Chapter 4

VIOLATIONS

I. Basis of Violations.

A. Standards and Regulations.

1. Iowa Code 88.4 of the Act states that each employer has a responsibility to comply with occupational safety and health standards promulgated under this chapter, which includes standards incorporated by reference. For example, the American National Standard Institute (ANSI) standard A92.2 – 1969, "*Vehicle Mounted Elevating and Rotating Work Platforms*," including appendix, is incorporated by reference as specified in §1910.67. Only the mandatory provisions, i.e., those containing the word "shall" or other mandatory language of standards incorporated by reference, are adopted as standards under the Act.

2. The Iowa OSHA State Plan adopts through the Iowa Administrative Code - 875, standards promulgated by Federal OSHA and published in Title 29 Code of Federal Regulations. The specific standards and regulations are found in Title 29 Code of Federal Regulations (CFR) 1900 series. Subparts A and B of 29 CFR 1910 specifically establish the source of all the standards, which serve as the basis of violations. Standards are subdivided as follows per OIS Application. For example, 1910.305(j)(6)(ii)(A)(2) would be entered as follows:

Subdivision Naming Convention	Example
Chapter	10
Part	1910
Section	305
Paragraph	(j)
Subparagraph	(6)
Item	(ii)
Subitem	(A)
Subitem 2	(2)

NOTE: The most specific provision of a standard shall be used for citing violations.

3. **Definition and Application of Vertical and Horizontal Standards.**

Vertical standards are standards that apply to a particular industry or to particular operations, practices, conditions, processes, means, methods, equipment, or installations. Horizontal standards are more general standards applicable to multiple industries. See §1910.5(c).

4. **Application of Horizontal and Vertical Standards.**

If a CSHO is uncertain whether to cite a horizontal or a vertical standard when both may be applicable, the supervisor or the Administrator shall be consulted. The following guidelines shall be considered:

a. When a hazard in a particular industry is covered by both a vertical (e.g., 1928) and a horizontal (e.g., 1910) standard, the vertical standard shall take precedence even if the horizontal standard is more stringent.

b. 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 standards must be performed. For the horizontal standard to apply, the analysis must show that the vertical standard does not address the precise hazard involved, even though it may address related or similar hazards.

> **EXAMPLE 4-1**: When employees are connecting structural steel, §1926.501(b)(15) may not be cited for fall hazards above 6 feet since that specific situation is covered by §1926.760(b)(1) for fall distances of more than 30 feet.

c. If the particular industry does not have a vertical standard that covers the hazard, then the CSHO shall use the horizontal standard.

d. When determining whether a horizontal or a vertical standard is applicable to a work situation, the CSHO shall focus attention on the particular activity an employer is engaged in rather than on the nature of the employer's general business.

e. Hazards found in construction work that are not covered by a specific 1926 standard shall not normally be cited under 1910 unless that standard has been identified as being applicable to construction. See Incorporation of General Industry Safety and Health Standards Applicable to Construction Work, 58 FR 35076 (June 30, 1993).

f. If a question arises as to whether an activity is deemed construction for purposes of the Act, contact the legal section. See §1910.12, Construction Work.

5. **Violation of Variances**.

The employer's requirement to comply with a standard may be modified through granting of a variance as outlined in Iowa Code 88.5.

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

b. If, during an inspection, CSHOs discover that an employer has filed a variance application regarding a condition that is an apparent violation of a standard, the Administrator or designee shall determine whether the variance request has been granted. If the variance has not been granted, a citation for the violative condition may be issued.

B. **Employee Exposure.**

A hazardous condition that violates an OSHA standard or the general duty clause shall be cited only when employee exposure can be documented. The exposure(s) must have occurred within the six months immediately preceding the issuance of the citation to serve as a basis for a violation, except where the employer has concealed the violative condition or misled OSHA, in which case the citation must be issued within six months from the date when OSHA learns, or should have known, of the condition. The legal section should be consulted in such cases.

1. **Determination of Employer/Employee Relationship**.

Whether or not exposed persons are employees of a particular employer depends on several factors, the most important of which is who controls the manner in which employees perform their assigned work. The question of who pays these employees may not

be the key factor. Determining the employer of exposed employees may be a complex issue, in which case the Administrator shall seek the advice of the legal section.

2. **Proximity to the Hazard**.

The actual and/or potential proximity of the employees to a hazard shall be thoroughly documented. (i.e., photos, measurements, employee interviews).

3. **Observed Exposure**.

a. Employee exposure is established if CSHOs witness, observe, or monitor the proximity or access of an employee to the hazard or potentially hazardous condition.

b. The use of personal protective equipment may not, in itself, adequately prevent employee exposures to a hazardous condition. Such exposures may be cited where the applicable standard requires the additional use of engineering and/or administrative (including work practice) controls, or where the personal protective equipment used is inadequate.

4. **Unobserved Exposure**.

Where employee exposure is not observed, witnessed, or monitored by CSHOs, employee exposure may be established through witness statements or other evidence that exposure to a hazardous condition has occurred or may continue to occur.

a. **Past Exposure**.

In fatality/catastrophe (or other "accident/incident") investigations, prior employee exposure(s) may be established if CSHOs establish, through written statements or other evidence, that exposure(s) to a hazardous condition occurred at the time of the accident/incident. Additionally, prior exposures may serve as the basis for a violation when:

- The hazardous condition continues to exist, or it is reasonably predictable that the same or similar condition could recur;

- It is reasonably predictable that employee exposure to a hazardous condition could recur when:

- The employee exposure has occurred in the previous six months;

- The hazardous condition is an integral part of an employer's normal operations; and

- The employer has not established a policy or program to ensure that exposure to the hazardous condition will not recur.

b. **Potential Exposure.**

Potential exposure to a hazardous condition may be established if there is evidence that employees have access to the hazard, and may include one or more of the following:

- When a hazard has existed and could recur because of work patterns, circumstances, or anticipated work requirements;

- 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; or

- 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.

c. **Documenting Employee Exposure**.

CSHOs shall thoroughly document exposure, both observed and unobserved, for each potential violation. This may include any of the following:

- 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;

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

C. **Regulatory Requirements**.

Violations of Iowa Administrative Code 875 Chapters 3 & 4 and Part 1904 shall be documented and cited when an employer does not comply with posting, recordkeeping, and reporting requirements of the regulations contained in these parts as provided by agency policy. See also CPL 02-00-111, *Citation Policy for Paperwork and Written Program Violations*, dated November 27, 1995.

NOTE: If prior to the lapse of the reporting period, the Administrator becomes aware of an incident required to be reported under §1904.39 through means other than an employer report, and an inspection of the incident is conducted, there is no violation for failure to report.

D. **Hazard Communication**.

Section 1910.1200 requires chemical manufacturers and importers to assess the hazards of chemicals they produce or import, and applies to these employers even though they may not have their own employees exposed. Violations of this standard by manufacturers or importers shall be documented and cited, irrespective of any employee exposure at the manufacturing or importing location. See CPL 02-02-079, *Inspection Procedures for the Hazard Communication Standard (HCS 2012)*, dated July 9, 2015.

E. **Employer/Employee Responsibilities**.

1. **Employer Responsibilities**.

Iowa Code 88.4 states: "Each employer shall furnish to each of the employer's employees 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 employer's employees and comply with occupational safety and health standards promulgated under this chapter."

2. **Employee Responsibilities.**

a. Paragraph two of Iowa Code Section 88.4 states: "Each employee shall comply with occupational safety and health standards and all rules, and orders issued pursuant to this chapter which are applicable to the employee's own actions and conduct." The Congressional Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards. However, Iowa Code Subsection 88.7(1)(b) addresses the issuance of citations to an employee who under the employee's own volition has violated the requirements of section 88.4, or of any standard or rule promulgated pursuant to section 88.5.

b. In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter shall be referred to the Administrator who shall consult with the Labor Commissioner.

c. The CSHO is expected to obtain information to ascertain whether the employer is exercising appropriate oversight of the workplace to ensure compliance with the Code. Concerted refusals by employees to comply will not ordinarily bar the issuance of a citation where the employer has failed to exercise its authority to adequately supervise employees, including taking appropriate disciplinary action.

