MICHIGAN DEPARTMENT

OF

LABOR AND ECONOMIC OPPORTUNITY

MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

FIELD OPERATIONS MANUAL

(FOM)

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TABLE OF CONTENTS

Chapter I. MIOSHA General 1

MIOSHA Mission 1
MIOSHA Vision 1
Authority 1
Federal/State Agreement 1
Jurisdiction – Coordination with Other Federal and State Agencies 2
MIOSH Act Applicability – Relationship to Other State Laws 3
Exemptions from MIOSHA Coverage 3
Shipbuilding, Shipbreaking, Ship Repairing, and Longshoring 3
Indian Reservations/Indian Country 4
Evaluating Volunteer Work for Coverage Under MIOSHA 4
Community Service 5
Non-Court Ordered 5
Court Ordered 5
Prisoners 5
Students 5
Statutory Exemptions 6
Domestic Employment 6
Mining Employment 7
Federal Government Establishments/Employers/Employees 7
Other Federal Laws 8
OSHA Fiscal Year Budget Appropriations Riders 8
Home-Based Worksites 8

Chapter II. MIOSHA Responsibilities and Structure 9

Administration Responsibilities and Structure 9
Responsibilities 9
Structure 9
Director, LEO 9
Director, MIOSHA 9
General Duties 9
Specific Duties 9
Deputy Director, MIOSHA 9
Departmental Analyst 9
Personnel Liaison 9
Construction Safety and Health Division (CSHD) Responsibilities and Structure 10
Responsibilities 10
The Asbestos Program 10
Structure 11
Director 11
Safety Manager 11
Health Manager 11
Health Supervisor 11
Safety Supervisor 11
Industrial Hygienist Specialist 11

Senior Compliance Officer (SO and IH) 11
Compliance Officer (SO and IH) 11
Departmental Analyst 11
General Industry Safety and Health Division (GISHD) Responsibilities and Structure 12
Responsibilities 12
The Employee Discrimination Section 12
The Chemical Compliance Program 12
Structure 12
Director 12
Safety and Health Manager 12
Employee Discrimination Section Manager 12
Safety or Health Supervisor 12
Industrial Hygienist Specialist 13
Senior Compliance Officer (SO and IH) 13
Compliance Officer (SO and IH) 13
Discrimination Rights Representative 13
Departmental Analyst 13
Departmental Technician 13
Technical Services Division (TSD) Responsibilities and Structure 13
Responsibilities 13
Laboratory and Equipment Services Section (LESS) 13
Management Information Systems Section (MISS) 13
Standards and FOIA Section 14
Radiation Safety Section (RSS) 14
Structure 14
Director 14
Program Manager 14
CET Grant Program Administrator 14
Laboratory Scientist 14
Equipment Technician 14
Departmental Analyst 15
Physicist 15
Departmental Technician 15
Consultation Education and Training (CET) Division Responsibilities and Structure 15
Responsibilities 15
Structure 16
Director 16
Program Manager 16
Training and Consultation Program Supervisor 16
Onsite Consultation Program Safety or Health Supervisor 16
MIOSHA Communications Specialist 17
Michigan Voluntary Protection Program (MVPP) Specialist 17
Training and Consultation Program Consultant 17
Onsite Consultation Program Consultant 17
Departmental Analyst 17
Program Developer/Web Coordinator 17

MIOSHA Appeals Division Responsibilities and Structure 17
Responsibilities 17
Structure 18
Director 18
Appeals Coordinator 18
Board Clerk 18
Agency Phone/Fax Numbers 19
General Industry Safety And Health Division Health District Office Map 21

Chapter III. Non-Inspection Agency Operational Issues and Procedures 22

Standards 22
Promulgation 22
Development 22
Application 23
Agency Guidelines 23
Safety and Health Management System (SHMS) 23
Assaults 23
Conduct 24
Training 24
MIOSHA Emergency Management Plan (MIOSHA EMP) 24
Disclosure of Documents 25
Policy 25
Procedures 25
Requests for Records 25
Disclosable Information on Case File Forms 26
Non-disclosable Information on Case File Forms 26
Information Which Will be Exempt From Disclosure in Whole or in Part on Case File Forms 26
Disclosure of Witness' (Interview) Statements 26
Medical Records 26
Appeal Rights 26
Waiving Fees 27
Retention of FOIA Files 27
Subpoenas 27
Subpoenas Issued to MIOSHA 27
General 27
Requirements of Subpoenas for Depositions/Trial Appearances (With or Without Records) 27
Preparation for Depositions/Trial Appearances 28
Notify the Office Upon Completion of Testimony 29
Administrative Subpoenas Issued by MIOSHA 29

Chapter IV. Pre-Inspection Procedures 31

Inspection Scheduling 31
General Requirements 31
Inspection/Investigation Types 31
Unprogrammed 31

Unprogrammed Related 31
Programmed 31
Programmed Related 31
Inspection Priorities 32
Inspection Selection Criteria 32
Scheduling 32
Effective Use of Resources 32
Effect of Appeal 32
Employer Contacts 33
Voluntary Compliance Programs 33
Unprogrammed Inspections 33
General 33
Definitions 33
Imminent Danger 33
Fatality/Catastrophe 33
Complaints 33
Referrals 34
Employer-Reported Referral (ERR) 34
Accidents 34
Follow-ups 34
Monitoring 34
Variance 34
Notification of Abatement Inspections [Other-than-serious (OTS) Only] 34
Imminent Danger 34
Fatality/Catastrophe 35
Complaints 35
Evaluating Complaints 35
Electronic Complaints 35
Identity of Complainant 35
On-Site Complaint Inspection 35
Off-Site Complaint Inspections 37
Letter Complaint Inspection 37
Telephone Complaint Inspection 37
Procedures for an On-Site Complaint Inspection 37
Procedures for a Letter Complaint Inspection 38
Procedures for a Telephone Complaint Inspection 39
Referrals 39
Employer-Reported Referral (ERR) 39
Accidents 39
Follow-ups 39
Monitoring 39
Variance 39
Notification of Abatement) 39
Discrimination Complaints 40
Programmed Inspections 40
GISHD 40

CSHD 40
Strategic Plan and Other Emphasis Programs 41
General 41
Scheduling of Strategic Plan or Other Emphasis Program Inspections 41
Non-Fatal Accidents 42
Inspection Preparation 42
General 42
Planning 42
MIOSHA Safety and Health Management System 42
Electrical 42
Lockout/Tagout 42
Confined Space 43
Fall Protection for MIOSHA Personnel 43
Advance Notice of Inspections 44
Policy 44
Documentation 45
Pre-Inspection Warrant/Subpoena Process 45
Expert/Specialist Assistance 45

Chapter V. Inspection Procedures 46

General Inspection Procedures 46
Inspection Scope 46
Comprehensive 46
Partial 46
Conduct of the Inspection 46
Time of Inspection 46
Construction Worksites 46
Entry of Construction Worksites 46
Initial Contact 46
Presenting Credentials 46
Delay of Inspection 47
Recordkeeping Review 47
Refusal to Permit Inspection 47
Refusal of Entry or Inspection 47
Employer Interference 48
Administrative Subpoena 48
Obtaining an Inspection Warrant 48
Warrant/Court Order Inspection 48
Action to be Taken upon Receipt of Warrant/Subpoena 48
Law Enforcement Assistance 49
Warrant 49
Subpoena 49
Refused Entry or Interference while Presenting a Warrant/Subpoena 49
Forcible Interference with Conduct of Inspection or Other Official Duties 49
Release for Entry 50
Bankrupt or Out of Business 50
Strike or Labor Dispute 50

Rescue Operations....50
Non-Standard Procedures or Equipment....51
Voluntary Rescue Operations Performed by Employees....51
Emergency Response....52
Role in Emergency Operations....52
Response to Significant Events....52
MIOSHA's Role....52
Employee Participation....52
Public Information Policy....53
Opening Conference....53
Appropriations Riders....53
Voluntary Compliance Programs....53
Preemption by Another Agency....54
Attendance at Opening Conference....54
Scope....54
Forms Completion....55
Employees of Other Employers....55
Selection of Walkaround Representatives....55
Employees Represented by a Certified or Recognized Bargaining Agent....55
Safety Committee....55
Other Authorized Employee Representative....56
No Authorized Employee Representative....56
Number of Interviews....56
Trade Secrets....56
Classified Areas....56
Immediate Abatement....56
Walkaround Inspection....56
Disruptive Conduct....57
Examination of Records/Written Programs and Posting Requirements....57
Records/Written Program....57
Posting....57
Good Faith Evaluation....57
Safety and Health Management System Evaluation....57
Record All Facts Pertinent to a Proposed Violation....57
Sampling....58
Photographic Evidence....58
Interviews....58
Time and Location....59
Privacy....59
Employee Right of Non-Discrimination....59
Informal Interviews....59
Formal Interview....59
Determining Employment Status of Employees Interviewed....60
Employee Right of Complaint During Walkaround....61
Abatement Assistance During Inspection....61
Policy....61

Disclaimers 61
Prompt Abatement During Inspection 61
Employee Exposure Evaluation 61
Trade Secrets 62
Policy 62
Restrictions and Controls 62
Section 63 of the Act 62
Photographic Evidence 62
Violations of Other Laws 62
Imminent Danger Referrals within MIOSHA Enforcement Divisions 62
Within the Same Division 62
Between Divisions 63
Closing Conferences 63
Special Inspection/Investigation Procedures 64
Imminent Danger Inspection Procedures 64
Elimination of the Imminent Danger 64
Voluntary Elimination of the Imminent Danger 65
Action Where the Danger is Immediate and Voluntary Elimination Is Not Accomplished 66
Action Where the Danger is that the Harm will Occur Before Abatement is Required 66
Fatality Investigations 67
Staff Notification 67
Investigation Procedures 67
Families of Victim(s) 68
Criminal 68
Public Information Policy 69
Recording and Tracking of Fatality Investigations 69
OSHA Information System (OIS) Fatality/Catastrophe Report Form 69
Investigation Module 69
Pre-Citation Review 70
Post-Citation Procedures/Abatement Verification 70
Relationship to Other Programs and Activities 70
Emergency Management/Homeland Security 70
Strategic Plan Inspections 70
Cooperative Programs 70
Non-Fatal Accident Investigations 71
Follow-up Inspections 71
Purpose and Procedures 71
Scope 71
Documentation 71
Cease Operation 71
Citation Issuance 71
Follow-up Files 72
Severe Violator Enforcement Program (SVEP) Reinspections 72
Monitoring Inspections 72
Intra-Office Assistance (IOA) Safety/Health Inspections 73
Definition 73

Purpose....73
Procedures....73
Temporary Labor Camp Inspections....73
Introduction....73
Definitions....73
Temporary....73
Temporary Labor Camp Housing....73
New Construction....73
Enforcement of Temporary Labor Camp Standards....73
Inspections of Temporary Labor Camps....74
Temporary Labor Camp Inspection Procedures....75
Programmed Inspections....75
Liaison with Other Agencies....75
Appropriations Riders....75
Worker Occupied Housing....75
Language....75
Minimize Disruptions....75
Prompt Abatement....75
Primary Concern....76
Condition of Employment....76
Field Sanitation Inspections....76
Agriculture....76
Pesticides....77

Chapter VI. Inspection Documentation and Issuance Procedures....78

Typical Case File Documentation....78
General....78
Guidelines....78
Attorney General and MIOSHA Appeals Division Coordination....78
Case File Documentation....78
No Inspection Conducted....78
Inspection Conducted, No Citations to be Issued....78
Inspection Conducted, Citations to be Issued....79
Health Inspections....80
Document Potential Exposure....80
Employer's Occupational Safety and Health System (Including Expanded Standards)....80
Monitoring....80
Medical Surveillance Program(s)....81
Recordkeeping....81
Engineering Controls....81
Work Practice and Administrative Controls....81
Personal Protective Equipment....81
Regulated Areas....81
Employee Training....81
Emergency Action Plan....81
Purging Case File Information....82
Violations....82

Basis of Violations 82
Standards and Regulations....82
Definition and Application of Vertical and Horizontal Standards....82
Variances 83
Employee Exposure 83
Definition of Employee 83
Proximity to the Hazard....83
Observed Exposure 83
Unobserved Exposure....83
Potential Exposure 84
Documenting Employee Exposure 85
Notice of Potential Hazard Form and Safety/Health Recommendation Form 85
MIOSHA Rule Exists 85
No MIOSHA Rule 85
Types of Violations 86
Other-Than-Serious Violations 86
Serious Violations 86
General Duty Clause Violations....87
Evaluation of Potential General Duty Clause Situations....87
Limitations on Use of the General Duty Clause 88
Pre-Citation Review of General Duty Clause Violations....89
Willful Violations....89
Pre-Citation Review Willful Violations 92
Willful Worksheet....93
Criminal/Willful Violations....94
Repeat Violations 94
Identical Standard and Rule 94
Different Standards and Rules 94
Time Limitations....94
Inspection History....95
Repeat vs. Willful 96
Repeat vs. Failure to Abate 96
Alleged Violation Description (AVD)....96
Repeat Documentation....96
Substantially Similar Condition 96
Finality....97
Failure to Abate Notification....97
De minimis Violations 97
Combining and Grouping of Violations....98
Combining 98
Grouping....98
Grouping Related Violations....98
Grouping Other-Than-Serious Violations Where Grouping Results in a Serious Violation 98
Where Grouping Results in Higher Gravity Other-Than-Serious Violation....98
Violations of Posting and Recordkeeping Requirements....98

Penalties for Grouped Violations 98
When Not to Group or Combine 98
Multiple Inspections 98
Separate Establishments of the Same Employer 99
General Duty Clause Violations 99
Egregious Violations 99
Written Program, MIOSHA Poster, Notification Violations 99
MIOSHA Poster 100
Access to Exposure and Medical Records (Notification Requirements) 100
Multi-employer Worksites 101
Employee Responsibilities 102
Affirmative Defenses 102
Definition 102
MIOSH Act Requirement 102
Burden of Proof 103
Common Affirmative Defenses 103
Unpreventable Employee Misconduct or Isolated Event 103
Impossibility 103
Greater Hazard 104
Abatement 104
Period 104
Reasonable Abatement Date 104
Long-Term Abatement Date for Implementation of Feasible Engineering Controls 104
Final Abatement Date 105
Employer Abatement Plan 105
Feasible Administrative, Work Practice and Engineering Controls 105
Definitions 105
Engineering Controls 105
Administrative Controls 105
Work Practice Controls 105
Feasibility 105
Technical Feasibility 105
Economic Feasibility 106
Responsibilities 106
Reducing Employee Exposure 106
Failure to Submit Abatement Assurance 106
Closing of Case File Without Abatement Certification 106
Penalties 106
General Policy 106
Civil Penalties 107
Statutory Authority 107
Minimum Penalties 108
Penalty Factors 108
Gravity of Violation 108
Severity Assessment 108
High Severity 108

Medium Severity 109
Low Severity 109
Minimal Severity (other-than-serious violations) 109
Probability Assessment 109
Categorization 109
Determination 109
Circumstances to be Evaluated 109
Final Probability Assessment 110
Gravity-Based Penalty (GBP) 110
Serious Violations 110
Serious Violation Penalty Table 110
Other-Than-Serious (OTS) Violations 110
OTS Violation Penalty Table 111
Exception to GBP Calculations 111
GBP for Combined, Grouped, or Instance-by-Instance Violations 111
Severity Assessment 111
Probability Assessment 112
Gravity-Based Penalty (GBP) 112
Instance-by-Instance Cases 112
Penalty Adjustment (Reduction)Factors 112
Limitations 112
Size Reduction 113
Size Reduction Table 113
Good Faith Reduction 114
History Reduction 114
Total Reduction 115
Proposed Serious Penalty Table 115
Effect on Penalties if Employer Immediately Corrects or Initiates Corrective Action 116
Failure to Provide Notification of Abatement (NOA) 116
Failure to Abate (FTA) 117
Repeat Violations 119
Gravity-Based Penalty Factors 119
Penalty Increase Factors 119
Increase Factor Table for Serious Repeated Violations and Other-Than-Serious with Greater Probability Repeat Violations 120
Other-Than-Serious with Lesser Probability 120
Repeat Penalty Table for Other-than-Serious Violations with Lesser Probability 121
Willful Violations 121
Other-than-Serious Willful Penalty 121
Serious Willful Penalty 122
Serious Willful Size Reduction Table 122
Penalties to be Proposed for Serious Willful Violations Table 123
Regulatory Violations 123
General Application 123
Willful Regulatory Violations 124
Injury and Illness Recording and Reporting Requirements 124

Other Regulatory Requirements....124
MIOSHA Poster....124
Citation Posting....124
Advance Notice Notification Requirements....124
Abatement Notification....124
Appeal Notification Posting....124
Access to Exposure and Medical Records....124
GBP Regulatory Penalty Table....125
Criminal Penalties....125
Issuing Citations....126
Issuance Deadline....126
Sending Citations to the Employer....126
Sending Citations to the Employee....126

Chapter VII. Post-Citation Procedures and Abatement Verification....127

Writing Citations and Citation Deadline....127
Citations, Appeals, and Settlements....127
Appeal not Pursued....127
First Appeal (Employer Petition)....127
First Appeal (Employee Petition)....127
Penalty Reduction Agreement....128
Petition for Modification of Abatement (PMA)....128
Filing Date....128
Incomplete Petitions....128
Processing PMAs....129
Second Appeal (Formal Appeal)....129
Transmittal of Notice of Appeal and Other Documents to the Board....129
Transmittal of File to the Attorney General's Office....130
Verification of Abatement....130
Abated During Inspection....130
Other-than-Serious....130
Serious, Repeat, Fail-to-Abate, Willful, or Instance-by-Instance....130
Certification Timeframe....130
Abatement Documentation....131
Adequacy of Abatement Documentation....131
SO/IH Observed Abatement....131
Effect of Appeal Upon Abatement Period....132
Informal Conferences....132
General....132
Procedures....132
Participation by MIOSHA Officials....132
Conduct of the Informal Conference....133
Opening Remarks....133
Closing....133
Amending or Withdrawing Citation and Notification of Penalty in Part or in its Entirety....133
Citation Revision Justified....133
Citation Revision Not Justified....133

Procedures for Amending or Withdrawing Citations 133
Section 35 Violations 134
Services Available to Employers 135
Corporate-Wide Settlement Agreements 135
Penalty Collections 135

Index 136

CHAPTER I. MIOSHA GENERAL

I. MIOSHA Mission. Help assure the safety and health of Michigan workers.

II. MIOSHA Vision. Enhance the quality of life and contribute to the economic vitality in Michigan by serving as an effective leader in occupational safety and health. Provide through inclusion of staff and stakeholder creativity and commitment:

A. Credible, customized and responsive consultation, education and training,

B. Firm, fair and targeted enforcement,

C. Cooperative agreements with individual employers and employee and employer organizations, and

D. Relevant, fact-based standards promulgation.

III. Authority. The Michigan Occupational Safety and Health Administration (MIOSHA), under the Michigan Department of Labor and Economic Opportunity (LEO), administers the occupational safety and health program in compliance with the provisions of the Michigan Occupational Safety and Health Act, Act 154 of the Public Acts of 1974, as amended, (hereafter referred to as the "Act") and consistent with an agreement between Michigan and the United States Secretary of Labor, which became effective October 3, 1973, and is known as the Michigan State Plan for Occupational Safety and Health. The agency is responsible for the establishment and execution of an 18(b) agreement under the federal act and for the coordination of the state plan provisions for occupational safety and health. The Act, as amended, prescribes the powers and duties of MIOSHA and directs the administrative actions to be taken to implement the provisions of the Act. The program activities under both the federal and state acts are administered by MIOSHA with the authority to enforce the provisions of the Act. This is accomplished through a combination of voluntary consultation activities and enforcement inspections and investigations. When enforcement inspections determine civil violations of the Act or of health and safety standards promulgated under the authority of the Act, MIOSHA issues citations or cease operation orders, and proposed penalties and abatement dates.

IV. Federal/State Agreement.

A. In an agreement between the State of Michigan and the United States Secretary of Labor, effective October 3, 1973, certain responsibilities were required of the state. The state has met all of these requirements. The responsibilities were as follows:

1. The state will implement the plan within three (3) years following its approval date (October 3, 1973). The Secretary, upon the state's implementation of the plan, will provide operational status to the state. (An operational status agreement was entered into on January 6, 1977.) After a minimum of one (1) year of the state becoming operational, the Secretary may determine that the state is capable of continuing its implementation of the safety and health program in conformance with the plan and will grant an 18(b) determination to the state. That determination will provide the state with exclusive jurisdiction for administering and enforcing an occupational safety and health program in Michigan.

2. Prior to an 18(b) determination being made by the Secretary, the state and the Secretary each have separate authorities to administer and enforce occupational safety and health programs in Michigan.

3. The state will promulgate safety and health standards which, at a minimum, are at least as effective as the federal safety and health standards.

4. The state, by its own commitment within the plan, will not promulgate or enforce standards dealing with longshoring, shipbuilding, ship repairing, and shipbreaking until it decides otherwise, at which time it will initiate a change to the plan.

5. The state is required by the plan to have an operations manual.

6. The state is required by the plan to promulgate regulations relating to inspections, citations and proposed penalties.

7. The state is required by the plan to distribute/provide a poster to be displayed by all employers informing employees of their rights and responsibilities under the Act.

8. Certification is one (1) of the elements necessary for MIOSHA to receive final state plan approval from the federal Occupational Safety and Health Administration (OSHA). On January 16, 1981, MIOSHA received certification from OSHA that all seven (7) steps listed had been successfully completed.

B. Under the agreement, MIOSHA activities are monitored and evaluated to determine if the state plan is being carried out to satisfy criteria for continuing plan approval to the degree determined by the federal government necessary to assure occupational safety and health protection to covered employees. Monitoring is performed on a continuous basis and includes, but is not limited to, statistical analysis based on submissions from the state management information system, case file review, investigation of complaints about state plan administration (CASPA), on-the-job evaluation, special surveys, and liaison with state designated agencies. Evaluation refers to judgments and inferences about the quality of the state program based on evidence gathered through the monitoring system and may take the form of recommendations to the state and/or the United States Assistant Secretary of Labor for OSHA.

V. Jurisdiction – Coordination with Other Federal and State Agencies.

A. Every effort shall be made in instances involving dual jurisdiction with other federal or state agencies to coordinate activities in an effort to provide the highest level of protection for workers and avoid the duplication of effort. See Chapter V. I. C. 3., Preemption by Another Agency.

B. When the federal appropriations act contains riders restricting the state from using federal funds for occupational safety and health enforcement programs and 21(d) on-site consultation programs, the state may limit its inspection and enforcement activities in accordance with these restrictions. The state reserves the right to

establish separate state funding for such activities in the event the state determines such activities are necessary for its operations.

C. MIOSHA has jurisdiction for public employees engaged in maritime work, (e.g., port authorities, cities, counties). This coverage of public employees is for both the land-side areas and aboard vessels.

D. The operational status agreement between the United States Department of Labor and the Michigan Department of Labor and Economic Opportunity has been amended to clarify that marine construction is included in its State Plan jurisdiction. Construction activities (e.g., bridge and pier construction, bulkhead construction, installation of sewage outfalls) occurring from a vessel are considered marine construction and are covered under various MIOSHA regulations.

VI. MIOSH Act Applicability – Relationship to Other State Laws.

A. Whenever employment falls within the definitional terms stated in Sections 2(1), 5(1), and 5(2) of the Act, and such employment is not exempt because of one (1) of the provisions, MIOSH Act shall be deemed applicable.

B. Section 69(3) of the Act provides, "Any occupational safety or health standard adopted by reference pursuant to Section 14, promulgated pursuant to the Act, or continued in effect pursuant to Sections 21(1) and 24(3) shall be deemed to supersede any occupational safety or health standard or rule promulgated pursuant to any other law of this state. However, where another state agency has authority to promulgate standards or rules applicable to the public safety or health, the rules and standards promulgated pursuant to the Act shall not be deemed to supersede such other agency rules or standards, but shall be deemed to have concurrent applicability with such rules and standards."

VII. Exemptions from MIOSHA Coverage.

A. Shipbuilding, Shipbreaking, Ship Repairing, and Longshoring.

1. Under the state plan agreement, specific activities related to maritime (shipbuilding, shipbreaking, ship repairing and longshoring) remain within the exclusive jurisdiction of OSHA.

2. These limitations do not apply to pleasure craft manufacturing or repair facilities or to warehousing or administrative support facilities which are not located dock-side.

3. As a general rule, any employment that was covered by the federal Longshoremen's and Harbor Worker's Compensation Act (LHWCA) 33 U.S. 901, et seq., prior to the 1972 amendments to the LHWCA shall not be subject to inspection or investigations under MIOSHA.

4. Before initiating any assignment related to maritime, the division director or designee will contact the Wisconsin OSHA office to determine appropriate jurisdiction.

B. Indian Reservations/Indian Country. The operational status agreement between the United States Department of Labor and the Michigan Department of Labor and Economic Opportunity has been amended to clarify jurisdiction on Indian Reservations/Indian Country.

1. Employers who are enrolled members of Indian Reservations and located within the border or confines of all "Indian country" are covered by federal OSHA jurisdiction and enforcement authority.

2. Non-member employers within the reservations and member employers located outside the territorial borders of Indian reservations are under MIOSHA jurisdiction.

3. Due to the sovereign status of Indian Reservations, MIOSHA staff may be refused entry onto Indian Reservation lands. If a representative of the reservation refuses to allow an inspection to proceed, the safety officer/industrial hygienist (SO/IH) shall leave the premises and immediately report the refusal to his or her supervisor. MIOSHA Administration will decide whether to seek assistance from Federal OSHA or another agency.

   NOTE: See current Agency Instruction MIOSHA-COM-15-1 Indian Country Inspections/Investigations and Interventions.

C. Evaluating Volunteer Work for Coverage Under MIOSHA. Before the MIOSH Act can be applied, an employer-employee relationship must be established. The Main factor to consider is whether the work is "controlled" by a directing entity. The following analysis must be completed to determine whether there is an employer-employee relationship when a person is performing work as a volunteer:

1. Does the employer control the work? (i.e., can the individual performing the work schedule at their convenience or is the person told when to report and how to perform the work, is there a designated position that provides direction/oversight, is the equipment and material needed for the work provided for the volunteer, etc.)

   If the work is not controlled, there is no employer-employee relationship and the volunteer work is not covered by MIOSHA jurisdiction. The SO/IH does not need to further analyze the relationship.

2. When it is determined the work is controlled:

   Check to see whether the volunteer receives any type of compensation, or whether a product is produced or revenue is generated as a result of the volunteer work. If the response is "no," there is no employer-employee relationship and the volunteer work is not covered by MIOSHA jurisdiction. The SO/IH does not need to further analyze the relationship.

3. When there is compensation, a product produced, or revenue generated:

   Determine the level of compensation, product produced, or revenue generated. If the level of compensation is minimal (i.e., a lunch or t-shirt,

local fundraiser, etc.), there is no employer-employee relationship and the volunteer work is not covered by MIOSHA jurisdiction. The SO/IH does not need to further analyze the relationship.

4. When compensation, product produced, or revenue generated is more than minimal:

   This indicates that for MIOSHA purposes, an employer-employee relationship exists and the volunteer work performed is covered by MIOSHA safety and health standards.

D. Community Service.

1. Non-Court Ordered. Individuals that are required to perform community service will be evaluated the same as volunteers. (examples include school, civic organization, or part of a rehabilitation program)

2. Court Ordered. Individuals ordered by a court to perform community service are not covered under MIOSHA jurisdiction.

E. Prisoners. The Michigan Attorney General has declared that prisoners are not covered under MIOSHA jurisdiction.

F. Students. Work performed by students will be evaluated the same as volunteer work. When students work strictly in a learning mode such as the classroom, a lab, controlled or simulated environment, where no product or revenue is generated, they are not covered by MIOSHA. However, if the students are doing work within the learning environment that is revenue generating or producing something of value for the school, the students are covered by MIOSHA. Some examples include:

1. Example 1: Students in an auto shop or auto body class learn the techniques and observe through classroom training. To give students a chance to practice learned techniques, the school allows the public to bring their cars to the shop free of charge other than parts and material costs.

   Are They Covered?: The students are not covered by MIOSHA. The work is performed within the learning environment and no revenue or value is produced for the school.

2. Example 2: Students in an auto shop or auto body class learn the techniques and observe through classroom training. To give students a chance to practice learned techniques, the school allows the public to bring their cars to the shop and charges for the auto service and labor performed by the students. The school uses the funds to purchase supplies for the classroom.

   Are They Covered?: The students are covered by MIOSHA. The work is performed within the learning environment but revenue or value is produced for the school.

3. Example 3: Students studying to be dental hygienists learn, observe and perform cleanings under direct supervision and instruction of an instructor. The patient is not paying for the service.

   Are They Covered?: The students <u>are not</u> covered by MIOSHA. The work is performed within the learning environment as a part of the teaching experience.

4. Example 4: Students studying to be dental hygienists learn, observe and perform cleanings under direct supervision and instruction of an instructor. The patient is paying for the service.

   Are They Covered?: The students <u>are</u> covered by MIOSHA. The work is performed within the learning environment and payment is received for the benefit the dental program/office regardless of the service provided.

5. Example 5: Students in a Building Trades Class receive classroom instruction or simulation work in a controlled lab environment. There is no product generated for revenue.

   Are They Covered?: The students <u>are not</u> covered by MIOSHA. The work is performed within the learning environment and no revenue is generated. However, if revenue is generated, the students are covered regardless of where the work is performed.

6. Example 6: Students in a Building Trades Class receive classroom instruction or simulation work in a controlled lab environment and also travel to the job site to work on building houses under school supervision. The houses built are then sold to generate money that would go back to the school district.

   Are They Covered?: The students <u>are not</u> covered during the classroom or simulation lab work. The students are covered by MIOSHA for work performed at the job site.

G. <u>Statutory Exemptions</u>.

1. <u>Domestic Employment</u>. Domestic employment is defined in Section 4(7) of the Act to mean "that employment involving an employee specifically employed by a householder to engage in work or an activity relating to the operation of a household and its surroundings, whether or not the employee resides in the household." Thus, individuals who privately employ persons for the purpose of performing, for the benefit of such individuals, which are commonly regarded as ordinary domestic household tasks, such as housecleaning, cooking, and caring for children, shall not be subject to the requirements of the Act with respect to such employment. Tasks commonly referred to as "gardening," "yard work," or "lawn work" are deemed to be included under domestic employment if the individuals employed for such work are employed by a householder. This exclusion from coverage does not apply in instances where a householder contracts with a firm that is in business to provide domestic

services. However, in such instances the firm, not the householder, is subject to the requirements of the Act.

2. Mining Employment. MIOSHA does not apply to mines as defined in the Act. Section 4(8) provides: "Mines," except as provided in paragraph (d) below, means all of the following:

   a) An area of land from which minerals are extracted in non-liquid form, or if in liquid form, are extracted with workers underground.

   b) Private ways and roads appurtenant to an area of land described in the previous paragraph.

   c) Lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property, including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting minerals from their natural deposits in non-liquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

   d) The above definitions do not include industrial borrow pits or sand, gravel, crushed, and dimension stone quarrying operations, or surface construction operations.

   NOTE: MIOSHA and the Federal Mine Safety and Health Administration (MSHA) developed an operational agreement in 1979 as to which agency will conduct inspections in specific establishments. The agreement contains a list of establishments and designated jurisdictional coverage. This does not mean MIOSHA gave up any jurisdiction and is only an operational agreement for assigning inspections. In some cases, both agencies may have inspection responsibilities (refer to the memorandum between the former Michigan Department of Labor and MSHA, dated December 5, 1979.)

H. Federal Government Establishments/Employers/Employees. Federal government establishments/employers/employees are exempt from the MIOSH Act. For the U.S. Postal Service, federal coverage in Michigan encompasses U.S. Postal Service employees and contract employees engaged in U.S. Postal Service operations. MIOSHA continues to exercise jurisdiction over all other private sector contractors working at federal establishments, except those engaged in U.S. Postal Service mail operations, such as building maintenance, security, and construction employees.

