

## Issuance of Citations by OSHA

### 65200 POLICY GUIDE

*The primary method of enforcing the Occupational Safety and Health Act is the issuance of citations by the Occupational Safety and Health Administration. OSHA must issue a citation to the employer if it discovers a violation during an inspection, unless the violation is a de minimis violation.*

*A citation must be issued with reasonable promptness, within six months after the violation occurred, must be in writing, must describe with particularity the nature of the violation, must include a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated, and must fix a reasonable time for abatement of the violation (Section 9 of the Act).*

*A citation for nonserious, serious, repeated, and willful violations is issued on OSHA Form 2, Citation and Notification of Penalty. A citation for failure to correct a prior violation is issued on OSHA Form 2B, Notification of Failure to Abate Alleged Violation and of Proposed Additional Penalty.*

*The method for contesting citations is discussed in Employer Defenses.*

*See OSHA citation requirements as detailed in the agency's Field Inspection Reference Manual, Chapter IV.*

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### APPLICATION OF POLICY

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### Statutory Requirements for Issuance of Citations

If a violation is discovered during an OSHA inspection, OSHA must issue a citation to the employer. The citation:

- Must be issued with reasonable promptness.
- Must be in writing.
- Must describe with particularity the nature of the violation.
- Must include a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.
- Must be issued within six months after the violation occurred.
- Must fix a reasonable time for abatement of the violation (Section 9 of the Act).

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### Pre-Citation Consultation

OSHA field personnel are to meet with regional labor solicitors in a pre-citation consultation before issuing citations in the following types of cases:

- Complex jurisdictional questions.
- Cases arising under newly issued standards.
- Issues of sufficient public concern.
- Cases which likely will reach the major litigation stage in the development of OSHA law.
- General duty and willful violations presenting novel or complex questions of law.

- Special cases designated by the Associate Labor Solicitor and the OSHA director of field coordination for the purpose of planning their litigation strategy, and to avoid duplication of effort.

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## Six Months Limitation

A citation may not be issued if the alleged violation occurred six months or more before the citation is actually signed and dated (Section 9(c) of the Act).

The Review Commission has held, however, that the six month time limitation begins to run only when OSHA discovers or reasonably should have discovered a violation (*Secretary of Labor v. Sun Ship Inc.*, Rev. Comm. 1985, 12 OSHC 1185). The Commission has rejected the argument that a violation occurs at the time, and only at the time, that the unsafe conditions first come into existence. The determining factor in deciding when the six month limitation begins to run is OSHA's ability to discover the violation.

As a result, in a case where the employer failed to report a fatality within the required timeframe, the Review Commission held that the citation was still valid, even though it was issued more than six months after the event, because it was the employer's fault that the citation could not be issued within the six month period (*Yelington Welding Service.*, Rev. Comm. 1978, 6 OSHC 2013). Similarly, in *Secretary of Labor v. General Dynamics Corp., Electric Boat Div.*, Rev. Comm. 1993, 15 OSHC 2122, the Commission found that OSHA did not have information to discover recordkeeping violations within the six month period, and so the six month period began to run only after OSHA knew or reasonably should have known of the violations.

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## Reasonable Promptness

Section 9(a) of the Act requires that citations be issued with reasonable promptness. The Area Director will issue citations as soon as possible after an inspection for safety and health violations.

OSHA's failure to issue a citation with reasonable promptness does not make the citation invalid, however. A citation that is not issued promptly will be enforced unless the employer shows that the delay in issuing the citation prejudiced the employer's ability to prepare and present its defense (*Havens Steel Co. v. OSHRC*, 738 F2d 397, 11 OSHC 2057 (CA 10 1984); *Secretary of Labor v. General Dynamic Corp., Electric Boat Div.*, Rev. Comm. 1993, 15 OSHC 2122). Unsupported, general allegations that OSHA's delay prejudiced the employer will not be enough to establish prejudice (*National Industrial Constructors, Inc.*, Rev. Comm. 1981, 10 OSHC 1081).

At one time, the Review Commission used a test of whether OSHA's delay in issuing the citation was "unconscionable." That test has now been rejected. The sole criterion for vacating a citation based on promptness is whether the employer establishes that OSHA's delay in issuing the citation resulted in prejudice in preparing or presenting the employer's defenses. It is irrelevant whether the delay was unconscionable or unjustifiable (*National Industrial Constructors, Inc.*, supra).

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## Sending the Citation to the Employer

If violations are discovered during an inspection, OSHA will send the employer the Citation and Notification of Penalty (OSHA Form 2) by certified mail, return receipt requested. Although the OSH Act specifies that certified mail is to be used, the Review Commission has held that failure to use certified mail does not necessarily invalidate the service. In *Secretary of Labor v. General Dynamic Corp., Electric Boat Div.*, Rev. Comm. 1993, 15 OSHC 2122, the Commission held that hand delivering the citation to the employer is adequate service.

