (iv) When a group of whistleblowers have been discharged;
  - (v) When there has been a pattern of retaliation.

The OGC should be consulted when punitive damages are being considered.

#### **O. Settlement Agreements Negotiated by OHSB**

1. Any settlement agreement proposed by OHSB shall:
  - a. Be in writing;
  - b. Stipulate that the respondent agrees to comply with the relevant statute(s);
  - c. Address the alleged retaliation;
  - d. Specify the relief obtained; and
  - e. Address a constructive effort to alleviate any chilling effect on other employees. This could include a posting of the settlement notice or training for management personnel.

2. Approval of the Bureau Chief must be obtained for settlement agreements proposed by the respondent. If the agreement is substantially different from what is requested by the complainant, the reasons for the differences must be documented in the case file.
3. If the respondent is uncooperative or does not agree to terms of a reasonable settlement, the OGC shall be requested to process a petition on behalf of the Secretary seeking restraint of the violation and other such relief as may be appropriate as described in Section 50-9-25.B of the Act.
4. The final agreement terms should be signed by the respondent, the complainant, the Discrimination Investigator and the Bureau Chief. The final agreement shall be placed in the case file.
5. If there is a payment as part of the settlement agreement, the respondent shall send a check to OHSB along with the signed settlement agreement. OHSB shall then make the final signatures on the agreement and forward the check to the complainant.

**P. Bilateral Settlement Agreements**

1. A bilateral settlement agreement is one between OHSB and the respondent, without the complainant's consent. It is an acceptable remedy to be used only under the following conditions:
  - a. The terms of the settlement agreement are reasonable in terms of the back pay, compensation for out-of-pocket expenses, reinstatement conditions, and the merits of the case; and
  - b. The complainant refuses to accept the settlement offer.
2. The Discrimination Investigator shall describe the complainant's objections to the settlement in the final investigative report.
3. The bilateral settlement agreement shall be signed by the Bureau Chief, the Discrimination Investigator, and the respondent. A copy of the signed agreement shall be sent to the complainant.

**Q. Settlement Agreements to Which OHSB is not a Party**

1. Settlement agreements may also be reached without OHSB participation. Settlements reached between the parties must be reviewed and approved by the Bureau Chief to ensure the terms of the settlement are fair, adequate, reasonable, and consistent with the purpose and intent of the Act. Approval of the settlement demonstrates the Bureau's consent and achieves the consent of all three parties. The following criteria should be used for this determination:
  - a. OHSB shall not approve a provision that states or implies that OHSB is party to a confidentiality agreement;
  - b. OHSB shall not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future;
  - c. OHSB shall not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his employment;
  - d. OHSB shall ensure that the complainant's decision to settle is voluntary;
  - e. OHSB shall only approve of a waiver of future employment if the following factors are considered and documented in the case file:

- (i) The breadth of the waiver must be limited to allow the employee to obtain similar employment in the area or the employee must be satisfied that the amount of compensation is sufficient to offset his inability to obtain similar employment in the area;
  - (ii) The complainant's case is sufficiently weak to warrant acceptance of the waiver;
  - (iii) The complainant understands and voluntarily accepts the waiver; or
  - (iv) The complainant does not choose to re-employ in the same profession.
2. The approval by OHSB of an agreement to which OHSB is not a party only pertains to the terms of the agreement pertaining to Section 50-9-25 of the [Act](#).
  3. If both parties are amenable to also signing an OHSB agreement, the OHSB agreement shall incorporate the two-party settlement agreement by inserting the following paragraph in the OHSB agreement:
 

*Respondent and Complainant have signed a separate agreement encompassing matters not within OHSB's jurisdiction. OHSB's authority over that agreement is limited to the provisions of Section 50-9-25 of the Act. Therefore, OHSB approves and incorporates in this agreement only the terms of the other agreement pertaining to Section 50-9-25 of the Act.*
  4. A copy of the reviewed agreement shall be retained in the case file.

#### IV. Enforcement

If the respondent fails to comply with the settlement, the OGC shall be consulted to pursue direct enforcement of the settlement agreement in court.

If the settlement agreement was negotiated and agreed to before the final determination was made in the case, and the respondent fails to comply with the terms of the agreement; the investigator shall complete the investigation and make a final determination.

#### V. Appeals

The complainant has the right to appeal the Bureau Chief's decision in writing to the Director of the Environmental Protection Division within 15 days of complainant's receipt of the final decision. The Director of the Environmental Protection Division will normally supply the Bureau with a copy of the appeal.

The Discrimination Investigator shall supply the Director of the Environmental Protection Division with a copy of the case file and a written response to each item mentioned in the complainant's appeal.

The Director of the Environment Protection Division shall review all information pertinent to the appeal and notify the complainant that the appeal has been denied or that the case will be investigated further. If further investigation is recommended, it will be performed by the Discrimination Investigator or other designee of the Bureau Chief. The Bureau Chief shall provide all findings to the Director of the Environmental Protection Division.

The Director of the Environmental Protection Division will, within 60 days of the appeal, issue a determination to withhold the original findings or issue a different decision and will notify all parties of the action.