NOTE: However, federal establishments/employers/employees are not exempt from the Asbestos Abatement Contractors Licensing Act (i.e. Act 135, P.A. 1986, as amended) or the Asbestos Workers Accreditation Act (i.e. Act 440, P.A. 1988, as amended), both of which are administered by the MIOSHA Asbestos Program.

I. Other Federal Laws. Unless a federal law specifically preempts or has been interpreted by the courts to preempt state activity in this area, it will be presumed that MIOSHA is applicable.

J. OSHA Fiscal Year Budget Appropriations Riders. OSHA fiscal year budget appropriations riders may exempt certain employers. MIOSHA may choose to implement and recognize such exemptions or provide state funding to continue routine activities. See current Agency Instruction, MIOSHA-ADM-06-7 Small Farming Operations and Small Employers in Low Hazard Industries - Guidelines for MIOSHA Activity.

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

MIOSHA will only conduct inspections of non-office home-based worksites, such as manufacturing operations, when it receives a complaint or referral alleging that a violation of a safety or health standard exists that threatens physical harm, that an imminent danger is present, or that there was a work-related fatality.

CHAPTER II. MIOSHA RESPONSIBILITIES AND STRUCTURE

I. Administration Responsibilities and Structure.

A. Responsibilities.

1. The director of LEO is responsible for administering and enforcing the provisions of MIOSHA. This function is performed by delegation and assignment of duties to the appropriate managerial hierarchy as outlined in this chapter.

2. Primary administering responsibilities lie with the director of MIOSHA. MIOSHA is comprised of various divisions which are assigned distinct functions relevant to the MIOSHA program. They are expected to coordinate their functional activities as a team with an appreciable degree of interdependency for the purpose of smooth agency operation.

B. Structure.

1. Director, LEO - The director, with the assistance of the deputy director, is responsible for the broad administration of MIOSHA. The department director is the designated representative of the MIOSHA state program.

2. Director, MIOSHA

a) General Duties - Manages and directs the MIOSHA program and reports to the LEO Director through the designated deputy director.

b) Specific Duties

(1) Ensures that all policies, procedures, priorities, and instructions necessary for the program are issued and implemented by the agency staff and personnel.

(2) Ensures that the agency has sufficient resources (personnel, funds, equipment, supplies, and materials) to adequately perform its mission.

(3) Represents the interest and concerns of the MIOSHA program within LEO, as well as with OSHA, industry, and the general public.

3. Deputy Director, MIOSHA - Reports to the MIOSHA Director and assists in managing and directing the various segments of the MIOSHA program. In addition, manages, directs, and oversees the activities of the MIOSHA program for the Construction Safety and Health Division (CSHD), the General Industry Safety and Health Division (GISHD), the Consultation Education and Training (CET) Division, the Technical Services Division (TSD), and the Appeals Division.

4. Departmental Analyst - Provides analytical support to agency director and agency deputy director.

5. Personnel Liaison - Serves as the recognized resource for personnel and labor relations issues for MIOSHA. Serves as the personnel liaison

between the agency and LEO Office of Human Resources. Assists agency managers with recruiting, selection, hiring, and labor relations issues. Provides personnel information to staff and the general public regarding employment opportunities, job requirements, compensation, and fringe benefits.

II. Construction Safety and Health Division (CSHD) Responsibilities and Structure.

A. Responsibilities.

1. CSHD has the responsibility of protecting covered employees performing construction operations in the State of Michigan through enforcement of construction safety and health standards.

2. CSHD conducts inspections and investigations, and issues citations to ensure compliance with construction safety and health standards. The division responds to complaints from employees or their representatives, investigates accidents including fatalities, and responds to referrals of unsafe or unhealthy conditions from other agencies. The division also conducts unannounced inspections at worksites throughout the state in accordance with current priority inspection guidelines.

3. "Construction operations" is defined in Section 4(4) of the Act as the work activity designated in major groups 15, 16, and 17 of the Standard Industrial Classification Manual, U.S. Office of Management and Budget, 1972.

   NOTE: The equivalent North American Industry Classification System (NAICS) code is Sector 23-Construction.

   Construction operations include demolition, new work, additions, alterations, remodeling and repairing (this includes non-contract construction work). Maintenance work, where the hazards to employees may be the same as those presented by working conditions, practices, means, methods, processes, and equipment traditionally associated with construction, will be evaluated to determine whether the condition will be subject to standards applicable to construction operations.

4. CSHD administers the asbestos program. The Asbestos Program has six (6) major areas of responsibility:

   a) License asbestos abatement contractors (Pursuant to Act 135, Public Act 1986, as amended).

   b) Process asbestos abatement project notifications (Pursuant to Act 135, Public Act 1986, as amended).

   c) Conduct compliance investigations regarding occupational exposure to asbestos.

   d) Review and accredit asbestos training courses (Pursuant to Act 440, Public Act 1988, as amended).

e) Accredit asbestos workers (Pursuant to Act 440, Public Act 1988, as amended).

f) Addresses the State of Michigan's responsibilities mandated by the Asbestos Hazard Emergency Response Act (AHERA).

5. CSHD participates in cooperative programs such as alliances, partnerships with employers, associations, and trade groups who are willing to work together to achieve common goals of increasing workplace safety and health awareness and reducing injuries and illnesses.

B. Structure.

1. Director - Manages and operates the enforcement segment of the MIOSHA program in construction.

2. Safety Manager - Assists and supports the division director by managing the day-to-day safety or health activities of the division, and by providing guidance and direction to the supervisors.

3. Health Manager - Assists and supports the division director by managing the day-to-day safety or health activities of the division. Provides second-level management of all industrial hygiene construction activities in the state, oversees the state-wide asbestos programs, and processes appeals.

4. Health Supervisor - Implements and manages the enforcement activities of the industrial hygiene compliance officers. This activity includes first level supervision, support and evaluation of assigned compliance officers, processing case files, and issuing citations.

5. Safety Supervisor - Implements and manages the safety enforcement activities of the division in their designated group. This includes first level supervision, support and evaluation of assigned compliance officers, processing case files, issuing citations, and processing appeals.

6. Industrial Hygienist Specialist - Provides expertise to the agency in their specialty area. Additional duties include performing other compliance inspections and assisting the supervisor.

7. Senior Compliance Officer (SO and IH) - Leads team inspections, conducts investigations initially recognized as complex, assists other compliance officers, performs enforcement activities and other duties as assigned.

8. Compliance Officer (SO and IH) - Performs enforcement activities. In addition, these individuals participate in the appeals process, testify in depositions, evaluate abatement assurance, and other duties as assigned.

9. Departmental Analyst - Provides analytical support to division director and manager.

III. General Industry Safety and Health Division (GISHD) Responsibilities and Structure.

A. Responsibilities.

1. GISHD has the responsibility of protecting covered employees performing general industry operations in the State of Michigan through enforcement of safety and health standards, except for construction.

2. GISHD conducts inspections and investigations, and issues citations to ensure compliance with general industry safety and health standards. The division responds to complaints from employees or their representatives, investigates accidents including fatalities, and responds to referrals of unsafe or unhealthy conditions from other agencies. The division also conducts unannounced inspections at worksites throughout the state in accordance with current priority inspection guidelines.

3. The GISHD participates in cooperative programs such as alliances, partnerships with employers, associations, and trade groups who are willing to work together to achieve common goals of increasing workplace safety and health awareness and reducing injuries and illnesses.

4. GISHD also administers the Employee Discrimination Section and Chemical Compliance Program.

a) The Employee Discrimination Section is responsible for investigation of discrimination complaints and determination of any violations of Section 65(1) of the Act. If there is a violation, the department shall order all appropriate relief including rehiring or reinstatement of the employee to the former position with back pay.

b) The Chemical Compliance Program has the primary responsibility for administrating, directing, and coordinating statewide programs that investigate chemical production facilities.

B. Structure.

1. Director - Manages and operates the enforcement segments of the MIOSHA program in general industry.

2. Safety and Health Manager - Assists and supports the division director by managing the day-to-day activities of the division and by providing guidance and direction to the supervisors.

3. Employee Discrimination Section Manager - Manages and operates the enforcement and appeals process for employee discrimination described in Section 65 of the Act, based on both federal and state administrative law judges and circuit court decisions.

4. Safety or Health Supervisor - Implements and manages the enforcement activities of his/her designated group. This includes first level supervision, support and evaluation of assigned compliance officers, processing case files, issuing citations, and processing appeals.

5. Industrial Hygienist Specialist - Provides expertise to the agency in his/her specialty area. Additional duties include performing other compliance inspections and assisting the supervisor.

6. Senior Compliance Officer (SO and IH) - Leads team inspections, conducts investigations initially recognized as complex, assists other compliance officers, performs enforcement activities, and other duties as assigned.

7. Compliance Officer (SO and IH) - Performs enforcement activities. In addition, these individuals participate in the appeals process, testify in depositions, evaluate abatement assurance, and other duties as assigned.

8. Discrimination Rights Representative - Provides expertise for employee discrimination investigations, negotiations, and settlement resolutions described in Section 65 of the Act. Duties include taking depositions and appearing in court before administrative law judges for appeal hearings.

9. Departmental Analyst - Provides analytical support to division director and manager.

10. Departmental Technician - Coordinates response to employer requests for modification of citation and settlement agreements. Duties also include coordinating the abatement assurance program, tracking refusal-of-entry calls from field staff, and processing administrative warrants for refusal-of-entry cases.

IV. Technical Services Division (TSD) Responsibilities and Structure.

A. Responsibilities.

1. TSD provides a variety of services to MIOSHA staff and clients.

2. The program areas include the following:

a) Laboratory and Equipment Services Section (LESS). This section includes an industrial hygiene laboratory, which is accredited by the American Industrial Hygiene Association to perform analysis of air and material samples. LESS also includes an instrument calibration and maintenance program for providing field instrumentation to MIOSHA industrial hygienists and safety officers to assess exposure to chemical and physical hazards in the workplace. LESS maintains the CET Video Loan Library and provides free training materials to clients.

b) Management Information Systems Section (MISS). This section is responsible for compilation of accurate and timely injury and illness data, providing information to MIOSHA clients about recordkeeping requirements, preparing statistical information and reports about enforcement activities, monitoring data related to MIOSHA strategic planning activities, and providing IT-related support to other MIOSHA programs. Conducts and compiles the surveys sent out for the Bureau of Labor Statistics (BLS).

c) Standards and FOIA Section. This section provides services for the promulgation and distribution of Michigan occupational safety and health standards and rules. Coordinates the activities of advisory committees and conducts other activities, such as public hearings to receive comments on proposed standards. Coordinates and prepares responses from MIOSHA for requests for information under the Michigan Freedom of Information Act. Coordinates and manages the CET Grant Program, which complements safety and health training and education activities within MIOSHA. CET grants are awarded annually to nonprofit organizations. The MiWISH or equipment grants are administered through the standards and FOIA section. MiWISH grants are matching grants, up to $5,000 for purchasing safety and health equipment. Coordinates the activities of the MIOSHA Leadership Program.

d) Radiation Safety Section (RSS). The Radiation Safety Section serves to reduce unnecessary exposure to ionizing radiation from x-ray machines and other radiation machines; to protect and improve the health of Michigan's population through the development and enforcement of appropriate regulatory requirements pertaining to the use of radiation machines; and to help ensure through the regulatory process that mammography machines and facilities are capable of high-quality mammography which can provide patients and physicians with the best chance of discovering breast cancer in its earliest stages. The RSS is responsible for all nonfederal, nontribal radiation machine and facility regulation in Michigan.

B. Structure.

1. Director - Ensures that the mission of the division is being fulfilled and that adequate resources are provided to division and agency staff so that they are able to perform their job responsibilities. Works with the TSD program managers and their staff to coordinate the completion of their responsibilities in an efficient and timely manner.

2. Program Manager - Schedules daily work activities for their staff and ensures that requests of clients are fulfilled.

3. CET Grant Program Administrator - Administers the statewide CET grant program. Works on “special” projects as assigned.

4. Laboratory Scientist - Prepares sampling media and analyzes samples submitted by MIOSHA field staff using approved methods in a timely manner with proper attention to quality control audits.

5. Equipment Technician - Calibrates, maintains, and repairs field instrumentation for MIOSHA field staff for proper collection of samples or accurate assessment of worker exposure to chemical and physical work hazards.

6. Departmental Analyst - Develops programs and collects, compiles, and analyzes data related to occupational illnesses, injuries and fatalities. Generates reports using the data.

7. Physicist - Inspects and certifies ionizing radiation producing machines.

8. Departmental Technician - Solicits, receives, and inputs survey data into databases for statistical evaluation of injuries and illnesses for Michigan workers, establishments, and industries. Also, processes requests submitted under the Michigan Freedom of Information Act (FOIA).

V. Consultation Education and Training (CET) Division Responsibilities and Structure.

A. Responsibilities.

1. Section 54 of the Act created an Education and Training Division in the MIOSHA program. CET services are provided throughout the state by a staff of experienced, professional, occupational safety consultants, construction safety consultants, and industrial hygienists. As an integral part of the MIOSHA program, the CET Division provides the ability for employees and employers to learn proactively about the safety and health standards that affect their workplace, to understand best practices for creating and maintaining a safe work environment, and to strive for program recognition of significant workplace safety and health management system performance. The consultants in the CET division are non-enforcement personnel and offer services to public and private employers and employees. CET services are provided, upon request, through actual visits to an establishment, by fax, mail, telephone, and email.

   There are two (2) major program areas in the CET Division; the Onsite Consultation Program [funded by the 21(d) grant] and the Training and Consultation Program [funded by the SET grant (Section 55 of the Act)].

2. The Onsite Consultation Program provides assistance to Michigan's small employers (typically less than 250 employees) in identifying, evaluating, and controlling occupational safety and health hazards in the workplace. There are no penalties or citations issued during the hazard surveys, however, the employer is held responsible for making the necessary abatements to serious hazards identified. Case files are maintained with strict confidentiality.

3. The Onsite Consultation Program also offers a Self-Help Program. Under this program, employers may be eligible to borrow sampling equipment for occupational health monitoring, be trained in its use, and perform their own sampling at their workplace. The sample analysis is provided by the LESS Laboratory at no charge to the employer.

4. The Training and Consultation Program offers a wide variety of consultation, education, and training services. These activities include, but are not limited to, assisting employers and employees with developing and implementing a safety and health management system, conducting

safety and health hazard recognition training or hazard surveys, consultation on MIOSHA standards and methods to abate violations. Each consultant is equipped to conduct training on a wide selection of safety and health topics at the employer's site.

5. The CET Division conducts seminars throughout the state through the MIOSHA Training Institute (MTI). Participants can take courses to complete Level One and Level Two certificate programs.

6. The CET Division maintains a publication library of brochures, posters, cards, stickers and abatement advice. These materials are available online and in limited hard copy quantities.

7. The CET Division administers several recognition programs such as the Michigan Voluntary Protection Program (MVPP), Michigan Safety and Health Achievement Recognition Program (MSHARP), and other CET awards to acknowledge and partner with outstanding companies who serve as models for best practices in safety and health. The Michigan Challenge Program (MCP) offers high-hazard industries an opportunity to work comprehensively with a CET consultant to develop a safety and health management system.

8. The CET Division participates in cooperative programs such as Alliances, Partnerships with employers, and associations with trade groups who are willing to work together to achieve common goals of increasing workplace safety and health awareness and reducing injuries and illnesses.

B. Structure.

1. Director - Manages the overall personnel and program functions of the CET Division. This entails oversight for the Training and Consultation Program, the Onsite Consultation Program, and any other related activities.

2. Program Manager - Assists the division director in managing the CET Division. Provides supervision to all CET supervisors and functions as the Project Manager for the Onsite Consultation Program. The Program Manager also carries out the overall administration of Division activities in the absence of the director.

3. Training and Consultation Program Supervisor - Supervises safety and health consultants. The supervisor observes and assists consultants in the field, participates in management planning, provides leadership and guidance to field staff, and manages various special projects.

4. Onsite Consultation Program Safety or Health Supervisor - Supervises field staff assigned to the statewide Onsite Consultation Program. The supervisory reviews casework, provides guidance and instruction to staff, and develops program policies and procedures. In addition, the Health Supervisor oversees the administration of the Self-Help Program.

5. MIOSHA Communications Specialist - Provides an effective communications system to educate Michigan employers and employees on workplace safety and health. Serves as editor of the quarterly publication, the MIOSHA News. Produces press releases and media material on significant MIOSHA compliance cases, as well as a wide range of workplace outreach activities.

6. Michigan Voluntary Protection Program (MVPP) Specialist - Coordinates the application process, on-site team activities, award ceremony, and reevaluations for current MVPP participants statewide. The Specialist also coordinates program development, policy and procedure development, training, and promotional activities related to the MVPP.

7. Training and Consultation Program Consultant - Advises business, industry, construction, unions, employee groups, schools, colleges, municipalities, counties, and other state agencies, by assisting with establishing and implementing programs to improve workplace safety and health.

8. Onsite Consultation Program Consultant - Serves as a safety consultant or industrial hygienist. Promotes and performs workplace safety or health consultations and surveys for employers, to identify specific hazards at the workplace and provides advice for their control and prevention. The Program Consultant also provides employer and employee training on specific safety or health hazards including engineering controls, to supplement a hazard survey.

9. Departmental Analyst - Provides analytical support to Division Director and Program Manager.

10. Program Developer/Web Coordinator - Provides oversight of MTI training course material and coordinates web activities.

VI. MIOSHA Appeals Division Responsibilities and Structure.

A. Responsibilities.

1. Provide all parties with a fair, objective and professional administrative arena for resolution of contested MIOSHA cases. Enforcement of MIOSHA standards generates citations for alleged violations. The MIOSHA statute provides for a two-step citation appeal process for employers and/or employees to appeal any citations issued by the enforcement divisions to resolve disputes related to the alleged violations. If the citations cannot be resolved through the informal conference process utilized by the enforcement divisions, the case is transmitted to the Appeals Division where prehearings are conducted in an attempt to reach settlement. The Appeals Division also represents the agency's enforcement divisions at the formal appeal stage when an employer or employee contests the department's decision on a variance, a petition for modification of abatement (PMA), or a discrimination complaint.

2. The Board of Health and Safety Compliance and Appeals of MIOSHA (Board) was created within LEO by Section 46 of the Act. The Board is an entirely separate and distinct agency within LEO. It consists of seven (7) part-time members who are appointed by the governor for four-year terms. Administrative Law Judges (ALJ) conduct contested case hearings on behalf of the Board. Upon the issuance of an ALJ decision, the Board may direct review upon the request of a party or on a member's own motion. If the Board directs review, it reviews the record and may uphold, reverse, or modify in whole, or in part the ALJ's decision. If it fails to direct review, the ALJ's decision becomes a final order of the Board. After exhausting the administrative appeal process, any party may file an appeal with the Michigan Circuit Courts within 60 days of the final order of the board.

B. Structure.

1. Director - Ensures that the mission of the division is met by managing the appeals process within the agency. This includes scheduling and insuring representation for prehearings and hearings by coordinating with division employees and representatives of the attorney general's staff. The director also has a hands-on roll in settling difficult case files.

2. Appeals Coordinator - Conducts prehearings with employers, employer representatives, employees, employee representatives, attorneys, and department representatives in an attempt to reach a resolution acceptable to all parties. They study the case file, do research on industry standards for equipment and processes, seek out precedents in previous cases, elicit additional input from the parties, and draft proposed settlement language.

3. Board Clerk - Dockets appealed cases and schedules prehearing conferences. Transmits late or unresolved cases to the Michigan Administrative Hearing Systems (MAHS), Circuit Court, or Michigan Court of Appeals. Issues orders closing MIOSHA appealed cases. Provides the members of the Board with copies of all closed MIOSHA appealed cases on a bi-monthly basis.

AGENCY PHONE/FAX NUMBERS

ADMINISTRATION	517/284-7777
	517/284-7775 (Fax)
Fatality Hotline	800/858-0397
MIOSHA Hotline	800/866-4674
MIOSHA COVID-19 Hotline	855-SAFE-C19 (855-723-3219)
APPEALS DIVISION	517/284-7711
	517/284-7705 (Fax)
CONSTRUCTION SAFETY & HEALTH DIVISION	517/284-7680
	517/284-7685 (Fax)
Asbestos Program	517/284-7700 (Fax)
CONSULTATION EDUCATION AND TRAINING DIV.	517/284-7720
	517/284-7725 (Fax)
GENERAL INDUSTRY SAFETY & HEALTH DIV.	517/284-7750
	517/284-7755 (Fax)
Employee Discrimination Section	313/456-3109
	313/456-4226 (Fax)
*Grand Rapids District 1	616/447-2650
	616/447-2649 (Fax)
*Saginaw District 2	989/758-1726
	989/758-1896 (Fax)
*Escanaba Office	906/786-7784
	906/786-0624 (Fax)
*Detroit Office District 3 and District 5	313/456-4054
	313/456-4950 (Fax)

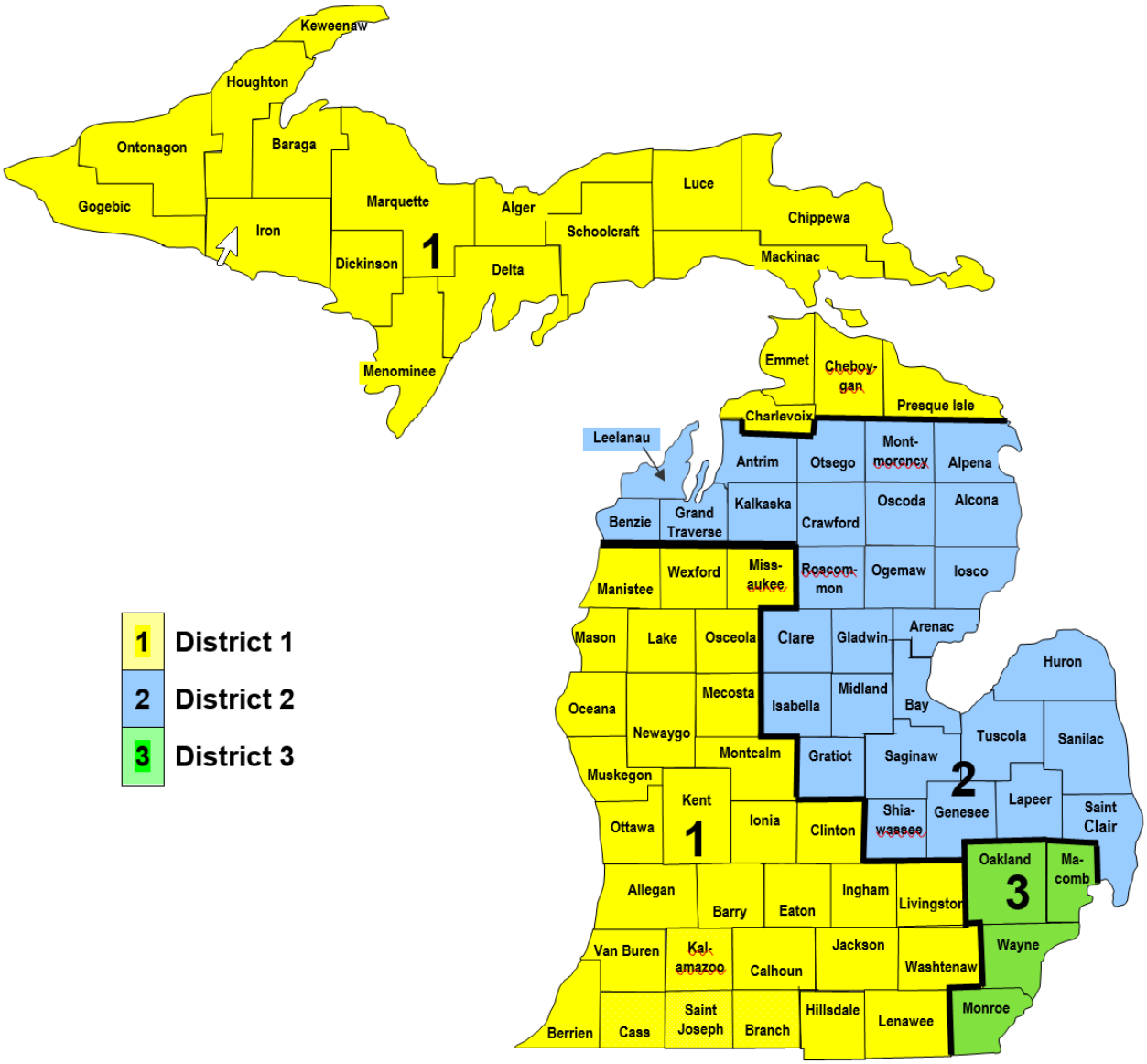
TECHNICAL SERVICES DIVISION	517/284-7790
	517/284-7775 (Fax)
Laboratory & Equipment Services Section	517/284-2900
	517/284-2920 (Fax)
Management Information Systems Section	517/284-7790
	517/284-7775 (Fax)
Standards and FOIA Section	517/284-7740
	517/284-7775 (Fax)
CET Grant Program	517/284-7811
FOIA	517/284-7735 (Fax)
Radiation Safety Section	517/284-7820
	517/636-0531 (Fax)

OTHER AGENCY PHONE/FAX NUMBERS

ATTORNEY GENERAL	517/373-2560
	517-241-7987 (Fax)
MICHIGAN ADMINISTRATIVE HEARING SYSTEM	517/335-2484
(MAHS)	517-373-6235 (Fax)

*See next page for map of Health District offices. Refer all general industry safety issues to the Lansing office at 517/284-7750. Refer all construction issues to the Lansing office at 517/284-7680.

General Industry Safety and Health Division
Health District Office Map



CHAPTER III. NON-INSPECTION AGENCY OPERATIONAL ISSUES AND PROCEDURES

I. Standards.

A. Promulgation.

1. Section 21(1) of the Act continues in effect those standards promulgated by the General Industry Safety Standards Commission under the authority of Act 282, P.A. 1967 and by the Construction Safety Standards Commission under the authority of Act 89, P.A. 1963.

2. Section 24(1) of the Act continues in effect those standards promulgated by the Occupational Health Standards Commission, under Section 31 of the Administrative Procedures Act of 1969, Act No. 306 of the Public Acts of 1969, as amended, which were in effect on the effective date of MIOSHA (January 1, 1975). Act 141 of Public Acts of 1993, amended Act 306 of Public Acts of 1969, the Administrative Procedures Act, and allows the department to follow an expedited process when promulgating a rule that is substantially similar to an existing federal standard.

3. Section 14(1) and (3) provide that where there was an occupational safety or health standard in effect on January 1, 1975, pursuant to the federal Occupational Safety and Health Act, Public Law 91-596, for which there was no state standard, the federal standard was to be incorporated by reference and has the same force and effect as a standard promulgated pursuant to MIOSHA.

4. Sections 21(2) and 24(4) of the Act authorize the director of the department to promulgate an emergency safety or health standard at any time with the concurrence of the Governor and pursuant to the Administrative Procedures Act, if an emergency standard is necessary to protect employees. The promulgation of the emergency standards will be initiated by action of the department director.

5. Copies of occupational safety and health standards promulgated by the department, as well as federal standards incorporated by reference, are available online or upon request at cost from MIOSHA Standards and FOIA Section, TSD.

B. Development. The respective enforcement divisions and the department will cooperate in the development and promulgation of standards at least as effective as federal standards in a manner consistent with the requirements of the state and federal occupational safety and health acts, and the state commitments as set forth in the Michigan State Plan for Occupational Safety and Health. An advisory committee may be formed to assist in creating or adopting the new or amended rules. The advisory committee may be tasked with creating implementation and outreach strategies to assist employers in understanding and applying the new rules.

C. Application.

1. General Industry standards shall apply, according to their scope and application, to any employment or place of employment in any industry. Only a limited number of standards apply to agriculture. See MIOSHA Standards Order Form, Section D – Agricultural Health and Safety Standards, for the list of all applicable standards for agriculture. Construction standards shall apply to construction operations without regard to the industry classification in which the construction operation is performed.

2. If a particular (vertical) standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over a general (horizontal) standard, which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

3. In the event a standard appears to protect persons other than employees, the standard shall be applicable only to employees, their employment, and places of employment. Federal standards incorporated by reference and some state promulgated standards contain internal references, which incorporate standards of other agencies and organizations, i.e., American National Standards Institute (ANSI), etc. Such internally referenced standards shall also have the same force and effect as standards promulgated pursuant to MIOSHA.

4. For a complete listing of standards see MIOSHA Standards on the MIOSHA website.

II. Agency Guidelines.

A. Safety and Health Management System (SHMS). The purpose of the MIOSHA SHMS is to provide a comprehensive, ongoing process to assess and prevent or control hazards to which MIOSHA staff may be exposed. See current Agency Instruction, MIOSHA-SHMS-12-1 MIOSHA Safety and Health Management System.

B. Assaults.

1. MIOSHA employees are protected under Section 35(10) of the Act, which reads:

"A person shall not assault a department representative or other person charged with enforcement of this act in the performance of that person's legal duty to enforce this act. A person who violates this subsection is guilty of a misdemeanor. A prosecuting attorney having jurisdiction of this matter and the attorney general knowing of a violation of this section may prosecute the violator."

2. All incidents of threats or assaults must be reported immediately to agency management for follow-up investigation and future planning. This applies to threats received personally, telephonically, or electronically. See

Chapter V, Inspection Procedures, for guidelines on assaults that occur during inspections.

C. Conduct.

1. In order to maintain the public trust, it is essential that all employees function honestly and fairly, free from all forms of impropriety, threats, and favoritism. Our organization values and respects people and we strive to operate with the utmost integrity, excellence, and honor. Employees must maintain and exercise the highest standards of duty to the public in carrying out their official responsibilities and duties.

2. State facilities, computers, cell phones, credit cards, automobiles, and other state-provided equipment are to be used only in the performance of official state business. The individual who is assigned a computer, cell phone, credit card, automobile, or other equipment is responsible for the protection and its proper use.

3. Employees shall not hold a supplementary part-time or full-time position without first seeking and obtaining approval from the department (see Supplemental Employment Approval Request form - C-27). Any employee engaging in unauthorized supplemental employment may be subject to disciplinary action.

4. Employees shall not, directly or indirectly, solicit or accept any gifts or loan of money, goods, services, or other items of value for the benefit of any person or organization other than the state.

5. Acceptance of gifts, gratuities, favors, meals, entertainment, no matter how innocently tendered and received from those who have or seek business with the state, must follow LEO Code of Ethics Policy.

6. During official duties, agency employees may be asked to share a meal with an employer or employees. Agency employees may join them if no party involved in the activity has been excluded from the opportunity. No free meals may be accepted by the agency employees that could reasonably be expected to influence the manner in which the employee performs work or makes decisions.

D. Training.

1. Agency field staff will be trained before entering the field with both classroom and field training. Training is on-going through staff meetings, special training sessions, classes, and field accompaniments. Supervisors will evaluate and determine individual training needs.

2. For further training instructions, see current Agency Instruction, MIOSHA-TRG-04-1 Training for MIOSHA Personnel.

E. MIOSHA Emergency Management Plan (MIOSHA EMP). The purpose of the MIOSHA EMP is to clarify procedures and policy for MIOSHA responses to significant incidents, which occur in the State of Michigan. The MIOSHA EMP outlines procedures to ensure that trained and equipped personnel, and logistical

and operational assistance are in place. These procedures outline MIOSHA's role in providing technical assistance and consultation during initial response, recovery, rescue efforts, and traditional MIOSHA program services during clean-up operations following an incident, which has been declared an emergency by the Governor of Michigan. The MIOSHA EMP may be activated fully or partially, depending on the circumstances of the incident. It has the flexibility to manage responses to small incidents and can be expanded to cover complex, sustained incidents. See current Agency Instruction, MIOSHA-ADM-04-4 MIOSHA Emergency Management Plan (MIOSHA EMP).