3. **Affirmative Defenses.**

An affirmative defense is a claim which, if established by the employer, will excuse it from a violation which has otherwise been documented by the CSHO. Although affirmative defenses must be proved by the employer at the time of the hearing, CSHOs should preliminarily gather evidence to rebut an employer's potential argument supporting any such defenses. See Chapter 5, Section VI, *Affirmative Defenses,* for additional information.

4. **Multi-Employer Worksites.**

On multi-employer worksites in all industry sectors, more than one employer may be cited for a hazardous condition that violates an OSHA standard. For specific and detailed guidance, see the multi-employer policy contained in CPL 02-00-124, *Multi-Employer Citation Policy*, dated December 10, 1999.

II. Serious Violations.

A. Chapter 88.14.

Iowa Code Chapter 88.14 (11) provides that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one 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."

B. Establishing Serious Violations.

1. CSHOs shall consider four factors in determining whether a violation is to be classified as serious. The first three factors address whether there is a substantial probability that death or serious physical harm could result from an accident/incident or exposure relating to the violative condition. The **probability** that an incident or illness will occur is **not** to be considered in determining whether a violation is serious, but **is** considered in determining the relative gravity of the violation. The fourth factor addresses whether the employer knew or could have known of the violative condition.

2. The classification of a violation need not be completed for each instance. It should be done once for each citation or, if violation items are grouped in a citation, once for the group.

3. If the citation consists of multiple instances or grouped violations, the overall classification shall normally be based on the most serious item.

4. The four-factor analysis outlined below shall be followed in making the determination whether a violation is serious. Potential violations of the general duty clause shall also be evaluated on the basis of these steps to establish whether they may cause death or serious physical harm.

C. Four Steps to be Documented.

1. **Type of Hazardous Exposure(s)**.

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

a. CSHOs need not establish the exact manner in which an exposure to a hazard could occur. However, CSHOs shall note all facts which could affect the probability of an injury or illness **resulting** from a potential accident or hazardous exposure.

b. If more than one type of hazardous exposure exists, CSHOs shall determine which hazard could reasonably be predicted to result in the most severe injury or illness and shall base the classification of the violation on that hazard.

c. The following are examples of some types of hazardous exposures that a standard is designed to prevent:

EXAMPLE 4-2: Employees are observed working at the unguarded edge of an open-sided floor 30 feet above the ground in apparent violation of §1926.501(b)(1). The regulation requires that the edge of the open-sided floor be guarded by standard guardrail systems. The type of hazard the standard is designed to prevent is a fall from the edge of the floor to the ground below.

EXAMPLE 4-3: Employees are observed working in an area in which debris is located in apparent violation of §1910.22(a)(1). The type of hazard the standard is designed to prevent here is employees tripping on debris.

EXAMPLE 4-4: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of §1910.1052. This is 75 ppm above the PEL mandated by the standard.

2. **The Type of Injury or Illness**.

The second step is to identify the most serious injury or illness that could reasonably be expected to result from the potential hazardous exposure identified in Step 1.

a. In making this determination, CSHOs shall consider all factors that would affect the severity of the injury or illness that could

reasonably result from the exposure to the hazard. CSHOs shall not give consideration at this point to factors relating to the **probability** that an injury or illness will occur.

b. The following are examples of types of injuries that could reasonably be predicted to result from exposure to a particular hazard:

EXAMPLE 4-5: If an employee falls from the edge of an open-sided floor 30 feet to the ground below, the employee could die, break bones, suffer a concussion, or experience other serious injuries that would substantially impair a body function.

EXAMPLE 4-6: If an employee trips on debris, the trip may cause abrasions or bruises, but it is only marginally predictable that the employee could suffer a substantial impairment of a bodily function. If, however, the area is littered with broken glass or other sharp objects, it is reasonably predictable that an employee who tripped on debris could suffer deep cuts which could require suturing.

c. For conditions involving exposure to air contaminants or harmful physical agents, the CSHO shall consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure. The Chemical Sampling Information website shall be used to determine both toxicological properties of substances listed and a Health Code Number. (See CPL 02-02-043, *The Chemical Information Manual*, dated July 1, 1991)

d. In order to support a classification of serious, a determination must be made that exposure(s) at the sampled level could lead to illness. Thus, CSHOs must document all evidence demonstrating that the sampled exposure(s) is representative of employee exposure(s) under normal working conditions, including identifying and recording the frequency and duration of employee exposure(s). Evidence to be considered includes:

- The nature of the operation from which the exposure results;
- Whether the exposure is regular and on-going or is of limited frequency and duration;

- How long employees have worked at the operation in the past;

- Whether employees are performing functions which can be expected to continue; and

- Whether work practices, engineering controls, production levels, and other operating parameters are typical of normal operations.

e. Where such evidence is difficult to obtain or inconclusive, CSHOs shall estimate frequency and duration of exposures from any evidence available. In general, if it is reasonable to infer that regular, ongoing exposures could occur, CSHOs shall consider such potential exposures in determining the types of illness that could result from the violative condition. The following are some examples of illnesses that could reasonably result from exposure to a health hazard:

EXAMPLE 4-7: If an employee is exposed regularly to methylene chloride above 25 ppm, it is reasonable to predict that cancer could result.

EXAMPLE 4-8: If an employee is exposed regularly to acetic acid above 10 ppm, it is reasonable that the resulting illnesses would be irritation to eyes, nose and throat, or occupational asthma with chronic rhinitis and sinusitis.

3. **Potential for Death or Serious Physical Harm.**

The third step is to determine whether the type of injury or illness identified in Step 2 could include death or a form of serious physical harm. In making this determination, the CSHO shall utilize the following definition of "serious physical harm":

Impairment of the body in which part of the body is made functionally useless or is substantially reduced in efficiency on or off the job. Such impairment may be permanent or temporary, chronic or acute. Injuries involving such impairment would usually require treatment by a medical doctor or other licensed health care professional.

a. Injuries that constitute serious physical harm include, but are not limited, to:

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

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

- Cancer;
- Respiratory illnesses (silicosis, asbestosis, byssinosis, etc.);
- Hearing impairment;
- Central nervous system impairment;
- Visual impairment; and
- Poisoning.

c. The following are examples of injuries or illnesses that could reasonably result from an accident/incident or exposure and lead to death or serious physical harm:

EXAMPLE 4-9: If an employee falls 15 feet to the ground, suffers broken bones or a concussion, and experiences substantial impairment of a part of the body requiring treatment by a medical doctor, the injury would constitute serious physical harm.

EXAMPLE 4-10: If an employee trips on debris and because of the presence of sharp debris or equipment suffers a deep cut to the hand requiring suturing, the use of the hand could be substantially reduced. This injury would be classified as serious.

EXAMPLE 4-11: An employee develops chronic beryllium disease after long-term exposure to beryllium at a concentration in air of 0.004 mg/m^3, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

NOTE: The key determination is the likelihood that death or serious harm will result ***IF*** an accident or exposure occurs. ***The likelihood of an accident occurring is addressed in penalty assessments and not by the classification.***

4. **Knowledge of Hazardous Condition.**

The fourth step is to determine whether the employer knew or, with the exercise of reasonable diligence, could have known, of the presence of the **hazardous condition**.

a. The knowledge requirement is met if it is established that the employer actually knew of the hazardous condition constituting the apparent violation. Examples include the employer saw the condition, an employee or employee representative reported it to the employer, or an employee was previously injured by the condition and the employer knew of the injury. CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice.

b. If it cannot be determined that the employer has actual knowledge of a hazardous condition, the knowledge requirement may be established if there is evidence that the employer could have known of it through the exercise of reasonable diligence. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition. Examples of such evidence include:

- The violation/hazard was in plain view and obvious;
- The duration of the hazardous condition was not brief;

- The employer failed to regularly inspect the workplace for readily identifiable hazards; and

- The employer failed to train and supervise employees regarding the particular hazard.

c. The actual or constructive knowledge of a supervisor who is aware of a violative condition or practice can usually be imputed to the employer for purposes of establishing knowledge. In cases where the employer contends that the supervisor's own conduct constituted an isolated event of employee misconduct, the CSHO shall attempt to determine whether the supervisor violated an established work rule, and the extent to which the supervisor was trained in the rule and supervised regarding compliance to prevent such conduct.