If the complainant's appeal is denied, he shall be notified of his right to ask for a federal review of a dually-filed complaint.

## VI. Federal Review

A complainant may ask for federal review of his case, provided he indicated in his complaint that he wanted the complaint to be dual-filed. He may only ask for a federal review after the appeal process has been completed by the Director of the Environmental Protection Division. The request for a federal review must be made in writing to OSHA Region VI and postmarked within 15 days of receipt of the appeal decision.

The results of a federal review process may require that the case be opened again for further investigation.

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

(Reserved for future use)

## Chapter 15 Legal Issues

### I. Subpoenas

Section 50-9-18 of the [Act](#) provides the department authority to apply to the district court for an order requiring the attendance and testimony of witnesses and the production of evidence.

#### A. Activities Requiring a Subpoena

1. Refusal by an employee or employer to provide testimony during an inspection or hearing could be a reason for the Bureau to seek a subpoena.
2. Refusal by an employer to provide records such as injury and illness data, written safety plans, or other records associated with an inspection or investigation could be a reason for the Bureau to seek a subpoena.

#### B. Obtaining a Subpoena

For any situation requiring a subpoena, the Compliance Program Manager will work with the Bureau Chief and the OGC to obtain the subpoena.

### II. Emergency Court Orders

Section 50-9-14 of the [Act](#) provides the district courts with the authority to restrain any conditions or practices in any place of employment when there is imminent danger of death or serious physical harm.

#### A. Activities Requiring a Court Order

This action should be used if an employer refuses to immediately correct the conditions when there is an existing danger that could reasonably be expected to cause death or serious physical harm.

#### B. Obtaining a Court Order

The Compliance Program Manager will work with the Bureau Chief and the OGC to obtain the court order.

### III. Warrants

Section 50-9-8 of the [Act](#) provides the department authority to seek the issuance of a warrant in order to compel an employer to allow an inspection. Section 50-9-10 of the [Act](#) provides the department's representatives the authority to enter any place of employment for the purpose of conducting an inspection.

#### A. Activities Requiring a Warrant

1. When a CO attempts to perform an inspection of a work site, the employer may refuse entry. The employer may also hinder the inspection process by denying the CO access to certain areas of the work site. In either case, the CO should leave the premises and begin the process of obtaining a warrant to enforce the inspection process.
2. When reviewing the history of an employer prior to an inspection, the CO may discover a history of an employer refusing entry without a warrant. In this case, the CO may attempt to obtain a warrant prior to an inspection.

## **B. Process of Obtaining a Warrant**

To obtain a warrant, the CO should contact the Compliance Program Manager as soon as possible with the request for a warrant. The Compliance Program Manager shall consult with the Bureau Chief and contact the OGC to initiate the process. The OGC is responsible for enforcing the laws and regulations that the Environment Department administers. The form titled “Request for Legal Services” must be used to request the services of the OGC. This form can be found at [http://dws/oogc/request\\_for\\_legal\\_services.doc](http://dws/oogc/request_for_legal_services.doc). The assigned attorney from the OGC will prepare necessary court documents and assist with the preparation of an affidavit.

## **C. General Information Necessary to Obtain a Warrant**

The following information, in the form of an affidavit, is generally required to obtain a warrant:

1. Name of CO attempting the inspection and the assignment number if assigned.
2. A designation of the type of inspection being attempted, i.e., for safety or health, or both.
3. Name and complete address of the employer. If the address of the work site is different from the company mailing address, it should also be included.
4. Estimated number of employees at the work site.
5. Summary of all facts leading to the refusal or limitation of inspection. The following information should be included:
  - a. Date and time of entry/attempted entry;
  - b. Date and time of denial;
  - c. Stage of denial (entry, opening conference, walkaround, etc.);
  - d. Full name and title of the person(s) to whom CO presented credentials;
  - e. Full name and title of person(s) who refused entry; and
  - f. Reasons stated for the denial by person(s) refusing entry.
6. If the request is for a preemptive warrant based upon a history of the employer denying entry without a warrant, the following information should be provided in the affidavit:
  - a. A summary of each previous inspection when a warrant was required for entry; and
  - b. The reason for the current inspection, e.g., programmed inspection, referral, complaint, etc.

## **D. Procedures for Serving the Warrant on the Employer**

When a warrant has been obtained, the CO is authorized to conduct the inspection in accordance with the terms of the warrant. Any questions from an employer concerning the reasonableness of the inspection shall be referred to the Compliance Program Manager. Refer to [Chapter 3](#) of this manual for more details.

The inspection should begin as soon as possible after obtaining the warrant or as soon as possible after the date authorized by the warrant.

Upon completion of the inspection, if the warrant includes a return of service request, the CO shall complete the return of service information and forward it to the Compliance Program Manager for appropriate action.

#### **E. Actions Required if Entry Is Refused with a Warrant**

When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, the CO shall specifically inquire as to whether the employer is refusing to comply with the warrant.

If the employer refuses to comply or if consent is not given, the CO shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the Compliance Program Manager for further direction.