III. Disclosure of Documents.

A. Policy. MIOSHA's policy regarding the disclosure of documents in investigation and other files is governed by the Freedom of Information Act (FOIA), as amended, being Act No. 442 of Public Acts of 1976.

1. The policy is to disclose all documents to which the public is entitled under the Freedom of Information Act and the regulations, including those where an exemption may apply if it is in the public interest to do so and does not impede the discharge of any of the functions of the agency, unless disclosure of such documents is prohibited (see Section 13(1) and (2) of FOIA and Sections 14d(1) and 63(1) and (2) of the Act).

2. At the same time, great care shall be taken to ensure that documents which are exempt from disclosure are kept confidential.

B. Procedures. The MIOSHA FOI Coordinator shall perform duties as described by MIOSHA FOIA policies and procedures.

1. When an appropriate request is received for public documents, and describes a public record sufficiently to enable the public body to locate the document, it may be inspected and copied. Copies will be provided, except exempted information as indicated in Section 13 of FOIA.

2. A person may subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. The subscription length is six (6) months and may be renewed (see Section 3(1) of FOIA).

C. Requests for Records. In accordance with Section 5(2) of FOIA, when a public body receives a request for a public record, it shall respond to the request within five (5) business days in one (1) of the following ways:

1. Grant the request.

2. Issue a written notice to the requesting person denying the request.

3. Grant the request in part and issue a written notice to the requesting person denying the request in part.

4. Under special circumstances, issue one (1) notice extending for 10 business days the period during which the public body shall respond to the request.

D. Disclosable Information on Case File Forms. Documents contained in the case files must be disclosed under FOIA in accordance with the exempted provisions of Section 13 of FOIA and Section 63(2) of the Act.

E. Non-disclosable Information on Case File Forms. Information which cannot be disclosed because it is protected by the MIOSH Act shall be kept confidential to the extent permitted under the law. All case file material shall be reviewed carefully before disclosure is made to ensure that no protected information is revealed, as referenced by Section 13 of FOIA and Section 63(2) of Act 154.

F. Information Which Will be Exempt From Disclosure in Whole or in Part on Case File Forms. Information contained in the following items shall be kept confidential when disclosure could be detrimental to agency's activities and when such information is exempt from disclosure.

1. As a general rule, information about a person may be disclosed to that person.

2. The name, sex, and age of a deceased person may normally be disclosed unless the privacy of survivors can reasonably be expected to be compromised by such disclosure.

3. For purposes of exemption, an individual's name, address, and telephone number are considered to be personal information, the disclosure of which may constitute an unwarranted invasion of personal privacy. Mere deletion of a person's name may not be sufficient unless the statement standing alone would not tend to indicate any particular individual as having made such statement (for example, where only one (1) person had knowledge of the facts).

4. Communication and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. Calculations, factual comments, and notes are disclosable generally.

G. Disclosure of Witness' (Interview) Statements. Interview statements are disclosable under FOIA, but are subject to the exemptions in Section 13 of FOIA and Section 63(2) of Act 154.

H. Medical Records. The Workers' Compensation Employers Basic Report of Injury, Form 100, is considered confidential and exempt from disclosure as provided in Section 230 of the Michigan Workers' Compensation Act 317 of 1969. In addition, Occupational Disease Reports (required by Part 56 of Public Act 368) and other personal medical records as defined in MIOSHA Part 470, Employee Medical Records and Trade Secrets, are also considered confidential and exempt from disclosure to the extent permitted by law.

I. Appeal Rights. Requesters under FOIA have a right to appeal any denial (partial or total) of information pursuant to their request in accordance with Section 10(1) of FOIA.

J. Waiving Fees. It is MIOSHA policy to provide the next-of-kin a copy of the fatality investigation report sent to the employer. MIOSHA will waive any fees for the initial copy only.

K. Retention of FOIA Files. FOIA responses are kept for one (1) year and are disposed of in accordance with the current FOIA retention schedule.

IV. Subpoenas.

A. Subpoenas Issued to MIOSHA.

1. General.

a) Subpoenas relating to work activity may be served on individual MIOSHA employees or on the agency.

b) The agency will confer with the Attorney General's office on any questions as to the validity of a subpoena.

c) The information obtained relating to inspections, concerning inspections, or is a part of the official inspection file, is property of the State of Michigan. Inspection records are not the property of MIOSHA employees and requests for documents must be made to the agency. Under no circumstances are they to be retained or used for any private purpose. Copies of documents or other recorded information not necessary or pertinent, or not suitable for inclusion in the case file, shall either be returned to the employer or destroyed.

d) The information obtained from inspection activities is determined to be disclosable or not disclosable on the basis of criteria established in the MIOSH Act and other applicable laws or legal privileges. The MIOSHA employee shall direct any requests for official files to the Lansing office.

e) If a MIOSHA employee is served in person, he/she shall read the subpoena and immediately notify their designated supervisor and Appeals Division staff that a subpoena has been served. Appeals Division staff shall advise the MIOSHA employee of necessary steps or actions to take. The MIOSHA employee shall promptly notify his or her supervisor of the action to be taken.

f) If a complainant's name is required to be revealed under subpoena, the complainant will be notified by Appeals Division staff.

2. Requirements of Subpoenas for Depositions/Trial Appearances (With or Without Records).

a) For depositions, Appeals Division staff will determine if date and time are appropriate and make special arrangements for appearance, if necessary.

b) For trial appearances, the MIOSHA employee must appear at the subpoena issued date, time and location unless otherwise instructed

by the attorney or court who has issued the subpoena. The MIOSHA employee will be sent a copy of the subpoena.

c) If records are required with the appearance of a MIOSHA employee, Appeals Division staff will forward the records to the attorney in advance of the date of the appearance with instructions regarding their release. The Appeals Division will inform the MIOSHA staff member if records have been requested along with the appropriate date, time and location for the appearance and a copy of the subpoena.

d) If a subpoena is received in a district office and if time permits before appearance date, the MIOSHA employee shall forward the subpoena and subpoena fee (if any) to the Appeals Division staff. If time does not permit, subpoenas should be forwarded as soon as possible.

e) When a subpoena for records relates to an open MIOSHA case file that is under appeal, Appeals Division staff shall notify the Attorney General's office at which time a motion to quash may be filed to relieve MIOSHA from the obligation to comply with the subpoena, or, a protective order will be sought to prevent the attorney, making the request, from releasing the documents to others.

f) When a subpoena for records relates to a closed MIOSHA file that has evidence of trade secret and/or complainant identity issues, Appeals Division staff must contact the Attorney General's office for guidance on what to release.

g) Under certain circumstances, a MIOSHA employee may have representation by the Attorney General's office.

3. Preparation for Depositions/Trial Appearances.

a) Always review the official case file(s) prior to deposition or court appearance.

b) MIOSHA employee rights when testifying or giving a deposition:

(1) If a question is not understood, ask that it be repeated.

(2) If a yes or no answer cannot be given, say so.

(3) If the MIOSHA employee has forgotten or cannot recall, say so.

(4) Answer only the question asked and do not make assumptions or offer opinions.

(5) Tell the truth. If the MIOSHA employee is misunderstood or a mistake has been made, clarify the statement immediately.

(6) If abusive questions are asked, the MIOSHA employee should ask to be treated with respect.

(7) Do not attest to being an expert witness. Inspection/investigation activity would not normally qualify a MIOSHA employee as an expert in the field of health or safety, unless for some reason the employee is qualified for this designation.

(8) The MIOSHA employee may excuse themselves at 5:00 p.m. in accordance with normal business hours, as well as excuse themselves for a drink, breaks, meals, or the use of a restroom.

(9) A MIOSHA employee has a right to question the need for personal information not related to the case in question. The MIOSHA employee may refuse to answer any personal questions, or request to provide the information off the record, bearing in mind that a judge may order them to answer these questions at a later date.

4. Notify the Office Upon Completion of Testimony.

a) If the court has imposed requirements for the department to retain records, the MIOSHA employee must explain the requirements in writing and return the records to the Appeals Division staff in the Lansing office.

b) If the court has imposed any other requirements, such as another appearance by a MIOSHA employee or requirements for other documents, the MIOSHA employee must notify the Appeals Division staff. The Appeals Division staff shall notify the Attorney General's office if the subpoena or deposition relates to an open case file (under investigation or appeal).

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

1. If a person refuses to provide requested information or evidence, the MIOSHA employee shall explain the reason for the request. If he/she refuses to produce the information or evidence requested, the MIOSHA employee shall inform the person that the refusal will be reported to a supervisor and that the agency may take further legal action.

2. Upon receipt of notification of an employer's refusal to provide requested information or evidence, the division director will decide whether an administrative subpoena should be requested. If a subpoena is requested,

it shall be prepared by the division for the MIOSHA director, deputy director, or division director's signature.

3. The MIOSHA director, deputy director, or division director shall evaluate the circumstances and determine whether the subpoena should be issued. If the MIOSHA director, deputy director, or division director determines the subpoena should be issued, he/she shall sign it for service.

4. The subpoena may be served in person by a MIOSHA employee or by certified mail to the individual, or if the individual name is not available, to the business' or organizations' "Custodian of Records," with return receipt requested. Subpoenas may also be served by a process server. See Agency Instruction MIOSHA-COM-14-1 Process Servers for Delivery of Citations and Other Legal Documents.

5. The person served may comply with the subpoena by making the information or evidence available immediately to the MIOSHA employee upon service, or by making the information or evidence available at the time and place specified in the subpoena.

6. If the person honors the subpoena, the inspection or investigation will proceed as usual.

7. If the person refuses to honor the subpoena, the MIOSHA director or deputy director shall proceed as usual for cases involving a refusal of entry and may refer the matter to the Attorney General for appropriate action (see Chapter V, Inspection Procedures, for guidelines on refusals).

CHAPTER IV. PRE-INSPECTION PROCEDURES

I. Inspection Scheduling.

A. General Requirements. MIOSHA's priority system for conducting inspections is designed to distribute available MIOSHA resources as effectively as possible to ensure that maximum feasible protection is provided to the working men and women of Michigan. Effective and efficient use of resources requires careful, flexible planning. In this way, the overall goal of hazard abatement and worker protection is best served.

B. Inspection/Investigation Types.

1. Unprogrammed. Inspections under this category are scheduled in response to alleged hazardous working conditions that have been identified at a specific worksite. The following types of inspections are covered under this OSHA Information System (OIS) category:

a) Fatality/Catastrophe.

b) Accident.

c) Complaint.

d) Referral.

e) Monitoring.

f) Variance.

g) Follow-up.

2. Unprogrammed Related. Additional inspections of employers at multi-employer or single-employer worksites whose operations are not directly affected by the subject of the conditions identified in the complaint or referral are unprogrammed related. An example would be that during the course of conducting a complaint or referral inspection, and unrelated hazards are observed that were not part of the original assignment, this could be conducted as a second inspection based on the professional judgment of the SO/IH in consultation with his or her supervisor and coded as unprogrammed related. This category also includes "Notification of Abatement Inspections" for other-than-serious violations.

3. Programmed. Inspections of worksites which have been scheduled based upon objective or random selection criteria are programmed. The worksites may be selected by state scheduling plans, emphasis programs, or strategic plan-related criteria. This may include non-fatal accidents.

4. Programmed Related. Additional inspections of employers at multi-employer or single-employer worksites whose activities were not included in the programmed assignment. This may include non-fatal accidents.

C. Inspection Priorities.

Generally, priority of inspection categories shall be as follows:

PRIORITY	CATEGORY
First	Imminent Danger
Second	Fatalities
Third	Complaints/Referrals
Fourth	Non-Fatal Accidents
Fifth	Follow-up/Monitoring/Variances
Sixth	Programmed

NOTE: Deviations from the table above will be considered on a case-by-case basis.

D. Inspection Selection Criteria.

1. Scheduling. Ensure that all inspections are scheduled within the framework of this chapter, that they are consistent with the objectives of the agency, and that appropriate documentation of scheduling practices is maintained.

2. Effective Use of Resources. Ensure that MIOSHA resources are effectively distributed during inspection activities. If an inspection is of a complex nature, the supervisor may request assistance from other field staff, another office, or supervisor.

3. Effect of Appeal. If an employer scheduled for inspection, either programmed or unprogrammed, has appealed a citation and/or a penalty received as a result of a previous inspection and the case is still pending before the Board of Health and Safety Compliance and Appeals or before Michigan courts, the following guidelines apply:

   a) If the employer has appealed the penalty only, the inspection shall be scheduled as though there were no appeal.

   b) If the employer has appealed the citation itself or any items thereon, then programmed and unprogrammed inspections shall be scheduled in accordance with the guidelines in this chapter. The scope of unprogrammed inspections normally shall be partial. All

items under appeal shall be excluded from the inspection unless a potential imminent danger is involved, the condition is different from the previously cited condition, or it is a construction operation.

4. Employer Contacts. Contacts for information initiated by employers or their representatives shall not trigger an inspection, nor shall such employer inquiries protect them against regular inspections conducted pursuant to guidelines established by MIOSHA. Further, if an employer or its representative indicates that an imminent danger exists or that a fatality has occurred, MIOSHA shall act in accordance with established inspection priority procedures.

5. Voluntary Compliance Programs. Employers who participate in voluntary compliance programs may be exempt from programmed inspections. See Chapter V. I. C. 2.

II. Unprogrammed Inspections.

A. General. This section relates to information received and processed before an inspection, rather than information which is provided to the SO/IH during an inspection.

B. Definitions.

1. Imminent Danger. Section 5 (3) of the Act defines imminent danger as ". . . a condition or practice in a place of employment which is such that a danger exists which could reasonably be expected to cause death or serious physical harm, either immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided . . ."

The following conditions must be present in order for a hazard to be considered an imminent danger:

a) Death or serious harm must be threatened; AND

b) It must be reasonably likely that a serious accident could occur immediately OR, if not immediately, then before abatement would otherwise be implemented.

NOTE: For a health hazard, exposure to the toxic substance or other hazard must cause harm to such a degree as to shorten life, be immediately dangerous to life and health, or cause substantial reduction in physical or mental efficiency or health, even though the resulting harm may not manifest itself immediately.

2. Fatality/Catastrophe. Workplace death of an employee.

3. Complaints. Reports of an alleged hazard (over which MIOSHA has jurisdiction) or a violation of the Act given by a current employee, a representative of employees, a Section 65(1) investigator seeking resolution of a discrimination complaint, or an individual with knowledge

of the workplace, such as the employee of a contractor working on-site. In some circumstances, a complaint may be accepted from a former employee, for example, a complaint is filed simultaneous or shortly after employment ends (generally within 30 days) or where the employee may have been discriminatorily discharged for a complaint about unsafe or unhealthful conditions in the workplace. Reports of unsafe or unhealthy working conditions received from any other individuals alleging to be knowledgeable of the situation, such as an attorney acting for an employee, may be treated as either a complaint or a referral depending on the seriousness of the allegations, level of detail provided, and other factors deemed appropriate.

4. Referrals. Reports received by MIOSHA of an alleged hazard or a violation of the Act given by any source not considered a complainant. These include media reports; referrals from local, state, or federal agencies; and health care providers.

5. Employer-Reported Referral (ERR). Employer reported accidents other than fatalities/catastrophes.

6. Accidents. All workplace non-fatal injuries or illnesses that are not referrals (e.g., not employer-reported referrals or media referrals).

7. Follow-ups. Inspections conducted after the employer's final order date to ensure abatement of previously issued citations.

8. Monitoring. Inspections conducted to ensure that hazards are being corrected and employees are being protected, whenever a long period of time is needed for an establishment to come into compliance, when requested by employers to evaluate abatement progress, or to verify compliance with the terms of granted variances. These are always conducted during the abatement period.

9. Variance. Evaluation of an employer's request to deviate from a rule that provides the same level of protection that the original rule provided.

10. Notification of Abatement Inspections [Other-than-serious (OTS) Only]. Office-based telephone inspections for the purpose of citing employers for failure to notify MIOSHA of abatement of previously issued citations in accordance with Rule 1349(1) of Part 13, Inspections and Investigation, Citations and Proposed Penalties.

C. Imminent Danger. Any allegation of imminent danger received by a MIOSHA office shall be handled in accordance with the following procedures:

1. A manager or supervisor shall immediately determine whether there is a reasonable basis for the allegation. If the hazard is determined to be imminent danger, the manager or supervisor will immediately inform the division director or designee.

2. An imminent danger inspection shall be scheduled with the highest priority. Typically, an imminent danger inspection will be conducted the same day the report is received.

3. When an immediate inspection cannot be made, a MIOSHA representative shall contact the employer (and when known, the employee representative) immediately, obtain as many pertinent details as possible concerning the situation, and attempt to have any employees affected by the imminent danger voluntarily removed or have the hazard eliminated.

   a) A record of what steps, if any, the employer intends to take in order to eliminate the danger will be included in the case file.

   b) This notification shall be considered advance notice (when an inspection is conducted) and shall be handled in accordance with the procedures given in this chapter.

D. Fatality/Catastrophe. All workplace fatalities must be reported and will be evaluated for compliance with reporting requirements as specified in Administrative Rules Part 11, Reporting and Recording of Occupational Injuries and Illnesses. MIOSHA will determine on a case-by-case basis if the fatality is MIOSHA-covered and will assign as necessary. MIOSHA will initiate the investigation, if assigned, within one (1) day.

E. Complaints.

1. Evaluating Complaints. All complaints will be evaluated according to established procedures, including the criteria listed below to determine if the complaint includes issues covered by MIOSHA. When information is not provided by the complainant, the complaint is too vague to evaluate, or the office has other specific information that the complaint is not valid, an attempt shall be made to clarify or supplement available information. If a decision is made that the complaint is not valid, a letter or email will be sent to the complainant or the complainant will be contacted by telephone advising of the decision and its reasons. The contact will be documented and attached to the complaint.

2. Electronic Complaints. Electronic complaints where a current employee has provided their name and checked the "This constitutes my electronic signature" box shall be considered as a formal complaint and processed accordingly.

3. Identity of Complainant. The identity of the complainant shall be kept confidential unless otherwise requested by the complainant, in accordance with Section 28(3) of the Act. No information shall be given to employers, which would allow them to identify the complainant. When requested by the complainant, a complainant's name shall be revealed during onsite and offsite inspections.

4. On-Site Complaint Inspection. This is an inspection that is initiated primarily as a result of a complaint, is conducted by an SO/IH at the employer's worksite, and meets at least one (1) of the criteria listed below:

a) The complaint was reduced to writing, is signed by a current employee, employee representative, or a former employee (a complaint is filed simultaneous or shortly after employment ends, generally within 30 days, or where the employee may have been discriminatorily discharged for a complaint about unsafe or unhealthful conditions in the workplace). The complainant must state the reason for the inspection request with reasonable particularity. In addition, there are reasonable grounds to believe that a violation of a safety or health standard or danger exists, as provided in Section 28 of the Act.

b) The complaint alleges that physical harm, such as disabling injuries or illnesses has occurred as a result of the alleged hazard(s) and there is reason to believe that the hazard or related hazards still exist. Injuries or illnesses are those that may result in permanent disabilities or illnesses that are chronic or irreversible. Examples of permanently disabling injuries or illnesses include: amputation, blindness, standard threshold shift in hearing, lead or mercury poisoning, or third-degree burns.

c) The complaint is based on an allegation of an imminent danger situation.

d) The complaint identifies an establishment or an alleged hazard covered by an emphasis program.

e) The employer fails to provide an adequate response to a letter inspection or the complainant provides evidence that the employer's response is false or does not adequately address the hazard(s).

f) The firm or establishment that is the subject of the complaint has a history of instance-by-instance, willful, or failure-to-abate citations. The division may determine not to inspect a facility when good quality abatement evidence has been provided and programs have been implemented to prevent a recurrence of hazards.

g) A Section 65 discrimination investigator requests that a complaint inspection be conducted in response to an employee's allegation that he/she was discriminated against for complaining about safety or health conditions in the workplace or for refusing to do an allegedly imminently dangerous job/task.

h) If an on-site inspection is scheduled, or has begun at an establishment, and a complaint that would normally be investigated by telephone/fax is received, that complaint may, at the division's discretion, be scheduled for on-site inspection as a companion complaint.

i) Due to rapidly changing conditions on a construction worksite, CSHD may consider complaints that do not meet the above criteria for an on-site complaint investigation, when the complainant does not provide their name and address.

5. Off-Site Complaint Inspections. Letter or telephone complaint inspections are conducted for other complaints that do not meet one (1) of the preceding on-site complaint inspection criteria. Initially, off-site complaint inspections do not include an on-site inspection of the workplace. Most on-line complaints will be addressed by one (1) of these two (2) methods.

a) Letter Complaint Inspection. A letter complaint inspection differs from an on-site complaint inspection in that in a letter complaint inspection, MIOSHA advises the employer of the alleged hazards by telephone, fax, letter, and/or email. The employer is required to provide a written response.

b) Telephone Complaint Inspection. In situations that do not meet the on-site complaint inspection criteria, are deemed to be of an other-than-serious nature, and it is believed that the issues can quickly be addressed by telephone, a telephone complaint inspection may be conducted. MIOSHA shall send a letter to the employer and the complainant summarizing the findings.

6. Procedures for an On-Site Complaint Inspection.

a) The appropriate division shall evaluate each complaint, and other available information, and exercise professional judgment to determine whether or not there are reasonable grounds to believe that a violation or hazard exists. If there are no reasonable grounds to believe that a violation or hazard exists, an on-site inspection shall not be conducted. The division may also determine not to inspect a facility when there is evidence that the condition complained of is being abated.

b) When a written complaint signed by a current employee or employee representative is received, and there are reasonable grounds to believe that a violation or hazard exists, an on-site inspection shall generally be conducted. The complainant may be contacted for clarification of issues raised in the complaint, as necessary. Where a written, signed complaint has been submitted, but in the professional judgment of the division, there are no reasonable grounds to believe that a violation or danger exists, no on-site inspection shall be made. In such situations, the complainant shall be notified in writing of MIOSHA's intent to not conduct an on-site inspection, the reasoning behind such a determination, and their appeal rights under Section 28(4) of the Act.

c) If, after an on-site inspection is initiated, it is determined the workplace is covered under the federal appropriations rider, a determination will be made on whether the inspection will be terminated or continued using state funds. See current Agency Instruction, MIOSHA-ADM-06-7 Small Farming Operations and Small Employers in Low Hazard Industries - Guidelines for MIOSHA Activity.

d) After an on-site complaint inspection, the division shall send the complainant a report addressing the complaint items, with reference to the citation(s) or a description of why the findings did not result in a violation. The complainant shall also be informed of their appeal rights under Section 28(4) of the Act.

7. Procedures for a Letter Complaint Inspection.

a) If the complaint requires a letter complaint inspection, MIOSHA will contact the employer by telephone and notify him/her of the complaint and its allegations, if a telephone contact will clarify and help explain the issues of the complaint more clearly. In all cases, a letter shall be sent to the employer advising the employer of the complaint items and the need to respond to MIOSHA within a specified time period. When applicable, the employer shall be informed of the requirements of Section 65(1) of the Act, and that the complainant will be kept informed of the complaint progress. Follow-up contact may be by telephone at the option of the manager or supervisor.

b) In the letter or during the telephone call, MIOSHA shall ask for the name of the contact person at the employer's worksite and request that a copy of the letter be posted and/or provided to the employee representative upon receipt. The company fax number may be requested. The employer is advised of what information is needed to answer the letter complaint. Documentation, such as invoices, sampling results, photos, video tape, etc., shall be required and provided by the employer as evidence of abatement, to ensure that the complaint hazard(s) has been eliminated or does not exist.

c) Concurrent with the letter to the employer, a letter to the complainant shall be sent containing a copy of the letter to the employer. Copies of subsequent correspondence related to the complaint may be sent to the complainant.

d) If a signed complaint is received after the complaint letter inspection process has begun, MIOSHA shall make a determination as to whether the alleged hazard is still likely to exist based on the employer's response and/or by contacting the complainant. The complainant shall be informed that the letter complaint inspection has begun.

e) If no employer or an inadequate employer response is received, additional contact with the employer may be made before an on-site complaint inspection is scheduled. Ultimately, if the employer provides no response or an inadequate response or MIOSHA determines from other information that the condition is not being corrected, an on-site complaint inspection will be scheduled.

f) The complaint will be closed when MIOSHA is satisfied that documents provided and/or contacts confirm that the hazard has been eliminated/abated. A letter will be sent to the employer acknowledging that the alleged hazard(s) have been adequately addressed. A letter is also sent to the complainant explaining the complaint is being closed as a result of a satisfactory response from the employer and offering to discuss the disposition of the complaint and how to obtain a copy of the employer's response through FOIA.

8. Procedures for a Telephone Complaint Inspection. The employer will be contacted and explained the allegations and advised as necessary as to how to abate the condition. If the agency is satisfied the conditions have been addressed, the response will be documented in the case file. A letter will be sent to the employer acknowledging that the alleged hazard(s) have been adequately addressed. A copy of this letter will be mailed to the complainant.

F. Referrals. Referrals shall be handled in a manner similar to that of complaints.

G. Employer-Reported Referral (ERR). Employer reported accidents other than fatalities/catastrophes.

H. Accidents. All workplace non-fatal injuries or illnesses that are not referrals (e.g., not employer-reported referrals or media referrals).

I. Follow-ups. In cases where follow-up inspections are necessary, they shall be conducted as promptly as resources permit. Except in unusual circumstances, follow-up inspections shall take priority over all programmed inspections. Follow-up inspections should not normally be conducted within the 15 working day appeal period unless high gravity serious violations were issued. See this chapter regarding effect of appeal upon abatement period.

J. Monitoring. Monitoring inspections are initiated in response to settlement agreements, in response to employer requests for assistance prior to the final abatement date, and at the agency's discretion.

K. Variance. Variance inspections are initiated in response to employer requests to deviate from the requirements of an occupational safety or health standard.

L. Notification of Abatement. See current Agency Instruction, MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure.

M. Discrimination Complaints. The complainant shall be advised of the protection against discrimination afforded by Section 65(1) of the Act, and shall be informed of the procedure for filing a 65(1) complaint.

1. Section 65(1) complaints filed by former employees exclusively alleging that they were terminated for exercising their rights under the Act may be scheduled for compliance investigation by GISHD or CSHD.

2. Such complaints should be transmitted to the Employee Discrimination Section of MIOSHA to be handled by the appropriate discrimination officer for investigation of the alleged 65(1) discrimination complaint.

3. If a Section 65(1) complaint contains health or safety concerns, these concerns shall be addressed by the GISHD or the CSHD as an on-site or letter complaint inspection. However, the Section 65(1) portion of the complaint shall be referred to the Employee Discrimination Section as indicated in paragraph (2) above to be addressed accordingly.

4. Any Section 65(1) complaint alleging an imminent danger shall be handled in accordance with the instructions in this chapter.

III. Programmed Inspections.

A. GISHD. Under the inspection targeting system, employers in North American Industrial Classification System (NAICS) codes targeted by the MIOSHA strategic plan and randomly selected establishments will be identified for inspection. Emphasis is placed on selecting NAICS and establishments with high injury, illness, and fatality rates. The system is augmented with special programs such as national and state emphasis programs.

B. CSHD. The MIOSHA Strategic Plan identifies construction SIC code groups 15, 16, and 17 as high hazard industry for targeting purposes. The CSHD assigns programmed inspections at construction sites from Dodge Report information provided by the University of Tennessee (U of T). The U of T has a contract with Federal OSHA to use Dodge Reports published by McGraw Hill, to identify active construction sites for inspection targeting. Lists of active construction sites are provided to field staff, specific to their area, for scheduled inspection targeting. The system is augmented with special programs such as national and state emphasis programs.

Contractors performing friable asbestos removal or encapsulation work in Michigan must provide project notifications 10 calendar days prior to any non-emergency asbestos project. Emergency notices may be submitted at any time. The notifications must indicate the start and end dates and other job-related information. CSHD evaluates the notices for the purpose of inspection scheduling. CSHD will attempt to inspect 50 percent of all new asbestos licensees who are performing work in Michigan during the first year of obtaining their license. CSHD will attempt to inspect 50 percent of the asbestos licensees who are performing work in Michigan at least once every three (3) years. Inspections will be scheduled based upon the best utilization of resources.

C. Strategic Plan and Other Emphasis Programs.

1. General. The MIOSHA Strategic Plan and other emphasis programs provide for programmed inspections in high potential injury or illness rate situations. These programs may include participation in emphasis programs originated through federal OSHA.

   The description of, and reasons for, these programs will be set forth in appropriate instructions or notices. Such programs shall be submitted for approval to the Director of MIOSHA or designee.

   Other special programs may be developed by the agency to cover special categories of inspections, which are not "high hazard," or "high incidence rate" inspections and thus not covered under these programs on the general scheduling system.

   The subject matter of these programs shall be identified by one (1) or more of the following:

   a) Specific industry.

   b) Trade/craft.

   c) Substance.

   d) Type of workplace operation.

   e) Type/kind of equipment.

   f) Other identifying characteristics.

   The scope of these programs shall be described and may be limited by geographic boundaries, size of worksite, or similar considerations.

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

2. Scheduling of Strategic Plan or Other Emphasis Program Inspections. The following guidelines shall apply in scheduling these inspections:

   a) Certain programs identify the specific worksites and/or industries that will be inspected. Therefore, the only action remaining to be taken is the scheduling of inspections.

   b) Other programs identify only the subject matter of the program and contemplate that not all worksites within the program will necessarily be inspected.

   c) If no special worksites are identified within the program, available information will be used to compile a worksite list.

   d) These programs shall be periodically evaluated to assess the need for continuation of the program.

D. Non-Fatal Accidents. Non-fatal accidents involving significant publicity, or any other accident not involving a fatality, however reported, may be considered as either a complaint, a referral, or a non-fatal accident depending on the source of the report.

IV. Inspection Preparation.

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

B. Planning. It is important that the SO/IH prepares for an inspection. Due to the wide variety of industries and associated hazards likely to be encountered, pre-inspection preparation is essential to the conduct of a quality inspection. The SO/IH shall also ensure the selection of appropriate inspection materials and equipment, including personal protective equipment, based on anticipated exposures and training received in relation to the uses and limitations of such equipment.

1. If assigned an inspection or investigation at a past employer or those where a close immediate family member is employed, the SO/IH will call his or her supervisor or manager for instructions. In most cases, the inspection will be reassigned unless enough time has lapsed that it normally would not be considered a conflict or where the firm may have changed management or ownership.

2. The SO/IH is required to comply with all safety and health rules and practices at the establishment and wear or use the safety clothing or protective equipment required by MIOSHA standards and by the employer for the protection of employees. MIOSHA staff will adhere to current Agency Instruction, MIOSHA-SHMS-12-1 MIOSHA Safety and Health Management System (SHMS), for policies and procedures.

a) Electrical. A MIOSHA employee shall not operate, energize or de-energize non-state equipment. If it is necessary to have non-state equipment operated, energized or de-energized, MIOSHA staff must discuss the reason and whether the request can be accommodated safely with the employer representative. If it is determined safe, the MIOSHA employee will request the employer representative have the equipment operated, energized or de-energized. A MIOSHA employee shall not enter electric power substations without approval of the division director or designee. See current Agency Instruction MIOSHA-SHMS-11-2 Electrical Safety Work Practices for MIOSHA Personnel.

b) Lockout/Tagout. A MIOSHA employee is not to perform lockout on non-MIOSHA equipment as part of inspection or consultation activities. See current Agency Instruction MIOSHA-SHMS-15-2

Control of Hazardous Energy Sources (Lockout-Tagout) for MIOSHA Personnel.

c) Confined Space. A MIOSHA employee shall not enter any confined spaces whether PRCS or non-permit spaces as defined in MIOSHA Part 90/490 without prior approval by the division director or designee. See current Agency Instruction MIOSHA-SHMS-14-2 Confined Space and Tunnels Under Construction Entry for MIOSHA Personnel.

d) Fall Protection for MIOSHA Personnel. A MIOSHA employee must don and use the appropriate fall protection PPE before proceeding into an area with a fall hazard, unless other appropriate action eliminates the hazard or the issues can be addressed from outside the hazardous area. See current Agency Instruction MIOSHA-SHMS-13-3 Personal Protective Equipment (PPE) for MIOSHA Personnel.