III. General Duty Requirements.

Iowa Code Section 88.4 requires that "Each employer shall furnish to each of the employer's employees 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 employer's employees….."

A. Evaluation of General Duty Requirements.

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

- The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;

- The hazard was recognized;

- The hazard was causing or was likely to cause death or serious physical harm; and

- There was a feasible and useful method to correct the hazard.

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

B. Elements of a General Duty Requirement Violation.

1. Definition of a Hazard.

a. The hazard in a Section 88.4 citation is a *workplace condition* or practice to which employees are exposed, creating the *potential for death or serious physical harm* to employees.

b. These conditions or practices must be **clearly stated in a citation** so as to apprise employers of their obligations and must be ones the employer can reasonably be expected to prevent. The hazard must therefore be defined in terms of the **presence of hazardous conditions or practices that present a particular danger to employees**.

2. **Do Not Cite the Lack of a Particular Abatement Method.**

a. General duty clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures but rather addresses the failure to prevent or remove a particular hazard. Section 88.4 therefore does not mandate a particular abatement measure but only requires an employer to render the workplace free of recognized hazards by any feasible and effective means the employer wishes to utilize.

b. In situations where a question arises regarding distinguishing between a dangerous workplace condition or practice and the lack of an abatement method, the Administrator shall consult with the Labor Commissioner or designee, or the legal section for assistance in correctly identifying the hazard.

EXAMPLE 4-12: Employees are conducting sanding operations that create sparks in the proximity of magnesium dust (workplace condition or practice) exposing them to the serious injury of burns from a fire (potential for physical harm). One proposed method of abatement may be engineering controls such as adequate ventilation. The "hazard" is sanding that creates sparks in the presence of magnesium that may result in a fire capable of seriously injuring employees, not the lack of adequate ventilation.

EXAMPLE 4-13: Employees are operating tools that generate sparks in the presence of an ignitable gas (workplace condition) exposing them to the danger of an explosion (physical harm). The hazard is use of tools that create sparks in a volatile atmosphere that may cause an explosion capable of seriously injuring employees, not the lack of approved equipment.

EXAMPLE 4-14: In a workplace situation involving high-pressure machinery that vents gases next to a work area where the employer has not installed proper high-pressure equipment, has improperly installed the equipment that is in place, and does not have adequate work rules addressing the dangers of high pressure gas, there are three abatement measures the employer has failed to take. However, there is only one hazard (i.e., employee exposure to the venting of high-pressure gases into a work area that may cause serious burns from steam discharges).

3. **The Hazard is Not a Particular Accident/Incident**.

a. The occurrence of an accident/incident does not necessarily mean that the employer has violated Section 88.4 although the accident/incident may be evidence of a hazard. In some cases a Section 88.4 violation may be unrelated to the cause of the accident/incident. Although accident/incident facts may be relevant and shall be documented, the citation shall address the **hazard in the workplace that existed prior to the accident/incident**, not the particular facts that led to the occurrence of the accident/incident.

EXAMPLE 4-15: A fire occurred in a workplace where flammable materials were present. No one was injured by the fire but an employee, disregarding the clear instructions of his supervisor to use an available exit, jumped out of a window and broke a leg. The danger of fire due to the presence of flammable materials may be a recognized hazard causing or likely to cause death or serious physical harm, but the action of the employee may be an instance of unpreventable employee misconduct. The citation must address the underlying workplace fire hazard, not the accident/incident involving the employee.

4. **The Hazard Must be Reasonably Foreseeable**.

The hazard for which a citation is issued must be reasonably foreseeable. All of the factors that could cause a hazard need not be present in the same place or at the same time in order to prove foresee ability of the hazard; e.g., an explosion need not be imminent.

EXAMPLE 4-16: If combustible gas and oxygen are present in sufficient quantities in a confined area to cause an explosion if ignited, but no ignition source is present or could be present,

no Section 88.4 violation would exist. However, if the employer has not taken sufficient safety precautions to preclude the presence or use of ignition sources in the confined area, then a foreseeable hazard may exist.

NOTE: It is necessary to establish the reasonable foreseeability of the workplace hazard, rather than the particular circumstances that led to an accident/incident.

EXAMPLE 4-17: A titanium dust fire spreads from one room to another because an open can of gasoline was in the second room. An employee who usually worked in both rooms is burned in the second room as a result of the gasoline igniting. The presence of gasoline in the second room may be a rare occurrence. However, it is not necessary to demonstrate that a fire in both rooms could reasonably occur, but only that a fire hazard, in this case due to the presence of titanium dust, was reasonably foreseeable.

5. **The Hazard Must Affect the Cited Employer's Employees**.

a. The employees exposed to the Section 88.4 hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a Section 88.4 violation if his own employees are not exposed to the hazard.

b. In complex situations, such as multi-employer worksites, where it may be difficult to identify the precise employment relationship between the employer to be cited and the exposed employees, the Administrator shall consult with the Labor Commissioner or designee and the legal section to determine the sufficiency of the evidence regarding the employment relationship.

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

6. **The Hazard Must Be Recognized**.

Recognition of a hazard can be established on the basis of employer recognition, industry recognition, or "common-sense" recognition. The use of common sense as the basis for establishing recognition shall be limited to special circumstances. Recognition of the hazard must be supported by the following evidence and adequate documentation in the file:

a. **Employer Recognition.**

- A recognized hazard can be established by evidence of actual employer knowledge of a hazardous condition or practice. Evidence of employer recognition may consist of written or oral statements made by the employer or other management or supervisory personnel during or before the IOSHA inspection.

- Employer awareness of a hazard may also be demonstrated by a review of company memorandums, safety work rules that specifically identify a hazard, operations manuals, standard operating procedures, and collective bargaining agreements. In addition, prior accidents/incidents, near misses known to the employer, injury and illness reports, or workers' compensation data, may also show employer knowledge of a hazard.

- Employer awareness of a hazard may also be demonstrated by prior Federal OSHA or OSHA State Plan State inspection history which involved the same hazard.

- Employee complaints or grievances and safety committee reports to supervisory personnel may establish recognition of the hazard, but the evidence should show that the complaints were not merely infrequent, off-hand comments.

- An employer's own corrective actions may serve as the basis for establishing employer recognition of the hazard if the employer did not adequately continue or maintain the corrective action or if the corrective action did not afford effective protection to the employees.

  NOTE: CSHOs are to gather as many of these facts as possible to support establishing a Section 88.4 violation.

b. **Industry Recognition**.

- A hazard is recognized if the employer's relevant industry is aware of its existence. Recognition by an industry other than the industry to which the employer belongs is generally insufficient to prove this element of a Section 88.4 violation. Although evidence of recognition by an employer's similar operations within an industry is preferred, evidence that the employer's overall industry recognizes the hazard may be sufficient. The Administrator shall consult with the Labor Commissioner or designee on this issue. Industry recognition of a hazard can be established in several ways:

    - Statements by safety or health experts who are familiar with the relevant conditions in industry (regardless of whether they work in the industry);

    - Evidence of implementation of abatement methods to deal with the particular hazard by other members of the industry;

    - Manufacturers' warnings on equipment or in literature that are relevant to the hazard;

    - Statistical or empirical studies conducted by the employer's industry that demonstrate awareness of the hazard. Evidence such as studies conducted by the employee representatives, the union or other employees must also be considered if the employer or the industry has been made aware of them;

    - Government and insurance industry studies, if the employer or the employer's industry is familiar with the studies and recognizes their validity;

    - State and local laws or regulations that apply in the jurisdiction where the violation is alleged to have occurred and which currently are enforced against the industry in question. In such cases, however, corroborating evidence of recognition is recommended; and/or

- If the relevant industry participated in the committees drafting national consensus standards such as the American National Standards Institute (ANSI), the National Fire Protection Association (NFPA), and other private standard-setting organizations, this can constitute industry recognition. Otherwise, such private standards normally shall be used only as corroborating evidence of recognition. Preambles to these standards that discuss the hazards involved may show hazard recognition as much as, or more than, the actual standards. However, these private standards **cannot** be enforced as OSHA standards, but they may be used to provide evidence of industry recognition, seriousness of the hazard or feasibility of abatement methods.