The next step in the process is to determine the appropriate law enforcement office to contact for assistance. Depending upon the location of the work site, either the city, county, state or federal authorities will be requested to accompany the CO back to the work site to enforce the warrant. The law enforcement officials will determine the specific actions required to enforce the warrant.

### **IV. Contest Process**

If a citation is issued, an employer may contest the citation issued by OHSB or the proposed penalty associated with the citation pursuant to Section 50-9-17.B of the [Act](#), or may petition for a modification of the abatement period. The notice of contest must be received by OHSB within fifteen working days of the citation being received by the employer.

Section 50-9-17.E of the [Act](#) provides an employer with an option to notify OHSB that it is unable to take the corrective action required within the period of abatement. [11.5.5.303 NMAC](#) describes the Petition for Modification of Abatement (PMA) Period. The PMA must be received by OHSB prior to the abatement date identified in the citation.

The Occupational Health and Safety Review Commission (OHSRC) is the governing body designated to arbitrate a contest of a citation or to determine the need for an abatement extension. 11.5.5 NMAC describes the procedures of the OHSRC. This section of the manual describes the activities of COs and the Compliance Program Manager when dealing with contests and requests for abatement extensions.

#### **A. Time Limit for Filing a Notice of Contest**

1. The [Act](#) provides an employer 15 working days following its receipt of a notice of a citation to notify OSHA of the employer's desire to contest a citation or proposed assessment of penalty.
2. In cases where a notice of contest is not mailed, i.e., postmarked, within the 15 working day period allowed for contest, the Compliance Program Manager must still forward the notice of contest to the OHSRC. The Compliance Program Manager shall coordinate with the OGC to file a motion to dismiss the contest due to the late receipt of the notice.
3. OHSB shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the date 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.

4. Written or oral statements from the employer or its representative explaining the employer's reason for missing the filing deadline shall also be maintained in the case file. Notes shall be taken to document oral communications.

#### **B. Petition for Modification of Abatement Period Only**

If the notice of contest is submitted to the Compliance Program Manager 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 found at [11.5.5.303 NMAC](#).

#### **C. Communication When the Intent to Contest Is Unclear**

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 Compliance Program Manager shall contact the employer to clarify the intent of the communication.

1. 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 OHSRC.
2. The Compliance Program Manager shall inform the employer of the option to participate in an informal conference for resolving any issues (described in [Chapter 8](#) of this manual). If contact with the employer reveals a desire for an informal conference, the employer shall be informed that the informal conference does not extend the 15 working day contest period.
3. In cases when the Bureau 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 cannot be an 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.
4. If the Compliance Program Manager determines that the employer intends the document to be a notice of contest, it shall be transmitted to the OGC as described in the next section of this manual.

#### **D. Processing a Notice of Contest**

1. The original signed notice of contest, or petition for modification of abatement period, with all attachments and affidavits as described in [11.5.5.302 NMAC](#) and related documents must be sent to the OHSRC within five working days of receipt of the employer's notification.

A request for legal services should be promptly prepared and sent to the OGC. The form titled "Request for Legal Services" must be used to request the services of the OGC. This form can be found at [http://dws/oogc/request\\_for\\_legal\\_services.doc](http://dws/oogc/request_for_legal_services.doc).

2. A copy of the notice of contest and related documents shall be retained in the case file. The envelope containing the notice of contest shall be retained in the case file with the postmark intact. The same procedure shall be used for a petition for modification of abatement period.
3. Once the notice of contest is received by the OHSRC secretary, it will be docketed and a notice of docketing issued by the secretary. Unless the notice of contest is informally

resolved, an Administrative Complaint must be filed by the OGC within 90 days of the docketing. If the contest is a petition for modification of abatement period, the petitioner must request a hearing from the OHSRC within 20 days.

#### **E. Communications While Proceedings are Pending Before the Commission**

##### **1. Communications with the employer**

After a notice of contest is filed and the case is within the jurisdiction of the OHSRC, 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 approval of the Compliance Program Manager.

Once a notice of contest has been filed, all inquiries relating to the Citation and Notification of Proposed Penalty shall be referred promptly to the Compliance Program Manager. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other government agencies, attorneys, and any other party.

##### **2. Communications with OHSRC**

In accordance with [11.5.5.112 NMAC](#), neither COs, the Compliance Program Manager, the Bureau Chief, nor other OHSB personnel shall have any direct or indirect communication relevant to the merits of any open case with any member of the OHSRC, or any of the parties or interveners. All inquiries and communications shall be handled through the OGC.

#### **F. Informal Administrative Review**

As provided by [11.5.5.306 NMAC](#), OHSB shall initiate an informal administrative review promptly upon receipt of a notice of contest or a petition for modification of abatement period. The Compliance Program Manager shall perform the following activities related to the informal administrative review:

##### **1. Notification forms**

When notifying the respondent (or a petitioner for a PMA) of an informal administrative review the Compliance Program Manager shall include with the notification the following:

- a. A form for the notice to affected employees as described in [11.5.5.1006 NMAC](#);
- b. A form for the affidavit of posting as described in [11.5.5.1009 NMAC](#);
- c. A certificate of service, if applicable, which the responsible employer may complete as appropriate (see [11.5.5.1001 NMAC](#)); and
- d. A brief explanation of the requirements for completion, posting, service, and filing.