3. The SO/IH shall not enter any area where special entrance restrictions apply until the required precautions have been taken. It is the responsibility of the division director or designee to determine that an inspection may be conducted without exposing the SO/IH to hazardous situations and to procure whatever materials and equipment are needed for the safe conduct of the inspection.

4. Prior to conducting an inspection, the SO/IH shall review as appropriate the types of conditions likely to be encountered, including the work processes, equipment and materials involved, and the hazards likely to be associated with them.

5. The SO/IH and supervisor will conduct an establishment search by accessing the OSHA website and OIS. The SO/IH and supervisor should use name variations and address-matching in their establishment search to maximize their efforts due to possible company name changes and status (e.g., LLC, Inc.). When the search affects the classification or penalty of a violation in a current inspection, the SO/IH and supervisor shall include the findings in the case file.

   NOTE: MIOSHA may use establishment history from another location (in- or out-of-state) to document knowledge of willful violations. The SO/IH and supervisor shall include this remote history in the case file when appropriate.

6. The SO/IH must be aware that a good first impression is of utmost importance to the creation of an atmosphere of cooperation, and is essential to the successful completion of the inspection. Such an impression can be created by careful planning. Dress shall be appropriate to the type of establishment to be inspected. Proper protective clothing and equipment shall be worn and company conduct rules observed. The SO/IH shall attempt to become aware of how the employer and the

employee representatives feel about our presence in the workplace, and shall take care not to become a source of resentment. SO/IHs are expected to be respectful and professional in their demeanor. The inspection shall be conducted as efficiently as possible, without undue delay and with sensitivity to the needs and concerns of those involved.

7. The closing conference shall be used as a means of reinforcing the agency's intent to be cooperative, helpful, and courteous in the conduct of business. The SO/IH shall explain the availability of other MIOSHA programs in addition to enforcement, such as consultation, education, and training. Grantee organizations in the area may be identified as well as the specific services they offer.

C. Advance Notice of Inspections.

1. Policy. Section 29(5) of the Act contains a prohibition against giving advance notice of inspections. Act 154, as amended, regulates many conditions which are subject to speedy alteration and disguise by employers. To forestall such changes in worksite conditions, the Act, in Section 29(5), prohibits unauthorized advance notice. Advance notice exists whenever a division sets up a specific date or time with the employer for the SO/IH to begin an inspection.

Advance notice prohibitions do not apply to Section 65 investigations. 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 supervisor. Advance notice generally does not include nonspecific indications of potential future inspections.

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

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 department's designee 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;

d) When the giving of advance notice would enhance the probability of an effective and thorough inspection.

Section 29(6) of the Act provides that advance notice in any of the situations described above shall not be given more than 24 hours before the inspection or investigation is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances.

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

D. Pre-Inspection Warrant/Subpoena Process. A division may seek a warrant/subpoena in advance of an attempted inspection if circumstances are such that pre-inspection process is desirable or necessary.

1. Although the agency generally does not seek warrants without evidence that the employer is likely to refuse entry, the supervisor may seek a warrant in advance of an attempt to inspect or investigate whenever circumstances indicate.

   NOTE: Examples of such circumstances would be evidence of denied entry in previous inspections, awareness that a job will only last a short time, or that job processes will be changing rapidly.

2. Administrative subpoenas may also be issued prior to any attempt to contact the employer or other person for evidence related to a MIOSHA inspection or investigation.

E. Expert/Specialist Assistance.

1. The agency will arrange for a specialist and/or specialized training, preferably from within MIOSHA, to assist in an inspection or investigation when the need for such expertise is identified. Division director and agency administration approval is required prior to requesting assistance from outside experts on enforcement cases.

2. The agency may ask for the assistance of OSHA specialists or outside consultants. The OSHA specialists and outside consultants shall be briefed on the purpose of the inspection and the personal protective equipment to be utilized.

CHAPTER V. INSPECTION PROCEDURES

I. General Inspection Procedures.

A. Inspection Scope. Inspections, either programmed or unprogrammed, fall into one (1) of two (2) categories depending on the scope of the inspection:

1. Comprehensive. A substantially complete inspection of all potentially hazardous areas of the establishment.

2. Partial. An inspection whose scope is limited to certain potentially hazardous areas, operations, conditions or practices at the establishment. A partial inspection must be expanded to address any potentially serious hazards in plain view or discovered by the SO/IH during the inspection process. Consistent with the provisions of Section 29 of Act 154, and division priorities, the SO/IH shall use professional judgment to determine the necessity for expansion of the inspection scope, based on information gathered during records or program review or the walkaround inspection.

B. Conduct of the Inspection.

1. Time of Inspection. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise. The supervisor and SO/IH shall confer with regard to entry outside of normal working hours.

2. Construction Worksites. 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). Where the construction site extends over a large geographical area (e.g., road building), the entire job may be considered a single worksite.

3. Entry of Construction Worksites. The SO/IH shall determine whether there is a representative of a general contracting agency at the worksite. If so, the SO/IH shall contact the representative, advise him/her of the inspection and request that he/she attend the opening conference. If the inspection is being conducted as a result of a complaint, a copy of the complaint is to be furnished to the general contractor and any affected subcontractors.

4. Initial Contact. Upon arriving at the worksite, the SO/IH shall proceed immediately to the appropriate entrance, such as main office, construction trailer, security post, etc. Violations observed by the SO/IH while enroute to making contact with the proper management representatives shall be noted and addressed during the opening conference.

5. Presenting Credentials. At the beginning of the inspection the SO/IH shall locate the owner representative, operator or agent in charge at the workplace and present credentials. On construction sites this will most often be the representative of the general contractor. For security reasons,

do not allow official state credentials to be copied. Business cards are to be provided to appropriate parties upon arrival.

6. Delay of Inspection. 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 an employer representative. This delay should normally not exceed one (1) hour. If the delay is expected to or does exceed one (1) hour, contact your supervisor.

7. Recordkeeping Review.

   a) Part 11, Recording and Reporting of Occupational Injuries and Illnesses, Rule 408.22140(1) states that once a request is made, an employer must provide the required recordkeeping records within four (4) business hours.

   b) Although the employer has four (4) hours to provide injury and illness records, the SO/IH 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 SO/IH is to begin the walkaround portion of the inspection.

8. Refusal to Permit Inspection. Section 29 of the Act provides that SO/IHs may enter without delay and at reasonable times any establishment covered under the Act for the purpose of conducting an inspection. An employer has a right to require that the SO/IH seek an inspection warrant prior to entering an establishment and may refuse entry without such a warrant.

9. 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, an attempt shall be made to obtain as much information as possible about the establishment.

   a) If the employer refuses to allow an inspection of the establishment to proceed, the SO/IH shall leave the premises and immediately report the refusal to his or her supervisor.

   b) If the employer raises no objection to inspection of certain portions of the workplace but objects to inspection of other portions, the SO/IH shall document this in the case file. Normally, the SO/IH shall continue the inspection, confining it only to those certain portions to which the employer has raised no objections. The SO/IH shall advise the employer that the refusal will be reported to his or her supervisor and that the agency may take further action.

   c) The SO/IH shall not suggest or imply to the employer in any case that he or she will get a warrant or a subpoena to complete the inspection.

d) On multi-employer worksites valid consent for site entry can be granted by the owner or another employer with employees at the worksite.

10. Employer Interference. Where entry has been allowed but the employer interferes with or limits any important aspect of the inspection, the SO/IH shall determine whether or not to consider this action as a refusal. Examples of interference are the inability to complete the walkaround, to examine records essential to the inspection, take essential photographs and/or video, to inspect a particular part of the premises, to conduct private employee interviews, or refuse to allow attachment of sampling devices. Where the SO/IH determines that the actions of the employer reaches a level of a refusal, the SO/IH shall leave the premises and immediately report the refusal to his or her supervisor.

11. Administrative Subpoena. Whenever there is a reasonable need for records, documents, testimony and/or other supporting evidence necessary for completing an inspection, the division director or designee may contact the Department of Attorney General and request the issuance of an administrative subpoena.

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

    a) With the approval of the division director, the supervisor may initiate the warrant process.

    b) The warrant sought shall normally be limited to the specific working conditions or practices forming the basis of the inspection. A broad scope warrant, however, may be sought when the information available indicates conditions which are pervasive or if the establishment is on the current list of targeted establishments.

13. Warrant/Court Order Inspection. When a warrant or court order is obtained requiring an employer to allow an inspection, the SO/IH is authorized to conduct the inspection in accordance with the provisions of the warrant or court order.

14. Action to be Taken upon Receipt of Warrant/Subpoena. The inspection will normally begin within 24 hours of receipt of a warrant or of the date authorized by the warrant for the initiation of the inspection.

    a) An officer of the court shall serve a copy of the warrant to the employer.

    b) Upon completion of the inspection, the “Return to the Administrative Inspection Warrant” form shall be completed, signed and forwarded to the court.

c) Where the walkaround is limited by a warrant or an employer's consent to specific conditions or practices, a subpoena for production of records may be obtained in accordance with this chapter. The records specified in the subpoena may include (as appropriate) injury and illness records, exposure records, the written hazard communication program, the written lockout/tagout program, maintenance and inspection records, and records relevant to the employer's safety and health management system, such as safety and health manuals or minutes from safety meetings.

d) The division director or designee may request the Department of Attorney General to authorize, for each inspection, an administrative subpoena which seeks production of the above specified categories of documents. The subpoena may call for immediate production of the records with the exception of the documents relevant to the safety and health management system, for which a period of five (5) working days normally shall be allowed.

e) If circumstances make it appropriate, a second warrant may be sought based on the review of records or on "plain view" observations of other potential violations during a limited scope walkaround.

15. Law Enforcement Assistance.

a) Warrant. The officer of the court shall accompany the SO/IH when a warrant is presented. Michigan State Police or local law enforcement is acceptable. The SO/IH shall request the officer stay as long as necessary.

b) Subpoena. A subpoena may be served with or without law enforcement assistance.

16. Refused Entry or Interference while Presenting a Warrant/Subpoena. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant/subpoena, the SO/IH shall immediately contact the division director or designee.

17. Forcible Interference with Conduct of Inspection or Other Official Duties. Whenever a MIOSHA 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, and the SO/IH shall immediately leave the employer's premises.

a) If assaulted or violently threatened, the SO/IH may contact law enforcement authorities directly.

b) The supervisor shall be advised by the most expeditious means.

c) Upon receiving a report of such forcible interference, the supervisor or designee shall immediately notify the division director.

18. Release for Entry. The SO/IH shall not sign any form or release or agree to any waiver. This includes any employer forms concerned with trade secret information.

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

19. Bankrupt or Out of Business. If the establishment scheduled for inspection is found to have ceased business and there is no known successor, the SO/IH shall report the facts to his or her supervisor. If an employer, although adjudicated 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.

20. Strike or Labor Dispute. Plants or establishments may be inspected regardless of the existence of labor disputes involving work stoppages, strikes or picketing. If the SO/IH identifies an unanticipated labor dispute at a proposed inspection site, the supervisor shall be consulted before any contact is made.

a) Programmed inspections may be deferred during a strike or labor dispute, either between a recognized union and the employer or between two (2) unions competing for bargaining rights in the establishment.

b) Unprogrammed inspections (complaints, fatalities, etc.) may be performed during strikes or labor disputes. However, the seriousness and reliability of any complaint shall be thoroughly evaluated by the supervisor prior to scheduling an inspection to ensure as far as possible that the complaint reflects a good faith belief that a true hazard exists.

If there is a picket line at the establishment, the SO/IH shall inform the appropriate union official of the reason for the inspection prior to initiating the inspection. During the inspection, SO/IHs will make every effort to ensure that their actions are not interpreted as supporting either party to the labor dispute.

21. Rescue Operations. MIOSHA has no authority to direct rescue operations. This is the responsibility of the employer and/or of local political subdivisions or State agencies. MIOSHA does have the authority to monitor and inspect the working conditions of covered employees engaged in rescue operations to make certain that all necessary procedures are being taken to protect the lives of the rescuers.

a) Non-Standard Procedures or Equipment. Emergencies created by accidents may necessitate immediate rescue work, and any loss of time may increase injuries and/or fatalities. Therefore, when only nonstandard procedure or equipment is available for use in an emergency situation, MIOSHA will permit its use without citing the employer, rather than cause a delay to occur by waiting for equipment which meets MIOSHA standards requirements. However, if the SO/IH determines the nonstandard procedure or equipment will result in imminent danger, the instructions on imminent danger shall be followed.

The use of such procedure or equipment by employers shall be limited to the actual emergency rescue work. However, its continued use by employers in clean-up or reconstruction work shall warrant the issuance of citations when appropriate.

b) Voluntary Rescue Operations Performed by Employees. MIOSHA acknowledges that an employee may choose to place himself/herself at risk to save the life of another person. Typically, citations will be issued when:

(1) An 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 an employee, including failing to provide appropriate training and rescue equipment; or

(2) An 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 an employee, including failing to provide appropriate training and rescue equipment; or

(3) An employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as operations where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; AND

an 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.

Typically, a citation will not be issued if an employer has trained employees not to respond to a life threatening danger but an employee attempts a voluntary rescue regardless of whether the attempt is successful.

22. Emergency Response.

a) Role in Emergency Operations. While it is MIOSHA's policy to respond as quickly as possible to significant events that may affect the health or safety of employees, the agency does not have authority to direct emergency operations.

b) Response to Significant Events. These significant events may include incidents with extensive property damage or with potential employee injury that generate widespread media interest. MIOSHA may respond to significant events promptly and acts as an active and forceful protector of employee safety and health, as appropriate, during the response, cleanup, removal, storage, and investigation phases of these incidents, while maintaining a visible but limited role during the initial response phase.

c) MIOSHA's Role.

(1) For inspections of an ongoing emergency response or post-emergency response operation where there has been a catastrophic event, or where MIOSHA is acting under the Michigan Emergency Management Plan (MEMP), Disaster Response Team Administrator and MIOSHA Administration will determine the overall role that MIOSHA will play. See current Agency Instruction, MIOSHA-ADM-04-4 MIOSHA Emergency Management Plan (MIOSHA EMP).

(2) During an event that is covered by the MIOSHA EMP, MIOSHA has a responsibility and authority to both enforce its regulations and provide technical advice and assistance to the on-scene coordinator.

23. Employee Participation. The SO/IH shall advise the employer that Section 29(4) of the Act requires that an employee representative be given an opportunity to participate in the inspection.

a) For the purpose of this chapter, the term "employee representative" refers to (1) a representative of the certified or recognized bargaining agent, or, if none, (2) an employee member of a safety and health committee who has been chosen by the employees (employee committee members or employees at large) as their MIOSHA representative, or (3) a person who has been selected as

the walkaround representative by a majority of the employees of the establishment.

b) SO/IHs shall determine as soon as possible after arrival whether the employees at the worksite to be inspected are represented and, if so, shall ensure that employee representatives are afforded the opportunity to participate in all phases of the workplace inspection.

c) If an employer resists or interferes with participation by employee representatives in an inspection and this cannot be resolved by the SO/IH, the continued resistance shall be construed as a refusal to permit the inspection and the supervisor shall be contacted in accordance with this chapter.

24. Public Information Policy. Media inquiries shall be directed to the Department Media Office. The MIOSHA public information policy regarding responses to inspections and investigations is to explain MIOSHA presence to the news media. The purpose is not to provide a continuing flow of facts nor to issue periodic updates on the progress of the inspection or investigation. See current Agency Instruction, MIOSHA-GEN-13-1 MIOSHA Media/Communications Policy.

C. Opening Conference. The SO/IH shall attempt to inform all affected employers of the purpose of the inspection, provide a copy of the complaint if applicable, and shall attempt to obtain the employers consent to include participation of an employee representative when appropriate. The opening conference shall be kept as brief as possible. The pamphlet "Your Rights and Responsibilities Under MIOSHA" may be used for assistance in expediting an opening conference but cannot be used as a substitute for an opening conference.

An abbreviated opening conference may be conducted whenever the SO/IH believes that circumstances at the worksite dictate the walkaround begin as promptly as possible.

1. Appropriations Riders. The SO/IH shall determine if any appropriations riders are in place that could affect the inspection. See current Agency Instruction, MIOSHA-ADM-06-7 Small Farming Operations and Small Employers in Low Hazard Industries - Guidelines for MIOSHA Activity.

2. Voluntary Compliance Programs. Employers who participate in voluntary compliance programs such as MVPP and MSHARP are exempt from programmed inspections. The SO/IH shall determine whether the employer falls under such an exemption during the opening conference. See current Agency Instruction, MIOSHA-ADM-06-8 Coordination of Enforcement and Consultation Interventions.

a) A consultation visit in progress has priority over programmed inspections. The programmed inspection may be conducted after the consultation is closed.

b) If an unprogrammed inspection (follow-up, monitoring, imminent danger, non-fatal accident, fatality, complaint, referral, or variance)

is to be conducted, the inspection shall not be deferred, but its scope shall be limited to those areas required to complete the purpose of the investigation.

c) MVPP and MSHARP approved companies are exempt from programmed inspections.

3. Preemption by Another Agency. The Federal OSHA Act, Section 4(b)(1), contains language that preempts OSHA coverage of working conditions covered by other federal agencies. The MIOSH Act contains no such provision. MIOSHA asserts its jurisdiction over all employees in the State of Michigan except where specifically exempted by the MIOSH Act, or voluntarily relinquished under the State Plan Agreement or a Memorandum of Understanding (see Chapter I, Sections III, IV, and V of this manual for additional information).

While issues of jurisdiction are normally addressed during the assignment process, it occasionally arises during the opening conference. If the employer or any other person raises the issue of preemption, it is important that the SO/IH not make any statement which could be interpreted as agreeing to any lack of jurisdiction. The SO/IH can explain that the MIOSH Act does not contain the exemption language of the Federal OSHA Act, but should not get involved in any lengthy or technical discussion on the subject. Rather, they should gather enough information to restate the employer's position and contact his or her supervisor and/or manager and explain the situation.

The supervisor or manager will discuss the case with the division director, deputy agency director, agency director, and representative of the Attorney General's office as appropriate. The SO/IH will then be advised to proceed with the inspection/investigation or to withdraw and refer the issue to the appropriate agency.

4. Attendance at Opening Conference. MIOSHA encourages employers and employees to meet together in the spirit of open communication. The SO/IH shall conduct a joint opening conference with employer and employee representatives. Exceptions:

a) If either party objects to a joint conference, the SO/IH may conduct separate conferences with employer and employee representatives.

b) If it is infeasible to hold a joint opening conference due to unavailability of employer or employee representatives, the SO/IH may conduct separate conferences.

5. Scope. The SO/IH shall outline in general terms the purpose of the inspection, employer/employee rights and responsibilities, employees' right to participate without fear of discrimination, walkaround requirements, the need for taking photographic evidence (including still images, still image/audio combinations, and videos), samples and measurements, the right to privately interview employees, the review of

required records and posters, possible referrals, and the closing conference. See current Agency Instruction, MIOSHA-ADM-06-3 Photographic Documentation.

NOTE: If an employer clearly refuses to allow the SO/IH to take photographic evidence during an inspection, the SO/IH shall contact a supervisor to determine if photographic evidence is critical to documenting the case. If it is, this may be treated as a refusal of entry.

In addition, the SO/IH shall inform the employer that compliance officers must address any other serious safety or health hazards observed or brought to their attention during the inspection or investigation.

6. Forms Completion. The SO/IH shall obtain available information for all appropriate forms.

7. Employees of Other Employers. During the opening conference, the SO/IH shall determine whether the employees of any other employers are working at the establishment. If these employers may be affected by the inspection, an additional inspection(s) for these employers may be initiated at the discretion of the SO/IH in the CSHD. For GISHD, the SO/IH should contact his or her supervisor prior to formally opening an additional inspection. 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.

8. Selection of Walkaround Representatives. Those representatives designated to accompany the SO/IH during the walkaround are considered walkaround representatives and will generally include employer designated and employee designated representatives. At establishments where more than one (1) 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 (1) employer and/or employee representative may accompany the SO/IH throughout or during any phase of an inspection if the SO/IH determines that such additional representatives will aid, and not interfere with, the inspection.

   a) Employees Represented by a Certified or Recognized Bargaining Agent. During the opening conference, the highest ranking union official or union employee representative on-site shall designate who will participate in the walkaround unless otherwise specified in a bargaining agreement. Section 29(4) of the Act gives the SO/IH the authority to resolve all disputes as to whom is the representative authorized by the employer and employees. The SO/IH may decide to include others.

   b) Safety Committee. The employee members of a plant safety committee or the employees at large may have designated an employee representative for MIOSHA inspection purposes.

c) Other Authorized Employee Representative. A person who has been selected as the walkaround representative by a majority of the employees of the establishment.

d) No Authorized Employee Representative. Where employees are not represented by a recognized bargaining agent, where there is no safety committee, or where the majority of the employees have not chosen or agreed to an employee representative for MIOSHA inspection purposes whether or not there is a safety committee, the SO/IH shall interview a reasonable number of employees during the walkaround.

The number of interviews is based upon the number of employees affected by the inspection not the total number of employees at the worksite. The following is a guideline for a minimum number of employees to interview when there is no certified or recognized bargaining agent:

NUMBER OF INTERVIEWS

1 to 10	=	1 Interview
11 to 20	=	2 Interviews
21 to 50	=	3 Interviews
51 to 70	=	4 Interviews
71 to 100	=	5 Interviews
101 to 150	=	6 Interviews
151 to 200	=	7 Interviews
Over 200	=	8 Interviews

NOTE: See current Agency Instruction MIOSHA-COM-15-4 Employee Interviews in Safety and Health Investigations.

9. Trade Secrets. The SO/IH shall ascertain from the employer if there are any trade secret areas in the establishment. The SO/IH shall identify all trade secret documentation in the case file.

10. Classified Areas. In areas containing 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 an SO/IH.

11. Immediate Abatement. SO/IHs should explain to employers the advantages of immediate abatement, including that there is no requirement to provide certification of abatement for violations corrected during the inspection.

D. Walkaround Inspection. The main purpose of the walkaround inspection is to identify potential safety and/or health hazards in the workplace. The SO/IH shall conduct the inspection in such a manner as to eliminate unnecessary personal exposure to hazards and to minimize unavoidable personal exposure to the extent

possible. MIOSHA staff will adhere to current Agency Instruction, MIOSHA-SHMS-12-1 MIOSHA Safety and Health Management System, for policies and procedures.

The SO/IH shall encourage dialogue and questions related to safety and health issues, and should offer suggestions and explanations as to how problems might be abated. The major goal of MIOSHA inspections is to foster a mutual interest on the part of labor and management in eliminating or reducing workplace hazards. This involves building cooperation on the foundation of existing good safety and health practices. Such practices shall be commended and promoted whenever possible. CET services and programs shall be recommended when appropriate.

MIOSHA policy is to remain neutral in dealing with management and labor. Bias or even the appearance of partiality toward one side or the other may lessen MIOSHA's effectiveness.

1. Disruptive Conduct. The SO/IH may deny the right of accompaniment to any person whose conduct interferes with a full and orderly inspection. If disruption or interference occurs, the SO/IH shall use professional judgment as to whether to suspend the walkaround or take other action. The supervisor shall be consulted if the walkaround is suspended or any representatives are asked to leave. Any action taken by the SO/IH regarding disruptive conduct must be documented in the case file.

2. Examination of Records/Written Programs and Posting Requirements.

   a) Records/Written Programs. As appropriate, the SO/IH shall review the injury and illness records to the extent necessary to determine compliance, identify trends, and specific serious injuries/illnesses that may warrant investigation. See current Agency Instruction, MIOSHA-STD-05-2 Recording and Reporting of Occupational Injuries and Illnesses for complete guidelines. Other MIOSHA programs and records will be reviewed at the SO/IH's professional discretion as necessary.

   b) Posting. The SO/IH shall determine if posting requirements are met in accordance with Act 154 and R408.22101, et seq.

3. Good Faith Evaluation. For possible penalty reduction, the SO/IH shall evaluate the employer's good faith efforts to comply with the requirements of the Act. See MIOSHA Form 516 Good Faith Worksheet. This form will be completed for all inspections with an alleged violation(s).

4. Safety and Health Management System (SHMS) Evaluation. The SO/IH shall evaluate the employer's SHMS per current Agency Instruction, MIOSHA-ADM-08-2, Safety and Health Management Systems - Promotion and Evaluation.

5. Record All Facts Pertinent to a Proposed Violation. Typically, proposed violations shall be brought to the attention of employer and employee representatives at the time they are documented. SO/IHs 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, and measurements (when appropriate). If employee exposure (either to safety or health hazards) is not observed, the SO/IH shall document facts on which the determination is made that an employee has been or could be exposed.

6. Sampling. The SO/IH, where appropriate, shall determine as soon as possible after the start of the inspection whether sampling, such as, but not limited to, air sampling and surface sampling, is required by utilizing the information collected during the walkaround and from the pre-inspection review. The IH will reference the procedures located in the Chemical Information Manual and the Industrial Hygiene Technical Manual for additional information on sampling techniques.

   a) The IH will verbally advise the employer of any overexposures as soon as practicable. The IH shall document the employer contact in the case file.

   b) If an affected employee or employee representative requests sampling results, verbal summaries of the results shall be provided.

   NOTE: A copy of the citations and data sheets may be provided to the affected employee or employee representative upon request and after completion of the inspection.

7. Photographic Evidence. Photographic evidence shall be taken whenever appropriate. Photographic evidence that support violations shall be properly labeled and may be attached to the appropriate photograph form. The SO/IH shall ensure that any photographic evidence relating to confidential or trade secret information are identified as such. The SO/IH will process requests for copies of photographic evidence from employers/employee representatives according to their current division policy. See current Agency Instruction, MIOSHA-ADM-06-3 Photographic Documentation.

8. Interviews. A free and open exchange of information between the SO/IH and employees is essential to an effective inspection. Section 29(1) of the Act authorizes the SO/IH to question any employee (including the employer, owner, operator, agent, or an employee) privately during regular working hours in the course of a MIOSHA inspection. The SO/IH shall be in charge of inspections and questioning of persons. Interviews provide an opportunity for employees or other individuals to point out hazardous conditions and, in general, to provide assistance as to what violations of the Act may exist and what abatement action should be taken. Such interviews shall be kept as brief as possible. Individual interviews are authorized even when there is an employee representative present. Interviews may be informal or formal.

a) Time and Location. 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, or on any shift as necessary. MIOSHA has the authority to subpoena an employee for an interview.

b) Privacy. Interviewing employees in private is MIOSHA's right. Employers shall be informed that the interview is to be in private. Whenever an employee expresses a preference that an employee representative be present for the interview, the SO/IH shall make a reasonable effort to honor that request.

Any employer objection to private interviews with employees may be construed as a refusal of entry and handled in accordance with the procedures of this chapter.

c) Employee Right of Non-Discrimination. Employees shall be advised of their rights under Section 65(1) of the Act during their interview.

d) Informal Interviews. Informal interviews are a private discussion regarding safety and health concerns. These discussions are not required to be recorded on an interview form, however, the interview must be documented in the case file. At a minimum, the interviewee's name and job title shall be documented in the case file.

Informal interviews are typically not sufficient for documenting violations based on information provided solely by an employee and not observed by the SO/IH or substantiated by other evidence in the case file. The information provided by the employee interviewed shall typically be documented on the Violation Worksheet or Field Narrative.

e) Formal Interviews. Formal interviews of employees or other individuals shall be obtained whenever the SO/IH determines that such statements would be useful in documenting potential violations. Typically formal interviews are used during fatality, accident, or other significant investigations. In addition, the SO/IH should consider using this type of statement when it appears the employer may not be cooperative or in contentious situations.

(1) These interviews shall normally be reduced to writing on an Interview Statement, and the individual shall be encouraged to sign and date the statement (see form MIOSHA-508). The SO/IH shall assure the individual that the statement will be held confidential to the extent allowed by law, but they may be used in court/hearings.

(2) Each person interviewed shall be asked his/her name, job title, address, and phone number.

(3) Interview statements shall normally be written in the first person and in the words of the individual.

(4) The statements shall end with wording such as: "I have read the above, and it is true to the best of my knowledge." The statement shall also include the following: "I request that my statement be held confidential to the extent allowed by law." The individual, however, may waive confidentiality.

(5) Any changes or corrections shall be initialed by the individual; otherwise, the statement shall not be changed, added to or altered in any way. The individual shall sign and date the statement and the SO/IH shall then sign it as a witness.

(6) If the individual interviewed is illiterate, the SO/IH shall read the interview statement to the individual and ask them to sign, mark, or initial indicating agreement.

(7) If the individual refuses to sign the statement, the SO/IH shall note such refusal and the reason why on the statement. The statement shall, nevertheless, be read to the individual and agreement on the contents shall be obtained. A note that this was done shall be entered into the case file.

(8) The employee shall be given a copy of the interview statement only in cases where they have signed it.

(9) Video or sound recordings shall not be utilized for employee interviews without agency director or designee approval.

(10) A transcription of a recorded statement shall be made as needed.

NOTE: See current Agency Instruction MIOSHA-COM-15-4 Employee Interviews in Safety and Health Investigations.

f) Determining Employment Status of Employees Interviewed. The courts have ruled that a current and continuing employee is more likely to be truthful, and therefore a written statement can be entered into the case record without having to subpoena the individual for live testimony. If the employee has had a break in employment or is not an employee at the time of the interview, then a written statement may not be allowed into the record in an appeal. In such cases the individual must be subpoenaed to testify in person. During the formal interview, the SO/IH must determine:

(1) Was the employee employed with the employer being inspected at the start of the inspection?

(2) What is the employee's employment status at the time of the interview?

(3) Has the employee been employed continuously with the employer since we began our inspection and if not, why not?

The information must be documented in the case file. In certain cases the SO/IH may want to ask the employer for a list of their employees to help document the employment status of a person interviewed.

9. Employee Right of Complaint During Walkaround. The SO/IH may consult with any employee who desires to discuss a possible violation. The discussion shall cover the employee's right to file a written complaint. The discussion will determine whether it is appropriate to include the verbal complaint in the current inspection or whether a separate written complaint should be filed. The SO/IH shall investigate the alleged hazard, where possible, and record the findings. If a written complaint is received, the procedures in Chapter IV shall be followed, and the issue(s) may be included with the current inspection.

10. Abatement Assistance During Inspection.

a) Policy. The SO/IH shall offer abatement assistance during the inspection as to how workplace hazards might be corrected. The information shall provide guidance to the employer in developing acceptable abatement methods or in seeking appropriate professional assistance. The SO/IH shall not imply MIOSHA endorsement of any product through use of specific product names when recommending abatement measures.

b) Disclaimers. The employer shall be informed that:

(1) The employer is not limited to the abatement methods suggested by MIOSHA;

(2) The methods explained are general, and may not be effective in all cases; and

(3) The employer is responsible for selecting and carrying out an effective abatement method.

c) Prompt Abatement During Inspection. When the employer abates the violation during the inspection, the SO/IH shall mark the item abated and document how it was corrected.

11. Employee Exposure Evaluation. The SO/IH may conduct monitoring during the walkaround or subsequent visits.

12. Trade Secrets. Trade secrets are matters that are not of public or general knowledge. A trade secret is any confidential formula, pattern, process, equipment, list, blueprint, device or compilation of information used in the employer's business which gives an advantage over competitors who do not know or use it.

