

## ***OSHA'S New Field Operations Manual***

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### **CPL 02-00-148**

- Replaces 1994 “Field Inspection Reference Manual” (FIRM) – 329 pages!
- Revises OSHA’s enforcement policies and procedures manual
- Provides the field offices a reference document for identifying the responsibilities associated with the majority of their inspection duties.
- Effective date: 3/26/2009

## Overview

- OSHA says: "This document is part of OSHA's continuing commitment to make its standards and enforcement activities transparent and understandable to all parties."
- The Field Operations Manual (FOM) assists compliance officers in scheduling and conducting inspections, enforcing regulations.
- It also offers guidance on how to inform employers about OSHA's free On-Site Consultation Service and compliance assistance.

## Scope of FOM

- Chapter 1. Introduction
- Chapter 2. Program Planning
- Chapter 3. Inspection Procedures
- Chapter 4. Violations
- Chapter 5. Case File Preparations and Documentation
- Chapter 6. Penalties and Debt Collection
- Chapter 7. Post-Citation Procedures and Abatement Verification
- Chapter 8. Settlements
- Chapter 9. Complaint and Referral Processing
- Chapter 10. Industry Sectors
- Chapter 11. Imminent Danger, Fatality, Catastrophe and Emergency Response
- Chapter 12. Specialized Inspection Procedures
  - I. Multi-Employer Workplace/site Policy [Reserved]
  - II. Temporary Labor Camps
- Chapter 13. Federal Agency Safety and Health Programs [Reserved]
- Chapter 14. Health Inspection Enforcement Policy [Reserved]
- Chapter 15. Legal Issues
- Chapter 16. Disclosure under the Freedom of Information Act (FOIA)

## State Impact

- States must have, as a part of their State plan, formal written policies and procedures on all aspects of their compliance program, including inspections, targeting, citations, penalties, and post citation processes, which are at least as effective as the procedures in this revised FOM.
- In adopting equivalent policies and procedures States must address each chapter and/or policy area in this manual.

## Significant Changes

- Area Office responsibilities have been expanded.
- A section has been added to cover OSHA Cooperative Programs Overview.
- A section has been added to address Enforcement Exemptions and Limitations.
- A section has been added to address Preemption by Another Federal Agency.
- A section has been added to address enforcement activity at the United States Postal Service.
- A section has been added to address Home-Based Worksites.
- A note has been added defining “other critical inspections as determined by the Assistant Secretary” to include referrals, although not limit only to referrals.

## Significant Changes

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

## Significant Changes

- The definition and application of horizontal and vertical standards have been revised and clarified.
- The discussion of the four factors involved in determining a serious violation has been expanded and clarified, with examples.
- The elements of a general duty clause violation are given an expanded discussion, with examples.
- Additional clarification is provided on limitations of use of the general duty clause, with examples.
- Expanded and clarified guidance is provided on willful violations, with examples.
- Updated guidance is provided for criminal/willful violations.
- Violations cited by State Plan States **cannot** be used as a basis of OSHA repeat violations by Federal OSHA, even if the same standards are cited by a State agency. Only 1-11 violations that have become a final order of the Review Commission are to be considered.
- Clarification is provided on time limitations for citing repeat violations.
- Responsibilities of the Area Director in citing repeat violations are clarified.
- De minimis *violations* are corrected to de minimis *conditions*.

## Significant Changes

- Clarifies when not to group or combine violations.
- Guidance on citing health standard violations has been updated.
- Clarification is provided on Statute of Limitation for issuance of citations.
- Expanded guidance is provided on Classified and Trade Secret Information.

## Significant Changes – Penalty Criteria

- Adds a provision requiring documentation in the case file if the Area Director approves a partial reduction for *Size* for small employers (1-25 employees)
- Adds a provision allowing some OSHA Strategic Partnership (OSP) sites to qualify for an extra 10% *Good Faith* reduction
- Adds a provision clarifying that the *History* reduction factor is to be applied nationwide, and to include State Plan state history as well
- A *History* reduction will no longer be given to employers being cited for failure to certify abatement.
- The Quick-Fix policy has been modified to allow it to apply to medium gravity serious violations.
- A note has been added to clarify that the second *Size* chart applies only to serious willful violations.
- The reduction factor for *History* is allowed for penalties for regulatory violations that are classified as willful; this is in addition to the reduction factor for *Size* that has been allowed.
- A change has been made to abatement verification policy to not allow a *History* reduction to employers being cited for failure to certify abatement or for failure to notify employees and tagging movable equipment.
- A clarification has been added to the Part 1904 provision that the Repeated and Willful penalty policies are applicable to recordkeeping violations.