##### **2. Participants**

At the request of the Compliance Program Manager, any member of OHSB may attend the informal administrative review. The respondent, and any affected employee or representative of affected employees (upon proper filing of intervention) may participate in the informal administrative review. Any party may also be represented by legal counsel during the informal administrative review.

##### **3. Employee notification requirements**

At least five days prior to the date of any meeting or telephone conference, the respondent or petitioner is required to post in one or more locations reasonably accessible to the

affected employees, a notice to affected employees. See [11.5.5.1006 NMAC](#) for a sample posting form.

This posting shall remain in place until the meeting is held.

4. Notification of posting

The respondent, or petitioner, is required to submit an affidavit of posting as illustrated in [11.5.5.1009 NMAC](#). The Compliance Program Manager shall forward this notice of posting to the Commission secretary within five days after receipt. If the notice of posting is not received, the Compliance Program Manager shall not commence the informal administrative review.

5. Settlement agreement

One possible outcome of the informal administrative review is a settlement agreement between the respondent (or petitioner for the PMA) and OHSB. Required and optional terms of the settlement agreements are described in [11.5.5.503 NMAC](#).

a. Employee notification requirements

The employer is required to post a copy of the settlement agreement signed by all parties. See [11.5.5.503.D NMAC](#).

b. Notification of posting

The employer is required to submit to the Compliance Program Manager an affidavit of posting of the settlement agreement within five days of the posting. See [11.5.5.503.D NMAC](#).

c. Filing of settlement agreement

The Compliance Program Manager shall file the settlement agreement with the Commission Secretary as soon as possible after receiving the affidavit of posting.

If the affidavit of posting is not received in a timely manner, the Compliance Program Manager shall consult with the OGC to determine further action.

6. Unilateral vacation of contested citation

The Bureau Chief may, at any time prior to the conclusion of the informal administrative review, unilaterally and unconditionally vacate all contested items of a citation. This action may be considered if new evidence is discovered indicating the citations were incorrect or invalid. The authorization for performing this action and the sample format for filing the notice with OHSRC is found in [11.5.5.307 NMAC](#).

7. Withdrawal of contest

The respondent may unilaterally and unconditionally withdraw the notice of contest as authorized by [11.5.5.307 NMAC](#).

8. Withdrawal of petition

A petitioner may unilaterally and unconditionally withdraw the petition for modification of abatement. See [11.5.5.307 NMAC](#).

9. Administrative complaint

If one of the actions described by items 5, 6, 7 or 8 above is not taken, the Bureau Chief, in consultation with the OGC, shall file an administrative complaint with OHSRC. The

administrative complaint shall request a hearing before OHSRC. The administrative complaint shall be filed within 90 days of the docketing of the contest with the OHSRC.

10. Request for hearing

If the responsible employer has petitioned for a modification of abatement period only (but not contested the citation), the petitioner must file a request for hearing within 20 days of the docketing of the case with the OHSRC.

**G. Commission Procedures**

If a case arising from a contested citation is docketed, and it is not resolved through an informal administrative review, an administrative complaint must be filed within 90 days of docketing. The Respondent must answer the administrative complaint within 15 days of receipt of the complaint. If the case is a result of a petition for modification of abatement period, the petitioner must request a hearing within 20 days after docketing. 11.5.5.701 requires the OHSRC to schedule a hearing on the merits to commence on a date within 30 days after filing of the respondent's answers to the administrative complaint. If a hearing is not scheduled within 20 days after the answer is filed, the Bureau Chief shall coordinate with OGC to request that a hearing be scheduled.

The Bureau Chief, in consultation with the OGC, shall be responsible for making decisions regarding any motions associated with the hearing of the administrative complaint and for directing OHSB staff in the participation in the hearing. This section describes the activities in which OHSB personnel may be involved.

1. Discovery methods

Once a legal proceeding has been initiated by the filing of an administrative complaint or request for hearing on a PMA, each party has the opportunity to "discover evidence in the possession of an opposing party. Discovery methods include requests for admissions, interrogatories, requests for production of documents, and depositions.

An attorney from the OGC will represent the Bureau in responding to discovery requests. It is essential that all OHSB personnel coordinate and cooperate with the assigned attorney to ensure that responses are accurate, complete, and filed in a timely manner.

2. Requests for admissions

A Request for Admissions is a document by which the opposing party makes specific factual statements that must be responded to by either an admission that it is true, or a denial. The OGC attorney will work with OHSB witnesses to prepare the response or make the request of the opposing party.

3. Interrogatories

An interrogatory is a written question from the opposing party. OHSB witnesses shall draft and sign answers to interrogatories, with OGC assistance. It is the responsibility of the OHSB to answer each interrogatory separately and fully. The OGC attorney shall sign any objections to the interrogatories. OHSB witnesses should be aware that they might be deposed or examined at hearing on the interrogatory answers provided.