Any classified or trade secret information and/or personal knowledge of such information by MIOSHA personnel shall be handled in accordance with the regulations of MIOSHA or any other identified responsible agency. The collection of such information, and the number of personnel with access to it, shall be limited to the minimum necessary for the conduct of compliance activities. The SO/IH shall identify classified and trade secret information as such in the case file.

a) Policy. It is essential to the effective enforcement of the Act that the SO/IH and all MIOSHA personnel preserve the confidentiality of all information and investigations, which might reveal a trade secret.

b) Restrictions and Controls. When the employer identifies an operation or condition as a trade secret, it shall be treated as such. Information obtained in such areas, including all photographic evidence and MIOSHA documentation forms, shall be identified as a trade secret.

c) Section 63 of the Act. All information reported to or obtained by the SO/IH in connection with any inspection or other activity which contains or which might reveal a trade secret shall be kept confidential. This also applies to all experts/specialists under contract to MIOSHA. Such information shall not be disclosed except to other MIOSHA officials concerned with the enforcement of the Act or, when relevant, in any proceeding under the Act.

d) Photographic Evidence. If the employer objects to the taking of photographic evidence because trade secrets would or may be disclosed, the SO/IH should advise the employer of the protection against such disclosure afforded by Section 63 of the Act. If the employer still objects, the SO/IH shall contact their supervisor.

13. Violations of Other Laws. If an SO/IH observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency, when appropriate.

14. Imminent Danger Referrals within MIOSHA Enforcement Divisions.

a) Within the Same Division. When the SO/IH observes a condition or practice which may constitute an imminent danger under the jurisdiction of the other discipline within that division, a referral to the other discipline shall be made by telephone per division instructions.

The telephone call shall be made immediately after the SO/IH brings the imminent danger situation to the employer's attention to quickly remove employees from harm.

In GISHD, the verbal notice will be followed up by the completion of a written request for assistance. See current Agency Instruction, MIOSHA-COM-13-1, Dual, One-MIOSHA, Intra-Office Assistance, and Transfer of Inspections/Investigations.

In CSHD, assistance is requested via a telephone call.

b) Between Divisions. When the SO/IH observes a condition or practice which may constitute an imminent danger under the jurisdiction of the other division, a referral to the other division shall be made by telephone per division instructions.

The telephone call shall be made immediately following the completion of any other appropriate action by the SO/IH who discovers the imminent danger condition or practice.

The verbal notice will be followed by a written notification (i.e., email, field narrative).

E. Closing Conferences.

1. At the conclusion of an inspection, the SO/IH shall conduct a closing conference with the employer and the employee representatives, jointly or separately, as circumstances dictate. Either party may decline a closing conference. The closing conference may be conducted on-site or by telephone. When conducting a separate closing conference for employers and labor representatives (where the employer has declined to have a joint closing conference with employee representatives), the SO/IH shall normally hold the conference with employee representatives first, unless the employee representative requests otherwise. This procedure will ensure that worker input is received before employers are informed of violations and proposed citations.

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

2. The SO/IH shall review all of the proposed violations found during the inspection and other pertinent issues, including but not limited to:

a) Both the employer and the employee representatives shall be advised of their rights to participate in any subsequent conferences, meetings or discussions, and their appeal rights.

b) The SO/IH shall describe in detail the nature of an alleged violation, discuss with the employer appropriate means of abatement, and how to submit proof of abatement. For example, if a violation for lack of training is to be proposed, the employer shall be advised as to who the affected employees are by including either the names of employees who were not trained, when known, or other means of identifying them such as "all employees hired since the last training session."

c) The employer shall be advised of employee discrimination rights in accordance with Section 65 of the MIOSH Act.

3. Any unusual circumstances noted during the closing conference shall be documented in the case file.

4. Because the SO/IH may not have all pertinent information at the completion of the on-site inspection, the closing conference may be held later by telephone or in person.

5. The SO/IH shall advise the employee representatives that:

a) Under R 408.21417(1) of Administrative Part 4, Procedures, if the employer appeals, the employees have a right to elect "party status" before the Board.

b) Employees must be notified by the employer if a notice of appeal or a petition for modification of abatement date is filed.

c) Employees have the right to appeal as described in Section 41 of the Act.

d) Employees have rights against discrimination in accordance with Section 65 of the Act.

6. The SO/IH shall explain Feasible Administrative Work Practice and Engineering Controls. See Chapter VI, III.D.

II. Special Inspection/Investigation Procedures.

A. Imminent Danger Inspection Procedures. All alleged imminent danger situations brought to the attention of the agency or discovered by SO/IHs while conducting any inspection will be inspected immediately. Additional inspection activity will take place only after the imminent danger condition has been resolved.

The SO/IH will offer the employer and employee representatives the opportunity to participate in the worksite inspection, unless the immediacy of the hazard makes it impractical to delay the inspection in order to afford time to reach the area of the alleged imminent danger.

1. Elimination of the Imminent Danger. As soon as reasonably practical after it is concluded that conditions or practices exist which constitute an imminent danger, the employer shall be so advised and requested to notify its employees of the danger and remove them from exposure to the imminent danger. The employer should be encouraged to do whatever is

possible to eliminate the danger promptly or remove the employee(s) from the danger on a voluntary basis.

2. Voluntary Elimination of the Imminent Danger. The employer may voluntarily and completely eliminate the imminent danger as soon as it is pointed out.

   a) Voluntary elimination of the hazard has been accomplished when the employer:

      (1) Immediately removes affected employees from the danger area;

      (2) Immediately removes or abates the hazardous condition; and

      (3) Gives satisfactory assurance that the dangerous condition will remain abated before permitting employees to work in the area.

   b) Satisfactory assurance can be evidenced by:

      (1) After removing the affected employees, immediate corrective action is initiated, designed to bring the dangerous condition, practice, means or method of operation, or process into compliance, which, when completed, would permanently eliminate the dangerous condition; or

      (2) 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

      (3) A good faith representation by the employer that permanent corrective action will be instituted as soon as possible. Where personal protective equipment can eliminate the imminent danger, such equipment will be issued and its use strictly enforced until the condition is permanently corrected.

      NOTE: Through onsite observations, the SO/IH shall ensure that any/all representations from the employer that an imminent danger has been abated are accurate.

   c) When an imminent danger is voluntarily eliminated:

      (1) No cease operation order shall be sought.

      (2) An appropriate citation and notification of penalty shall be issued.

(3) The SO/IH will inform the affected employees or their authorized representative(s) that, although an imminent danger had existed, danger has been eliminated. They will also be informed of any steps taken by the employer to eliminate the hazardous condition.

3. Action Where the Danger is Immediate and Voluntary Elimination Is Not Accomplished. If the employer either cannot or does not voluntarily eliminate the hazard or remove employees from the exposure and the danger is immediate, the following procedures shall be observed:

a) The SO/IH shall notify the employer that a cease operation order will be sought in accordance with Section 31(1) of the Act and then shall contact the supervisor, who will decide whether to contact the division director to obtain a cease operation order.

NOTE: The SO/IH 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.

b) The SO/IH shall notify employees and employee representatives that a cease operation order is being sought and shall advise them of their rights.

c) The employer shall be advised that Section 31(3) of the Act allows the department to petition the circuit court having jurisdiction to restrain any condition or practice which is an imminent danger to employees.

d) The division director and the Department of Attorney General shall assess the situation and make arrangements for the expedited initiation of court action and/or posting of the cease operation order, if warranted.

e) Upon receipt of the department director or designee's authorization to issue the cease operation order, a cease operation order form will be prepared.

f) Upon completion of the order, the SO/IH shall immediately provide the employer and employee representative with a copy. If there is no employee representative, a copy of the order shall be posted by the employer at the location(s) where the imminent danger exists.

g) The SO/IH may proceed to post the "Cease Operation" tag on or near all equipment, processes, operations, etc., which must be stopped in order to avoid the imminent danger.

h) The tags and order shall be removed at the time that the imminent danger is eliminated, even though violations may still exist.

4. Action Where the Danger is that the Harm will Occur Before Abatement is Required. If the danger is that the harm will occur before abatement is

required, i.e., before a final order of the Board can be obtained in an appealed case, the supervisor shall be contacted.

In many cases, the SO/IH or supervisors may not decide there is such an imminent danger at the time of the physical inspection of the plant/worksite. Further evaluation of the file or additional evidence may warrant consultation with the Attorney General's Office.

In appropriate cases, the imminent danger notice may be posted at the time citations are delivered or even after the notice of appeal is filed.

B. Fatality Investigations. A fatality is defined as an employee death resulting from a work-related incident or exposure; in general, from an accident or illness caused by or related to a workplace hazard.

1. Staff Notification. If MIOSHA staff become aware of job-related fatalities that appear to be within MIOSHA's jurisdiction, they must notify the division director or designee immediately. MIOSHA will send an SO/IH to investigate.

2. Investigation Procedures.

a) All fatalities will be thoroughly investigated in an attempt to determine whether a violation of MIOSHA safety and health standards, regulations, or the general duty clause occurred.

b) The investigation shall be initiated within one (1) working day after receiving an initial report of the incident.

c) The SO/IH shall identify and interview persons with firsthand knowledge of the incident, including first responders, police officers, medical responders, and management, as early as possible in the investigation. The sooner a witness is interviewed, the more accurate and candid the witness statement will be.

d) If an employee representative is actively involved in the inspection, he or she can serve as a valuable resource by assisting in identifying employees who might have information relevant to the investigation.

e) Fatality files shall typically include the following documentation:

(1) Personal Data – Victim(s). Potential items to be documented include: name; address; telephone; 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 time of the incident; employee deceased/injured; nature of injury – fracture, amputation, etc.; and prognosis of injured employee.

(2) Incident Data. Potential items to be documented include: How and why did the incident occur; the physical layout of the worksite; sketches/drawings; measurements;

video/audio/photos to identify sources, and whether the accident was work-related.

(3) Equipment or Process Involved. Potential items to be documented include: equipment type; manufacturer; model; manufacturer's instructions; kind of process; condition; misuse; maintenance program; equipment inspection (logs, reports); warning devices (detectors); tasks performed; how often equipment is used; energy sources and disconnecting means identified; and supervision or instruction provided to employees involved in the accident.

(4) Witness Statements. Potential witnesses include: the public; fellow employees; management; emergency responders (e.g., police department, fire department); and medical personnel (e.g., medical examiner).

(5) Safety and Health Program. Potential questions include: Does the employer have a safety and/or health program? Does the program address the type of hazard that resulted in the fatality? How are the elements of the program specifically implemented at the worksite?

(6) Multi-Employer Worksite. Describe the contractual and in practice relationships of the employer with the other employers involved with the work being performed at the worksite.

(7) Records Request. Potential records include: disciplinary, training, maintenance, monitoring, etc.

3. Families of Victim(s). A family member of an employee involved in fatal occupational accidents or illnesses shall be contacted by letter at an early point in the investigation, given an opportunity to discuss the circumstances of the accident or illness, and provided timely and accurate information at all stages of the investigation as directed below. After the employer has received the report, a copy will be mailed to the next-of-kin.

   In some situations, these procedures should not be followed to the letter; e.g., in some small businesses, the employer, owner, or supervisor may be a relative of the victim. In these circumstances, such steps as issuance of the form letter may not be appropriate without some editing. See current Agency Instruction, MIOSHA-COM-06-1 Inclusion of Victim's Families in Fatality Investigations.

4. Criminal. Section 35(5) of the Act provides criminal penalties for an employer who is convicted of having willfully violated a MIOSHA standard, rule or order when that violation caused the death of an employee. In an investigation of this type, therefore, the nature of the evidence available is of paramount importance. There shall be early and close liaison between the SO/IH, the supervisor, the division director and

the Department of Attorney General in developing any finding which might involve a violation of Section 35(5) of the Act.

5. Public Information Policy. Media inquiries shall be directed to the Department Media Office. MIOSHA's public information policy regarding response to fatalities is to explain MIOSHA's presence to the news media. The purpose is not to issue periodic updates on the progress of the investigation. See current Agency Instruction, MIOSHA-GEN-13-1 MIOSHA Media/Communications Policy.

6. Recording and Tracking of Fatality Investigations.

   a) OSHA Information System (OIS) "Fatality/Catastrophe Report" Form. The OIS "Fatality/Catastrophe Report" form is a pre-inspection form that must be completed for all fatalities.

      (1) The division will generate a "Fatality/Catastrophe Report" in OIS for all fatalities as soon as possible after learning of a fatality. To generate a "Fatality/ Catastrophe Report," the "Classification" and "Do Inspection" sections must be completed in the "FAT/CAT Info" sub-tab of the "Manage Unprogrammed Activity" module.

      (2) Enforcement divisions will send a copy of the "Fatality/Catastrophe Report" to TSD within 48 hours of the receipt of a report of a fatality.

      (3) If additional information relating to the fatality becomes available that affects the decision to investigate, TSD will be updated.

   b) Investigation Module.

      (1) The Investigation module in OIS is used to summarize the results of all fatality investigations. Once an inspection has been saved "Final," the division may input information in the Investigation module. The Investigation module contains the following tabs: Event Information, Victim Information, Construction Related, and Abstract Questions.

      All data fields in the Investigation module will be updated at the conclusion of the investigation.

      (2) Only one (1) Investigation module is necessary for all inspections related to the fatality. If a subsequent fatality occurs during the course of an inspection, a new Investigation module for that fatality should be submitted.

      Example: A fatality occurs in employer's facility in August. Both a safety and health inspection are

initiated. One (1) Investigation module 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 Investigation module should be submitted for the second fatality and an additional inspection should be opened.

7. Pre-Citation Review. The division director or designee is responsible for reviewing all fatality investigation case files to ensure that the case has been properly developed and documented in accordance with the procedures outlined here, to ensure that an Investigation module is completed for each fatality, and to review all proposed instance-by-instance penalties.

8. Post-Citation Procedures/Abatement Verification. Abatement verification submitted for items related to a fatality will be evaluated to determine whether a follow-up investigation is warranted. Circumstances that would indicate that a follow-up investigation may not be warranted include the worksite was destroyed during the event, the jobsite no longer exists, adequate verification of abatement has been provided, the SO/IH has verified abatement during the inspection, etc. For additional guidelines see current Agency Instruction, MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure.

9. Relationship to Other Programs and Activities.

   a) Emergency Management/Homeland Security. Agency Instruction, MIOSHA-ADM-04-4 MIOSHA Emergency Management Plan (MIOSHA EMP) clarifies the procedures and policies for MIOSHA's responses to incidents of state or national significance. Generally, MIOSHA will provide technical assistance and consultation in coordinating the protection of response worker and recovery worker safety and health. Whether MIOSHA will conduct a formal fatality investigation in such a situation will be determined on a case-by-case basis.

   b) Strategic Plan Inspections. If a fatality investigation arises with respect to an establishment that is also in the current inspection cycle to receive a programmed inspection under any Site Specific Targeting program, the investigation and the inspection may be conducted either concurrently or separately.

   c) Cooperative Programs. If a fatality occurs at a Michigan Voluntary Protection Program (MVPP) or a MIOSHA's Safety and Health Achievement Recognition Program (MSHARP) site, the CET division director will be notified. When enforcement activity has concluded, the CET division director will be informed so that the site can be reviewed for program issues.

C. Non-Fatal Accident Investigations. During any inspection, if the SO/IH finds that a serious injury has occurred that may warrant a separate investigation, the SO/IH shall contact his or her supervisor for further instructions. This may be handled as a separate investigation.

D. Follow-up Inspections.

1. Purpose and Procedures. The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Issuance of willful, repeat and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of when a follow-up inspection may be appropriate. See current Agency Instruction MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure. Follow-up inspections may be assigned by the supervisor on a case-by-case basis.

2. Scope. During a follow-up inspection only items in the assignment may be included in this inspection. If the SO/IH observes or has any additional serious items brought to their attention, the SO/IH will open a new inspection to address those items.

3. Documentation. The follow-up case file must contain documentation for those items that the employer satisfactorily abated, including an explanation of the method of abatement. Simply writing "corrected" or "abated" is not sufficient documentation. This information may be documented on a copy of the original citation or elsewhere in the case file (Field Narrative or video/audio documentation). In the event that any item has not been abated, complete documentation shall be included in the case file to support the failure to abate violation. See Chapter VI, IV. B. 12.

   IHs 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).

   If there is reasonable probability that a Notification of Failure to Abate Alleged Violation will be issued, appropriate short-term or full-shift sampling is required to verify employee exposure.

4. Cease Operation. In accordance with Section 45 of the Act, MIOSHA has the option of issuing a cease operation order in lieu of issuing a notice of failure to abate. The issuance of a cease operation order under Section 45 of the Act must be approved by the department director or designee.

5. Citation Issuance. If the cited items have not been abated, a Notification of Failure to Abate Alleged Violation shall normally be issued. Typically, violations that were originally grouped will remain grouped on the Notification of Failure to Abate Alleged Violation. If a subsequent follow-up inspection indicates the condition has still not been abated, the supervisor shall be consulted for further guidance.

NOTE: If the employer has exhibited good faith, a late PMA may be considered in accordance with Chapter VII, II. E. 3. b., where there are extenuating circumstances.

If it is determined that the originally cited violation was abated but then recurred, a citation for a repeat violation may be appropriate (separate inspection required).

6. Follow-up Files. The follow-up inspection file shall be included with the original case file.

E. Severe Violator Enforcement Program (SVEP) Reinspections. For any SVEP inspection, a reinspection must be conducted after the citations become final orders even if abatement verification of the cited violations has been received. The purpose of the reinspection is to assess not only whether the cited violation(s) were abated, but also whether the employer is committing similar violations. If one (1) or more violations not cited under the original inspection are noted during the reinspection, a separate case will be opened. See current Agency Instruction MIOSHA-COM-11-2 Severe Violator Enforcement Program (SVEP).

F. Monitoring Inspections. Monitoring inspections are done after citation issuance and prior to the final order abatement date of the citations. They may be as a result of a settlement agreement or graduated abatements on items with lengthy or complex abatements. They may also be done when an employer makes a request for abatement assistance, violation clarification, or on applicability of the rule to the violation.

1. An inspection shall be classified as a monitoring inspection when a safety/health inspection is conducted for one (1) or more of the following purposes:

   a) Determine the progress an employer is making toward final correction.

   b) Ensure that the target dates of a multi-step abatement plan are being met.

   c) Ensure that an employer's petition for the modification of abatement dates is made in good faith and that the employer has attempted to implement necessary controls as expeditiously as possible.

   d) Ensure that the employees are being properly protected until final controls are implemented.

   e) Ensure that the terms of a permanent variance are being carried out.

   f) Provide abatement assistance for items under citation.

2. Monitoring inspections may be assigned by the supervisor on a case-by-case basis.

G. Intra-Office Assistance (IOA) Safety/Health Inspections.

1. Definition. Inspections that are initiated in response to a request from either an SO or IH to the other discipline, in order to address an observed hazard that is covered by regulations of the other discipline. These can be intra or inter-divisional inspections.

2. Purpose. When conditions warrant an on-site inspection by both a safety officer and an industrial hygienist, MIOSHA believes that a dual or IOA inspection, when possible, will better serve the employer and more effectively utilize agency resources.

3. Procedures. These inspections will be coordinated in accordance with current Agency Instruction MIOSHA-COM-13-1 Dual, One-MIOSHA, Intra-Office Assistance, and Transfer of Inspections/Investigations.

H. Temporary Labor Camp Inspections.

1. Introduction. MIOSHA Part 511, Temporary Labor Camps Standards, is applicable to both agricultural and non-agricultural workplaces.

2. Definitions.

NOTE: MIOSHA Part 511 does not contain a definition section. The following definitions reflect OSHA's and MIOSHA's interpretation of the standard.

a) Temporary. The term *temporary* in Part 511 refers to employees who enter into an employment relationship for a discrete or defined time period. As a result, the term *temporary* refers to the length of employment, and not to the physical structures housing employees.

b) Temporary Labor Camp Housing. This is employer-provided housing directly related to the seasonal or temporary employment of employees. In this context, "housing" includes both permanent and temporary structures located on or off the property of the employer.

c) 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 (see MDA Labor Camp Rules R325.3615).

3. Enforcement of Temporary Labor Camp Standards.

a) Background. In Michigan there are two (2) State agencies that inspect and enforce regulations with regard to temporary labor camps (migrant labor camps). These are the MIOSHA General Industry Safety and Health Division (GISHD) of LEO, and the Migrant Labor Housing Section (MLHS) of the Michigan Department of Agriculture (MDA). GISHD authority comes from

the MIOSHA program and standards adopted from OSHA. The MLHS is charged with periodic inspection and licensing of agricultural labor camps with five (5) or more migrant laborers engaged in agricultural activities.

NOTE: In addition to MIOSHA and MDA enforcement activities, the U.S. Department of Labor, Wage and Hour Division (WHD) of the Employment Standards Administration (ESA), enforces the Migrant and Seasonal Agricultural Worker Protection Act in Michigan. U.S. WHD has several employees whose entire job is to conduct programmed inspections at farms that employ migrant workers and have temporary labor camps. They do not enforce federal OSHA regulations, including field sanitation. U.S. WHD inspections address wage and hour regulations, child labor regulations, and temporary labor camp regulations that are similar to OSHA/MIOSHA regulations.

b) There are two (2) sets of State rules or standards applicable to temporary labor camp housing in Michigan. Which standard will be used at a given inspection depends on which agency is doing the inspection and when the facilities were built.

c) The MIOSHA occupational health standard is Part 511, Temporary Labor Camps. This is identical to OSHA's 1910.142. Wherever there is conflict between the provisions of Part 511 and the rules administered by Michigan Department of Agriculture, Part 511 will prevail.

d) Michigan Administrative Rules R325.3601 through R325.3643 are rules pertaining to agricultural labor camps pursuant to Part 124 of the Public Health Code, Act 368 of 1978, as amended. These rules are similar, but not identical to Part 511. They are enforced by the MLHS of the Michigan Department of Agriculture. Rules R325.3601 et seq. became effective December 14, 1989, and help eliminate conflicts with Part 511.

4. Inspections of Temporary Labor Camps.

a) Unsigned complaints concerning temporary labor camps, and those not being assigned for inspection by GISHD, may be referred to the MLHS office in Lansing for their review and response.

b) Signed written complaints and referrals received by GISHD will be investigated by IH field staff. On-site inspections may be coordinated with the MLHS office in Lansing, and an MLHS sanitarian may accompany the IH in cases involving a temporary labor camp where applicable.

c) Employers shall be made aware of foregoing policy and procedures during the opening conference, prior to the inspection

of a temporary labor camp facility. This policy applies to all employer-provided housing covered by MIOSHA.

5. Temporary Labor Camp Inspection Procedures.

a) Programmed Inspections. Under normal circumstances, GISHD will not conduct programmed inspections of temporary labor camps. The annual inspection of camps are conducted by MLHS sanitarians in conjunction with their licensing program. GISHD staff may be involved in inspections arising from written complaints, referrals, and fatalities.

b) Liaison with Other State Agencies. Inspections conducted by GISHD IH personnel may involve coordination and accompaniment with MLHS sanitarian personnel.

c) Appropriations Riders. Inspections shall be conducted in accordance with existing policies and procedures under applicable appropriation riders. See current Agency Instruction, MIOSHA-ADM-06-7 Small Farming Operations and Small Employers in Low Hazard Industries - Guidelines for MIOSHA Activity.

d) Worker Occupied Housing. Generally, inspections shall be conducted when temporary labor camp housing facilities are occupied.

e) Language. Since employees may not speak English or may only speak English as a second language, every effort shall be made, before the inspection begins, to find a person to translate conversations with employees if necessary.

f) Minimize Disruptions. The IH shall conduct inspections in such a manner as to minimize disruptions of the personal lives of those living in the housing facilities. If an occupant of a dwelling unit refuses entry for inspection purposes, the IH shall not insist on entry and shall proceed with the inspection unless, in his/her judgment, the lack of access into 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. The same shall apply in cases where employers refuse entry to the housing facility and/or to the entire farm. The MLHS sanitarian may prove helpful in overcoming objections of employers and employees to the investigation.

g) Prompt Abatement. During inspections, the IH shall encourage employers to abate hazards as quickly as possible. Particular attention shall be paid to identifying instances of failure to correct and violations repeated from season to season. These violations shall be cited in accordance with normal procedures.

h) Primary Concern. In conducting a temporary labor camp inspection, the IH shall be primarily concerned with those facilities or conditions which most directly relate to employee safety and health. For example, the relevant dimensions and ratios specified in Part 511 are mandatory, however, it is inappropriate to cite minor variations from specific dimensions and ratios when a violation does not have an immediate or direct effect on safety and health.

6. Condition of Employment. Part 511 covers only housing that is a term and condition of employment. Factors in determining whether housing is a term and condition of employment include situations where:

a) Employers require employees to live in the housing.

b) The housing is in an isolated location or the lack of economically comparable alternative housing makes it a practical necessity to live there.

c) Additional factors to consider in determining whether the housing is a term and condition of employment include, but are not limited to:

(1) Cost of the housing to the employee – is it provided free or at a low rent?

(2) Ownership or control of the housing – is the housing owned or controlled or provided by the employer?

(3) Distance to the worksite from the camp, distance to the work-site from other non-camp residences – is alternative housing reasonably accessible (distance, travel, cost, etc.) to the worksite?

(4) 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?

(5) Relationship of the camp occupants to the employer – are those living in the camp required to work for the employer upon demand?

I. Field Sanitation Inspections. MIOSHA will conduct field sanitation inspections in accordance with current Division Instruction, GISHD-STD-08-1 Field Sanitation Standard Enforcement Procedures.

J. Agriculture. MIOSHA has very few standards that are applicable to agriculture. See MIOSHA Standards Order Form, Section D – Agricultural Health and Safety Standards, for the list of all applicable standards for agriculture. Activities that take place after harvesting are considered general industry operations and are covered by MIOSHA's general industry standards.

K. Pesticides. In Michigan, there are two (2) State agencies that inspect and enforce regulations with regard to pesticide use and application. These are MIOSHA and the Michigan Department of Agriculture. MIOSHA's authority comes from Act 154. The Department of Agriculture is responsible for licensing pesticide applicators in the State of Michigan and enforces some rules affecting worker health and safety. However, MIOSHA enforces all applicable rules and standards in this industry.

CHAPTER VI. INSPECTION DOCUMENTATION AND ISSUANCE PROCEDURES

I. Typical Case File Documentation.

A. General.

1. Guidelines. These guidelines are developed to assist the SO/IH in determining the minimum level of written documentation. Inspection records are any record made by an SO/IH that concern, relate to, or are part of, any inspection, or are a part of the performance of any official duty. All official documents and drawings constituting the basic documentation of an inspection/investigation must be part of the case file. Inspection records include (i.e., drawings, interviews, monitoring, measurements, photographic evidence, and employer records). Inspection records are the property of the State of Michigan and not the property of the SO/IH, and are not to be retained or used for any private purpose.

2. Attorney General and MIOSHA Appeals Division Coordination. Consultation in accordance with division or agency procedures, including Attorney General and MIOSHA Appeals Division procedures, shall be considered when the inspection or investigation could involve important, unusual or complex litigation or when consultation is necessary in the SO/IH's or supervisor's professional judgment. If consultation is deemed necessary, such consultation shall be conducted at the earliest stage possible of the investigation.

B. Case File Documentation. The following paragraphs indicate what documentation is typically required when an on-site inspection has been attempted or conducted.

1. No Inspection Conducted:

a) Inspection Report with appropriate boxes checked and indicating the reason for no inspection.

b) Case File Diary Sheet.

c) If refusal of entry, information necessary to secure a warrant.

d) Brief statement on appropriate inspection form expanding upon the reason for not conducting the inspection.

2. Inspection Conducted, No Citations to be Issued:

a) Inspection Report completed with the appropriate information.

b) Case File Diary Sheet.

c) Where appropriate the following inspection form(s) with pertinent information:

(1) Documentation Log for Dual and Intra-Office Assistance Requests (IOAs)

(2) Inspection Guidelines – MIOSHA 506

(3) Field Narrative – MIOSHA 507

(4) Interview Statement – MIOSHA 508

(5) Notice of Potential Hazard – MIOSHA 517

(6) Safety/Health Recommendation – MIOSHA 510

(7) Photographs – MIOSHA 511

(8) Safety & Health Management System Evaluation – MIOSHA 512-GI or MIOSHA 512-C, per current Agency Instruction, MIOSHA-ADM-08-2 Safety and Health Management Systems - Promotion and Evaluation.

(9) Good Faith Worksheet – MIOSHA 516

(10) Health monitoring/sampling reports and data sheets

(11) Specific forms required by a division for unique investigations

d) Records obtained during the inspection, based on the SO/IH's professional judgment as to what should be obtained. Records may include checklists or other SO/IH generated documentation.

e) Copy of letters, if any, to employer, employee representative(s), and/or complainant(s).

3. Inspection Conducted, Citations to be Issued:

a) Inspection Report (MIOSHA 1) completed with the appropriate information.

b) Case File Diary Sheet.

c) Where appropriate the following inspection form(s) with pertinent information:

(1) Documentation Log for Dual and Intra-Office Assistance Requests (IOAs)

(2) Inspection Guidelines – MIOSHA 506

(3) Field Narrative – MIOSHA 507

(4) Interview Statement – MIOSHA 508

(5) Violation Worksheet – MIOSHA 509, or the equivalent, and any additional documentation necessary to support the violation. For violations classified as repeat, the file shall include a copy of the previous citation(s) on which the repeat classification is based and documentation of the original inspection case closing date.

(6) Notice of Potential Hazard – MIOSHA 517

(7) Safety/Health Recommendation – MIOSHA 510

(8) Photographs – MIOSHA 511

(9) Safety & Health Management System Evaluation – MIOSHA 512-GI or MIOSHA 512-C, per current Agency Instruction, MIOSHA-ADM-08-2 Safety and Health Management Systems - Promotion and Evaluation.

(10) Good Faith Worksheet – MIOSHA 516

(11) Health monitoring/sampling reports and data sheets

(12) Specific forms required by a division for unique investigations

d) Records obtained during the inspection, based on the SO/IH's professional judgment as to what should be obtained. Records may include checklists or other SO/IH generated documentation.

e) Copy of letters, if any, to employer, employee representative(s), and/or complainant(s).

NOTE: On occasion the SO/IH may become aware of, or the employer may provide information indicating that CET has provided service in the past. Typically, the SO/IH will not use such information to document a violation of a MIOSHA rule or standard. Such use of the employer's good faith effort to comply can discourage employers from seeking CET services.

C. Health Inspections.

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

2. Employer's Occupational Safety and Health System (Including Expanded Standards). IHs 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:

a) Monitoring. The employer's system for monitoring safety and health hazards in the establishment should include a program for self-inspection. IHs 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.

b) Medical Surveillance Program(s). IHs 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.

c) Recordkeeping. IHs 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 recordkeeping requirements under specific health standards.

d) Engineering Controls. IHs shall identify any engineering controls present, including substitution, isolation, general dilution and local exhaust ventilation, and equipment modification.

e) Work Practice and Administrative Controls. IHs shall identify any control techniques, including personal hygiene, housekeeping practices, employee job rotation, employee training and education. Rotation of employees as an administrative control requires employer knowledge of the extent and duration of exposure.

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

f) Personal Protective Equipment. An effective personal protective equipment program should exist for the worksite. A detailed evaluation of the program shall be documented to determine compliance with specific standards, such as, noise, respiratory protection, and personal protective equipment.

g) Regulated Areas. IHs 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.

h) Employee Training. IHs shall investigate compliance with employee training requirements specified in expanded health standards.

i) Emergency Action Plan. IHs 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 IH's evaluation shall determine if: potential emergency conditions are included in the written plan, emergency conditions are explained to employees and there is a training program for the protection of affected employees, including use and maintenance of personal protective equipment.

D. Purging Case File Information. Divisions have developed processes to notify SO/IHs when a case has been closed. SO/IHs are expected to do the following to ensure proper retention of case file information:

When citations are issued, the SO/IH must review their records to dispose of copies of inspection files, including computer files. Administration recognizes that SO/IHs may want to keep certain portions of cases, e.g., citation language that can be cut/pasted in future cases or photos to be used for training or hazard/violation identification training at division/regional meetings. It is acceptable to retain this information in an edited form (all employer or employee identifiers removed).