- In cases where State and local government agencies have codes or regulations covering hazards not addressed by OSHA standards, the Administrator, upon consultation with the Labor Commissioner or designee, shall determine whether the hazard is to be cited under Section 88.4 or referred to the appropriate local agency for enforcement.

  EXAMPLE 4-18: A safety hazard on a personnel elevator in a factory is documented during an inspection. It is determined that the hazard may not be cited under Section 88.4, but there is a state code that addresses this hazard and an agency that actively enforces the code. The situation normally shall be referred to the enforcement agency in lieu of citing Section 88.4.

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

  - NIOSH criteria documents.

  - EPA publications.

  - National Cancer Institute and other agency publications.

- OSHA Hazard Alerts.
- OSHA Technical Manual.

c. **Common Sense Recognition.**

If industry or employer recognition of the hazard cannot be established in accordance with (a) and (b), hazard recognition can still be established if a hazardous condition is so obvious that any reasonable person would have recognized it. This form of recognition should only be used in flagrant or obvious cases.

EXAMPLE 4-19: In a general industry situation, courts have held that any reasonable person would recognize that it is hazardous to use an unenclosed chute to dump bricks into an alleyway 26 feet below where unwarned employees worked. In construction, Section 88.4 could not be cited in this situation because §1926.252 or §1926.852 applies.

7. **The Hazard Was Causing or Likely to Cause Death or Serious Physical Harm**.

a. This element of a Section 88.4 violation is virtually identical to the substantial probability element of a serious violation under Subsection 88.14 (11) of the Code. Serious physical harm is defined in Paragraph II.C.3. of this chapter.

b. This element of a Section 88.4 violation can be established by showing that:

- An actual death or serious injury resulted from the recognized hazard, whether immediately prior to the inspection or at other times and places; or
- If an accident/incident occurred, the likely result would be death or serious physical harm.

EXAMPLE 4-20: An employee is standing at the edge of an unguarded floor 25 feet above the ground. If a fall occurred, death or serious physical harm (e.g., broken bones) is likely to result.

c. In the health context, establishing serious physical harm at the cited levels may be challenging if the potential for illness/harm

requires the passage of a substantial period of time. In such cases, expert testimony is crucial to establish there is probability that long-term serious physical harm will occur from such illnesses or harm. It will generally be less difficult to establish this element for acute illnesses, since the immediacy of the effects will make the causal relationship clearer. In general, the following must be shown to establish that the hazard causes, or is likely to cause, death or serious physical harm when such illness or death will occur only after the passage of time:

- Regular and continuing employee exposure at the workplace to the toxic substance at the measured levels could reasonably occur;

- An illness reasonably could result from such regular and continuing employee exposures; and

- If illness does occur, its likely result is death or serious physical harm.

8. **The Hazard May be Corrected by a Feasible and Useful Method**.

a. To establish a Section 88.4 violation, the agency must also identify the existence of a measure(s) that is feasible, available, and likely to correct the hazard. Evidence regarding feasible abatement measures shall indicate that the recognized hazard, rather than a particular accident/incident, is preventable.

b. If the proposed abatement method would eliminate or significantly reduce the hazard beyond whatever measures the employer may be taking, a Section 88.4 citation may be issued. A citation will not be issued merely because the agency is aware of an abatement method different from that of the employer, if the proposed method would not reduce the hazard significantly more than the employer's method. In some cases, only a series of abatement methods will materially reduce a hazard and then all potential abatement methods shall be listed. For example, an abatement note shall be included on the IOSHA violation worksheet and -2 such as "Among other methods, one feasible and acceptable means of abatement would be to ____." (Fill in the blank with the specified abatement recommendation.)

c. Examples of such feasible and acceptable means of abatement include, but are not limited, to:

- The employer's own abatement method, which existed prior to the inspection, but was not implemented;

- The implementation of feasible abatement measures by the employer after the accident/incident or inspection;

- The implementation of abatement measures by other employers/companies; and

- Recommendations made by the manufacturer addressing safety measures for the hazardous equipment involved, as well as suggested abatement methods contained in trade journals, national consensus standards and individual employer work rules. National consensus standards shall not solely be relied on to mandate specific abatement methods.

  EXAMPLE 4-21: An ANSI standard addresses the hazard of exposure to hydrogen sulfide gas and refers to various abatement methods, such as the prevention of the buildup of materials that create the gas and the provision of ventilation. The ANSI standard may be used as general evidence of the existence of feasible abatement measures.

  In this example, the citation shall state that the recognized hazard of exposure to hydrogen sulfide gas was present in the workplace and that a feasible and useful abatement method existed; e.g., preventing the buildup of gas by providing an adequate ventilation system. It would not be correct to base the citation on the employer's failure to prevent the buildup of materials that could create the gas and to provide a ventilation system as both of these are abatement methods, not recognized hazards.

d. Evidence provided by expert witnesses may be used to demonstrate feasibility of abatement methods. In addition, although it is not necessary to establish that an industry recognizes a particular abatement measure, such evidence may be used if available.

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

1. The general duty clause shall be used only where there is no standard that applies to the particular hazard and in situations where a recognized hazard is created in whole or in part by conditions not covered by a standard. See IAC 875-10.2.

   EXAMPLE 4-22: A hazard covered only partially by a standard would be construction employees exposed to a collapse hazard because of a failure to properly install reinforcing steel. Construction standards contain requirements for reinforcing steel in walls, piers, columns, and similar vertical structures, but do not contain requirements for steel placement in horizontal planes, e.g., a concrete floor. A failure to properly install reinforcing steel in a floor in accordance with industry standards and/or structural drawings could be cited under the general duty clause.

   EXAMPLE 4-23: The powered industrial truck standard at §1910.178 does not address all potential hazards associated with forklift use. For instance, while that standard deals with the hazards associated with a forklift operator leaving his vehicle unattended or dismounting the vehicle and working in its vicinity, it does not contain requirements for the use of operator restraint systems. An employer's failure to address the hazard of a tipover (forklifts are particularly susceptible to tipovers) by requiring operators of powered industrial trucks equipped with restraint devices or seat belts to use those devices could be cited under the general duty clause. See CPL 02-01-028, *Compliance Assistance for the Powered Industrial Truck Operator Training Standards*, dated November 30, 2000, for additional guidance.

2. The general duty clause may also be applicable to some types of employment that are inherently dangerous (fire brigades, emergency rescue operations, confined space entry, etc.).

   a. Employers involved in such occupations must take the necessary steps to eliminate or minimize employee exposure to all recognized hazards that are likely to cause death or serious physical harm. These steps include an assessment of hazards that may be encountered, providing appropriate protective equipment, and any training, instruction, or necessary equipment.

b. An employer who has failed to take such steps and allows its employees to be exposed to a hazard may be cited under the general duty clause.

D. **Limitations of Use of the General Duty Clause**.

Section 88.4 is to be used only within the guidelines given in this chapter.

1. **Section 88.4 Shall Not be Used When a Standard Applies to a Hazard**.

As discussed above, Section 88.4 may not be cited if an OSHA standard applies to the hazardous working condition. If there is a question as to whether a standard applies, the Administrator shall consult with the Labor Commissioner or designee. The legal section will assist the Labor Commissioner or designee in determining the applicability of a standard prior to the issuance of a citation.