4. Production of documents

If a request for production of documents is served on the OGC and that request is forwarded to the OHSB, OHSB staff shall make all documents relevant to that discovery demand available to the OGC attorney as expeditiously as possible.

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 informant), OHSB witnesses shall not withhold any information from the OGC attorney.

It is the OGC's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

#### 5. Depositions

Depositions permit an opposing party to take a potential witness's pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. OSHB personnel may be required to offer testimony during a deposition. In such cases, an OGC attorney will be during the deposition.

#### 6. Appearance as a witness

Any member of OHSB may be called upon to be a witness during the hearing. The OGC shall provide specific instructions to OHSB employees who may appear as a witness. The following considerations will generally enhance the hearing testimony of any OHSB employee:

##### a. Review documents and evidence

In consultation with the OGC and the Compliance Program Manager, the witness shall review documents and evidence relevant to the inspection or investigation before the proceeding to familiarize herself with the facts of the case and to minimize the need to refer to the file or other documents during their testimony.

##### b. Attire

OHSB witnesses shall wear appropriate clothing to reflect respect for the OHSRC proceedings.

##### c. Responses to questions

OHSB witnesses shall answer all questions directly and honestly. If a question is unclear, the witness should ask to have the question repeated or clarified.

##### d. Commission's instructions

OHSB witnesses should listen carefully to any instruction provided by a member or counsel for OHSRC and, unless instructed to the contrary by the OGC counsel, follow the instruction.

### **H. Appealing an OHSRC Decision**

If the Bureau Chief disagrees with the decision of the OHSRC, she may, after conferring with counsel and senior management, decide to appeal to the District Court. The authority to appeal is found in Section 50-9-17.F of the [Act](#). The guidelines for the appeal process are described by [Section 39-3-1.1 NMSA 1978](#).

### **I. Court Enforcement of Final Orders**

An employer's obligation to abate a cited violation arises when there is a final order. Section 50-9-8.D of the [Act](#) authorizes the department to institute legal proceedings to compel compliance with the Act or any regulation of the Environmental Improvement Board. Any employer who violates such an order can be found in contempt of court. The threat of a contempt of court ruling can be an effective and speedy alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowable

time. The court order can be requested from the court whether the final order results from a review commission ruling, a settlement agreement, or an uncontested citation.

#### **J. Selection of Cases for Court Enforcement**

All final orders issued in enhanced enforcement cases must be considered for court enforcement action. In addition, court enforcement actions should be considered when any of the following factors are present:

1. The employer has a citation history or other indications of serious compliance problems, such as widespread violations of the same standards at multiple establishments or worksites;
2. The employer's statements or actions indicate a reluctance or refusal to abate significant hazards;
3. The employer's behavior demonstrates indifference to employee safety;
4. The employer has committed repeated violations of the Act, particularly of the same standard, which continue undeterred by the normal remedies of civil monetary penalties;
5. The employer has demonstrated a repeated refusal to pay penalties;
6. The employer has filed false or inadequate abatement verification reports; or
7. The employer has disregarded a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

#### **K. Drafting of Citations and Settlements to Facilitate Court Enforcement**

Proper drafting of citations and settlement agreements can facilitate obtaining a court enforcement action and maximize its deterrent effect.

Notations stating, "Corrected during inspection" or "Employer has abated all hazards" shall not be made on the citation in cases being considered for court enforcement activity.

When possible, OHSB should attempt to identify cases that may warrant court enforcement at least a month before issuing the citation. When OHSB identifies such a case, the Compliance Program Manager shall contact the OGC to discuss citation language. If a case identified for potential court enforcement is being resolved through a settlement agreement (either formal or informal), language should be sought in the agreement committing the employer to specific ongoing abatement duties.

Language in a settlement agreement imposing a specific duty on the employer, such as a requirement that the employer hire a consultant to develop a safety program or a requirement to provide OHSB with a list of other work sites, can be enforced under a court order.

#### **L. Follow-up Inspections**

The OGC will notify the Bureau Chief when a court has entered an enforcement order. OHSB shall then promptly schedule an inspection or investigation to determine whether the employer is complying with the court order. The Bureau Chief, in consultation with the OGC, will determine the nature and extent of the inspection or investigation. The OGC will advise on the kind of "clear and convincing" evidence that would be needed to support a contempt petition in the event of the employer's noncompliance with the order of the court.

If non-conformance of the court order is found, the Compliance Program Manager shall immediately contact the OGC to determine what evidence is needed for submission to the court.

## V. Criminal Processing

Section 50-9-24 of the [Act](#) provides for criminal prosecution under certain circumstances.

### A. Violations Associated With the Death of an Employee

Section 50-9-24.J states “Any employer who willfully violates any provision causing death to any employee shall, upon conviction be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months.”

### B. Advance Notice

Section 50-9-24.K states “Any person who gives advance notice of any inspection, shall upon conviction, be punished by a fine of not more than \$1000 or by imprisonment for not more than six months.”

### C. Making False Statements to OHSB

Section 50-9-24.L states “Whoever knowingly makes any false statement shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months”

### D. Revealing Trade Secrets

Section 50-9-24.M states “A person who reveals a trade secret shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for less than one year.”