## Significant Changes – Post-inspection

- Provides procedures for accepting and handling electronic (e-mail) notices of contest.
- Provides policies and procedures for informal conferences; policies and procedures for settlement of cases.
- Provides guidance on the attendance of the employer's attorney at the informal conference.
- Specifically prohibits any discussion of possible criminal referrals in fatality cases during the informal conference.
- Provides updated policies and procedures on Petitions for Modification of Abatement Date.
- Replaces the current directive on abatement verification, OSHA Instruction CPL 02-00-114, Abatement Verification Regulation Enforcement Policies and Procedures
- Provides an expanded definitions section, including definitions of the terms *Abatement* and *Abatement Dates*.
- Provides expanded guidance on citations for violations of §1903.19.
- Provides policy on follow-up inspections for employer failure to verify abatement under §1903.19, including follow-up inspections under the Enhanced Enforcement Program.

## Significant Changes - Complaints

- The definition of *complaint* has been clarified to include only present employees, not past employees.
- The potential harm necessary to file a complaint has been clarified to include health harm as well as physical harm.
- The OSHA-90 form has been identified as the proper form in which to use the coding identified under the referral sources.
- The FOM explicitly states that information received via telephone from a current employee or representative of employees is considered a non-formal complaint until a signed copy of the information is received.

## Significant Changes – Legal

- Equal Access to Justice Act explains the application of this Act to OSHA enforcement proceedings.
- Include explanation of the Commission Simplified Proceedings and some of its rules.
- Discusses Federal Court Enforcement under Section 11(b) of the Act adds enforcement instruction regarding Federal summary enforcement orders previously stated in the Enhanced Enforcement Program directive.

## General Duty Clause

- Section 5(a)(1) of the Act requires that “Each 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.”
- Necessary elements to prove a violation of the general duty clause:
  - ▶ The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - ▶ The hazard was recognized;
  - ▶ The hazard was causing or was likely to cause death or serious physical harm; and
  - ▶ There was a feasible and useful method to correct the hazard.
- A general duty citation must involve both the presence of a serious hazard and exposure of the cited employer’s **own** employees.

## General Duty Clause

- “The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 5(a)(1), although the accident/incident may be evidence of a hazard.”
- “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.”
- “The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foreseeability of the hazard; e.g., an explosion need not be imminent.”
  - *It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.*

## General Duty Clause

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



## General Duty Clause

- Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or “common-sense” recognition.
- 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 OSHA inspection.
- 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 to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.
- Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.
- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.
- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

## General Duty Clause

- 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 5(a)(1) violation.
- Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient.

## Industry Recognition

- Industry recognition of a hazard can be established in several ways:
  - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);
  - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;
  - Manufacturers' warnings on equipment or in literature;
  - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard.
  - Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;
  - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;
  - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred;
  - If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National FireProtection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition.
    - Otherwise, such private standards normally shall be used only as corroborating evidence of recognition.

## Criminal Prosecutions

- Section 17(e) of the Act, as amended, provides that: "Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine" of not more than \$250,000 for an individual and \$500,000 for an organization or by imprisonment for not more than six months nor less than 30 days, or by both.
  - FOM clarifies that no criminal prosecution will be filed for willful citations under General Duty Clause
- "If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral to the U.S. Department of Justice. . . . [inform witnesses that] making a false statement to a CSHO during the course of an investigation could be a criminal offense. Making a false statement, upon conviction, is punishable by up to \$10,000 or six months in jail, or both."
- Criminal penalties are imposed by the courts after trials and not OSHA or OSHRC.
- At informal conference, "There should be no discussion with employers or employee representatives concerning the potential for referral of fatality inspections to the Department of Justice for criminal prosecution under the Act."

# QUESTIONS?

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