



## *“The Public Interest”*

### Health/Safety and Environmental Issues

*the PASMA way to shared knowledge*

Public Agency Safety Management Association

August 2015

### **Special Addendum – Urgent Notice**

**Cal/OSHA has submitted a proposed language change to T8CCR334**

### **“Repeat Citation History to go State Wide”**

Cal/OSHA has submitted, and the Office of Administrative Law has posted a proposed language change to **T8CCR334** regarding an employer’s history “look back” from **3 years to 5 years** and to go **from site specific to State wide** consideration as the basis to issue a Repeat Citation. As posted on the Office of Administrative Law, <http://www.oal.ca.gov/res/docs/pdf/notice/33z-2015.pdf> the Public Hearing has already been scheduled for Friday October 2, 2015. Unfortunately most stakeholders governed by Cal/OSHA **DO NOT** look at the Office of Administrative Law website, rather most of us wait for the proposed standard to make its way to the DIR (Cal/OSHA) web page. To date, neither the notice of public hearing nor the proposed language changes have filtered its way to that site. Meaning the regulated community has lost at least 14 days to digest, research, analyze and formulate an appropriate response.

**“Substantive Changes:** The proposed amendments also change the starting time for calculating the “Repeat” look back period. Under California’s current enforcement standard, for an occupational safety and health violation to be considered a “Repeat” violation, the conduct giving rise to the earlier violation must have occurred within the three years immediately preceding the conduct resulting in the later violation. The proposed amendments would change this calculation so that the look back period would begin to run from the latest of the following dates: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; (2) the date on which the underlying citation became final by operation of law; or (3) the date of final abatement of the violation cited in the underlying citation. The proposed amendments further remove the existing establishment site and geographic region restrictions. With the exception of field sanitation violations, for an occupational safety and health violation to be considered a “Repeat violation under California’s existing enforcement standards, the violation must be based on a prior violation cited either (1) at the same work site or address for businesses with fixed establishments such as factories and stores; or (2) within the same Region of the Division for businesses such as construction and excavation which have no fixed establishments. The proposed elimination of the geographic restrictions would subject employers with multiple work sites in California to repeat penalties based on previous citations issued, regardless of the location or region of the original citation. This change will make the Division’s “Repeat” violation standard consistent with Fed/ OSHA’s “Repeat” violation standard which considers employer’s enforcement history across all of the employer’s locations within Fed/OSHA jurisdictions when determining “Repeat” violations”.

I strongly encourage every member to articulate individual and collective opposition to this language change particularly since the argument that it will be as effective as Fed/OSHA cannot be verified through any metrics that the Division has provided for any of its recent rule changes. As with AB2774, this appears to be yet another venue to increase the number of citations issued and that my friends, I feel is both Arbitrary and Capricious. **Caveat Emptor.**



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### Front Page:

**Code Speak De-Mystified** Pgl

### Individual Highlights:

**T8CCR3328**

**Pg 2-3**

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## Code Speak Demystified – Defensive Options

In the June newsletter I challenged the reader to read and decipher the Code Speak involved with four of my favorite safety orders. The challenge was to consider what type of evidence it would take to affirm a citation about each of the Code sections; **§3328. Machinery and Equipment; §5097. Hearing Conservation Program; §5141. Control of Harmful Exposure to Employees; and §5155. Airborne Contaminants.** As intimated, the intent and text of these orders are so well thought out that the evidence supporting a citation would be relatively simple. In discussing these sections, I hope to provide insight as to the type and source of the evidence any CSHO would likely explore during an investigation.

**T8CCR3328** The manufacturing process of any machine, equipment and/or material is bound by specifications regarding material strengths, assemblies, and principles of operations. In an attempt to limit manufacturing liability, manufacturers will also issue one or more of the following: owners, maintenance/repair, and/or users manuals. The Code writers recognized and capitalized on this reality and created an elegant, clear and concise proscriptive standard that requires relatively little evidence to support a citation by inserting words and phrases that mandate **compliance** with manufacturing criteria. Note that the terms "machinery and equipment" in this context also includes any that were created in-house such as **jigs and specialty tools** that some very creative in-house "fabricators"; known as maintenance, oft are prone to create. In short, this order does not presume or specify that the "machinery and equipment" was purchased from any specific commercial or industrial manufacturer. It simply regulates its deployment and because "machinery and equipment" as defined is so broad and all-inclusive, the lack of compliance to this order is easily proven particularly when an injury, illness or fatality has occurred. Having said that, I've offered up some "evidence" I used to look for during my old compliance days, and although not guaranteed, attention to this evidence should help insulate some exposures. The alternative of course is a citation. To be forewarned is to be forearmed.