If any of the above events come to the attention of any OHSB employee, they shall immediately bring the details to the attention of the Compliance Program Manager and the Bureau Chief. The Compliance Program Manager shall document all details associated with these events. The Bureau Chief shall consult with the OGC to determine whether sufficient cause exists to refer the matter to the Office of the New Mexico Attorney General, Water, Environment, and Utilities Division. Contact information for the Attorney General is available at:  
<http://www.nmag.gov/office/contact.aspx>.

## **Chapter 16 Access to Employee Medical Records**

### **I. General Policy**

In certain circumstances, OHSB access to employee medical records will be important to the performance of its statutory functions. Medical records, however, contain personal details concerning the lives of employees.

- A. Due to the substantial personal privacy interests involved, OHSB authority to gain access to personally identifiable employee medical information shall be exercised only after OHSB has made a careful determination of its need for this information.
- B. OHSB examination and use of information obtained under the provisions of this chapter shall be limited to only that information needed to accomplish the purpose for which it was obtained.
- C. Information obtained under the provisions of this chapter shall be retained by OHSB only for so long as needed to accomplish the purpose requiring access.
- D. The information shall be kept secure while in OHSB possession, and shall not be disclosed to other agencies or members of the public, except in narrowly defined circumstances.
- E. This chapter establishes procedures concerning access to, and protection of, employee medical records.

### **II. Scope and Application**

#### **A. Applicability**

Except as provided below, this chapter applies to any request by OHSB personnel to obtain access to records in order to examine or copy personally identifiable employee medical information, including those conducted as part of an onsite consultative visit.

#### **B. Definition**

For the purposes of this section, "personally identifiable employee medical information" means employee medical information accompanied by either direct identifiers (name, address, social security number, payroll number, etc.) or by information which could reasonably be used in the particular circumstances to indirectly identify specific employees (e.g., exact age, height, weight, race, sex, date of initial employment, job title, etc.).

#### **C. Non-applicability**

This section does not apply:

- 1. To the use of, or access to, aggregate employee medical information;
- 2. To medical records on individual employees that are not in a personally identifiable form;
- 3. To records required by [11.5.1.16 NMAC](#);
- 4. To death certificates;
- 5. To employee exposure records, including:
  - a. Biological monitoring records described in [§1910.1020\(c\)\(5\)](#), or
  - b. Exposure records required by specific occupational safety and health standards;

6. When compliance personnel conduct an examination of employee medical records solely to verify employer compliance with the medical surveillance recordkeeping requirements of an occupational safety and health standard, or with [11.5.2 NMAC](#), or with [§1910.1020](#). An examination of this nature shall be conducted onsite, and if requested, under the observation of the record holder. Compliance personnel shall not record and take offsite any information from medical records other than documentation of the fact of compliance or noncompliance;
7. To access or the use of personally identifiable employee medical information obtained in the course of litigation; or
8. When a written directive by the Bureau Chief authorizes appropriately qualified personnel to conduct limited reviews of specific medical information mandated by an occupational health and safety standard, or of specific biological monitoring test results.

#### **D. Personal Privacy Interests**

Even if not covered by the terms of this section, all medically related information reported in a personally identifiable form shall be handled with appropriate discretion and care befitting all information concerning specific employees. For example, there may be personal privacy interests involved that require the limitation of access to the information.

#### **E. Responsible Persons**

1. The Bureau Chief shall be responsible for the overall administration and implementation of the procedures contained in this section, including:
  - a. Making final determination concerning access to personally identifiable employee medical information; and
  - b. Making final determination on inter-agency transfer or public disclosure of personally identifiable employee medical information.
2. The Bureau Chief shall designate the Compliance Program Manager as the OHSB Medical Records Officer. The OHSB Medical Records Officer shall report directly to the Bureau Chief on matters concerning this chapter and shall be responsible for the following:
  - a. Making recommendations to the Bureau Chief on the approval or denial of written access requests;
  - b. Assuring that written access requests meet the requirements of this chapter;
  - c. Responding to employee, collective bargaining agent, and employer objections concerning written access requests;
  - d. Regulating the use of direct personal identifiers;
  - e. Regulating internal use and security of personally identifiable employee medical information;
  - f. Assuring that the results of the Bureau's analyses of personally identifiable medical information are, when appropriate, communicated to employees; and
  - g. Assuring that advance notice is given of intended inter-agency transfer or public disclosures.
3. The Principal OHSB Investigator shall be assigned by the Compliance Program Manager in each instance of access to personally identifiable employee medical information. The Principal OHSB Investigator shall be responsible for assuring that the examination and use

of this information is performed in the manner prescribed by a written access request and the requirements of this chapter. When access is pursuant to a written access request, the Principal OHSB Investigator shall be professionally trained in medicine, public health, or allied fields (epidemiology, toxicology, industrial hygiene, biostatistics, environmental health, etc.).