II. Violations.

A. Basis of Violations.

1. Standards and Regulations. Section 11(b) of the Michigan Occupational Safety and Health Act states that each employer has a responsibility to comply with the occupational safety and health standards promulgated under the Act, which includes mandatory provisions of standards incorporated by reference. The specific standards and regulations are compiled as the Michigan Occupational Safety and Health Standards for General Industry and Construction.

a) Definition and Application of Vertical and Horizontal Standards. Vertical standards are those standards which apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment or installations. Horizontal standards are other (more general) standards applicable to multiple industries. Within both vertical and horizontal standards there are general rules and specific rules. See current Agency Instruction, MIOSHA-COM-15-2 Horizontal or Vertical Standards - Determining Application.

(1) When a hazard in a particular industry is covered by both a vertical and a horizontal standard, the vertical standard shall typically take precedence even if the horizontal standard is more stringent.

(2) In situations covered by both a horizontal (general) and a vertical (specific) standard where the horizontal standard appears to offer greater protection, the horizontal (general) standard may be cited only if its requirements are not inconsistent or in conflict with the requirements of the vertical (specific) standard. To determine whether there is a conflict or inconsistency between the standards, an analysis of the intent of the two (2) standards must be performed. For the horizontal standard to apply, the analysis must show: 1) the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards, or 2) the vertical

standard does not provide additional protection or correction that is necessary to fully protect employees from the hazard.

(3) When determining whether a vertical or horizontal standard is applicable to a work situation, the SO/IH shall focus attention on the activity in which the employer is engaged at the establishment or worksite being inspected rather than the nature of the employer's general business.

(4) Hazards found in construction work that are not covered by a specific construction standard shall not normally be cited under general industry unless that standard has been referenced in a construction rule.

b) Variances. The employer's requirement to comply with a standard may be modified through granting of a variance, as outlined in Section 27 of the Act.

(1) An employer will not be subject to citation if the observed condition is in compliance with either the variance or the standard.

(2) In the event that the employer is not in compliance with the requirements of the variance, a violation of the standard shall be cited with a reference in the citation to the variance provision that has not been met.

2. Employee Exposure.

a) Definition of Employee. 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 these employees may not be the determining factor. Examples include temporary and/or leased employees. Determining the employer of an exposed person may be a very complex question, in which case the supervisor may seek the advice of the division director.

b) Proximity to the Hazard. The proximity of the workers to the point of danger of the operation shall be documented.

c) Observed Exposure. Employee exposure is established if the SO/IH witnesses, observes, or monitors exposure, proximity, or access of an employee to the hazardous or suspected hazardous condition during work or work-related activities. Where a standard requires engineering or administrative controls (including work practice controls), employee exposure shall typically be cited regardless of the use of personal protective equipment.

d) Unobserved Exposure. Where employee exposure is not observed, witnessed, or monitored by the SO/IH, employee exposure is

established if it is determined through witness statements or other evidence that exposure to a hazardous condition has occurred, continues to occur, or could recur. The IH shall always perform their own monitoring to establish employee over-exposure. However, company data may be utilized for certain violations as appropriate.

(1) In fatality or non-fatal accident investigations, employee exposure is established if the SO/IH determines, through written statements or other evidence, that exposure to a hazardous condition occurred at the time of the accident.

(2) In other circumstances, based on the SO/IH's professional judgment and determination, if exposure to hazardous conditions has occurred in the past, such exposure may serve as the basis for a violation when the exposure occurred in the previous six (6) months. With approval of the agency deputy director or designee, violations from exposures which occurred more than six (6) months previous may be considered for citation.

e) 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 (1) or more of the following:

(1) When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements.

(2) When a hazard would pose a danger to employees simply by their presence in an area and it is reasonably predictable that they could come into that area during the course of the work, to rest or to eat, or to enter or exit from an assigned work area and the employer has not taken steps to prevent access to unsafe machinery or equipment which employees may have access.

(3) When a hazard is associated with the use of unsafe machinery or equipment or arises from the presence of hazardous materials and it is reasonably predictable that an employee could again use the equipment or be exposed to the materials in the course of work.

However, if the inspection reveals an adequately communicated and effectively enforced safety policy or program that would prevent or minimize employee exposure, including accidental exposure to the hazardous condition, it would not be reasonably predictable that employee exposure could occur. In such circumstances, no citation should be issued in relation to the condition.

Every effort will be made to determine if any employees have been or will be exposed to a hazardous condition such as unguarded

equipment that is out of service or a scaffold not being used that is out of compliance. If exposure or potential exposure to the hazard cannot be documented through employee interviews and/or the SO/IH's professional judgment and determination, a note may be added to the inspection narrative that the condition and abatement was discussed with the employer.

f) Documenting Employee Exposure. SO/IHs shall thoroughly document exposure, both observed and unobserved. This includes:

(1) 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;

(2) Recorded statements or signed written statements;

(3) Photographs, videos, and/or measurements; and

(4) All relevant documents (e.g., autopsy reports, police reports, job specifications, site plans, MIOSHA 300/301/301A forms, equipment manuals, employer work rules, employer sampling results, employer safety and health programs, and employer disciplinary policies, etc.).

3. Notice of Potential Hazard Form and Safety/Health Recommendation Form.

a) MIOSHA Rule Exists. The Notice of Potential Hazard form is used to provide information to the employer on how to correct an identified hazard, when a MIOSHA rule does exist that can be applied to the identified hazard, but employee exposure cannot be determined or is not sufficient to document a violation. When a hazard is identified that can be addressed by an existing MIOSHA rule, every effort will be made to determine if any employees have been, or will be exposed to the hazardous condition, e.g., unguarded equipment that is out of service; a scaffold not being used that is out of compliance; or where monitoring results are not citable due to tolerance factors.

If exposure or potential exposure to a hazard cannot be documented through employee interviews or other means, and the hazard could otherwise be addressed by a MIOSHA rule, then this form will be used to describe the hazard and suggest corrective action.

b) No MIOSHA Rule. The Safety/Health Recommendation form is used to provide information to the employer on how to correct an identified hazard, when a MIOSHA rule does not exist that can be applied to the identified hazard. The SO/IH must consider the seriousness of the hazard, and whether the hazard is recognized,

and is causing, or is likely to cause, death or serious physical harm to the employee. The SO/IH will consult the MIOSHA FOM and their supervisor if they believe the hazard can be addressed using the General Duty Clause.

In the absence of meeting the criteria for a General Duty Clause violation, this form will be used to describe the hazard and suggest corrective action. No recommendations will be made for rule violations or correcting rule violations on out-of-service or abandoned equipment, where an exposure or potential exposure cannot be documented. Such situations will be addressed with the Notice of Potential Hazard form.

B. Types of Violations.

1. Other-Than-Serious (OTS) Violations. This type of violation shall be cited in situations where the most serious injury or illness that would be likely to result from a hazardous condition cannot reasonably be predicted to cause death or serious physical harm to exposed employees but does have a direct and immediate relationship to their safety and health. Regulatory violations are generally cited as other-than-serious.

   OTS violations of a MIOSHA rule must include a showing of an applicable rule, violation/noncompliance with the rule, employee exposure, and actual or constructive employer knowledge of the violative condition. See Step 4 in the section below regarding employer knowledge.

2. Serious Violations. A serious violation is 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 which exists, or from one (1) or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

   The SO/IH shall consider four (4) elements to determine if a violation is serious.

   Step 1. The types of accident or hazard exposure which the violated standard or the general duty clause is designed to prevent.

   Step 2. The most serious injury or illness which could reasonably be expected to result from the type of accident or hazard exposure identified in Step 1.

   Step 3. Whether the results of the injury or illness identified in Step 2 could include death or serious physical harm. Serious physical harm is defined as 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. Illnesses that

could shorten life or significantly reduce physical or mental efficiency by inhibiting the normal function of a part of the body.

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.

Step 4. Whether the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the hazardous condition.

a) In this regard, a supervisor at the worksite represents the employer, and a supervisor's knowledge of the hazardous condition amounts to employer knowledge.

b) In cases where the employer may contend that the supervisor's own conduct constitutes an isolated event of employee misconduct, the SO/IH shall attempt to determine the extent to which the supervisor was trained and supervised so as to prevent such conduct, and how the employer enforces the rule.

c) If, after reasonable attempts to do so, it cannot be determined that the employer has actual knowledge of the hazardous condition, the knowledge requirement is met if the SO/IH is satisfied that the employer could have known through the exercise of reasonable diligence.

As a general rule, if the SO/IH was able to discover a hazardous condition, and the condition was not transitory in nature, it can be presumed that the employer could have discovered the same condition through the exercise of reasonable diligence.

3. General Duty Clause Violations. Section 11(a) of the Act requires that the employer "Furnish to each employee, employment and a place of employment which is free from recognized hazards that are causing, or are likely to cause death or serious physical harm to the employee." The general duty provisions shall be used only where there is no standard that applies to the particular hazard involved. OTS citations shall not be issued for general duty clause violations.

a) Evaluation of Potential General Duty Clause Situations. In general, Board review 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 recognized hazard to which employees 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.

b) Limitations on Use of the General Duty Clause. Section 11(a) is to be used only within the guidelines given in this chapter.

(1) Section 11(a) may be cited in the alternative to cover a situation where there is doubt as to whether an existing standard applies to the hazard.

(2) Section 11(a) violations shall not be grouped together, but may be grouped with a related violation of a specific standard.

(3) Section 11(a) shall not normally be used to impose a stricter requirement than that required by a standard. An exception to this rule may apply if it can be documented that "an employer knows a particular safety or health standard is inadequate to protect his workers against the specific hazard it is intended to address." International Union, U.A.W. v. General Dynamics Land Systems Div., 815 F.2d 1570 (D.C. Cir. 1987).

(4) Section 11(a) shall normally not be used to require an abatement method not set forth in a specific standard. If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 11(a) shall not be cited to require medical surveillance.

(5) Section 11(a) shall not be used to enforce "should" standards.

(6) Section 11(a) shall not normally be used to cover categories of hazards exempted by a standard. If, however, the exemption is in place because the drafters of the standard (or source document) declined to deal with the exempt category for reasons other than the lack of a hazard, the general duty clause may be cited if all the necessary elements for such a citation are present.

(7) The following alternative standards shall be considered carefully before issuing a Section 11(a) citation for a health hazard.

(a) There are a number of general standards that shall be considered rather than Section 11(a) in situations where the hazard is not covered by a particular standard. If a hazard not covered by a specific standard can be substantially corrected by compliance with a personal protective equipment (PPE) standard, the PPE standard shall be cited.

(b) For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in Part 301, Air Contaminants, R325.51101, et seq. for general industry and in Part 601, Air Contaminants for Construction, R325.60151, et seq. for construction.

(c) Another general standard is Part 451, Respiratory Protection, R325.60051, et seq., which addresses the hazards of breathing harmful air contaminants not covered under Parts 301 and 601 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.

(d) Violations of Part 474, Sanitation, Rule 4201(7)(b), may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and the appropriate PPE standard where there is a potential for toxic materials to be absorbed through the skin.

c) Pre-Citation Review of General Duty Clause Violations. Section 11(a) citations shall undergo a pre-citation review when required by the division director or designee.

NOTE: If all criteria for issuing a General Duty Clause [Section 11(a)] citation are not met, but it is determined that a hazard still exists, the report of investigation shall describe the hazard and suggest corrective action. A Notice of Potential Hazard form or Safety/Health Recommendation form shall be used to describe the hazard and suggest corrective action.

4. Willful Violations. The following definitions and procedures apply whenever MIOSHA believes that a willful violation may exist. A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements.

a) The employer committed an intentional and knowing violation if:

(1) An employer representative was aware of the requirements of the Act, or the existence of an applicable standard or regulation, and was also aware of a condition or practice in violation of those requirements, and did not abate the hazard; or

(2) An employer representative was not aware of the requirements of the Act or standards, but was aware of a comparable legal requirement (e.g., state or local law) and

was also aware of a condition or practice in violation of that requirement, and did not abate the hazard.

NOTE: Good faith efforts made by the employer prior to the inspection to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, the SO/IH should consult with their supervisor if a willful classification is under consideration.

(3) An employer representative knows that specific steps that must be taken to address a hazard, but substitutes his/her judgment for the requirements of the standard.

Example: The employer was repeatedly issued citations addressing the same or similar conditions, but did not maintain corrective action.

b) The employer committed a violation with plain indifference to the law where:

(1) Management officials were aware of a MIOSHA requirement applicable to the company's business but made little or no effort to communicate the requirement to supervisors and employees.

(2) Company officials were aware of a continuing compliance problem but made little or no effort to avoid violations. Repeated issuance of citations addressing the same or similar condition may result in a willful violation.

(3) An employer representative was not aware of any legal requirement, but was aware that a condition or practice was hazardous to the safety or health of employees and made little or no effort to determine the extent of the problem or to take the corrective action. Knowledge of a hazard may be gained from such means as insurance company reports, safety committee or other internal reports, the occurrence of illnesses or injuries, 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 take appropriate measures to correct a violative condition and provide interim employee protection. If an employer does not take prompt action and/or provide interim protection, the self-audit may be used as the basis for a willful violation.

(4) In rare situations, 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.

c) It is not necessary that the violation be committed with a bad purpose or an evil intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinary negligence.

d) The SO/IH shall develop and record, during the inspection, all evidence available that indicates employer awareness of and the disregard for statutory obligations or of the hazardous conditions. Additionally, willfulness could exist if an employer is advised by employees or employee representatives of an alleged hazardous condition and the employer makes no reasonable effort to verify and correct the condition. The SO/IH shall complete a willful worksheet for each willful violation. The SO/IH shall answer any questions that are relevant to the violation from the following list. Upon completion of the worksheet, the SO/IH shall discuss with his or her supervisor the merits of the violation prior to the closing conference, and attach the willful worksheet to the violation worksheet.

(1) What is the evidence that the employer/employer representative knew that the condition existed?

(2) What is the evidence that the employer/employer representative had actual knowledge that the condition was hazardous?

Information which can be helpful in demonstrating an employer/employer representative's actual knowledge that the condition was hazardous may include:

(a) What is the nature of the employer's business?

(b) Is the condition recognized as a hazard within the industry the employer's business is involved in? If so, how are employers operating within the industry advised of the hazard?

(c) Does the employer subscribe to industry trade journals, MIOSHA/OSHA publications, safety and health newsletters, or other written materials which have discussed this particular safety and health hazard or other cases involving the hazard in the industry?

(d) Do the employer's company memorandums, safety rules, operating manuals, operating procedures, collective bargaining agreements, accident, illness and injury logs reveal the employer's awareness that the condition, if present, is hazardous?

(3) What is the evidence that the employer/employer representative was aware of the Act and the responsibility to provide safe and healthful working conditions?

(4) What, if any, precautions were taken by the employer to limit the hazardous conditions?

(5) What, if any, similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from MIOSHA or officials from other government agencies, an employee safety committee, employee reporting of hazard, or other source regarding the hazards, exposures, or requirements of a standard?

e) Pre-Citation Review of Willful Violations. Willful citations shall undergo a pre-citation review by the division director or designee.

Inspection #:

WILLFUL WORKSHEET

(To be attached to the violation worksheet)

(1) What is the evidence that the employer/employer representative knew that the condition existed?

(2) What is the evidence that the employer/employer representative had actual knowledge that the condition was hazardous?

Information which can be helpful in demonstrating an employer/employer representative's actual knowledge that the condition was hazardous may include:

(a) What is the nature of the employer's business?

(b) Is the condition recognized as a hazard within the industry the employer's business is involved in? If so, how are employers operating within the industry advised of the hazard?

(c) Does the employer subscribe to industry trade journals, MIOSHA/OSHA publications, safety and health newsletters, or other written materials which have discussed this particular safety and health hazard or other cases involving the hazard in the industry?

(d) Do the employer's company memorandums, safety rules, operating manuals, operating procedures, collective bargaining agreements, accident, illness and injury logs reveal the employer's awareness that the condition, if present, is hazardous?

(3) What is the evidence that the employer/employer representative was aware of the Act and the responsibility to provide safe and healthful working conditions?

(4) What, if any, precautions were taken by the employer to limit the hazardous conditions?

(5) What, if any, similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from MIOSHA or officials from other government agencies, an employee safety committee, employee reporting of hazard, or other source regarding the hazards, exposures, or requirements of a standard?

5. Criminal/Willful Violations. Section 35(5) of the Act provides that: "An employer who willfully violates this Act, an order issued pursuant to this Act, or a rule or standard promulgated under this Act which causes the death of an employee is guilty of a felony and shall be fined not more than $10,000.00, or imprisoned for not more than 1 year, or both. If the conviction is the second under this Act, the person shall be fined not more than $20,000.00, or imprisoned for not more than 3 years, or both."

   a) In cases where an employee's death has occurred which may have been caused by a willful violation, the SO/IH shall consult with the supervisor prior to the completion of the investigation to determine whether evidence exists and whether further evidence is necessary to establish the elements of a criminal/willful violation.

   b) All willful cases involving worker deaths shall be referred to the Attorney General to determine whether they may involve criminal violations of Section 35(5) of the Act.

6. Repeat Violations. An employer may be cited for a repeat violation if that employer has been cited previously for a substantially similar condition, the previous violation was abated and has reoccurred, has become a final order, and the case is closed.

   a) Identical Standard and Rule. Generally, similar conditions can be demonstrated by showing that in both situations the identical standard and rule was violated.

   b) Different Standards and Rules. In some circumstances, similar conditions can be demonstrated when different standards and rules are violated. Although there may be different standards and rules involved, the hazardous conditions found could be substantially similar and, therefore, a repeat violation would be appropriate.

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

   c) Time Limitations. 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 in order to ensure uniformity:

      (1) A rule violation will be cited as a repeat violation if the violation occurred within three (3) years of the case closing date for construction inspections. A rule violation will be cited as a repeat violation if the violation occurred within five (5) years of the case closing date for general industry inspections. The case closing date is determined by the close date on the OSHA website for that particular case file.

      (2) When a violation is found during an inspection, and a repeat citation has been issued for a substantially similar condition which meets the above time limitations, the

violation may be classified as a second instance repeat violation with a corresponding increase in penalty. Example 1: An inspection is conducted in an establishment and a repeat violation is found. That citation is not contested by the employer, becomes a final order, and the case is closed on October 17, 2006. On December 8, 2008, a citation for repeated violation of the same standard was issued. The violation found during the current inspection may be treated as a second repeated violation.

Example 2: An inspection is conducted in an establishment in May and the employer is cited with a rule violation. In July, the employer is cited for the exact same rule violation but the May file is not yet closed so a repeat violation cannot be issued. In January, the employer is found in violation of the same rule and the May and July files are now closed. The violation found during the current inspection is treated as a first repeat violation.

(3) For any further repeat citations, the supervisor shall be consulted for guidance.

d) Inspection History. For a fixed site, history is typically based on the establishment. When an employer controls more than one (1) facility, history may be based on all of the facilities under their control. The history of separately formed business entities, e.g. "sister," "subsidiary," "parent," or "affiliate" companies, may be used when the businesses:

(1) Are interrelated and integrated with respect to operations and safety and health matters, and

(2) Have a common president, management, supervision, or ownership, and

(3) Share a common worksite. Examples of when two (2) employers may be considered to share a common worksite include when the two (2) employers:

(a) have employees performing work activity on the same project or worksite; or

(b) have a single facility or office for their administrative or executive staff; or

(c) maintain a physical presence at each other's facilities or worksites; or

(d) share or interchange employees.

e) Facts and information supporting the position that the entities are a single establishment must be documented in the case file.

f) For construction operations and other non-fixed worksites, history may be based on state-wide operations.

g) Repeat vs. Willful. Repeat violations differ from willful violations in that they may result from an inadvertent, accidental or ordinary negligent act. Where a repeat violation may also meet the criteria for willful but not clearly so, a citation for a repeated violation shall normally be issued.

h) Repeat vs. Failure to Abate. A failure to abate situation exists when an item of equipment or condition previously cited has never been brought into compliance and is noted at a later inspection. If, however, the violation was not continuous (i.e., if it had been corrected and then reoccurred), the subsequent occurrence is a repeat violation.

i) Alleged Violation Description (AVD). If a repeated citation is issued, a notation shall be made in the AVD portion of the citation, using the following or similar language:

(COMPANY NAME) WAS PREVIOUSLY CITED FOR A VIOLATION OF THIS OCCUPATIONAL SAFETY AND HEALTH STANDARD OR ITS EQUIVALENT STANDARD (NAME PREVIOUSLY CITED STANDARD) WHICH WAS CONTAINED IN MIOSHA INSPECTION NUMBER_____, CITATION NUMBER_____, ITEM NUMBER_____, ISSUED ON (DATE), WITH RESPECT TO A WORKPLACE LOCATED AT ____.

j) Repeat Documentation. When a repeat violation has been issued, the documentation establishing that the prior violation is of a substantially similar condition, and that the prior violation has become a final order, must be preserved until the repeat violation becomes a final order and is no longer subject to review. Preservation of this documentation may be accomplished either by including these documents as a section of the inspection file for the repeat violation or retaining the inspection file for the prior violation. Each enforcement division shall develop procedures directing staff on which method will be used to preserve the necessary documentation within their division. Prior to the Appeals Division forwarding a repeat violation to administrative hearing, the Appeals Division shall ensure that the appropriate supportive documentation for the repeat violation is available and provided for use at hearing.

(1) Substantially Similar Condition. The citation for the prior violation, the violation worksheet, and any photos, videos, documents, or other evidence supporting the description of the violation, shall be retained. If for some reason the prior violation citation is not available, the basis for the repeated citation must be documented in the case file.

(2) Finality. Documents from the case file establishing the date and manner in which the prior citation became a final order shall also be retained. Documents which establish a violation as a final order include a Penalty Reduction Agreement, First Appeal Decision, Formal Settlement Agreement, Administrative Law Judge's Decision, or Board Decision. If the citation became final by operation of law (i.e., no appeal was filed), a copy of the certified mail receipt (green card) reflecting the date the employer received the citations and a Certificate of Record from a division representative attesting to the date the citations became final may be required to be produced at the time of the scheduling of the case for administrative hearing. Each enforcement division shall designate an individual as their representative for this purpose and notify the Appeals Division of their designee. The Appeals Division will be responsible for coordinating the preparation of the Certificate of Record when needed.

7. Failure to Abate Notification. Failure to abate exists when:

a) A previous citation issued to an employer has become a final order of the Board; and

b) The condition, hazard or practice found during a follow-up inspection is the same for which the employer was originally cited and has never been corrected by the employer (i.e., the violation was continuous), or is covered under a settlement agreement, or has not complied with interim measures involved in a long-term abatement within the time given.

8. De Minimis Violations. De minimis violations are violations of standards which have no direct or immediate relationship to safety or health and shall not be included in citations. A violation worksheet will not be completed for de minimis violations, except for those violations directly related to a complaint item. For those violations, a "De Minimis Notice of Violation" will be issued to the employer. In all other instances, the employer may be verbally notified of the violation and the SO/IH may note it in the inspection case file. The criteria for finding a de minimis violation are as follows:

a) An employer complies with the clear intent of the standard but deviates from its particular requirements in a manner that has no direct or immediate relationship to employee safety or health. These deviations may involve distance specifications, construction material requirements, use of incorrect color, minor variations from recordkeeping, testing, or inspection regulations, or the like.

b) 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 or the employer complies with a written interpretation issued by the division director.

c) An employer's workplace controls are technically beyond the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

C. Combining and Grouping of Violations.

1. Combining. Separate violations of a single rule having the same classification found during the inspection of an establishment or worksite generally shall be combined into one (1) alleged citation item. Each instance of the violation shall be separately set out within that item of the citation. Other-than-serious violations of a rule will typically be combined with serious violations of the same rule.

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

a) Grouping Related Violations. When the SO/IH believes that violations classified either as serious or as other-than-serious are so closely related as to constitute a single hazardous condition.

b) Grouping Other-Than-Serious Violations Where Grouping Results in a Serious Violation. When two (2) or more individual violations are found which, if considered individually, represent other-than-serious violations, but if grouped create a substantial probability of death or serious physical harm.

c) Where Grouping Results in Higher Gravity Other-Than-Serious Violation. Where the SO/IH finds during the course of the inspection that a number of other-than-serious violations are present in the same piece of equipment which, considered in relation to each other, affect the overall gravity of possible injury resulting from an accident involving the grouped violations.

d) Violations of Posting and Recordkeeping Requirements. Violations of the posting and recordkeeping requirements which involve the same document: e.g., MIOSHA 300 Form was not posted or maintained. See current Agency Instruction, MIOSHA-STD-05-2 Recording and Reporting of Occupational Injuries and Illnesses.

e) Penalties for Grouped Violations. If penalties are to be proposed for grouped violations, the proposed penalty shall be written on the first violation worksheet.

3. When Not to Group or Combine.

a) Multiple Inspections. Violations discovered in multiple inspections of a single establishment or worksite may not be grouped. When only one (1) inspection report is completed, an

inspection in the same establishment or at the same worksite shall be considered a single inspection even if it continues for a period of more than one (1) day or is discontinued with the intention of resuming it after a short period of time.

b) Separate Establishments of the Same Employer. Where separate inspections are conducted, either at the same time or different times, at two (2) establishments of the same employer and instances of the same violation are discovered during each inspection, the employer shall be issued separate citations for each establishment. The violations shall not be grouped.

c) General Duty Clause Violations. Because Section 11(a) of the Act is cited to cover all aspects of a serious hazard for which no standard exists, no grouping of separate Section 11(a) violations is permitted. This provision, however, does not prohibit grouping a Section 11(a) violation with a related violation of a specific standard.

d) Egregious Violations. Violations which are proposed as egregious citations shall not normally be combined or grouped. **Egregious violations must be approved by the MIOSHA director.**

D. Written Program, MIOSHA Poster, Notification Violations.

Violations related to written requirements can have a significant impact on safety and health management systems when applied appropriately to specific hazards identified in individual establishments. The following guideline is to assist the MIOSHA compliance staff in the evaluation of appropriate citation and penalties in particular circumstances. MIOSHA staff shall adhere to the following procedures for evaluation and citation.

MIOSHA recognizes that employers may have taken action to implement a variety of program requirements but may not have written documentation required. Many violations of comprehensive program requirements (e.g., hazard communication, personal protective equipment, equipment inspection records) are perceived to be paperwork deficiencies rather than implementation problems. For example, under current guidelines an employer might receive a penalty for not having SCBA inspection records when, in fact, there were inspections of the SCBA's and only the record is missing.

The failure to conduct an inspection would result in citations that could be classified as serious or other-than-serious violations based on the specific factors involved. However, the failure to have a record of that inspection, which is rarely as significant, would normally result in an other-than-serious violation with lesser probability.

1. As a general rule, when an evaluation of the employer's comprehensive program to address the specific hazards covered by the standard reveals there is documentable employee exposure to a serious hazard and the required written plan is missing or deficient and this deficiency contributed to the employee's exposure to this serious hazard, then a

violation for this written deficiency may be issued as a serious citation. Penalties should be assessed in accordance with the parameters of the documented exposure.

2. When an evaluation of the employer's comprehensive program to address a particular hazard demonstrates that appropriate protective practices were practiced at the site with regard to hazards, but a written plan was not utilized, an other-than-serious citation without monetary penalty should be issued on the initial visit. The employer should be provided information on the importance of documenting safety practices and provided written literature to assist in the development of a written plan. The employer shall be informed that subsequent violations would be subject to repeat policy and, therefore, could result in a penalty.

3. When an evaluation of the employer's comprehensive program to address a particular hazard demonstrates usage at that site could not present a risk to employees and written plan was not utilized, a citation should not be issued. The employer should be provided basic information on the purpose of the program for future reference.

4. As a general rule, when the employer's written plan to address a specific hazard is severely deficient, it will ordinarily be appropriate to issue one (1) citation for all of the deficiencies. In the rare instances that the specifics of a case indicate separate citation of each deficiency may be warranted, a careful review of the facts and objectives behind all citation items must be conducted. Caution should be exercised when penalties for separate program deficiencies are imposed.

5. MIOSHA Poster.

   a) When a pattern of previous citations for a particular establishment demonstrates a consistent disregard for the employer's responsibilities under the MIOSH Act and interviews show that employees were unaware of their rights under the Act, a citation for failure to post a MIOSHA poster is warranted. A citation may also be warranted when the lack of MIOSHA Poster is a complaint item.

   b) In all other cases, the employer shall be provided a copy of the notice and advised of the legal requirement to post it for employees. No citation shall be issued. This action shall be noted in the case file.

6. Access to Exposure and Medical Records (Notification Requirements).

   a) When interviews demonstrate that employees were never informed of the presence (location, means of access, right to access) of exposure records, and either the records demonstrate significant exposure for affected employees, or employees experienced

medical conditions which could be aggravated by the exposure, a citation with monetary penalty is warranted.

b) In all other cases of lack of employee notification, the employer should be advised of the requirement to inform employees that such records exist and are available to them. The violation should be classified as other-than-serious with no penalty.

c) Apparent violations of the standard not related to employee notification should be evaluated according to the specific hazard and exposure conditions present at that time.

E. Multi-employer Worksites. On multi-employer worksites, both construction and non-construction, citations normally shall be issued to employers whose employees are exposed to hazards (the exposing employer). See current Agency Instruction, MIOSHA-COM-04-1 Multi-Employer Work Sites for additional information regarding issuing citations to creating, controlling, and correcting employers in addition to exposing employers.

1. Additionally, the following employers normally shall be cited, whether or not their own employees are exposed:

a) The employer who actually creates the hazard (the creating employer).

b) The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer).

c) The employer who has the responsibility for actually correcting the hazard (the correcting employer).

2. Prior to issuing citations to an exposing employer, it must first be determined whether the available facts indicate that employer has a legitimate defense to the citation, by meeting all of the following:

a) The employer did not create the hazard;

b) The employer did not have the responsibility or the authority to have the hazard corrected;

c) The employer did not have the ability to correct or remove the hazard;

d) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed;

e) The employer has instructed his/her employees to recognize the hazard and, where necessary informed them how to avoid the dangers associated with it.

An exposing employer must have taken appropriate alternative means of protecting employees from the hazard. When circumstances justify it, the exposing employer shall have removed his/her employees from the job.

3. If an exposing employer meets all these defenses, that employer may or may not be cited. If all employers on a worksite with employees exposed to a hazard meet these conditions, then the citation shall be issued only to the employers who are responsible for creating the hazard and/or who are in the best position to correct the hazard or to ensure its correction. In such circumstances the controlling employer and/or the hazard-creating employer shall be cited even though no employees of those employers are exposed to violative condition. Penalties for such citations shall be calculated, using the exposed employees of all employers as the number of employees for probability assessment.

F. Employee Responsibilities.

1. Section 12 of the Act requires that employees:

a) Comply with rules and standards promulgated, and with orders issued pursuant to this Act.

b) Not remove, displace, damage, destroy, or carry off a safeguard furnished or provided for use in a place of employment, or interfere in any way with the use thereof by any other person.

The Act does not provide for the issuance of citations or the proposal of penalties against employees. However, employers are responsible for employee compliance with the standards.

2. In cases where the SO/IH determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, a citation should be issued to the employer.

3. Under no circumstances is the SO/IH to become involved in an on-site dispute involving labor-management issues or interpretation of collective bargaining agreements. The SO/IH is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with the Act. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge.

G. Affirmative Defenses.

1. Definition. An affirmative defense is any matter which, if established by the employer, will excuse the employer from a violation which has otherwise been proven by the SO/IH.

2. MIOSH Act Requirement. Section 33(6) of the MIOSH Act states that a citation will be vacated if it is shown that the employer has provided the equipment or training, educated employees regarding use of the equipment or implementation of the training, and taken reasonable steps including,

where appropriate, disciplinary action to assure that employees utilize the equipment and comply with the training. When it appears the employer has met all elements for an affirmative defense, the SO/IH will discuss with the supervisor and document in the case file. When all elements of an affirmative defense have been met, a citation will not be issued.