EXAMPLE 4-24: Chapter 88.4 shall not be cited for electrical hazards as §1910.303(b) and §1926.403(b) require that electrical equipment is to be kept free from recognized hazards that are likely to cause death or serious physical harm to employees.

2. **Section 88.4 Shall Normally Not be Used to Impose a Stricter Requirement than that Imposed by the Standard**.

When an existing standard is inadequate to protect worker safety and health, a section 88.4 citation may be considered. All of the section 88.4 elements discussed above must be satisfied, AND there must be actual employer knowledge that the standard was inadequate to protect employees from death or serious physical harm. *See Int. Union UAW v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570 (D.C. Cir. 1987). Such cases shall be subject to pre-citation review by the Labor Commissioner or designee, IOSH Administrator and legal section.

EXAMPLE 4-25: An IOSHA standard provides for a permissible exposure limit (PEL) of 5 ppm, and a recognized Occupational Exposure Limit (OEL)-such as an ACGIH Threshold Limit Value (TLV) or NIOSH Recommended Exposure Limit (REL)- is 3 ppm. An 88.4 citation may only be considered for exposures between the OEL and the PEL if the data establishes that exposures at the measured level are likely to cause death or serious physical harm and the employer has

actual knowledge that the PEL is inadequate to protect its employees.

3. **Section 88.4 Shall Normally Not be Used to Require Additional Abatement Methods not Set Forth in an Existing Standard**.

If a toxic substance standard covers engineering control requirements but not requirements for medical surveillance, Section 88.4 shall not be cited to additionally require medical surveillance. The Administrator shall evaluate the circumstances of special situations in accord with guidelines stated herein and consult with the Labor Commissioner or designee to determine whether a 88.4 citation can be issued in those special cases.

4. **Alternative Standards**.

The following standards shall be considered carefully before issuing a Section 88.4 citation for a health hazard.

a. There are a number of general standards that shall be considered rather than Section 88.4 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. In general industry, §1910.132(a) may be appropriate where exposure to a hazard may be prevented by the wearing of PPE.

b. For a health hazard, the particular toxic substance standard, such as asbestos and coke oven emissions, shall be cited where appropriate. If those particular standards do not apply, however, other standards may be applicable; e.g., the air contaminant levels contained in §1910.1000 in general industry and in §1926.55 for construction.

c. Another general standard is §1910.134(a), which addresses the hazards of breathing harmful air contaminants not covered under §1910.1000 or another specific standard, and which may be cited for failure to use feasible engineering controls or respirators.

d. Violations of §1910.141(g)(2) may be cited when employees are allowed to consume food or beverages in an area exposed to a toxic material, and §1910.132(a) where there is a potential for toxic materials to be absorbed through the skin.

E. **Classification of Violations Cited Under the General Duty Clause**.

Only hazards presenting serious physical harm or death may be cited under the general duty clause (including willful and/or repeated violations that would otherwise qualify as serious violations). Other-than-serious citations shall not be issued for general duty clause violations.

F. **Procedures for Implementation of Section 88.4 Enforcement**.

To ensure that citations of the general duty clause are defensible, the following procedures shall be followed:

1. **Gathering Evidence and Preparing the File.**

a. The evidence necessary to establish each element of a Section 88.4 violation shall be documented in the file. This includes all photographs, videotapes, sampling data, witness statements, and other documentary and physical evidence necessary to establish the violation. Additional documentation includes evidence of specific and/or general awareness of a hazard, why it was detectable and recognized, and any supporting statements or reference materials.

b. If copies of documents relied on to establish the various Section 88.4 elements cannot be obtained before issuing the citation, these documents shall be accurately cited and identified in the file so they can be obtained later if necessary.

c. If experts are necessary to establish any element(s) of a Section 88.4 violation, experts and the legal section shall be consulted **prior to the citation being issued** and their opinions noted in the file.

2. **Pre-Citation Review.**

The Administrator or designee shall review and approve all proposed Section 88.4 citations. These citations shall undergo additional pre-citation review as follows:

a. The Labor Commissioner or designee and legal section shall be consulted prior to the issuance of all Section 88.4 citations where complex issues or exceptions to the outlined procedures are involved; and

b. If a standard does not apply and all criteria for issuing a Section 88.4 citation are not met, yet the Administrator

determines that the hazard warrants some type of notification, a Hazard Alert Letter shall be sent to the employer and employee representative describing the hazard and suggesting corrective action.

IV. Other-than-Serious Violations.

This type of violation shall be cited in situations where the accident/incident or illness that would be most likely result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees.

V. Willful Violations.

A willful violation exists under the Code where an employer has demonstrated either an intentional disregard for the requirements of the Code or a plain indifference to employee safety and health. The Administrator is encouraged to consult with legal section when developing willful citations. The following guidance and procedures apply whenever there is evidence that a willful violation may exist:

A. Intentional Disregard Violations.

An employer commits an intentional and knowing violation if:

1. An employer was aware of the requirements of the Code or of an applicable standard or regulation and was also aware of a condition or practice in violation of those requirements, but did not abate the hazard; or

2. An employer was not aware of the requirements of the Code or standards, but had knowledge 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.

   NOTE**:** Good faith efforts made by the employer to minimize or abate a hazard may sometimes preclude the issuance of a willful violation. In such cases, CSHOs should consult the Administrator or designee if a willful classification is under consideration.

3. A willful citation also may be issued where an employer knows that specific steps must be taken to address a hazard, but substitutes its judgment for the requirements of the standard. See the internal memorandum on *Procedures for Significant Enforcement Cases*, and CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation*, dated October 21, 1990.

EXAMPLE 4-26: The employer was issued repeated citations addressing the same or similar conditions, but did not take corrective action.

B. **Plain Indifference Violations**.

1. An employer commits a violation with plain indifference to employee safety and health where:

   a. Management officials were aware of an OSHA requirement applicable to the employer's business but made little or no effort to communicate the requirement to lower level supervisors and employees.

   b. Company officials were aware of a plainly obvious hazardous condition but made little or no effort to prevent violations from occurring.

      EXAMPLE 4-27: The employer is aware of the existence of unguarded power presses that have caused near misses, lacerations and amputations in the past and does nothing to abate the hazard.

   c. An employer was not aware of any legal requirement, but knows that a condition or practice in the workplace is a serious hazard to the safety or health of employees and makes 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, or 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. See OSHA's Policy on Voluntary Employer Safety and Health Self-Audits. *Federal Register*, July 28, 2000 (65 FR 46498).

   d. Willfulness may also be established despite lack of knowledge of a legal requirement if circumstances show that the employer would have placed no importance on such knowledge.

EXAMPLE 4-28: An employer sends employees into a deep unprotected excavation containing a hazardous atmosphere without ever inspecting for potential hazards.

2. It is not necessary that the violation be committed with a bad purpose or malicious intent to be deemed "willful." It is sufficient that the violation was deliberate, voluntary or intentional as distinguished from inadvertent, accidental or ordinarily negligent.

3. CSHOs shall develop and record on the IOSHA violation worksheet all evidence that indicates employer knowledge of the requirements of a standard, and any reasons for why it disregarded statutory or other legal obligations to protect employees against a hazardous condition. Willfulness may exist if an employer is informed by employees or employee representatives regarding an alleged hazardous condition and does not make a reasonable effort to verify or correct the hazard. Additional factors to consider in determining whether to characterize a violation as willful include:

   a. The nature of the employer's business and the knowledge regarding safety and health matters that could reasonably be expected in the industry;

   b. Any precautions taken by the employer to limit the hazardous conditions or practices;

   c. The employer's awareness of the Code and of its responsibility to provide safe and healthful working conditions; and

   d. Whether similar violations and/or hazardous conditions have been brought to the attention of the employer through prior citations, accidents, warnings from OSHA or officials from other government agencies or an employee safety committee regarding the requirements of a standard.