## **F. Written Access Requests**

### **1. Requirement for written access request**

Except as provided below, each request by an OHSB representative to examine or copy personally identifiable employee medical information contained in a record held by an employer or other record holder shall be made pursuant to a written access request that has been approved by the Bureau Chief upon the recommendation of the OHSB Medical Records Officer. If deemed appropriate, a subpoena shall be obtained requiring the production of evidence under oath.

### **2. Approval criteria for written access request**

Before approving a written access request, the Bureau Chief and OHSB Medical Records Officer shall determine that:

- a. The medical information to be examined or copied is relevant to a statutory purpose and there is a need to gain access to this personally identifiable information;
- b. The personally identifiable medical information to be examined or copied is limited to only that information needed to accomplish the purpose for access; and
- c. The personnel authorized to review and analyze the personally identifiable medical information are limited to those who have a need for access and have appropriate professional qualifications.

### **3. Content of written access request**

Each written access request shall state with reasonable particularity:

- a. The statutory purposes for which access is sought;
- b. A general description of the kind of employee medical information that will be examined and why there is a need to examine personally identifiable information;
- c. Whether medical information will be examined onsite, and what type of information will be copied and removed offsite;
- d. The name, address, and phone number of the Principal OHSB Investigator and the names of any other authorized persons who are expected to review and analyze the medical information;
- e. The name, address, and phone number of the OHSB Medical Records Officer; and
- f. The anticipated period of time for which OHSB expects to retain the employee medical information in a personally identifiable form.

### **4. Special situations**

Written access requests are not required for the examination or copying of personally identifiable employee medical information under the following circumstances.

a. Specific written consent

If the specific written consent of the employee is obtained pursuant to [§ 1910.20\(e\)\(2\)\(ii\)](#), and OHSB or an OHSB employee is listed on the authorization as the designated representative to receive the medical information.

- (i) Whenever personally identifiable employee medical information is obtained through specific written consent and taken offsite, a Principal OHSB Investigator shall be promptly named to assure protection of the information.
- (ii) The OHSB Medical Records Officer shall be notified of this person's identity.
- (iii) The personally identifiable medical information obtained shall thereafter be subject to the use and security requirements of this chapter.

b. Physician consultation

A written access request need not be obtained when an OHSB staff or contract physician consults with an employer's physician concerning an occupational safety or health issue.

- (i) In a situation of this nature, the OHSB physician may conduct onsite evaluation of employee medical records in consultation with the employer's physician, and may make the necessary personal notes of his findings.
- (ii) No employee medical records, however, shall be taken offsite in the absence of a written access request or the specific written consent of an employee, and no notes of personally identifiable employee medical information made by the OHSB physician shall leave his control without the permission of the OHSB Medical Records Officer.

**G. Presentation of Written Access Request and Notice to Employees**

1. The Principal OHSB Investigator, or someone under his supervision, shall present at least two copies of the written access request and accompanying cover letter to the employer prior to examining or obtaining medical information subject to a written access request. At least one copy of the written access request shall not identify specific employees by direct personal identifier. The accompanying cover letter shall summarize the requirements of this chapter and indicate that questions or objections concerning the written access request may be directed to the Principal OHSB Investigator or to the OHSB Medical Records Officer.
2. The Principal OHSB Investigator shall promptly present a copy of the written access request (which does not identify specific employees by direct personal identifier) and its accompanying cover letter, to each collective bargaining agent representing employees whose medical records are subject to the written access request.
3. The Principal OHSB Investigator shall indicate that the employer must promptly post a copy of the written access request that does not identify specific employees by direct personal identifier, as well as post its accompanying cover letter. See [§ 1910.1020\(e\)\(3\)\(ii\)](#).
4. The Principal OHSB Investigator shall discuss with any collective bargaining agent and with the employer, the appropriateness of individual notice to employees affected by the written access request. When it is agreed that individual notice is appropriate, the Principal OHSB Investigator shall promptly provide to the employer copies of the written access request that do not identify specific employees by direct personal identifier, and its

accompanying cover letter. This procedure will enable the employer either to individually notify each employee or to place a copy in each employee's medical file.

#### **H. Objections Concerning a Written Access Request**

All employee collective bargaining agents and employer written objections concerning access to records pursuant to a written access request shall be transmitted to the OHSB Medical Records Officer. Unless OHSB decides otherwise, access to the records shall proceed immediately, notwithstanding the lodging of an objection.

The OHSB Medical Records Officer shall respond in writing to each employee's and collective bargaining agent's written objection to OHSB access. When appropriate, the OHSB Medical Records Officer may revoke a written access request and direct that any medical information obtained by it be returned to the original record holder or destroyed. The Principal OHSB Investigator shall assure that such instructions by the OHSB Medical Records Officer are promptly implemented.

#### **I. Removal of Direct Personal Identifiers**

Whenever employee medical information obtained pursuant to a written access request is taken offsite with direct personal identifiers included, the Principal OHSB Investigator shall, unless otherwise authorized by the OHSB Medical Records Officer, promptly separate all direct personal identifiers from the medical information, and code the medical information and the list of direct identifiers with a unique identifying number for each employee.

