

Cal/OSHA Inspections/Citations — “IGNORANCE OF THE LAW IS NO EXCUSE” — Cliff Notes

Cal/OSHA: Surviving an Inspection Preparation Note: Tact/Diplomacy/Kindness/Respect can re-negotiate the playing field from anxiety to mutual respect.

IT'S ALL ABOUT DUE PROCESS.

Play the game better by knowing the rules.

1. Know the rules of engagement – Inspection Process - Ref: Cal/OSHA P&P C1A through C1B3 particularly. <https://www.dir.ca.gov/samples/search/querypnp.htm>
2. Hazard Analysis – OSHA Technical Manual https://www.osha.gov/dts/osta/otm/otm_extended_toc.html
- 3 Cal. Labor Code 6314 - <https://codes.findlaw.com/ca/labor-code/lab-sect-6314.html>

Remember: It is your house and your rules...they are visitors and you establish conditions of entry.

OPTIONSTOCONSIDER -

WHERE POSSIBLE - ALWAYS MAINTAIN PERIMETER PRIVACY FENCING AND CONTROL ENTRY TO A SINGLE POINT.

If a Cal/OSHA inspector showed up at your site, would you know what to do?

1. Establish a one clear and known contact person and delay contact for about 1/2hr
2. Call the number of the Compliance Officer and verify the following:
 - A. How long with the Division
 - B. Are they Safety or Health (Industrial Hygienist)
3. Have a digital voice recorder in plain sight with the statement “It is corporate policy to record all regulatory agencies”.
4. Listen to the opening conference carefully – They are obligated to provide clear and concise info on rights and responsibilities; nature, purpose and scope of inspection.

(FYI - You can exclude Unions from participating in the opening conference) (Download your copy of a “Users Guide to Cal/OSHA

https://www.dir.ca.gov/dosh/dosh_publications/osha_userguide.pdf

Keep a copy of the Cal/OSHA 1A Cover sheet for contemporaneous recordkeeping

https://www.dir.ca.gov/DOSHPol/CalOSHA_1A-Open_Closing_Sheet.pdf

5. Ask what “General” areas of interest, and if it involves special PPE; THEY MUST HAVE THEIR OWN – DO NOT LEND YOURS. – IF the area needs resp. Protect. ASK if they are certified to wear respirator and ask for proof. If the area is ASBESTOS/LEAD/HazWopper – demand they show and you copy their 40hr. Cards. THESE ARE LEGITIMATE EXCLUSION POINTS – **REMEMBER** THEY HAVE TO FOLLOW THEIR OWN RULES. THOSE SAME RULES 1529, 5208, 5144, ETC. TELL YOU THAT YOU HAVE TO EXCLUDE THEM IF THEY DON'T MEET MINIMUM TRAINING.
6. Consider creating a 1 – 2hr. Site Safety Orientation training (similar to what your new hires would have to go through?) – REMEMBER, YOUR HOUSE _ YOUR RULES. Simply state, that it is corporate policy that all visitors must go through basic safety orientation.
7. Remind them that any photographs taken 1) must be done in RAW mode (not editable)
8. Ask them if they intend on taking any samples either direct reading or bulk – invoke your right to concurrent sampling. (good means of official time out if you do not have the technical expertise/equipment at the time)

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9. Other than the LOG 300 series documents – there is NO legal mechanism forcing the employer to a) forfeit any copies of corporate documents and b) employer can insist that documents be reviewed on site.
10. Authorization to enter has to be formally requested similar to “ have I explained the nature, purpose and scope of inspection to your satisfaction?... Do you understand your rights and responsibilities?... and finally, do I have your permission to continue this inspection.

Finally: Throughout the opening conference, engage in a technical Q&A with the compliance officer. If they don't give you a warm and fuzzy feeling (Competency) THERE ARE NO LAWS THAT PREVENT YOU FROM CALLING THE DISTRICT MANAGER AND ASK TO SEND A MORE “SEASONED” OR “QUALIFIED” INDIVIDUAL IN YOUR BUSINESS PROCESS AND EQUIPMENT.

REASON THIS IS IMPORTANT – AB 2774 has made CSHO's “Expert Witnesses...as long as their Division mandated training is current”...This you can ask about...and here is what they are supposed to have completed.