Citations will be mailed to employee representatives no later than one day after the citation is sent to the employer. Citations may also be mailed to any employee upon request (FIRM, Chapter IV).

In case law, the question has come up as to who precisely at the workplace should receive the citation. The Review Commission has made the determination that legal service of the citation must be "reasonably calculated to provide the employer with notice and an opportunity to determine whether to contest the

citations" (*Timco Manufacturing Corporation*, Rev. Comm. 1982, 10 OSHC 2019). Service does not need to be on the president of the company, for example, so long as service is made on an employee who will know who in the company to forward the citation to. Service is valid even if it is on an employee at a local worksite who will know to whom the documents should be forwarded (*B.J. Hughes, Inc.*, Rev. Comm. 1979, 7 OSHC 1471).

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## **Violations Not Actually Observed**

The general rule is that an employer will be cited for alleged violations only when observed by an OSHA compliance officer during an OSHA inspection. Where employee exposure is not observed, employee exposure can be established through witness statements or other evidence that exposure to a hazardous condition either has occurred, continues to occur, or could recur.

In fatality/catastrophe or other accident investigations, employee exposure can be established through witness statements or other evidence that exposure to a hazardous condition occurred at the time of the accident.

A citation may also be issued when the compliance officer has not seen a violation but the possibility exists that an employee could be exposed to a hazardous condition because of work patterns, past circumstances, or anticipated work requirements, and it is reasonably predictable that the employee exposure could occur. A potential exposure may be the basis of a citation, for example, if a hazardous condition is an integral part of an employer's recurring operations, but the employer has not established a policy or program to make sure that employee exposure will not recur. A potential exposure also exists when an employer has not taken steps to prevent access to unsafe machinery that employees need to use (FIRM, Chapter III).

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## **Particularity of Violation Description**

The OSH Act requires that each citation must describe "with particularity" the nature of each violation. A citation has a sufficient degree of particularity when it tells the employer what it did wrong. The citation must give the employer enough information so that the employer can prepare and present a defense to the charge. Note that, unless the employer shows that the lack of formal notice of the violation was prejudicial, the charges will not be dismissed (*Brock v. Dow Chemical U.S.A.*, CA 7 1986, 12 OSHC 2135).

For example, The Review Commission decided that a citation alleging a violation of the general duty clause was valid even though employees were not "required" to enter tanks immediately after cleaning them with freon as the citation stated. The Commission held that the citation met the particularity requirement because it clearly informed the employer that there was a problem with its procedures using freon in tanks and so the employer had been given adequate particular notice of the nature of the violation it was accused of (*Secretary of Labor v. General Dynamics Land Systems Div. Inc.*, Rev. Comm. 1991, 15 OSHC 1275.)

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## **Combining and Grouping Violations**

Violations may be combined into one citation when violations are of a single standard. Other-than-serious violations of a standard may be combined with serious violations of the same standard.

Violations may be grouped into a single item when a source of a hazard is identified that involves interrelated violations of different standards. Grouping may occur, for example, when two or more individual violations are found that, if considered individually, would be other-than-serious violations, but if grouped together create a substantial probability of death or serious physical harm (FIRM, Chapter III).

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## **OSHA Forms for Issuance of Citations**

<http://ehscenter.bna.com/pic2/ehs.nsf/id/DTRS-5ZYH83?OpenDocument>

Citations charging non-serious, serious, repeated, and willful violations are issued on OSHA Form 2, Citation and Notification of Penalty.

A citation charging an employer with failure to correct a prior violation is issued on OSHA Form 2B, Notification of Failure to Correct Alleged Violation and of Proposed Additional Penalty.

When a citation is amended, a copy of the original citation must be attached to the amended OSHA Form 2 when that form is forwarded to the employer.  
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## **Amendment and Withdrawal of the Citation**

Withdrawal or modification of the citation usually takes place during an informal settlement agreement. An amended Citation and Notification of Penalty Form (OSHA-2) will state that the employer must 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.

A citation may be withdrawn entirely by the Area Director, in which case a letter withdrawing the citation will be sent to the employer. The letter will say that the original citation has been withdrawn and will require that the employer post the withdrawal for three working days in the same locations that the original citation was posted.

A copy of the withdrawal will also be sent to employees or the employee representative in certain situations, such as when an employee representative participated in the walkaround inspection, when the inspection was in response to an employee complaint, or when the withdrawal was the result of an informal conference or settlement agreement in which an employee representative participated.

OSHA may amend or withdraw the citation at any time before it becomes final, even if it is being contested by either the employer or employee representatives. The Review Commission does not have the authority to review an OSHA decision to withdraw a citation, even when this decision is made during proceedings before the commission (*Cuyahoga Valley Railway Co. v. United Transportation Union, et al.*, U.S. SupCt 1985, 12 OSHC 1521).