1. The medical information, with its numerical code, shall thereafter be used and kept secured as though still in a directly identifiable form.
2. The Principal OHSB Investigator shall also hand deliver the list of direct personal identifiers with their corresponding numerical codes to the OHSB Medical Records Officer.
3. The OHSB Medical Records Officer shall thereafter limit the use and distribution of the list of coded identifiers to those with a need to know its contents.

#### **J. OHSB use of Personally Identifiable Employee Medical Information**

1. The Principal OHSB Investigator shall be responsible for assuring that personally identifiable employee medical information is used and kept secured, in accordance with this chapter.
2. The Principal OHSB Investigator, the OHSB Medical Records Officer, the Bureau Chief, and any other authorized person listed on a written access request may permit the examination or use of personally identifiable employee medical information by Department employees and contractors who have a need for access, and have appropriate qualifications for the purpose of which they are using the information. No OHSB employee or contractor is authorized to examine or otherwise use personally identifiable employee medical information unless so permitted.
3. When a need exists, access to personally identifiable employee medical information shall be provided to the OGC, and to department contractors who are physicians or who have contractually agreed to abide by the requirements of this chapter and other department directives and instructions.
4. OHSB employees and contractors are authorized to use personally identifiable employee medical information only for the purpose for which it was obtained, unless the specific written consent of an employee is obtained as to a secondary purpose, or the procedures of

paragraphs [II.F](#) through [II.I](#) of this chapter are repeated with respect to the secondary purpose.

5. Whenever practicable, the examination of personally identifiable employee medical information shall be performed onsite with a minimum of medical information taken offsite in a personally identifiable form.

#### **K. Security Procedures**

1. OHSB files containing personally identifiable employee medical information shall be segregated from other OHSB files. When not in active use, files containing this information shall be kept secured in a locked cabinet or vault.
2. The OHSB Medical Records Officer shall maintain a log of uses and transfers of personally identifiable employee medical information and lists of coded direct personal identifiers, except for uses by staff under their direct personal supervision.
3. The photocopying or other duplication of personally identifiable employee medical information shall be kept to the minimum necessary to accomplish the purposes for which the information was obtained.
4. The protective measures established by this chapter apply to all worksheets, duplicate copies, or other OHSB documents containing personally identifiable employee medical information.
5. Intra-division transfers of personally identifiable employee medical information shall be by hand delivery, United States mail, or equally protective means. Inter-office mailing channels shall not be used.

#### **L. Retention and Destruction of Records**

1. Consistent with state records disposition programs, personally identifiable employee medical information and lists of coded direct personal identifiers shall be destroyed or returned to the original record holder when no longer needed for the purposes for which they were obtained.
2. Personally identifiable employee medical information, which is currently not being used actively, but may be needed for future use, shall be transferred to the OHSB Medical Records Officer. The OHSB Medical Records Officer shall conduct an annual review of all centrally held information to determine which information is no longer needed for the purposes for which it was obtained.

#### **M. Using Personally Identifiable Employee Medical Information**

The OHSB Medical Records Officer shall assure the results of an agency analysis using personally identifiable employee medical information is communicated to the employees whose personal medical information was used as a part of the analysis.

#### **N. Inter-Agency Transfer and Public Disclosure**

1. Personally identifiable employee medical information shall not be transferred to another agency or office outside of the Bureau or disclosed to the public (other than to the affected employee or the original record holder) except when required by law or when approved by the Bureau Chief.
2. Except as provided below, the Bureau Chief shall not approve a request for an inter-agency transfer of personally identifiable employee medical information, which has not

been consented to by the affected employees, unless the request is by a public health agency which:

- a. Needs the requested information in a personally identifiable form for a substantial public health purpose;
  - b. Will not use the requested information to make individual determinations concerning affected employees which could be to their detriment;
  - c. Has regulations or established written procedures providing protection for personally identifiable medical information substantially equivalent to that of this section; and
  - d. Satisfies an exemption as provided by [14-6-1 NMSA 1978](#).
3. Upon the approval of the Bureau Chief, personally identifiable employee medical information may be transferred to the following offices:
    - a. The National Institute for Occupational Safety and Health (NIOSH),
    - b. The State Epidemiologist's Office, and
    - c. The State Attorney General.
  4. The Bureau Chief shall not approve a request for public disclosure of employee medical information containing direct personal identifiers unless there are compelling circumstances affecting the health and safety of an individual.
  5. The Bureau Chief shall not approve a request for public disclosure of employee medical information, which contains information that could reasonably be used indirectly to identify specific employees when the disclosure would constitute a clearly unwarranted invasion of personal privacy.
  6. Except as to inter-agency transfers to NIOSH, the State Epidemiologist, or the State Attorney General, the OHSB Medical Records Officer shall assure that advance notice is provided to any collective bargaining agent representing affected employees and to the employer on each occasion that the department intends to either transfer personally identifiable employee medical information or disclose it to a member of the public other than an affected employee. When feasible, the OHSB Medical Records Officer shall take reasonable steps to assure that advance notice is provided to affected employees when the employee medical information to be transferred or disclosed contains direct personal identifiers.

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