Cal/OSHA P&P C-12 <https://www.dir.ca.gov/DOSHPol/P&PC-12.pdf>

Inspection suggestion:

1. Your team should consist of 3(the lead [the one with the greatest technical and people skills], Recon: the runner that based on the tour direction, clears any OBVIOUS hazards before the inspection party arrives, the RECORDER photographer – photograph from perspective in 360 degrees.
2. Never volunteer answers/answer only direct questions – listen for open ended or leading questions.
3. There is currently NO Labor Code Section that mandates a private interview with ANY employee. Labor Code Section 6314 contains language that makes the interview process with ANY employee contingent on the EMPLOYEE. YOU CAN BE PRESENT FOR THE INTERVIEW.
4. NO management rep., be they a lead/shift super/or manager can be MADE TO TALK. They also have the right to have an attorney present. (applicable legal theory– managers have what is known as imputed knowledge and when they talk it's a “statement against interest”. LOOSE LIPS SINK SHIPS.
5. If any “evidence” is taken for “analysis” – a) have them sign your “custody release” form clearly describing the mfg/mdl/ss., and condition of the equipment. b) ask if the evidence is held in a secured “property room” (preserves the integrity of the evidence – FYI most District Offices do not currently have such a room and c) ask what type of analysis is going to be conducted, when, where and by whom. Insist that you be there with your own subject matter expert to conduct simultaneous testing.
6. If during the inspection the CSHO suggest a memory lapse as to the exact requirements of a Code,i.e., “I'll have to double check the code”...Take out your laptop/tablet and ask which code they are thinking of and both of you look at the language. Remember once they leave your site....you've lost influencing ability. **GOOD LUCK – the best defense is a strong offense – FORESIGHT & PREPARATION**

Cal/OSHA: Top Citations and Why They Stick – A Primer

2019 Most commonly issued Citations

Prevention is worth a pound of cure – trite but true.

AKA – DICK’S RULES OF THREE

EMPLOYER DUE DILLIGENCE

ALL OSHA PROGRAMS – REQUIRE EMPLOYERS PERFORM THE FOLLOWING:

1. **HAZARD IDENTIFICATION** – here the focus should be on “potential” and “foreseeable” - meaning proximity as well as based on the historical records.
2. **EVALUATION** – HOW are the hazards quantified relative to severity/extent and likelihood
3. **CONTROL** – requires a regimented sequence of engineering control and where not immediately attainable, administrative controls and if these two do not fully control the hazard, the employer is allowed in the interim to deploy PPE.

THE APPLICATION OF THE DUE DILLIGENCE CLAUSE DEMAND THAT THIS DUTY STATEMENT INCLUDE A **TIMELY CORRECTION RESPONSE TO ANY FINDING....**WHO AND HOW IS THAT TERM DEFINED? BASICALLY: WHAT IS THE CORRECTION TIME FOR “GENERAL/SERIOUS” HAZARDS AND HOW IS THAT DETERMINED.

Understanding Codes – Devil is in the DETAILS

1. 3 Basic Types of Code – and the “tells” that define them
 - A. **Proscriptive** – simple, direct, leave NO choice – “must, shall, will”
 - B. **Hybrids** – Most dangerously misread. Starts out with AFFIRMATIVE statement, then default to situational analysis with options
 - C. **Performance** – typically require a written document, establishes “if”, “then” scenarios. Highly situational. Contains words such as “may, should, could, consider”. Think IIPP, HazCom, Confined Space, LOTO etc.
 - D. **ALL** codes are applicable and enforceable ONLY if and WHEN the activity/machine/process is active AND an employee is exposed TO ITS DANGERS. The premise is all about WHAT IS A HAZARD, when and for how long.
 - E. **WILD CARDS** – CONSENSUS STANDARDS – NFPA, ACGIH, ANSI, CDC, ETC.
2. **CITATIONS** - with exception of “posting/record keeping” citations, most citation – require that 3 elements be provable, meaning there is EVIDENCE.
 - 1) There is a RECOGNIZED HAZARD
 - 2) There is a ZONE OF DANGER and most importantly,
 - 3) There is an EMPLOYEE EXPOSED IN THAT ZONE OF DANGER
 - 4) WITH EXCEPTION OF THE LOG 300 RULE CHANGE ALLOWING FOR A 5 YEAR EXPOSURE POTENTIAL...DIVISION HAS A 6 MONTH STATUTE OF LIMITATIONS.