3. Burden of Proof. When a citation has been issued, affirmative defenses must be proved by the employer at the time of the hearing. MIOSHA must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The SO/IH, therefore, shall keep in mind the potential affirmative defenses that the employer may make and attempt to gather contrary evidence when a statement made during the inspection fairly raises a defense. The SO/IH should bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the supervisor.

4. Common Affirmative Defenses. The following are explanations of the more common affirmative defenses with which the SO/IH shall become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts which can be gathered during the inspection are minimal.

   a) Unpreventable Employee Misconduct or "Isolated Event." The violative condition was unknown to the employer and in violation of an adequate work rule which was effectively communicated and uniformly enforced. To establish this defense, employers must show all of the following elements:

      (1) A work rule adequate to prevent the violation;

      (2) Effective communication of the rule to employees;

      (3) Methods for discovering violations of work rules; and

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

      Example. An unguarded table saw is observed. The saw, however, has a guard which is reattached while the SO/IH watches. Facts which the SO/IH shall document may include: Who removed the guard and why? Did the employer know that the guard had been removed? How long or how often had the saw been used without guards? Did the employer have a work rule that the saw guards not be removed? How was the work rule communicated? Was the work rule enforced? Have other employees used the saw without guards?

   b) Impossibility. Compliance with the requirements of a standard is functionally impossible or would prevent performances of required work, and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection.

Example. During the course of the inspection an unguarded power press is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the SO/IH shall document may include: Would a guard make performance of the work impossible or merely more difficult? Could a guard be used part of the time? Has the employer attempted to use guards? Has the employer considered alternative means or methods of avoiding or reducing the hazard?

c) Greater Hazard. Compliance with a standard would result in greater hazards to employees than noncompliance and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection and an application of a variance would be inappropriate.

Example. The employer indicates that a saw guard had been removed because it caused particles to be thrown into the operator's face. Facts which the SO/IH shall consider may include: Was the guard used properly? Would a different type of guard eliminate the problem? How often was the operator struck by particles and what kind of injuries resulted? Would safety glasses, a face mask, or a transparent shelf attached to the saw prevent injury? Was operator technique at fault and did the employer attempt to correct it? Was a variance sought?

III. Abatement.

A. Period. The abatement period shall be the shortest interval within which the employer can be expected to correct the violation. An abatement date shall be set forth in the citation as "Corrected During Inspection" or a specific date. When abatement has been witnessed by the SO/IH during the inspection, the abatement period shall be "Corrected During Inspection" on the citation.

NOTE: When failure-to-abate notifications are issued, no additional abatement period shall be granted.

B. Reasonable Abatement Date. The establishment of the shortest practicable abatement date requires the exercise of professional judgment on the part of the SO/IH.

NOTE: Abatement periods exceeding 30 calendar days should not normally be necessary, particularly for safety violations. Situations may arise, however, especially for health violations, where extensive structural changes are necessary or where new equipment or parts cannot be delivered within 30 calendar days. When an initial abatement date is granted that is in excess of 30 calendar days, the reason, if not self-evident, shall be documented in the case file.

C. Long-Term Abatement Date for Implementation of Feasible Engineering Controls. In situations where it is difficult to set a specific abatement date when the citation is originally issued; e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished, the SO/IH shall

discuss the problem with the employer at the closing conference and, in appropriate cases, shall encourage the employer to file a Petition for Modification of Abatement (PMA) if more time is needed.

1. Final Abatement Date. The SO/IH and the supervisor shall make their best judgment as to a reasonable abatement period. A specific date for final abatement shall, in all cases, be included in the citation. If necessary, an appropriate petition may be submitted later by the employer to the supervisor to modify the abatement date.

2. Employer Abatement Plan. The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.

   NOTE: A statement agreeing to provide the affected offices with written periodic progress reports shall be part of the long-term abatement plan.

D. Feasible Administrative, Work Practice and Engineering Controls. Where applicable, the SO/IH 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 controls by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

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

      (1) Technical Feasibility. Technical feasibility is the existence of technical know-how as to materials and methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced.

(2) Economic Feasibility. Economic feasibility means that the employer is financially able to undertake the measures necessary to abate the citations received.

2. Responsibilities.

a) The SO/IH shall document the underlying facts which give rise to an employer's claim of infeasibility. Serious issues of feasibility should be referred to the supervisor for determination. The SO/IH and the supervisor are responsible for making determinations whether engineering or administrative controls are feasible or not.

b) When economic infeasibility is claimed the SO/IH 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.

E. Reducing Employee Exposure. Feasible engineering, administrative or work practice controls must be instituted even if they are not sufficient to eliminate the hazard, or reduce exposure to or below the permissible exposure limit (PEL). Nonetheless, they are required in conjunction with personal protective equipment to reduce exposure to the lowest feasible level.

F. Failure to Submit Abatement Assurance. In accordance with Section 33(4) of the Act, the department may issue a citation if the employer fails to properly notify MIOSHA of compliance with this Act, order issued pursuant to this act, or a rule or standard promulgated pursuant to this Act. See current Agency Instruction, MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure.

G. Closing of Case File Without Abatement Certification. The closing of a case file without abatement certification(s) must be justified with a statement in the case file addressing the reason for accepting each uncertified violation as an abated citation and approved by the Division Director or designee.

IV. Penalties.

A. General Policy. The penalty structure provided under Section 35 of the Act is designed primarily to provide an incentive toward correcting violations voluntarily, not only to the employer cited but also to other employers who may have the same violations of the standards or regulations.

1. While penalties are not designed to be punitive, the legislature has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.

2. Large proposed penalties, therefore, serve the public purpose intended under the Act; and division criteria guiding approval of such penalties are based on meeting this public purpose.

3. The penalty structure outlined in this section is designed as a general guideline. To achieve the appropriate deterrent effect, deviations from this guideline are allowed.

4. A decision not to apply the penalty adjustments to achieve the deterrent effect should normally be based on consideration of one (1) or more of the factors listed below. However, this list is not intended to be exhaustive. If the decision not to apply the penalty adjustments is based on a consideration other than the factors listed below, the decision must be fully explained in the case file and approved by the division director or his/her designee. The factors to be considered include:

   a) The proposed citations are related to a fatality/catastrophe;

   b) The employer has received a willful or repeat violation within the past five (5) years related to a fatality;

   c) The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of Part 11, Recording and Reporting of Occupational Injuries and Illnesses R 408.22139;

   d) The employer is currently on the Severe Violator Enforcement List (SVEP);

   e) The proposed citations are being considered for an egregious case.

   f) The employer has numerous recordkeeping violations related to a large number or rate of injuries and illnesses at the establishment.

B. Civil Penalties.

1. Statutory Authority. Section 35 provides the department with the statutory authority to propose civil penalties for violations of the Act.

   a) Section 35(1) of the Act provides that any employer who has received a citation for an alleged violation of the Act which is determined to be of a serious nature shall be assessed a civil penalty of not more than $7,000 for each violation.

   b) Section 35(2) provides that, an employer who fails to correct a violation for which a citation has been issued, may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

   c) Section 35(3) provides that, when the violation is specifically determined not to be of a serious nature, a proposed civil penalty of not more than $7,000 may be assessed for each violation.

   d) Section 35(4) provides that, when the violation is specifically determined to be of a willfully or repeatedly nature, a proposed civil penalty of not more than $70,000 may be assessed for each violation.

   e) Section 35(6) provides that, when a violation of a posting requirement is cited, a civil penalty of not more than $7,000 shall be assessed. For lack of SDS postings, see current Agency Instruction, MIOSHA-STD-04-1 Hazard Communication Standards – Inspection Procedures and Agency Instruction,

MIOSHA-STD-05-2 Recording and Reporting of Occupational Injuries and Illnesses.

2. Minimum Penalties. The following guidelines apply:

   a) The proposed penalty for any willful violation shall not be less than $5,000. The $5,000 penalty is a statutory minimum and not subject to administrative discretion.

   b) When the adjusted proposed penalty for an other-than-serious violation or regulatory violation (citation item) would amount to less than $100, no penalty shall be proposed for that violation. When, however, there is a citation item for a posting violation, this minimum penalty amount does not apply with respect to that item since penalties for such items are mandatory under the Act.

   c) When the adjusted proposed penalty for a serious violation (citation item) would amount to less than $400, a $400 penalty shall be proposed for that violation.

   NOTE: See current Agency Instruction, MIOSHA-ADM-06-7 Small Farming Operations and Small Employers in Low Hazard Industries - Guidelines for MIOSHA Activity which may affect penalties for some inspections.

3. Penalty Factors. Section 36(1) of the Act provides that penalties shall be assessed on the basis of four (4) factors, gravity of the violation, size of the business, good faith efforts of the employer, and employer's history of previous violations.

4. Gravity of Violation. The gravity of the violation is the primary consideration in determining penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other-than-serious violations. To determine the gravity of a violation the following two (2) assessments shall be made:

   a) The severity of the injury or illness which could result from the alleged violation.

   b) The probability that an injury or illness could occur as a result of the alleged violation.

5. Severity Assessment. The classification of the alleged violation as serious or other-than-serious is based on the severity of the injury or illness that could result from the violation. This classification constitutes the first step in determining the gravity of the violation. A severity assessment shall be assigned to a hazard to be cited according to the most serious injury or illness which could reasonably be expected to result from an employee's exposure as follows:

   a) High Severity: Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.

b) Medium Severity: Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited period of disability.

c) Low Severity: Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.

d) Minimal Severity (other-than-serious violations): Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm. Therefore, severity is not an element to be considered in determining the gravity based penalty of an other-than-serious violation.

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

a) Categorization. Probability shall be categorized as greater probability or as lesser probability.

(1) Greater Probability results when the likelihood that an injury or illness will occur is judged to be relatively high.

(2) Lesser Probability results when the likelihood that an injury or illness will occur is judged to be relatively low.

b) Determination. The SO/IH, using professional judgment, shall identify, evaluate, and document on the worksheet all of the factors influencing the likelihood of the occurrence of an injury or illness and shall assign them a weight in accordance with the relative contribution of each.

c) Circumstances to be Evaluated. The following circumstances may normally be considered, as appropriate, when violations likely to result in injury or illness are involved:

(1) Number of workers exposed.

(2) Frequency and duration of employee exposure to the hazard.

(3) Employee proximity to the hazardous conditions.

(4) Use of appropriate personal protective equipment (PPE).

(5) Medical surveillance program.

(6) Worker training.

(7) Other pertinent working conditions.

(8) Youth and inexperienced workers.

(9) Persons who speak limited or no English.

d) Final Probability Assessment. All of the factors outlined above shall be considered together in arriving at a final probability assessment. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the supervisor may use professional judgment to adjust the probability appropriately. Such decisions should be explained in the case file.

7. Gravity-Based Penalty (GBP). The GBP is an unadjusted penalty and is based on professional judgment combining the severity assessment and the final probability assessment. A GBP may be assigned in some cases without using the severity and the probability assessment procedures when the procedures cannot appropriately be used. See Section 9 of this chapter, Penalty Adjustment (Reduction) Factors, for application of size, history, and good faith reductions.

NOTE: Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of such alleged violation by the SO/IH, the employer immediately corrects or initiates steps to correct the hazard.

a) Serious Violations. The GBP shall be assigned on the basis of the following table:

SERIOUS VIOLATION PENALTY TABLE

SEVERITY	PROBABILITY	GBP	GRAVITY
High	Greater	$7,000	High
Medium	Greater	$6,000	Moderate
Low	Greater	$5,000	Moderate
High	Lesser	$5,000	Moderate
Medium	Lesser	$4,000	Moderate
Low	Lesser	$3,000	Low

The division director or designee may authorize a lower gravity based penalty, when it is determined appropriate. The reasons for a lower gravity based penalty must be documented in the case file.

b) Other-Than-Serious (OTS) Violations. There is no severity assessment calculated for OTS violations. The GBP shall be assigned on the basis of the following table:

OTS VIOLATION PENALTY TABLE

PROBABILITY	SEVERITY	GBP
Greater	Minimal	$1,000 - $7,000
Lesser	Minimal	$0

(1) Lesser Probability. OTS violations judged to be of lesser probability shall be cited with no penalty.

(2) Greater Probability. OTS violations judged to be of greater probability shall be assigned a GBP of $1,000 - $7,000 to which appropriate adjustment factors shall apply. Size, history, and good faith reductions apply. The employer may be granted a 100 percent reduction in penalties for an OTS violation having a greater probability, if there are no willful (W), repeat (R), failure to abate (FTA), or high gravity serious violations resulting from the inspection.

(3) The agency director or designee may authorize a penalty up to $7,000 for an OTS violation when it is determined to be appropriate to achieve the necessary deterrent effect. The reasons for such a determination shall be documented in the case file.

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

8. GBP for Combined, Grouped, or Instance-by-Instance Violations. Combined or grouped violations will normally be considered as one (1) violation and shall be assessed one (1) GBP. The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or subitem of a combined or grouped violation if it is clear which instance will have the highest gravity. For grouped violations, the following special guidelines shall be adhered to:

a) Severity Assessment. There are two (2) considerations in calculating the severity of grouped violations.

(1) The severity assigned to the grouped violation shall be no less than the severity of the most serious reasonably predictable injury or illness that could result from the violation of any single item, and

(2) If a more serious injury or illness is reasonably predictable from the items being grouped, than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

b) Probability Assessment. There are two (2) considerations in calculating the probability of grouped violations.

(1) The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness, and

(2) If the overall probability of injury or illness is greater with the items being grouped, than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

NOTE: Some individual probability factors may be increased by grouping and others may not. The increased values shall be used in the probability calculation if, in the professional judgment of the SO/IH, a more appropriate probability assessment will result. For example, the number of employees exposed may be increased while the proximity factor may not.

c) Gravity-Based Penalty (GBP). A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines of this chapter.

d) Instance-by-Instance Cases. In instance-by-instance cases an additional factor of up to the number of violation instances may be applied. Penalties calculated with this additional factor shall only be proposed with the concurrence of the agency director or designee. Federal OSHA Instruction CPL 02-00-080, "Handling of Cases To Be Proposed for Violation-By-Violation Penalties," may be consulted for additional guidance on penalty calculations.

9. Penalty Adjustment (Reduction) Factors. The GBP may be reduced up to 95 percent depending upon the employer's "good faith," "size of business," and "history of previous violations." A maximum of 80 percent reduction is permitted for size, 30 percent for good faith, and 10 percent for history. However, the GBP may not be reduced by more than 95 percent.

a) Limitations. Since the circumstances of each inspection are unique, the good faith reduction will be calculated separately for each inspection. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the following limitations:

(1) High Gravity Serious: Only adjust for size and history.

NOTE: Penalties assessed for violations that are classified as other than "high gravity" shall be adjusted for size, good faith, and history, even within the same inspection.

(2) Repeat: Only adjust for size.

NOTE: If one (1) violation is classified as repeat, no reduction for good faith can be applied to any of the violations found during the same inspection.

(3) Willful: Only adjust for size and history.

NOTE: If one (1) violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation of the Act and at the same time, be acting in good faith.

(4) Regulatory: Only adjust for size and history.

b) Size Reduction. Penalty reductions with respect to employer size will normally be based on the highest number of employees controlled by the employer nationwide within the previous 12 months, per the following table:

SIZE REDUCTION TABLE

EMPLOYEES (nationwide)	PERCENT REDUCTION
1-10	80
11-25	60
26-100	40
101-250	20
251 or more	None

(1) An employer with 10 or fewer employees may be granted a size reduction factor of 80 percent, however if any of the citation items are willful (W), repeat (R), failure to abate (FTA), or high gravity serious, only a 60 percent size reduction will be applied to **all** non-willful citation items in the case file.

Note: Penalty adjustments for willful citation items are located in Chapter VI, Section IV-B.14.

(2) When an employer with a single work location has one (1) or more serious violations of high gravity or a number of serious violations of moderate gravity, indicating a lack of

concern for employee safety and health, the SO/IH/supervisor may recommend that only a partial reduction in penalty be permitted for size. Such decisions should be explained in the case file.

(3) For serious willful violations, see Serious Willful Penalty Reductions.

c) Good Faith Reduction. A penalty reduction of up to 30 percent, based on the SO/IH's professional judgment, is permitted in recognition of an employer's good faith efforts to comply with MIOSHA requirements. Good faith will be determined by completing the Good Faith Worksheet (MIOSHA 516).

(1) A reduction of 30 percent shall normally be given to employers receiving 25 or more points on the good faith worksheet.

(2) A reduction of 20 percent shall normally be given to employers receiving 15-24 points on the good faith worksheet.

(3) A reduction of 10 percent shall normally be given to employers receiving 5-14 points on the good faith worksheet.

(4) A reduction of 0 percent shall normally be given to:

(a) Employers receiving 0-4 points on the good faith worksheet.

(b) Employers being cited under abatement verification for failure to certify abatement.

(c) Employers being cited under abatement verification for failure to notify employees and tagging movable equipment.

(d) Any violation classified as high gravity serious, willful, repeat, or failure to abate.

d) History Reduction. A reduction of 10 percent shall be given to employers who have not been cited by MIOSHA for any serious, willful, or repeat violations within the past three (3) years for a construction inspection or within the past five (5) years for a general industry inspection. This 3-year or 5-year window of exposure starts with the case closing date of the prior inspection and ends with the closing conference date of the current inspection. In addition, a history reduction will not be given for:

(1) Employers being cited for failure to certify abatement.

(2) Employers being cited for failure to notify employees and tagging movable equipment.

e) Total Reduction. The total reduction will normally be the sum of the reductions for each adjustment factor. However, the total combined reduction for all factors shall not exceed 95 percent. The following Penalty Table will be used for determining appropriate adjusted proposed penalties for serious and other-than-serious violations based on the GBP and total reduction.

PROPOSED SERIOUS PENALTY TABLE

REDUCTION %	GBP				
	3000	4000	5000	6000	7000
10%	2700	3600	4500	5400	6300
15%	2550	3400	4250	5100	5950
20%	2400	3200	4000	4800	5600
25%	2250	3000	3750	4500	5250
30%	2100	2800	3500	4200	4900
35%	1950	2600	3250	3900	4550
40%	1800	2400	3000	3600	4200
45%	1650	2200	2750	3300	3850
50%	1500	2000	2500	3000	3500
55%	1350	1800	2250	2700	3150
60%	1200	1600	2000	2400	2800
65%	1050	1400	1750	2100	2450
70%	900	1200	1500	1800	2100
75%	750	1000	1250	1500	1750
80%	600	800	1000	1200	1400
85%	*450	600	750	900	1050
90%	*400	*400	*500	600	700
95%	*400	*400	*400	*400	*400

*$400 is the minimum serious penalty.

10. Effect on Penalties if Employer Immediately Corrects or Initiates Corrective Action. Appropriate penalties will be proposed with respect to an alleged violation even though, after being informed of such alleged violation by the SO/IH, the employer immediately corrects or initiates steps to correct the hazard.

11. Failure to Provide Notification of Abatement (NOA). A citation for violation of Rule 1349(1) of Part 13, Inspections and Investigation, Citations and Proposed Penalties, can be issued when the employer does not submit NOA for a citation item classified as "other." The main purpose of issuing the Rule 1349 citation is to save staff from having to do a follow-up inspection on-site for less than serious issues. Penalties shall be applied when an employer has not notified or corrected a previously cited violation which had become a final order of the Board. See current Agency Instruction, MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure. Only the reduction factor for size shall apply when assessing penalties.

12. Failure to Abate (FTA). A notification of failure to abate an alleged violation shall be issued in cases where violations have not been corrected as required, and an on-site inspection has been conducted for verification purposes. Generally, citation items which were originally grouped for penalty purposes will remain grouped with a single penalty when issuing a FTA notification. A single FTA penalty will also be calculated for citation items containing multiple instances. Under special circumstances, the agency director or designee may authorize multiple FTA penalties for grouped citation items or citation items containing multiple instances. Penalties shall be calculated using the "FTA Violation Worksheet" and current agency/division follow-up inspection instructions.

a) Step 1. A GBP for unabated violations is to be calculated for failure to abate of a serious or other–than-serious violation on the basis of the facts noted during the follow-up inspection. This recalculated GBP, however, shall not normally be less than that proposed for the item's original GBP or $1,000. When a lower GBP is proposed, justification shall be documented in the case file. In no circumstance shall the proposed GBP be less than $1,000.

b) Step 2. The GBP shall be reduced for current size only.

c) Step 3. The penalty multiplier for the first failure to abate will be five (5). The penalty multiplier for the second failure to abate will be 10. By the third failure to abate, a cease operations order should be considered.

d) Step 4. Proposed penalty: the penalty from Step 2 times the penalty multiplier from Step 3.

e) Step 5. When the SO/IH determines, and so documents on the FTA worksheet, that the employer has partially corrected the violation, the supervisor or manager may authorize a reduction of 50 percent of the amount of the proposed penalty from Step 4.

When a citation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the partial abatement factor shall take into consideration the extent that the violation has been abated.

f) Step 6. The proposed adjusted penalty shall be the amount from Step 4 times Step 5.

Original Inspection # _____

Follow-up Inspection # _____

Original Citation # _____ Item # _____

FAILURE-TO-ABATE (FTA) WORKSHEET

(To be attached to the violation worksheet)

1. Original proposed GBP or the current proposed GBP based upon the facts noted during the follow-up inspection. In no case shall the GBP be less than $1,000. $ 0.00
   Justification by the SO/IH and the reviewing supervisor for applying a lower GBP on the follow-up inspection is as follows:

   Enter the justification for applying a lower GBP here.

2. Size Reduction. Only the reduction factor for size, based upon the circumstances noted during the follow-up inspection, shall be applied to arrive at the proposed penalty. Enter Size Reduction percentage: 00 (GBP - size reduction) = $ 0.00

3. The penalty multiplier for the first failure to abate will be five. The penalty multiplier for the second failure to abate will be ten. By the third failure to abate, a cease operations order should be considered. 5

4. Proposed penalty: the penalty from line 2 times the penalty multiplier from line 3.=
   line 2 x penalty multiplier line 3 = $ 0.00 x 5 = $ 0.00

5. Partial abatement factor (this violation only)
   This factor is 1.0 (no reduction) or 0.5 (partial reduction). Justification by the SO/IH and the reviewing supervisor for applying a partial reduction for abatement is as follows:

6. Proposed adjusted penalty: proposed penalty times partial
   abatement factor = line 4 times line 5 = $ 0.00 x 0 = $ 0.00 *

* Enter this amount on the Violation Worksheet as the proposed adjusted penalty.

Click here for an interactive PDF of this worksheet.

13. Repeat Violations. Section 35(4) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of not more than $70,000 for each violation. A rule violation will be cited as a repeat violation if the violation occurred within three (3) years of the case closing date of the previous citation for construction inspections. A rule violation will be cited as a repeat violation if the violation occurred within five (5) years of the case closing date of the previous citation for general industry inspections.

a) Gravity-Based Penalty Factors. Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeat violations based on facts noted during the current inspection. Only the adjustment factors for size appropriate to the facts at the time of the current inspection, shall be applied.

b) Penalty Increase Factors. The amount of the increased penalty to be assessed for a repeat violation shall be determined by the size of the employer.

(1) Smaller Employers. For employers with 250 or fewer employees nationwide, the GBP shall be doubled for the first repeat violation, and multiplied by five (5) for a second repeat (i.e., this is the second time the violation has been cited as repeat within three (3) years of the case closing date for construction and five (5) years for general industry). For the first or second repeat, the GBP may be multiplied by 10 in cases where the division director determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file. The adjustment factor for size, appropriate to the facts at the time of the current inspection, shall be applied. In no event shall the penalty after these adjustments be less than $400 for the first repeat violation, $750 for the second repeat violation, and $1,000 for the third repeat.

(2) Larger Employers. For employers with more than 250 employees nationwide, the GBP shall be multiplied by five (5) for the first repeat violation. For first repeat violations, the GBP may be multiplied by 10 in cases where the division director determines that it is necessary to achieve the deterrent effect. The reasons for imposing a high multiplier factor shall be explained in the file. A second repeat within the 3-year period for construction and 5-year period for general industry shall be multiplied by 10 (this is the second time the violation has been cited as repeat within three (3) years of the case closing date for construction and five (5) years for general industry). The

adjustment factor for size, appropriate to the facts at the time of the current inspection, shall be applied. In no event shall the penalty after these adjustments be less than $500 for the first repeat violation, $1,000 for the second repeat violation, and $2,000 for the third repeat.

(3) Increased factors for third repeat violations shall be determined by the division director or appropriate designee.

INCREASE FACTOR TABLE FOR SERIOUS REPEATED VIOLATIONS AND OTHER-THAN-SERIOUS WITH GREATER PROBABILITY REPEAT VIOLATIONS (Based on three (3) years from case closing date for construction and five (5) years for general industry. Determine GBP, apply the increase factor and adjust for size:)

# OF EMPLOYEES (Nationwide)	1ST REPEAT	2ND REPEAT	3RD REPEAT
250 or Fewer	2x*	5x*	Discretionary
More Than 250	5x*	10x	Discretionary
MINIMUM PENALTY 250 or Fewer	$400	$750	$1,000
MINIMUM PENALTY More Than 250	$500	$1,000	$2,000

*The multiplier may be increased up to 10x at division director's discretion.

c) Other-Than-Serious with Lesser Probability. For repeat other-than-serious violations that would otherwise have no GBP penalty, the following penalty schedule shall be applied:

(1) Smaller Employers. For employers with 250 or fewer employees nationwide:

(a) First Repeat. A base penalty of $200 shall be assessed for the first repeat violation,

(b) Second Repeat. A base penalty of $500 shall be assessed for the second time the violation has been cited as repeat,

(c) Third Repeat. A base penalty of $1,000 shall be assessed for the third time the violation has been cited as a repeat.

(2) The adjustment factor for size, appropriate to the facts at the time of the current inspection, shall be applied. In no

event shall the penalty after these adjustments be less than $100 for the first repeat violation, $250 if the violation has been cited twice before, and $500 for the third repeat.

(3) Larger Employers. For employers with more than 250 employees nationwide:

(a) First Repeat. A penalty of $500 shall be assessed for the first repeat violation,

(b) Second Repeat. A penalty of $1,000 shall be assessed for the second time the violation has been cited as repeat,

(c) Third Repeat. A penalty of $2,000 shall be assessed for the third time the violation has been cited as a repeat.

REPEAT PENALTY TABLE FOR OTHER-THAN-SERIOUS VIOLATIONS WITH LESSER PROBABILITY

(Based on three (3) years from case closing date for construction and five (5) years for general industry. For small employers who have 250 or fewer employees, determine base penalty and adjust for size:)

# OF EMPLOYEES (Nationwide)	1ST REPEAT	2ND REPEAT	3RD REPEAT
BASE PENALTY 250 or Fewer	$200	$500	$1,000
MINIMUM PENALTY 250 or Fewer	$100	$250	$500
PENALTY More Than 250	$500	$1,000	$2,000

14. Willful Violations. Section 35(4) of the Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than $70,000 but not less than $5,000 for each violation.

a) Other-than-Serious Willful Penalty. The proposed penalty for an other-than-serious willful violation will not be less than $5,000. If the agency director or designee determines that it is appropriate to achieve the necessary deterrent effect, a higher proposed penalty may be applied. The reasons for this determination shall be documented in the case file.

b) Serious Willful Penalty. To determine the proposed penalty for a serious willful violation, complete Steps 1 through 4 below:

Step 1: Determine the gravity for each serious violation. See the Serious Violation Penalty Table in Section IV. B. 7. a) of this chapter.

Step 2: The size reduction factor for a serious willful violation shall be applied as shown in the following table. This table helps minimize the impact of large penalties for small employers with 50 or fewer employees.

Serious Willful Size Reduction Table

Employees (nationwide)	**Percent Reduction for Size**
1-10	80
11-20	60
21-30	50
31-40	40
41-50	30
51-100	20
101-250	10
251 or more	0

Step 3: The reduction factor for history shall be added to the size reduction determined in Step 2.

Step 4: The proposed penalty shall then be determined from the table below.

Penalties to be Proposed for Serious Willful Violations Table

Total percent reduction for size and/or history	High Gravity	Moderate Gravity	Low Gravity
0%	$70,000	$55,000	$40,000
10%	$63,000	$49,500	$36,000
20%	$56,000	$44,000	$32,000
30%	$49,000	$38,500	$28,000
40%	$42,000	$33,000	$24,000
50%	$35,000	$27,500	$20,000
60%	$28,000	$22,000	$16,000
70%	$21,000	$16,500	$12,000
80%	$14,000	$11,000	$8,000
90%	$7,000	$5,500	$5,000

NOTE: In no case shall the proposed penalty be less than the statutory minimum of $5,000. If the agency director or designee determines that it is appropriate to achieve the necessary deterrent effect, a higher proposed penalty may be applied. The reasons for this determination shall be documented in the case file.

15. Regulatory Violations. Except as provided and implemented in the Federal Appropriations Act, Section 35(6) of the Act provides that an employer who violates any of the posting requirements shall be assessed a civil penalty of up to $7,000 for each violation and may be assessed a like penalty for recordkeeping violations.

a) General Application. The procedures that follow shall be used in determining proposed penalties for violations of regulatory requirements only when the employer has knowledge of the requirements, such as previous inspections. If the employer does not have knowledge, citations without proposed penalties will be issued. All proposed penalties for regulatory violations shall have the adjustment factors for size and history applied, as appropriate.
.

b) Willful Regulatory Violations. In the case of regulatory violations that are determined to be willful, the GBP penalty shall be multiplied by 10. In no event shall the penalty, after reduction for size and history, be less than $5,000.

c) Injury and Illness Recording and Reporting Requirements. See current Agency Instruction, MIOSHA-STD-05-2 Recording and Reporting of Occupational Injuries and Illnesses.

d) Other Regulatory Requirements. Penalties for violations of other regulatory requirements shall be proposed as follows:

(1) MIOSHA Poster. If the employer has not displayed (posted) the notice furnished by MIOSHA as prescribed in R 408.22311 of Part 13, an other-than-serious citation shall normally be issued. Where a GBP is appropriate, the penalty shall be $1,000.

(2) Citation Posting. If an employer received a citation that has not been posted as prescribed in R 408.22348 of Part 13, an other-than-serious citation shall normally be issued. The GBP shall be $3,000.

(3) Advance Notice Notification Requirements. When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by R 408.22324(3) of Part 13, an other-than-serious citation shall be issued. The violation shall have a GBP of $2,000.

(4) Abatement Notification. The GBP shall be $1,000. Only the reduction factor for size shall apply when assessing penalties. See current Agency Instruction, MIOSHA-COM-05-2 Abatement Assurance and Follow-up Inspection Procedure.

(5) Appeal Notification Posting. When an employer has filed an appeal of a citation and has failed to post or otherwise notify the affected employees or their representative, as required by R 408.22351(2) of Part 13, the violation shall have a GBP of $1,000.

(6) Access to Exposure and Medical Records. If an employer is cited for failing to provide access to records as required under Part 470, Employee Medical Records and Trade Secrets for inspection and copying by any employee, former employee, or authorized representative of employees, a GBP of $1,000 shall normally be proposed for each record (i.e., either medical record or exposure record, on an individual employee basis). A maximum GBP of $7,000 may be proposed for such violations.

(7) The following table summarizes GBPs for regulatory violations.

GBP REGULATORY PENALTY TABLE

MIOSHA 300	$1,000
MIOSHA 301	$1,000
Post MIOSHA 300A Summary	$1,000
Electronically Submit 300A	$1,000
Access to Employee Records	$1,000 per record, up to $7000 per inspection
Post MIOSHA Poster	$1,000
Failure to Notify Employee Rep.	$2,000
Post Citation Copies	$3,000
Reporting Fatality	$5,000
Reporting In-patient Hospitalization, Amputation, Loss of Eye	$5,000
All Others	$1,000

NOTE: For regulatory penalties of less than $100 (after size and history reduction), issue the citation with no penalty except for posting violations.