OSHA may not amend or withdraw a citation which has become final.  
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## **Posting of Citation**

The employer must post a citation immediately after it is received, at or near each place where the alleged violations occurred (Section 9(b) of the Act). If it is not practicable, because of the nature of the employer's business, to post the citation at or near the place of the alleged violations, then the citation must be posted in a prominent place where it will be readily observable by all affected employees. The citation must remain posted for at least three days or until the violation is corrected, whichever is later (29 CFR 1903).

At the place where the citation is posted, the employer may indicate that the citation is being contested and explain its reasons for contesting the citation. The employer may also indicate the steps that have been taken to abate the citation (29 CFR 1903.16).

When an OSHA citation is amended, both the original citation and the amended version must be posted with the original citation until the amended violations have been corrected, or until three working days have elapsed, whichever is later (FIRM, Chapter IV).  
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## **Informal Conference**

According to 29 CFR 1903.19, the employer, any affected employee, or the employee representative may request an informal conference. When an informal conference is held, it must be within the 15 working day contest period. The Area Director will direct the meeting. The meeting will include a discussion of the purpose of the informal conference, the rights of the participants, contest rights and time restraints,

limitations on the meeting, settlements of cases. At the end of the discussion, the Area Director will make a decision about what action should be taken, based on the facts brought up at the conference.

Regardless of who requests the conference, the employer and employee are given the opportunity and encouraged to participate fully. If either party chooses not to participate in the informal conference, OSHA will try to contact that party to get their input before an informal settlement agreement is signed, in cases where the agreement changes more than the penalty.

If the requesting party objects to the other party's attending the conference, separate informal conferences may be held. During a joint informal conference, separate or private discussions may be held at the request of either party.

Employers will be required by 29 CFR 1903.19 to post copies of all changes to the citation that resulted from the conference. The employee representative will also be provided with copies of these documents. Note that an oral statement made during an informal conference that an employer or employee representative intends to contest a citation, penalty, or abatement date does *not* take the place of the required written notice of intent to contest. (For a discussion of the informal conference in relation to notices of contest see "Guide to Contesting Citations".)

At the end of the informal conference, the Area Director will decide what action will be taken. The Area Director is authorized to change abatement dates, to reclassify violations (for example, willful to serious, serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item if the employer has presented evidence during the informal conference that convinces the Area Director that the changes are justified. Changes in citations, penalties, or abatement dates will be made through an informal settlement agreement. If the informal conference involves an alleged failure to abate, the Area Director will set a new abatement date in the informal settlement agreement.

If an employer has been cited for a willful or repeated violation, and is willing to correct the violations, the employer may avoid the designation of willful or repeated by requesting a Section 17 designation. A Section 17 designation is usually made in the process of working out a settlement agreement. The employer must be willing to pay all or almost all of the penalty and be willing to make other significant concessions. Significant concessions may include the company entering into a corporate-wide settlement agreement, providing employee training, hiring a qualified safety and health consultant, effecting a comprehensive safety and health program, reporting new construction jobs or other worksites to OSHA, or waiving warrants for specified inspections/periods. A Section 17 designation allows the employer to avoid the "adverse public perception attached to a willful or repeated violation classification" (FIRM, Chapter IV).

(For a discussion of settlement agreements, see "Settlement Agreements", .)

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## **Citations for Paperwork Violations**

According to OSHA Instruction CPL 2.111, Nov. 7, 1995, OSHA's policy on enforcing paperwork requirements gives inspectors discretion in deciding when to issue citations and penalties. OSHA's policy includes these procedures:

- When an employer fails to post an OSHA notice, the employer will be given a copy of the notice. A citation for failure to post will be given only if the employer has a pattern of not posting the notice that shows a consistent disregard for complying with the OSH Act.
- Where injury and illness records have not been maintained but there have been no injuries or illnesses, a citation will not be issued. Where records have not been kept, and there have been recordable injuries and illnesses, a citation will be issued.

OSHA has issued general principles for citations when an employer is covered by a standard--such as bloodborne pathogens, respiratory protection, confined spaces, and lockout/tagout--that requires a written plan or certification, but the employer has a deficient or missing plan or certification, and the violation is not willful:

- An employer should be cited for a serious violation if the employer has failed or is likely to fail to follow protective measures so that employees are exposed to a risk of serious harm.

<http://ehscenter.bna.com/pic2/ehs.nsf/id/DTRS-5ZYH83?OpenDocument>

- When the employer has followed the proper protective measures and it is unlikely that the deficiency in the written plan will result in a failure to follow those measures in the future, a citation for an other-than-serious violation with no penalty will be assessed.
- No citation will be issued when an employer has not conducted a required evaluation of a potential hazard if no such hazard exists or could reasonably be expected to exist in the future.
- No citation will be issued if an employer has complied fully with the requirements of a standard but has failed to make the required written certification.
- When an employer's written plan is deficient, one citation will usually be issued for all the deficiencies.