      NOTE: This includes prior citations or warnings from officials of other OSHA jurisdictions.

4. Also, include facts showing that even if the employer was not consciously violating the Code, it was aware that the violative condition existed and made no reasonable effort to eliminate it.

VI. Criminal/Willful Violations.

Iowa Code Subsection 88.14(5) provides that: "Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 88.5, or of

any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be guilty of a serious misdemeanor; except that if the conviction is for a violation committed after a first conviction of such person, the person shall be guilty of an aggravated misdemeanor.

A. **Administrator Coordination.**

The Administrator, in coordination with the legal section, shall carefully evaluate all willful cases involving employee deaths to determine whether they may involve criminal violations of 88.14(5) of the Code. Because the quality of the evidence available is of paramount importance in these investigations, there shall be early and close discussions between the CSHO, the Administrator, the Labor Commissioner, and the legal section in developing all evidence when there is a potential Subsection 88.14(5) violation.

B. **Criteria for Investigating Possible Criminal/Willful Violations**

The following criteria shall be considered in investigating possible criminal/willful violations:

1. In order to establish a criminal/willful violation OSHA must prove that:

   a. The employer violated an OSHA standard. A criminal/willful violation cannot be based on the general duty clause, Section 88.4.

   b. The violation was willful in nature.

   c. The violation of the standard caused the death of an employee. In order to prove that the violation caused the death of an employee, there must be evidence which clearly demonstrates that the violation of the standard was the direct cause of, or a contributing factor to, an employee's death.

2. If asked during an investigation, CSHOs should inform employers that any violation found to be willful that has caused or contributed to the death of an employee is evaluated for potential criminal referral.

3. Following the investigation, if the Administrator decides to recommend criminal prosecution, a memorandum shall be forwarded promptly to the Labor Commissioner. It shall include an evaluation of the possible criminal charges, taking into consideration the burden of proof requiring that the Government's

case be proven beyond a reasonable doubt. In addition, if correction of the hazardous condition is at issue, this shall be noted in the transmittal memorandum, because in most cases prosecution of a criminal/willful case stays the resolution of the civil case and its abatement requirements.

4. The Administrator shall normally issue a civil citation in accordance with current procedures even if the citation involves charges under consideration for criminal prosecution. The Labor Commissioner shall be notified of such cases. In addition, the case shall be promptly forwarded to the legal section for possible referral to the appropriate County Attorney.

C. **Willful Violations Related to a Fatality**

Where a willful violation is related to a fatality and a decision is made to recommend a criminal referral, the Administrator shall ensure the case file contains documentation justifying that conclusion. The file documentation should indicate which elements of a potential criminal violation make the case suitable for referral.

VII. Repeated Violations.

A. **State Plan Violations.**

1. An employer may be cited for a repeated violation if that employer has been cited previously for the same or substantially similar condition or hazard and the citation has become a final order of the Employment Appeal Board. A citation may become a final order by operation of law when an employer does not contest the citation, or pursuant to court decision or settlement. The underlying citation which the repeated violation will be based on must have become a final order before the occurrence or observation of the second substantially similar violation

2. Prior citations by other State Plan States or Federal OSHA cannot be used as a basis for Iowa OSHA repeated violations. Only violations that have become final orders of the Employment Appeal Board may be considered.

B. **Identical Standards**.

Generally, similar workplace conditions or hazards can be demonstrated by showing that in both situations the identical standard was violated, but there are exceptions.

EXAMPLE 4-29: A citation was previously issued for a violation of §1910.132(a) for not requiring the use of safety-toe footwear for employees. A recent inspection of the same establishment revealed a violation of §1910.132(a) for not requiring the use of head protection (hardhats). Although the same standard was involved, the hazardous conditions in each case are not substantially similar and therefore a repeated violation would not be appropriate.

C. **Different Standards**.

In some circumstances, similar conditions or hazards can be demonstrated even when different standards are violated.

EXAMPLE 4-30: A citation was previously issued for a violation of §1910.28(b)(6)(ii) for not providing fall protection for each employee four feet or more above dangerous equipment. A recent inspection of the same employer reveals a violation of §1910.28(b)(7) for not providing fall protection for each employee exposed to an opening four feet or more above a lower level. Although different standards are involved, the conditions and hazards (falls) present during both inspections were substantially similar, and therefore a repeated violation would be appropriate.

NOTE**:** There is no requirement that the previous and current violations occur at the same workplace or under the same supervisor.

D. Obtaining Inspection History.

For purposes of determining whether a violation is repeated, the following criteria shall apply:

1. **High Gravity Serious Violations.**

   a. When high gravity serious violations are to be cited, the Administrator shall obtain a history of citations previously issued to this employer at all of its identified establishments statewide, within the same three digit North American Industry Classification System (NAICS) code.

   b. If these violations have been previously cited within the time limitations (described in Paragraph VII.E. of this chapter) and have become final orders of the Employment Appeal Board, a repeated citation may be issued.

   c. Under special circumstances, the Administrator, in consultation with the legal section, may also issue citations for repeated violations without regard for the NAICS code.

2. **Violations of Lesser Gravity.**

When violations are of lesser gravity than high gravity serious, the Administrator should obtain statewide inspection history whenever the circumstances of the current inspection would result in multiple serious, repeat, or willful citations.

E. Time Limitations.

1. Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.

A citation will be issued as a repeated violation if:

a. The citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later; or

b. The citation is issued within 3 years of final agency action if the previous citation had been contested.

2. When a violation is found during an inspection and a repeated citation has previously been issued for a substantially similar condition, the violation may be classified as a second instance repeated violation with a corresponding increase in penalty.

EXAMPLE 4-31: An inspection is conducted in an establishment and a violation of §1910.217(c)(1)(i) is found. That citation is not contested by the employer and becomes a final order of the Board on October 17, 2006. On December 8, 2007, a citation for a repeated violation of the same standard was issued and becomes a final order of the Board on March 15, 2008. A violation of the same standard is found during an inspection of the establishment on September 30, 2008. The violation found during this current inspection may be treated as a second instance repeated.

3. In cases of multiple prior repeated citations, each of the occurrences resulting in a repeated violation must be within a 3 year period of the final order of the original violation on which the first repeated violation was issued. The Labor Commissioner or designee shall be consulted for guidance.

F. Repeated v. Failure to Abate.

A failure to abate exists when a previously cited hazardous condition, practice or non-complying equipment has not been brought into compliance since the prior inspection (i.e., the violation is continuously present) and is discovered at a later inspection. If, however, the violation was corrected, but later reoccurs, the subsequent occurrence is a repeated violation.

G. Administrator Responsibilities.

After the CSHO makes a recommendation that a violation should be cited as repeated, the Administrator shall:

1. Ensure that the violation meets the criteria outlined in the preceding subparagraphs of this section;

2. Ensure that the case file includes a copy of the citation for the prior violation, the IOSHA violation worksheet describing the prior violation that serves as the basis for the repeated citation, and any other supporting evidence that describes the violation. If the prior violation citation is not available, the basis for the repeated citation shall, nevertheless, be adequately documented in the case file. The file shall also include all documents showing that the citation is a final order and on what date it became final (i.e., if the case was not contested, the **certified mail card** (final 15 working days from employer's receipt of the citation), **signed Informal Settlement** (on the date of the last signature of both parties as long as the contest period has not expired); or **Formal Settlement Agreements and Notice of Docketing** (final 30 days after docketing date), or **Judge's Decision and Notice of Docketing** (final 30 days after docketing));

3. OIS information shall not be used as the sole means to establish that a prior violation has been issued;

4. In circumstances when it is not clear that the violation meets the criteria outlined in this section, consult with the Labor Commissioner or designee before issuing a repeated citation.

5. If a repeated citation is issued, ensure that the cited employer is fully informed of the previous violations serving as a basis for the repeated citation by notation in the Alleged Violation Description (AVD) portion of the citation, using the following or similar language:

> The (employer name) was previously cited for a violation of this occupational safety and health standard or its equivalent standard (name

previously cited standard), which was contained in OSHA inspection number_____, citation number_____, item number_____ and was affirmed as a final order on (date), with respect to a workplace located at_____.