3. TYPES OF EVIDENCE

1. **HARD EVIDENCE** – Percipient witness CSHO PHOTO/SAMPLE/DIRECT READING/EMPLOYEE SYMPTOMS
2. **PERISHABLE EVIDENCE** – Any ORAL testimony (interview process)

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CODES OF SIGNIFICANCE – Meaning they are provable with little or no evidence

1. **T8CCR3328** – Machinery and Equipment - <https://www.dir.ca.gov/title8/3328.html>
2. **T8CCR5097** – Hearing Conservation - <https://www.dir.ca.gov/title8/5097.html>
3. **T8CCR3380** – PPE - <https://www.dir.ca.gov/title8/3380.html>
4. **T8CCR5155** – Airborne Contaminants - <https://www.dir.ca.gov/title8/5155.html>
5. **T8CCR5141** – Engineering Control - <https://www.dir.ca.gov/title8/5141.html>
6. **T8CCR5162** – Eye Wash/Shower - <https://www.dir.ca.gov/title8/5162.html>

COMMONLY CITED CODES THAT REQUIRE A WRITTEN PROGRAM/PROCEDURE

1. Injury & Illness Prevention Program (T8 3203)
2. Carcinogen Registration (T8 5203)
3. BBP/TB (T8 5193 & 5199)
4. Hearing Conservation (T8 5095-5099)
5. Confined Space (T8 5156-5158)
6. Heat Illness (T8 3395 and/or 3203)
7. Hazcom (T8 5194) 8. PPE (T8 3380-3387)
9. Respiratory Protection (T8 5144)
10. Chemical Hygiene (T8 5191)
11. Lead (T8 1532.1 & 5198)
12. Asbestos (T8 1529 & 5208)
13. Ventilation & IAQ (T8 5142-5143, 5154.1 & 5154.2)
14. Ergo (T8 5110)
15. Hoist & Crane (T84965-5035) & Sling (T8 5040-5049)
16. Forklifts / Site Vehicles (T8 3650-3668)
17. Hot Work Permit & Welding & Cutting (T8 4794-4848 & 5105)
18. Fire Protection (T8 6184)
19. Lockout/Tagout (T8 3314)
20. Electrical (T8 2300-2589.2 & 2700-2989.1)
21. Machine Guarding (T8 4189-4647)
22. Fall Protection (T8 1670)
23. Boilers Compressed Air Tanks (T8 454-560), Elevator Inspection Documents and Valid Permits (T8 300-3146)
24. Radiation (ionizing and non-ionizing) (T8 5075-5085)
25. Process Safety Management (T8 5189)

A WORD ABOUT THE APPEALS PROCESS – UNDERSTAND AND INITIATE “OFFICIAL TIME OUTS”

1. **Caution** - CSHO trained to “SELL” the Informal Conference – **IT IS NOT PART OF THE APPEALS PROCESS, AND IS SELDOM SCHEDULED PRIOR TO THE FORMAL APPEALS SUSPENSE DATE.**
2. **ALWAYS FILE YOUR APPEALS IMMEDIATELY**
3. **ALWAYS REQUEST COPY OF THE ENTIRE CASE FILE**

VENUE FLOW – APPEAL FILED > 1ST. TELECONFERENCE > JUDGE ASKS WAS INF. CONF. DONE? – IF NOT WILL INSTRUCT TO SCHEDULE > STATUS CONFERENCE > THEN APPEAL SCHEDULED.

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Strategic Option(s) Decision Logic – Where Your Evidence Supports these options consider raising the following either at the Appeal and/or Informal Conference.

1. Ask to vacate the citation(s).
2. Ask to “amend” the Characterization(s) of the Citation(s) [Serious to General or Accident Related to NON-accident Related] OR
 - a. Where applicable to “NOTICE” See Policy and Procedures Below
C-5 <https://www.dir.ca.gov/DOSHPol/P&PC-5.htm> 2/1/95
 - b. Where applicable to “INFORMATION MEMORANDUM”
C-4 <https://www.dir.ca.gov/DOSHPol/P&PC-4.htm> 2/1/95
3. Where there are multiple citations regarding the same hazard such as T8CCR3203(a)(2); (a)(4); and (a)(7), consider requesting the option below:

T8CCR336(k) Multiple Violations Pertaining To A Single Hazard. When a single hazard is the subject matter of multiple violations resulting in civil penalties, the Division may, in its discretion, depart from the preceding criteria to mitigate the cumulative effect of such penalties.

(1) This subsection does not apply to any penalty assessed for a Serious, Willful or Repeated violation or a failure to abate a Serious violation where such violation or violations have been determined by the Division to have caused death or serious injury, illness or exposure pursuant to Labor Code section 6302. This subsection does not apply to any Regulatory, General or Serious violation where the employer does not have an operative injury prevention program as set forth in subsection (d) of this section.