C. Criminal Penalties.

1. The Act and Michigan Compiled Laws provide for criminal penalties in the following cases:

   a) Willful violation of a MIOSHA standard, rule, or order causing the death of an employee. [R 408.1035(5)]

   b) Giving unauthorized advance notice. [R 408.1035(8)]

   c) Giving false information. [R 408.1035(7)]

   d) Assaulting an SO/IH. [R 408.1035(10)]

2. Criminal penalties are imposed by the courts after trials and not by MIOSHA or the Board of Health and Safety Compliance and Appeals.

V. Issuing Citations.

A. Issuance Deadline. A citation shall be issued with reasonable promptness after termination of the inspection or investigation. A citation shall not be issued after the expiration of 90 days from the completion of the physical inspection or investigation of the establishment.

B. Sending Citations to the Employer. Citations shall be sent by certified mail. Hand delivery of citations to the employer or an appropriate agent of the employer may be substituted for certified mailing if the certified mailed copies are returned. A signed receipt shall be obtained whenever possible; otherwise the circumstances of delivery shall be documented in the file. Additional copies of mailed citations may be hand-delivered when and where appropriate.

C. Sending Citations to the Employee. Citations may be mailed to employees and/or their representatives no sooner than three (3) days after the citation is sent to the employer.

CHAPTER VII. POST-CITATION PROCEDURES AND ABATEMENT VERIFICATION

I. Writing Citations and Citation Deadline. Section 33 of the Act controls the writing of citations. The agency policy is to issue all citations within 90 calendar days after the completion of the physical inspection or investigation. In no case shall any citation be issued beyond 90 calendar days from the completion of the investigation [reference, Section 33(1) of Act 154].

II. Citations, Appeals, and Settlements. In accordance with the provisions set forth in Section 41 of the Act, the notice of appeal is divided into two (2) major steps, the first appeal and the second appeal. MIOSHA has also implemented a procedure for settling cases prior to the appeal (Penalty Reduction Agreement). The 15 working day appeal period referenced below begins on the day following the day of receipt of the Citation and Notification of Penalty.

A. Appeal not Pursued. If the employer, employee, or employee representative does not petition the department within 15 working days after receipt of the citation and proposed penalty, the citation and proposed penalty becomes a final order of the Board of Health and Safety Compliance and Appeals (Board).

B. First Appeal (Employer Petition). Within 15 working days after receipt of a citation and proposed penalty, if any, an employer may petition the department for a grant of additional time for compliance, modification, or dismissal of the citation or proposed penalty. (For requests for additional time filed after the 15 working day period, see section on petition for modification of abatement in this chapter.) When a petition is submitted to the department, the employer shall transmit a copy immediately to the affected employees or to the employee representative or post a copy where the citations are posted. Upon receipt of a petition, the department may modify the time scheduled for compliance, modify the citation, dismiss the citation, dismiss the proposed penalty or modify the proposed penalty.

If the department meets with the employer regarding the employer's petition, an informal conference will be held and the attendance of the employee or employee representative will be allowed. Informal conferences may be held by any means practical, but meeting in person is preferred. The informal conference or any request for such a conference shall not operate as a stay of the 15 working day appeal period. The department shall notify the employer of its decision within 15 working days after receipt of the petition. The employer shall promptly post the notice of the department's decision together with the appropriate citation. The decision of the department shall become final 15 working days after the employer's receipt of the decision, unless further appealed.

C. First Appeal (Employee Petition). Within 15 working days after the employer has received a citation, an employee or employee representative may petition the department, alleging the period of time fixed in the citation for the abatement of the violation is unreasonable. When a petition is submitted to the department by an employee or employee representative, the department shall submit a copy of the petition immediately to the employer. If requested by the employee or

employee representative, their names will be deleted. Upon receipt of a petition, the department may modify or reaffirm the time scheduled for compliance. The department shall notify the employer of its decision within 15 working days after receipt of the petition. The employer shall promptly post the notice of the department's decision together with the appropriate citation. The decision of the department shall become final 15 working days after the employer's receipt of the decision, unless further appealed.

D. Penalty Reduction Agreements (PRAs) and Settlement Agreements (SAs). In addition to the appeal rights afforded by the MIOSH Act, MIOSHA has implemented a program for negotiating PRAs with the employer. This is a program designed to reach abatement of hazards at the earliest possible opportunity and reduce the need for appeals. PRAs are negotiated and finalized by the division that issued the citation(s). The PRA process, settlement agreements in general, and partial settlement agreements are discussed in greater detail in current Agency Instruction, MIOSHA-COM-04-2 Appeal and Settlement Processes for MIOSHA Enforcement Divisions.

E. Petition for Modification of Abatement (PMA). After a citation has become a final order of the Board, the employer may petition the Board for an extension of the abatement date no later than the close of the next working day following the date on which abatement was originally required. The employer must show that a good faith effort has been made to comply, and circumstances exist beyond the reasonable control of the employer which prevent achieving compliance with the standard or condition violated. All PMAs will be reviewed by the department for approval.

In accordance with Part 4, Procedures, Rule 441(6), the Board's authorized agent shall have the authority to approve timely, non-contentious, petitions for modification of abatement filed pursuant to Rules 441(1) through (7)(b). The representative in the MIOSHA program is the issuing division. The purpose of this transfer of responsibility is to facilitate the handling and to expedite the processing of PMAs to which neither the department nor any affected party objects.

The MIOSHA representative processing the PMAs shall ensure that the requirements of Rules 441 and 1355 are met.

1. Filing Date. A PMA must be filed in writing with the issuing division no later than the close of the next working day following the date on which abatement was originally required. Filing is deemed effective at the time of mailing or personal service. A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

2. Incomplete Petitions. If the employer's letter does not meet all the requirements of Rule 1355(2)(a-e), the employer may be contacted by phone and notified of the missing elements. A reasonable amount of time for the employer to respond shall be specified during this contact with the employer. The employer shall be encouraged to submit the missing

elements by facsimile transmission (fax). The employer shall be informed of the consequences of a failure to respond adequately; namely, that the PMA will not be granted and the employer may be issued a notice of failure to abate. If the employer responds satisfactorily by telephone or fax and the supervisor determines that the requirements for a PMA have been met, appropriate documentation shall be placed in the case file.

3. Processing PMAs. A PMA that is filed in a timely manner, meets the requirements of Rule 1355(2) (a-e), and to which no one has objected, will be granted by the issuing division acting on behalf of the Board.

   a) Incomplete petitions shall be transmitted to the Appeals Division in an expeditious manner. Petitions that have been objected to by an employee, authorized representative of the employees, or the division, shall be transmitted to the Appeals Division along with a notice of the objection for the Board's consideration.

   b) When the employer is late filing a PMA, the issuing division shall send a written response to the employer advising them of the late request. The response shall also inform the employer that they can resubmit their request along with a statement of exceptional circumstances explaining the delay, and ask the Board for consideration. Late requests that contain, or are accompanied by, a statement of exceptional circumstances, shall be transmitted to the Appeals Division for the Board's consideration.

F. Second Appeal (Formal Appeal). Within 15 working days after receipt of the department's decision, an employer may appeal the decision to the Board. Within 15 working days after the employer has received the decision, an employee, or employee representative may appeal the decision to the Board with respect to the violation abatement period, classification of citation, or proposed penalty.

NOTE: Only items and issues that were included in the first appeal and the decision response may be the subject of a second appeal. All appeals received relative to a department decision on a citation are considered "formal," and are forwarded to the Board for scheduling of a prehearing conference. If no agreement can be reached during the prehearing conference, the matter is scheduled by the Michigan Administrative Hearing Systems (MAHS) for a hearing before an administrative law judge (ALJ). The decision of the ALJ may be appealed to the Board for review as described in Section 42 of Act 154. Objections to any decision of the Board may be appealed to circuit court. If agreement is reached at any point in the appeals process, a settlement agreement or appropriate document is prepared to finalize the case.

III. Transmittal of Notice of Appeal and Other Documents to the Board. When the issuing division receives a formal appeal or a PMA that requires Board action, they shall promptly transmit the file to the Appeals Division.

A. Where the issuing division is certain that the initial petition or the notice of appeal was not mailed (i.e., postmarked) within the 15 working day period allowed, the

employer will be advised of the statutory time limitation. The employer shall be informed that MIOSHA has no jurisdiction to process the appeal because the notice was not filed within the 15 working days allowed and, therefore, the citation must be complied with including the payment of any outstanding penalties. A copy of all untimely notices shall be retained in the case file. If the employer appeals this decision, the file shall be transmitted to the Appeals Division for further handling.

B. If a petition is submitted to the agency after the 15 working day period, but prior to the abatement period having passed, and the notice appeals only the reasonableness of the abatement period, it shall be treated as a PMA and handled in accordance with the requirements outlined in Rule 441 of Part 4, Procedures, and Rule 1355 of Part 13, Inspections and Investigations, Citations and Penalties.

C. At the time of transmittal, the issuing division shall decide who potentially needs to be notified of any prehearing conference or hearing. The names of these individuals shall be entered in the "comments" section of the transmittal sheet. When the Appeals Division sends notices of prehearings and hearings to the issuing divisions, they will include this information. The decision on who to notify should be based on participation in, and knowledge of, the items being appealed. This could be any combination of safety officer, hygienist, specialist, supervisor, manager, or director.

IV. Transmittal of File to the Attorney General's Office. The Attorney General's Office receives documents from the Appeals Division when they are to be involved.

V. Verification of Abatement. The issuing division is responsible for determining if abatement has been accomplished. When abatement is not accomplished during the inspection or the employer does not submit adequate assurance of abatement, agency or division instructions will be followed. Abatement certification is the minimum level of abatement verification and is required for all violations once they become a final order.

A. Abated During Inspection. An exception to the requirement for abatement certification exists when the SO/IH observes abatement during the onsite portion of the inspection and the violation is listed on the citation as "Corrected During Inspection."

B. Other-than-Serious. For citation items classified as "other," submitting to the issuing division a signed copy of the citation item indicating the item has been abated is acceptable documentation of abatement. It is also acceptable to submit a document in writing, certifying abatement of the particular citation item for citation items classified as "other."

C. Serious, Repeat, Fail-to-Abate, Willful, or Instance-by-Instance. Requires documentation as deemed appropriate by the issuing division.

D. Certification Timeframe.

1. All citation items which have become final orders, regardless of their classifications, require written abatement certification within three (3) working days of the abatement date. See Rule 1349 (1) Part 13, Inspections and Investigations, Citations and Proposed Penalties.

2. A PMA received and processed in accordance with the guidance of the FOM will suspend the three (3) working day time period for receipt of the abatement certification for the item for which the PMA is requested.

   a) Thus, no citation will be issued for failure to submit the certification within three (3) working days of the abatement date.

   b) If the PMA is denied, the three (3) working day time period for submission to MIOSHA begins on the day the employer receives notice of the denial.

VI. Abatement Documentation.

A. Adequacy of Abatement Documentation.

1. Abatement documentation may be submitted in electronic form.

2. The abatement documentation submitted by the employer will be evaluated by MIOSHA for adequacy.

3. Examples of documents that demonstrate that abatement is complete include, but are not limited to:

   a) Photographic or video evidence of abatement;

   b) Evidence of the purchase or repair of equipment;

   c) Bills from repair services;

   d) Reports or evaluations by safety and health professionals describing the specific abatement of the hazard or a report of analytical testing;

   e) Records of training completed by employees if the citation is related to inadequate employee training;

   f) 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; and

   g) Other forms of conclusive evidence or actions taken to abate.

   NOTE: The employer may need to submit multiple types of abatement documentation to adequately document abatement.

B. SO/IH Observed Abatement.

1. Employers are not required to certify abatement for violations which they promptly abate during the onsite portion of the inspection and observed by the SO/IH. Observed abatement will be documented on the Violation Worksheet for each violation and must include the method of abatement.

2. If the observed abatement is for a violation that would normally require abatement documentation by the employer, the documentation in the case file must also indicate that abatement is complete. Where suitable, the SO/IH may use photographs or video evidence.

VII. Effect of Appeal Upon Abatement Period. In situations where an employer appeals either (1) the period set for abatement or (2) the citation itself, the abatement period generally shall not begin to run until the citation has become a final order. In accordance with the Act, the abatement period begins when a final order of the Board is issued. The abatement period is not stopped while an appeal to the court is ongoing unless the employer has been granted a stay. In situations where there is an employee appeal of the abatement date, the abatement requirements of the citation remain unchanged.

A. Where an employer has appealed only the proposed penalty, the abatement period continues to run unaffected by the appeal.

B. Where the employer does not appeal, he must abide by the date set forth in the citation even if such date is within the 15 working day notice of appeal period. Therefore, when the abatement period designated in the citation is 15 working days or less and a notice of appeal has not been filed, a follow-up inspection of the worksite may be conducted for purposes of determining whether abatement has been achieved within the time period set forth in the citation. A failure to abate notice may be issued on the basis of the SO/IH's findings.

C. Where the employer has filed a notice of appeal to the initial citation within the appeal period, the abatement period does not begin to run until the entry of a final Board order. Under these circumstances, any follow-up inspection within the appeal period shall be discontinued and a failure to abate notice shall not be issued.

NOTE. There is one (1) exception to the above rule. If an early abatement date has been designated in the initial citation and it is the opinion of the SO/IH and/or the supervisor that a situation classified as imminent danger is presented by the cited condition, appropriate imminent danger proceedings may be initiated notwithstanding the filing of a notice of appeal by the employer.

D. If an employer appeals an abatement date in good faith, a failure to abate notice shall not be issued for the item appealed until a final order affirming a date is entered, the new abatement period has been completed, and the employer has still not abated.

VIII. Informal Conferences.

A. General. Pursuant to Rule 1361, Part 13, Inspections and Investigations, Citations and Proposed Penalties, the employer, any affected employee, or the employee representative may request an informal conference. The subject of the meeting may be related to any issue raised by an inspection or investigation, citation, notice of proposed penalty, or appeal petition.

B. Procedures. Whenever the employer, an affected employee, or the employee representative requests an informal conference, both parties shall be afforded the opportunity to participate fully. If either party chooses not to participate in the informal conference, a reasonable attempt shall be made to contact that party to solicit their input. Informal conferences may be held by any means practical.

C. Participation by MIOSHA Officials. The inspecting SO/IHs shall be notified of an upcoming informal conference and, if practicable, given the opportunity to

participate in the informal conference at the discretion of the supervisor. The supervisor shall ensure that notes are made indicating the basis for any decisions taken at or as a result of the informal conference.

D. Conduct of the Informal Conference. The supervisor shall conduct the informal conference in accordance with the following guidelines:

1. Opening Remarks. The opening remarks shall include discussions of the following topics:

a) Purpose of the informal conference.

b) Rights of participants.

c) Appeal rights and time restraints.

d) Limitations, if any.

e) Settlements of cases.

f) Other relevant information.

2. Closing. At the conclusion of the discussion the main issues and potential courses of action shall be summarized.

IX. Amending or Withdrawing Citation and Notification of Penalty in Part or in its Entirety.

A. Citation Revision Justified. Amendments to or withdrawal of a citation shall be made when information is presented to the supervisor which indicates a need for such action and may include administrative or technical errors such as:

1. Citing of an incorrect standard.

2. Incorrect or incomplete description of the alleged violation.

3. Additional facts establish a valid affirmative defense.

4. Additional facts establish that there was no employee exposure to the hazard.

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

B. Citation Revision Not Justified. Amendments to or withdrawal of a citation shall not be made by the supervisor under certain conditions which include:

1. The 15 working days for filing a notice of appeal has expired with no notice filed, and the citation has become a final order.

2. Employee representatives have not been given the opportunity to present their views unless the revision involves only an administrative or technical error.

3. Minor editorial and/or stylistic modifications.

C. Procedures for Amending or Withdrawing Citations. The following procedures are to be followed in amending or withdrawing citations. The instructions

contained in this section, with appropriate modification, are also applicable to the amendment of the Notification of Failure to Abate Alleged Violation:

1. Withdrawal of or modifications to the citation and notification of penalty shall be accomplished by means of an appeal decision response letter. Depending on the number and complexity of the changes, an amended citation and Notification of Penalty Form may be issued as well.

2. When circumstances warrant it, the issuing division or Appeals Division, in consultation with the issuing division, may withdraw a citation in its entirety. Justifying documentation shall be placed in the case file. If a citation is to be withdrawn, the following procedures apply:

   a) A letter withdrawing the Citation and Notification of Penalty shall be sent to the employer. The letter shall refer to the original citation and penalty, state that they are withdrawn, and direct that the letter be posted by the employer for three (3) working days in those locations where the original citation was posted.

   b) A copy of the letter may also be sent to the employee representative as appropriate.

D. Section 35 Violations. The history of Section 35 of the Act concerned with penalties, indicates that the legislature devised the citation classification system outlined in Section 35 so that penalties might be proposed and assessed at various levels which would correspond to the nature and severity of the violations found. This classification system assumes that a recalcitrant employer will only be dissuaded from further violation by a significantly higher penalty as compared to an ordinarily negligent violator. The main reason for classifying violations, therefore, is to enable the department to propose a penalty appropriate to the violation.

1. If an employer, having been cited as willfully or repeatedly violating the Act, decides to diligently correct all violations but wishes to purge the adverse public perception attached to willful or repeated violation classification, and is willing to pay all or almost all of the penalty (normally not less than 80%), and agrees to make other concessions as applicable and determined by MIOSHA, then the fundamental public purpose of the Act has been accomplished, and a Section 35 designation may be applied. When a Section 35 designation is applied, the department is indicating that in the particular case, the actual classification of the violation is secondary to other considerations; such as, obtaining appropriate commitments while at the same time achieving swift and sure abatement of hazardous conditions.

2. Decisions to make a Section 35 designation should be based on the employer's showing of good faith to abate and whether the employer is willing to make other concessions as appropriate. Examples of concessions an employer may be willing to make may include, but are not limited to:

a) Agreement to use a safety or health consultant and to implement the consultant's recommendations.

b) Agreement to develop and implement a comprehensive safety and health management system.

c) Agreement to allow a MIOSHA CET consultant to do a comprehensive review of the employer's health and safety programs, and implement the consultant's recommendations even where such recommendations go beyond the requirements of MIOSHA standards.

3. A Section 35 designation may also be considered if the employer has advanced substantial reasons why the original classification is questionable but is willing to pay most or all of the penalty. It should be noted, however, that a Section 35 designation is not applicable where the original classification was not appropriate.

4. The Section 35 designation is normally only applied at the contested case step (formal step) of the appeals process.

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

XI. Corporate-Wide Settlement Agreements. Federal OSHA periodically negotiates corporate-wide settlement agreements. When these corporate-wide settlement agreements include facilities in Michigan, MIOSHA will be asked to consider recognizing the terms of these agreements. MIOSHA will evaluate corporate-wide settlement agreements on a case-by-case basis. MIOSHA will not typically negotiate a corporate-wide settlement agreement that includes facilities outside of Michigan.

XII. Penalty Collections. MIOSHA follows both LEO and internal procedures for collecting and depositing monies received from employers. The Michigan Department of Treasury handles debt collection on behalf of MIOSHA.

INDEX

Abatement 1, 7, 10, 11, 13, 15, 16, 31, 33, 34, 36, 38, 39, 56, 58, 61, 64, 66, 70, 71, 72, 75, 85, 88, 97, 104, 105, 106, 114, 116, 124, 127, 128, 129, 130, 131, 132, 133, 134, 135
Assistance.....61, 72, 135
Date.....1, 39, 72, 104, 105, 128, 130, 131, 132, 133
Partial.....117
Period.....34, 39, 104, 105, 129, 130, 132
Petition for Modification.....17, 64, 127, 128, 129
Plan.....72, 105
Verification.....70, 72, 114, 130
Act Applicability.....3
Administration.....1, 2, 4, 7, 9, 16, 45, 52, 74, 82
Responsibilities and Structure.....9
Administrative Controls.....80, 81, 83, 105, 106
Advance Notice.....35, 44, 45, 124, 125
Advisory Committee.....14, 22
Affirmative Defense.....102, 103, 133
Agency Phone/Fax Numbers.....19, 20
Appeals.... 9, 11, 12, 13, 17, 18, 19, 26, 27, 28, 29, 32, 33, 37, 38, 39, 60, 63, 64, 67, 78, 96, 97, 124, 127, 128, 129, 130, 132, 133, 134, 135
Appeals Division
Responsibilities and Structure.....17
Asbestos.....7, 10, 11, 19, 40, 89
Assaults.....23, 49
Attorney General.....5, 18, 20, 23, 27, 28, 29, 30, 48, 49, 54, 66, 67, 69, 78, 94, 130
Board of Health and Safety Compliance and Appeals.....18, 32, 125, 127
Effect of Appeal.....32, 39, 132
Catastrophe.....31, 33, 35, 69, 107
Cease Operation.....1, 65, 66, 71, 117
Citations .1, 2, 10, 12, 13, 15, 17, 30, 32, 34, 36, 38, 51, 52, 58, 63, 65, 67, 70, 71, 72, 78, 79, 82, 83, 84, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 113, 116, 117, 119, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135
Issuing.....11, 12, 101, 126
Withdrawing.....133
Writing.....127
Closing Conference.....44, 55, 63, 64, 91, 105, 114
Community Service.....5
Court Ordered.....5
Non-Court Ordered.....5
Complainant.....27, 28, 34, 35, 36, 37, 38, 39, 40, 79, 80
Complaint.....2, 8, 10, 12, 17, 31, 32, 33, 35, 36, 37, 38, 39, 40, 42, 46, 50, 53, 55, 61, 74, 75, 90, 97, 100
Discrimination.....12, 40
Complaints About State Plan Administration (CASPA).....2
Construction Safety and Health Division (CSHD).....9, 10, 11, 37, 40, 55, 63
Asbestos Program.....7, 10, 19
Responsibilities and Structure.....10
Construction Work.....10, 37, 46, 51, 83
Consultation Education and Training (CET) Division.....9, 13, 14, 15, 16, 20, 57, 70, 80, 135
Responsibilities and Structure.....15
Definitions.....7, 33, 73, 82, 83, 89, 102, 105
Depositions.....11, 13, 27, 28, 29
Deputy Director.....9, 29, 30, 84
Director, LEO.....9

Director, MIOSHA 9
Disclosure of Documents 25
Appeal Rights 26, 37, 38, 63, 128, 133
Exemptions 3, 6, 8, 26
Interview Statements 26, 60
Medical Records 26, 81, 100, 124
Non-disclosable Information 26
Discrimination 12, 13, 17, 33, 36, 40, 54, 59, 64
Employer/Employee Representative 55
Engineering Controls 17, 64, 80, 81, 83, 89, 104, 105, 106
Exemptions 3, 6, 8, 26
Expert/Specialist Assistance 45
Fatality 8, 19, 27, 31, 33, 35, 40, 42, 53, 59, 67, 68, 69, 70, 84, 107, 125
Fax Numbers 15, 36, 37, 38, 129
Feasibility 41, 105, 106
Federal/State Agreement 1
Monitoring 2, 13, 15, 31, 32, 34, 39, 53, 61, 68, 72, 78, 79, 80, 84, 85
Follow-ups 23, 31, 32, 34, 38, 39, 53, 70, 71, 72, 97, 106, 116, 117, 124, 132
Formal Complaint 35
Freedom of Information Act (FOIA) 14, 15, 25
Appeal 26, 28, 97, 124, 127, 128, 129, 132, 133
Disclosable Information 26
Requests for Records 25
Retention of Files 27
Waiving Fees 27
General Duty Clause 67, 86, 87, 88, 89, 99
General Industry Safety and Health Division (GISHD) 9, 12, 21, 40, 55, 63, 73, 74, 75, 76
Chemical Compliance Program 12
Employee Discrimination Section 12, 19, 40
Health District Office Map 21
Responsibilities and Structure 12
Good Faith 50, 57, 65, 72, 79, 80, 90, 108, 110, 111, 112, 113, 114, 128, 132, 134
Grouped Violations 98, 111, 112
Gravity-Based Penalty (GBP) 110, 112
Instance-by-Instance Cases 112
Probability Assessment 102, 109, 110, 111, 112
Severity Assessment 108, 110, 111, 112
Hospitalization 107, 109, 125
Imminent Danger 8, 32, 33, 34, 35, 36, 40, 44, 45, 51, 53, 62, 63, 64, 65, 66, 67, 71, 132
Indian Reservations 4
Informal Conference 17, 106, 127, 132, 133
Inspections 1, 2, 3, 4, 7, 8, 10, 11, 12, 13, 24, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 61, 62, 63, 64, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 82, 84, 85, 90, 91, 93, 94, 95, 96, 97, 98, 99, 103, 104, 106, 107, 108, 111, 112, 113, 114, 116, 117, 119, 120, 123, 124, 125, 126, 127, 130, 131, 132
Advance Notice 35, 44, 45, 124, 125
Attorney General and MIOSHA Appeals Division Coordination 78
Closing Conference 44, 55, 63, 64, 91, 105, 114
Conduct of the Inspection 43, 44, 46, 49
Construction ... 3, 7, 9, 10, 11, 12, 15, 17, 19, 20, 22, 23, 33, 37, 40, 43, 46, 51, 63, 69, 73, 82, 83, 89, 94, 96, 97, 101, 114, 119, 120, 121
Documentation 32, 38, 45, 55, 56, 58, 62, 67, 71, 78, 79, 80, 96, 99, 103, 129, 130, 131, 134
Follow-up 23, 31, 32, 34, 38, 39, 53, 70, 71, 72, 97, 106, 116, 117, 124, 132
History 36, 43, 95, 96, 108, 110, 111, 112, 113, 114, 122, 123, 124, 125, 134
Intra-Office Assistance (IOA) 63, 73, 78, 79
Off-site 37
On-site 2, 17, 34, 35, 36, 37, 38, 39, 40, 55, 63, 64, 73, 74, 78, 102, 116, 117
Opening Conference 46, 47, 53, 54, 55, 74
Preparation 7, 28, 42, 44, 97

Priorities 9, 10, 12, 32, 33, 46
Procedures 24, 30, 46, 64, 75, 107
Programmed 31, 32, 33, 39, 40, 41, 46, 50, 53, 54, 70, 74, 75
Scope 23, 32, 41, 42, 46, 48, 49, 54, 71, 80
Selection Criteria 31, 32
Severe Violator Enforcement Program (SVEP) 72
Types 31, 43, 80, 86, 131
Unprogrammed 31, 32, 33, 46, 50, 53, 69
Interviews 26, 48, 54, 56, 58, 59, 60, 61, 67, 78, 79, 80, 85, 100
Jurisdiction 1, 2, 3, 4, 5, 7, 23, 33, 54, 62, 63, 66, 67, 130
Medical Records 26, 81, 100, 124
Michigan Administrative Hearing System (MAHS) 18, 20, 129
Minimum 1, 2, 44, 56, 58, 59, 62, 78, 108, 116, 123, 130
MIOSH Act 3, 4, 7, 26, 27, 54, 64, 100, 102, 128
MIOSHA Emergency Management Plan (MIOSHA EMP) 24, 52, 70
MIOSHA Mission 1
MIOSHA Vision 1
Multi-employer Worksites 48, 68, 101
Notification of Abatement (NOA) 31, 34, 39, 116
Opening Conference 46, 47, 53, 54, 55, 74
Penalties 1, 2, 15, 34, 68, 70, 98, 99, 100, 102, 106, 107, 108, 110, 111, 112, 113, 115, 116, 117, 122, 123, 124, 125, 130, 132, 134
Adjustment Factors 111, 112, 119, 123
Civil 1, 107, 119, 121, 123
Criminal 68, 94, 125
Factors 34, 76, 83, 85, 99, 107, 108, 109, 110, 112, 115, 119, 120
Gravity 39, 71, 98, 108, 109, 110, 111, 112, 113, 114, 119, 122, 123
Minimum 108
Probability Assessment 102, 109, 110, 111, 112
Severity Assessment 108, 110, 111, 112
Tables 32, 103, 110, 111, 113, 115, 120, 121, 122, 123, 125
Penalty Reduction Agreements (PRAs) 97, 127, 128
Petition for Modification of Abatement (PMA) 17, 64, 105, 127, 128, 129
Photographic Evidence 54, 55, 58, 62, 78
Referrals 8, 10, 12, 31, 32, 34, 39, 42, 53, 55, 62, 63, 74, 75
Refusal of Entry 30, 47, 48, 55, 59, 75, 78
Representative
Employee 18, 35, 36, 37, 38, 44, 52, 53, 54, 55, 56, 57, 58, 59, 63, 64, 66, 67, 79, 80, 91, 124, 127, 129, 132, 133, 134
Employer 18, 42, 47, 89, 90, 91, 92, 93
No Authorized Employee Representative 56
Other Authorized Employee Representative 56
Walkaround 53, 55, 56
Rescue Operations 50, 51, 52
Safety and Health Management System (SHMS) 23, 42, 57
Settlement Agreements (SA)
Corporate-Wide Settlement Agreements 135
Settlement Agreements (SAs) 13, 39, 72, 97, 128, 129, 135
Severe Violator Enforcement Program (SVEP) 72
Standards 1, 2, 3, 5, 10, 12, 14, 15, 16, 17, 18, 20, 22, 23, 24, 42, 51, 67, 71, 73, 74, 76, 77, 80, 81, 82, 88, 89, 94, 97, 102, 106, 107, 135
Application 23, 82, 123
Development 14, 17, 22, 100
Emergency 11, 22, 25, 40, 51, 52, 68, 70, 81
Horizontal Standards 23, 82, 83
Promulgation 1, 14, 22
Vertical Standards 23, 82, 83
Subpoenas 27, 28, 29, 30, 45, 47, 48, 49, 59, 60
Completion of Testimony 29

Issued by MIOSHA (Administrative) 29
Issued to MIOSHA 27
Preparation 28
Requirements 27
Technical Services Division (TSD) 9, 13, 14, 69
CET Grant Program 14, 20
Laboratory & Equipment Services Section (LESS) 13, 15, 20
Management Information Systems Section (MISS) 13
Radiation Safety Section (RSS) 14
Responsibilities and Structure 13
Standards and FOIA Section 14, 20, 22
Telephone Numbers 19, 26
Temporary Labor Camps 73, 74, 75, 76
Trade Secrets 26, 28, 50, 56, 58, 62, 124
Variances 17, 31, 32, 34, 39, 53, 72, 83, 104
Violations 1, 8, 12, 16, 17, 23, 33, 34, 36, 37, 38, 43, 46, 49, 56, 57, 58, 59, 61, 62, 63, 64, 66, 67, 68, 71, 72, 75, 76, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 119, 120, 121, 122, 123, 124, 125, 127, 129, 130, 131, 133, 134
Combining 98, 110
Criminal 68, 94, 125
De minimis 97
Egregious 99, 107
Failure to Abate 71, 96, 97, 111, 113, 114, 117, 129, 132, 134
General Duty Clause 67, 86, 87, 88, 89, 99
Gravity 39, 71, 98, 108, 109, 110, 111, 112, 113, 114, 119, 122, 123
Grouping 98, 99, 112
Other-Than-Serious 31, 37, 86, 98, 99, 100, 101, 108, 109, 115, 119, 120, 121, 124
Probability Assessment 102, 109, 110, 111, 112
Regulatory 14, 86, 108, 113, 123, 124, 125
Repeat 94, 96, 114, 119, 120
Section 35 ..... 23, 68, 94, 106, 107, 119, 121, 123, 134, 135
Serious 39, 71, 86, 98, 110, 111, 113
Severity Assessment 108, 110, 111, 112
Types 86
Willful 43, 89, 92, 94, 96, 114, 121, 123
Written Program 57, 99
Warrants 13, 45, 47, 48, 49, 51, 57, 67, 71, 73, 78, 134
Work Practice Controls 83, 105, 106