VIII. De Minimis Conditions.

De minimis conditions are those where an employer has implemented a measure different than one specified in a standard that has no direct or immediate relationship to safety or health. Whenever de minimis conditions are found during an inspection, they shall be documented in the same manner as violations.

A. **Criteria**.

The criteria for finding a de minimis condition are as follows:

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

   EXAMPLE 4-32: §1910.217(e)(1)(ii) requires that mechanical power presses be inspected and tested at least weekly. If the machinery is seldom used, inspection and testing prior to each use is adequate to meet the intent of the standard.

2. An employer complies with a proposed OSHA standard or amendment or a consensus standard rather than with the standard in effect at the time of the inspection and the employer's action clearly provides equal or greater employee protection.

3. An employer complies with a written interpretation issued by Iowa OSHA, the OSHA National Office or an OSHA Regional Office.

4. An employer's workplace protections are “state of the art” and technically more enhanced than the requirements of the applicable standard and provides equivalent or more effective employee safety or health protection.

B. **Professional Judgment**.

Professional judgment should be exercised in determining whether noncompliance with a standard constitutes a de minimis condition.

C. **Administrator Responsibilities**.

The Administrator shall ensure that all proposed de minimis notices meet the criteria set out above.

IX. Citing in the Alternative.

In some cases, the same factual situation may present a possible violation of more than one standard.

> **EXAMPLE 4-33:** The facts which support a violation of §1926.501(b)(1) may also support a violation of §1910.28(b)(1), if no fall protection is provided and the use of safety harnesses is not required by the employer.

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

X. Combining and Grouping Violations.

A. **Combining**.

Separate violations of a single standard, for example §1910.212(a)(3)(ii), having the same classification found during the inspection of an establishment or worksite generally shall be combined into one alleged citation item. Different options presented in the SAVEs of the same standard shall normally also be combined. Each instance of the violation shall be separately set out within that item of the citation.

NOTE: Except for standards which deal with multiple hazards (e.g., Tables Z-1, Z-2 and Z-3 cited under §1910.1000 (a), (b), or (c)), the same standard may not normally be cited more than once on a single citation. However, the same standard may be cited on different citations based on separate classifications and facts on the same inspection.

B. **Grouping**.

When a source of a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single violation. The following situations normally call for grouping violations:

1. **Grouping Related Violations.**

   If violations classified either as serious or other than serious are so closely related they may constitute as a single hazardous condition, such violations shall be grouped and the overall classification shall normally be based on the most serious item.

2. **Grouping Other-than-Serious Violations Where Grouping Results in a Serious Violation.**

   When two or more violations are found which, if considered individually, represent other than serious violations, but together create a substantial probability of death or serious physical harm, the violations shall be grouped as a serious violation.

3. **Where Grouping Results in High Gravity Other-than-Serious Violation.**

   Where the CSHO finds, during the course of the inspection, that a number of other-than-serious violations are present, the violations shall be considered in relation to each other to determine the overall gravity of possible injury resulting from an accident or incident involving the hazardous condition.

4. **Penalties for Grouped Violations.**

   If penalties are to be proposed for grouped violations, the penalty shall be written across from the first violation item appearing on the Citation and Notification of Penalty IOSHA-2.

C. **When Not to Group or Combine**.

1. **Multiple Inspections.**

   Violations discovered during multiple inspections of a single establishment or worksite may not be grouped. Where only one IOSHA inspection report has been completed, an inspection at the same establishment or worksite shall be considered a single inspection even if it continues for a period of more than one day, or is discontinued with the intention of later resuming it.

2. **Separate Establishments of the Same Employer.**

   The employer shall be issued separate citations for each establishment or worksite where inspections are conducted, either simultaneously or at different times. If CSHOs conduct inspections at two establishments belonging to the same employer and

instances of the same violation are discovered during each inspection, the violations shall not be grouped.

3. **General Duty Clause.**

Because a Section 88.4 citation covers all aspects of a serious hazard where no standard exists, there shall be no grouping of separate Section 88.4 violations. This policy, however, does not prohibit grouping a Section 88.4 violation with a related violation of a specific standard.

4. **Egregious Violations.**

Egregious violations shall not normally be combined or grouped. See CPL 02-00-080, *Handling of Cases to be Proposed for Violation-by-Violation Penalties*, dated October 21, 1990.

XI. Health Standard Violations.

A. Citation of Ventilation Standards.

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

1. **Health-Related Ventilation Standards**.

a. Where an over-exposure to an airborne contaminant is present, the appropriate air contaminant engineering control requirement shall be cited; e.g., §1910.1000(e). Citations of this standard shall not be issued to require specific volumes of air to reduce such exposures.

b. Other requirements contained in health-related ventilation standards shall be evaluated without regard to the concentration of airborne contaminants. Where a specific standard has been violated and an actual or potential hazard has been documented, a citation shall be issued.

2. **Fire and Explosion-Related Ventilation Standards**.

Although not normally considered health violations, the following guidelines shall be observed when citing fire and explosion related ventilation standards:

a. **Adequate Ventilation**.

An operation is considered to have **adequate** ventilation when **both** of the following criteria are present:

- The requirement(s) of the specific standard has been met.

- The concentration of flammable vapors is 25 percent or less of the lower explosive limit (LEL).

  Exception: Some construction standards require that levels be kept to 20 percent of the LEL (e.g. 1926.651 (g)(1)).

b. **Citation Policy**.

If 25 percent (20 percent when specified for construction operations) of the LEL has been exceeded and:

- The standard's requirements have not been met, violations of the applicable ventilation standard normally shall be cited as serious.

- If there is no applicable ventilation standard, Section 88.4 of the Iowa Code shall be cited in accordance with the guidelines in Section III of this chapter, General Duty Requirement.

B. **Violations of the Noise Standard.**

Current enforcement policy regarding §1910.95(b)(1) allows employers to rely on personal protective equipment and a hearing conservation program, rather than engineering and/or administrative controls, when hearing protectors will effectively attenuate the noise to which employees are exposed to acceptable levels. (See Tables G-16 or G-16a of the standard).

1. Citations for violations of §1910.95(b)(1) shall be issued when technologically and economically feasible engineering and/or administrative controls have not been implemented; and

   a. Employee exposure levels are so elevated that hearing protectors alone may not reliably reduce noise levels received to levels specified in Tables G-16 or G-16a of the standard. (e.g., Hearing protectors which offer the greatest attenuation

may reliably be used to protect employees when their exposure levels border on 100 dba). See CPL 02-02-035, 29 CFR 1910.95(b)(1)*, Guidelines for Noise Enforcement; Appendix A*, dated December 19, 1983; or

b. The costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

2. When an employer has an ongoing hearing conservation program and the results of audiometric testing indicate that existing controls and hearing protectors are adequately protecting employees, no additional controls may be necessary. In making this assessment, factors such as exposure levels present, number of employees tested, and duration of the testing program shall be considered.

3. When employee noise exposures are less than 100 dBA but the employer does not have an ongoing hearing conservation program, or results of audiometric testing indicate that the employer's existing program is inadequate, the CSHO shall consider whether:

   a. Reliance on an effective hearing conservation program would be less costly than engineering and/or administrative controls.

   b. An effective hearing conservation program can be established or improvements made in an existing program which could bring the employer into compliance with Tables G-16 or G-16a.

   c. Engineering and/or administrative controls are both technically and economically feasible.

4. If noise workplace levels can be reduced to the levels specified in Tables G-16 or 16a by means of hearing protectors along with an effective hearing conservation program, a citation for any missing program elements shall be issued rather than for lack of engineering controls. If improvements in the hearing conservation program cannot be made or, if made, cannot reasonably be expected to reduce exposures, but feasible controls exist to address the hazard, then §1910.95(b)(1) shall be cited.