The ability to  
simplify means to  
eliminate the unnecessary  
so that the necessary  
may speak.

Hans Hofmann

## Code Speak Demystified – Defensive Options-Cont'd

### §3328. Machinery and Equipment.

- (a) Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, stresses, or loads which endanger employees.

**Example:**

1. Anytime the machinery or equipment is "amped up" beyond normal design capacity.
2. Anytime the machinery or equipment is used in excess of capacity to work on a part; i.e. using a wood bit to drill into metal or a wood saw to cut metal unless the blades are a designed to do both.
3. Special shop built jigs or extension tools without benefit of "good engineering practice".

**Evidence to Prove Compliance:** A) Establish JSA for equipment use. B) For shop built equipment create some blue print or drawings that demonstrates material strengths, means and methods of fabrication and limits of use.

- (b) Machinery and equipment in service shall be inspected and maintained as recommended by the manufacturer where such recommendations are available.

**Example:**

1. Manufacturers will always ship "Owners, Users and/or Repair and Maintenance" manuals.
2. Diligent compliance personnel will contact manufacturers and where none exists will search the web for similar or equivalent machinery/equipment, initiate a request for documents compare these documents to those retrieved from the employer and act accordingly.

**Evidence to Prove Compliance:** A) Inventory, develop and maintain library and Preventative Maintenance Schedules (don't wait for a failure).

- (c) Machinery and equipment with defective parts which create a hazard shall not be used.

**Evidence to Prove Compliance:** A) Develop, implement and maintain a documented "Inspection prior to use" protocol as clear condition of employment.

- (d) Machinery and equipment designed for a fixed location shall be restrained so as to prevent walking or moving from its location.

**Evidence to Prove Compliance:** A) The employer established and assigns all equipment during space planning phase and the manufacturer puts little holes in the base...it is an indicator that the machine once placed and not mobile must be fixed.

- (e) Machinery and equipment components shall be designed and secured or covered (or both) to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and/or falling unless the employer can demonstrate that to do so would be inconsistent with the manufacturer's recommendations or would otherwise impair employee safety.

**Evidence to Prove Compliance:** A) Establish, implement and maintain a machine guarding program. B) The employer would be hard pressed to "demonstrate" the "inconsistent with manufacturers..." option.

- (f) Any modifications shall be in accordance with (a) and with good engineering practice.

**Evidence to Prove Compliance:** A) Discuss and document any modification intents and efforts with manufacturer first. B) See T8CCR3328(a) Required evidence

### Code Speak Demystified – Defensive Options-Cont'd

**(g)** Machinery and equipment in service shall be **maintained in a safe operating condition.**

**Evidence to Prove Compliance: A) See T8CCR3328(b) Required evidence**

**(h)** Only **qualified persons** shall be **permitted to maintain or repair** machinery and equipment.

**Evidence to Prove Compliance:** A) Employer assigns "qualified"/"competent". Document employee and supervisor initial and periodic training consistent with LOTO and/or 3203. (See Cal/OSHA Training Matrix. B) Employer should maintain some evidence of employee demonstrated competency.

#### **§5097. Hearing Conservation Program.**

**(b)** Monitoring.

**(1)** When **information indicates** that any employee's exposure **may equal or exceed** an 8 hour time weighted average of 85 decibels, the **employer shall obtain** measurements for employees who may be exposed at or above that level. Such determinations **shall be made by December 1, 1982**

**(2)** The **monitoring requirement** shall be met by either **area monitoring or personal** monitoring that is representative of the employee's exposure.