5. When hearing protection is required but not used and employee exposures exceed the limits of Table G-16, §1910.95(i)(2)(i) shall be cited and classified as serious (see (8), below) whether or not the employer has instituted a hearing conservation program. §1910.95(a) shall no longer be cited except in the case of the oil and gas drilling industry.

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

6. Where an employer has instituted a hearing conservation program and a violation of one or more elements (other than §1910.95(i)(2)(ii)(a)) is found, citations for the deficient elements of the noise standard shall be issued if exposures equal or exceed an 8-hour time-weighted average of 85 dB.

7. If an employer has not instituted a hearing conservation program and employee exposures equal or exceed an 8-hour time-weighted average of 85 dB, a citation for §1910.95(c) only shall be issued.

8. Violations of §1910.95(i)(2)(i) may be grouped with violations of §1910.95(b)(1) and classified as serious when employees are exposed to noise levels above the limits of Table G-l6 and:

   a. Hearing protection is not utilized or is not adequate to prevent overexposures; or

   b. There is evidence of hearing loss that could reasonably be considered:

      - To be work-related, and

      - To have been preventable, if the employer had been in compliance with the cited provisions.

9. No citation shall be issued where, in the absence of feasible engineering or administrative controls, employees are exposed to elevated noise levels, but effective hearing protection is being provided and used, and the employer has implemented an effective hearing conservation program.

XII. Violations of the Respiratory Protection Standard (§1910.134).

If an inspection reveals the presence of potential respirator violations, CPL 02-00-158, *Inspection Procedures for the Respiratory Protection Standard*, dated June 26, 2014, shall be followed.

XIII. Violations of Air Contaminant Standards (§1910.1000).

A. **Requirements under the standard:**

1. Section 1910.1000(a) through (d) provide ceiling values and 8-hour time – weighted averages applicable to employee exposure to air contaminants.

2. Section 1910.1000(e) provides that to achieve compliance with those exposure limits, administrative or engineering controls shall first be identified and implemented to the extent feasible. When such controls do not achieve full compliance, personal protective equipment shall be used. Whenever respirators are used, their use shall comply with §1910.134.

3. Section §1910.134(a) provides that when effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used.

4. There may be cases where workplace conditions require that employers provide engineering controls as well as administrative controls (including work practice controls) **and** personal protective equipment. Section 1910.1000(e) allows employers to implement feasible engineering controls and/or administrative and work practice controls in any combination, provided the selected abatement means eliminates the overexposure.

5. Where engineering and/or administrative controls are feasible but do not, or would not, reduce air contaminant levels below applicable ceiling values or threshold limit values, an employer must nevertheless institute such controls to reduce the exposure levels. In cases where the implementation of all feasible engineering and administrative controls fails to reduce the level of air contaminants below applicable levels, employers must additionally provide personal protective equipment to reduce exposures.

B. **Classification of Violations of Air Contaminant Standards.**

Where employees are exposed to a toxic substance in excess of the PEL established by OSHA standards (without regard to the use of respirator protection), a citation for exceeding the air contaminant standard shall be issued. The violation shall be classified as serious or other-than-serious on the criteria set forth in the Chemical Sampling Information web page and based on whether respirators are being used. Classification of these violations is dependent upon the determination that an illness is reasonably predictable at the measured exposure level.

1. **Classification Considerations**.

Exposure to regulated substances shall be characterized as serious if exposures could cause impairment to the body as described in Paragraph II.C.3. of this chapter.

a. In general, substances having a single health code of 13 or less shall be considered as posing a serious health hazard at any level above the Permissible Exposure Limit (PEL). Substances in categories 6, 8 and 12, however, are not considered serious at levels where only mild, temporary effects would be expected to occur.

b. Substances causing irritation (i.e., categories 14 and 15) shall be considered other-than-serious up to levels at which "moderate" irritation could be expected.

c. For a substance having multiple health codes covering both serious and other-than-serious effects (e.g., cyclohexanol), a classification of other-than-serious is appropriate up to levels where serious a health effect(s) could be expected to occur.

d. For a substance having an ACGIH Threshold Limit Value (TLV) or a NIOSH recommended value, but no OSHA PEL, a citation for exposure in excess of the recommended value may be considered under Section 88.4 of the Code. Prior to citing a Section 88.4 violation under these circumstances, it is essential that CSHOs document that a *hazardous exposure* is occurring or has occurred at the workplace, not just that a recognized occupational exposure recommendation has been exceeded. See instructions in Section III of this chapter, *General Duty Requirements*.

e. If an employee is exposed to concentrations of a substance below the PEL, but in excess of a recommended value (e.g., ACGIH TLV or NIOSH recommended value), citations will not normally be issued. CSHOs shall advise employers that a reduction of the PEL has been recommended.

NOTE: An exception to this may apply if it can be documented that an employer knows that a particular safety or health standard fails to protect his workers against the specific hazard it is intended to address.

f. For a substance having an 8-hour PEL with no ceiling PEL but ACGIH or NIOSH has recommended a ceiling value, the case shall be referred to the Administrator or designee in accordance with Paragraph III.D.2. of this chapter. If no citation is issued, CSHO shall advise employers that a ceiling value is recommended.

2. **Additive and Synergistic Effects**.

a. Substances which have a known additive effect and, therefore, result in a greater probability/severity of risk when found in combination with each other shall be evaluated using the formula found in §1910.1000(d)(2). Use of this formula requires that exposures have an additive effect on the **same** body organ or system.

b. If CSHOs suspect that synergistic effects are possible they shall consult with their supervisor, who shall then refer the question to the Administrator or designee. If a synergistic effect of the cited substances is determined to be present, violations shall be grouped to accurately reflect severity and/or penalty.

XIV. Citing Improper Personal Hygiene Practices.

The following guidelines apply when citing personal hygiene violations:

A. Ingestion Hazards.

A citation under §1910.141(g)(2) and (4) shall be issued where there is reasonable probability that, in areas where employees consume food or beverages (including drinking fountains), a significant quantity of a toxic material may be ingested and subsequently absorbed.

1. For citations under §1910.141(g)(2) and (4), wipe sampling results shall be taken to establish the potential for a serious hazard.

2. Where, for any substance, a serious hazard is determined to exist due to potential for ingestion or absorption for reasons other than the consumption of contaminated food or drink (e.g., smoking materials contaminated with the toxic substance), a serious citation shall be considered under Section 88.4 of the Code.

B. Absorption Hazards.

A citation for exposure to materials that may be absorbed through the skin or can cause a skin effect (e.g., dermatitis) shall be issued where appropriate personal protective clothing is necessary, but is not provided or worn. If a serious skin absorption or dermatitis hazard exists that cannot be eliminated with protective clothing, a Section 88.4 citation may be considered. Engineering or administrative (including work practice) controls may be required in these cases to prevent the hazard. See §1910.132(a).

C. **Wipe Sampling.**

In general, wipe samples, not measurements for air concentrations, will be necessary to establish the presence of a toxic substance posing a potential absorption or ingestion hazard. See TED 01-00-015, *OSHA Technical Manual*, dated January 20, 1999, for sampling procedures.

D. **Citation Policy.**

The following criteria should be considered prior to issuing a citation for ingestion or absorption hazards:

1. A health risk exists as demonstrated by one of the following:

   a. A potential for an illness, such as dermatitis, and/or

   b. The presence of a toxic substance that may be potentially ingested or absorbed through the skin. (See the Chemical Sampling Information web page.)

2. The potential for employee exposure by ingestion or absorption may be established by taking both qualitative and quantitative wipe samples. The substance must be present on surfaces that employees contact (such as lunch tables, water fountains, work areas etc.) or on other surfaces, which, if contaminated, present the potential for ingestion or absorption.

3. The sampling results must reveal that the substance has properties and exists in quantities that pose a serious hazard.

XV. Biological Monitoring.

If an employer has been conducting biological monitoring, CSHOs shall evaluate the results of such testing. These results may assist in determining whether a significant quantity of the toxic substance is being ingested or absorbed through the skin.