**T8CCR5097** Ear buds and electronic media aside, noise is one of the most common Occupational Hazards in the industrial world. It is also one of the most insidious and difficult to manage, much less control. The noise safety orders are found in Article 105 including sections titled Scope and application, Exposure Limits, Hearing Conservation, Hearing Protectors, Training and Record Keeping. FYI, Compliance officers tend to be very sensitive to the use of Personal Protective Equipment, and ear plugs and/or muffs are a clear indicator that the provisions of Section 5097 may apply. The evidence needed to issue a citation for this subsection requires a Sound Level Meter, a company documents request, and/or manufacturers noise emissions data on the machinery or equipment in question.

The first element, "information indicates", refers to both subjective and objective information relating to noise such as a) elevated voice communication near any source; b) manufacturers noise data and/or c) hearing loss symptoms such as employee word discrimination difficulties or complaints about ringing in the ears, or the more generic, "it's really noisy here" lamentation found in a complaint. The element "employer shall", "measurements", "December 1, 1982" and the remainder of the highlighted text require a simple company documents request either verifying compliance or not. A most elegantly scripted standard that is easily enforced with easily obtained evidence. Caveat Emptor!

#### **§5141. Control of Harmful Exposure to Employees.**

**(a)** Engineering Controls. Harmful **exposures shall** be prevented by **engineering controls** whenever **feasible.**

**(b)** Administrative Controls. Whenever engineering controls **are not feasible** or **do not achieve** full compliance, **administrative controls shall** be implemented **if practicable.**

**(c)** Control by Respiratory Protective Equipment. Respiratory protective equipment, in accordance with Section 5144,

**shall be used** to prevent harmful exposures **as follows:**

**(1)** **During the time period** necessary to install or implement feasible engineering controls;

**(2)** Where **feasible engineering** controls and administrative controls **fail to achieve full compliance;** and



**(3) In emergencies.**

**Control of Harmful Exposure to Employees - Cont'd**

**T8CCR5141** Moving along to the third of my most "easily cited safety orders" is T8CCR5141 Control of Harmful Exposure to Employees. Note first that the term "harmful exposure" is defined in T8CCR5140 as "An exposure to **dusts, fumes, mists, vapors, or gases**: (a) In **excess of any permissible limit** prescribed by Section 5155; or (b) Of such a nature by inhalation as to **result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function**. As with the Noise order, this order also requires the employer to identify any objective as well as subjective (employee complaints/symptoms) data in order to comply with this code. Furthermore, critical elements associated with this order also require a specific control priority (see subsections a, b, and c) that must be documented by the employer. The most critical bits of hard evidence that could be used by any CSHO is: the SDS, the use of PPE, and the lack of any engineering controls such as local exhausts, fume hoods or spray booths both as field observations and a lack of employer documents proving due diligence.

**§5155. Airborne Contaminants.**

**(e) Workplace Monitoring**

**(1)** Whenever it is **reasonable to suspect** that **employees** may be **exposed to concentrations** of airborne contaminants in **excess of levels** permitted in section **5155(c)**, the employer **shall monitor** (or cause to have monitored) the work environment so that **exposures** to employees can be **measured or calculated**

**(2)** When exposures to airborne contaminants are found or are expected to exceed allowable levels, measures to control such harmful exposures shall be instituted in accordance with section 5141

**(3)** For the **adequate protection** of employees, the person **supervising, directing or evaluating** the monitoring and control methods **shall be versed** in this standard and shall be **competent in industrial hygiene practice**.

**(4)** All **monitoring results** shall be recorded and such records shall be **retained in** accordance with **section 3204**

**T8CCR5155** The last of the "easily cited" safety orders has everything to do with the Chemistries of the industrial world. As with noise, this order relies on the "due diligence" requirement to "quantify" the working environment. What type of poker tell would it take to trigger a potentially citable failure? An SDS, any symptom or complaint from an employee, and/or any personal sensations by the compliance officer, i.e., acrid taste, oily mist and/or any smells would satisfy the "reasonable to suspect" trigger task element. The evidence would be shored with an employer document request for "any" sampling and a copy of the targeted SDS. What better reason to call the Cal/OSHA consultation service

