



VOSH PROGRAM DIRECTIVE: 01-009A

ISSUED: October 15, 2007

SUBJECT: Citation Policy for Paperwork and Written Program Requirement Violations,
CPL 02-00-111 [CPL 2.111]

A. Purpose.

CHANGE I: This directive transmits to field personnel guidance to effect the consistent and uniform enforcement of VOSH's standards, particularly where technical violations involve employer obligations for posting, recordkeeping and documentation of performance, and have no adverse impact on worker safety and health. **CHANGE II:** This change includes revised citation instructions which appear in *bold italics* in sections I.3.d. and in I.5.a., on pages 4 and 5, respectively.

This Program Directive is an internal guideline, not a statutory or regulatory rule, and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application nor the force of law.

B. Scope.

This directive applies to all VOSH personnel.

C. Reference.

OSHA Instruction CPL 02-00-111 [CPL 2.111] (November 27, 1995).

D. Cancellation.

VOSH Program Directive 01-009 (May 1, 1996).

E. Action.

Directors and Managers shall ensure that field personnel adhere to the following procedures when evaluating and citing violations of paperwork and written program requirements.

F. Effective Dates.

CHANGE I: April 15, 1996.

CHANGE II: October 15, 2007.

G. Expiration Date.

Not Applicable.

H. Background.

In most cases, violations of standards which require employers to have a written program to address a hazard, or to make a written certification (e.g., hazard communication, personal protective equipment, permit-required confined spaces, and others) have a significant adverse impact on employee safety and health. In some situations, such violations may be perceived as “paperwork deficiencies” rather than critically important implementation problems, and therefore do not need to be cited. In other circumstances, violations of such standards have a significant adverse impact on employee safety and health and, therefore, must be cited.

I. Procedures for Evaluation and Citation. The “paperwork” and “written program” requirements addressed by this directive include recordkeeping, posting of the OSHA Notice, written program requirements in standards such as lockout/tagout, permit-required confined spaces, bloodborne pathogens, hazard communication, personal protective equipment, and other essentially similar requirements found in VOSH standards.

1. Failure to Post the OSHA Notice (1903)[See VOSH ARM §40].

a. The employer shall be provided a copy of the OSHA Notice and shall be advised of the legal requirement to post it for employees. The employer shall also be informed of the consequences of failure to post the Notice. These actions shall be noted in the case file. This policy applies in all cases, except as noted in “b.” below.

b. A citation for failure to post the OSHA Notice is warranted **if**:

The pattern of violative conditions for a particular establishment demonstrates a consistent disregard for the employer’s responsibilities under the Occupational Safety and Health Act of 1970 (Act); **and**

(1) Interviews show that employees are unaware of their rights under the Act; **or**

(2) The employer has been previously cited or advised by VOSH of the posting requirement.

2. Injury and illness records (1904).

a. Where no records are maintained **and** there have been injuries or illnesses which meet the requirements for recordability, as determined by other records or by employee interviews, a citation for failure to maintain records normally shall be issued.

b. Where no records are maintained and there have been no injuries or illnesses, as determined by employee interviews, a citation shall not be issued.

- c. When the required records are maintained but no entry is made for a specific injury or illness which meets the requirements for recordability, a citation for failure to record the event normally shall be issued.
 - d. When the required records are maintained but have not been completed with the detail required by the regulation, or the records contain minor inaccuracies, the records shall be reviewed to determine if there are deficiencies that materially impair the understandability of the nature of hazards, injuries and illnesses in the workplace. If the records are defective to this degree, a citation for failure to record normally shall be issued.
 - e. In all other cases, the employer shall be provided information on maintaining the records for the employer's analysis of workplace injury trends and on the means to maintain the records accurately. The employer's promised actions to correct the deficiencies shall be recorded and no citation shall be issued.
 - f. Where citations are issued, penalties shall be proposed only in the following cases:
 - (1) Where VOSH can document that the employer was previously informed of the requirements to keep records; **or**,
 - (2) Where the employer's deliberate decision to deviate from the recordkeeping requirements, or the employer's plain indifference to the requirements, can be documented.
3. Requirements for a Written Plan or Certification: General Principles. (Such as requirements in the Respiratory Protection, Confined Spaces, Bloodborne Pathogens, Lockout/Tagout and Personal Protective Equipment standards, and other similar standards.)

The following **general principles** apply to issuance of citations for violation of requirements that an employer prepare a written plan or certification to address a hazard. In each of the situations discussed below:

- (1) the employer is covered by a standard that requires a written plan or certification to address a hazard,
 - (2) VOSH finds that the written plan or certification is missing or deficient, and
 - (3) the violation is not willful.
- a. When the **employer has failed or is likely to fail to follow protective measures** required by the standard in a manner that is related to the deficiency in the plan, so that employees are exposed to a risk of serious harm, a citation for a serious violation of the standard with a penalty normally shall be issued. Penalties shall be proposed in accordance with an assessment of the exposure.

- b. When the **employer has followed the proper protective measures** required by the standard, and it is unlikely that the deficiency in the plan will result in failure to follow proper practices in the future, a citation for an other-than-serious violation with no penalty normally shall be issued. In addition, the employer shall be: (1) provided literature to assist it in developing a proper written plan, and (2) informed of possible penalties for subsequent violations.
- c. When a **standard requires an evaluation of a potential hazard in the workplace**, and the employer has failed to conduct the evaluation, but no such hazard exists or could reasonably be anticipated in the future in the employer's workplace, or the hazard could not be present at a level to present a risk to employees, no citation shall be issued.
- d. When the **employer has complied fully with a requirement in a standard** (e.g., for taking particular protective measures, for an evaluation, or for training), except that the employer has failed to make a required written certification that the action was taken, ***an other than serious*** citation shall be issued.
- e. When the **employer's written plan to address a hazard is deficient**, it will ordinarily be appropriate to issue one citation for all of the deficiencies in the plan. In rare instances, the specifics of a case may indicate that citing each deficiency separately may be warranted. In such cases, a careful review of the facts and objectives behind all citation items must be conducted.

4. Requirements for a Written Plan or Certification: Examples.

- a. Permit-Required Confined Spaces (1910.146).
 - (1) When an employer did not perform an evaluation of the workplace to determine whether there were permit-required confined spaces that would be subject to the standard, and no such spaces are discovered during the inspection, no citation shall be issued.
 - (2) When an employer did not perform an evaluation of the workplace to determine whether there were permit-required confined spaces that would be subject to the standard, and such hazardous spaces are discovered during the inspection, a citation with penalty normally shall be issued.
- b. Personal Protective Equipment (1910.132).
 - (1) When an employer carries out the required assessment of workplace hazards and determines, correctly, that there are no hazards which require personal protective equipment, but has not completed the required documentary certification of the assessment, no citation shall be issued.
 - (2) When an employer carries out the required assessment of workplace hazards and determines, correctly, that there are hazards which require personal protective

equipment and has provided the appropriate PPE, but has not completed the required documentary certification of the assessment, no citation shall be issued.

- (3) When an employer has failed to conduct the required assessment and does not provide personal protective equipment needed to guard against a serious risk of eye injury, for example, a citation with penalty normally shall be issued.

- c. Lockout/Tagout (1910.147). An employer's lockout procedures incorrectly call for use of control circuitry rather than acceptable energy control devices during covered servicing or maintenance procedures. A citation, with penalty, normally shall be issued.

5. Hazard Communication (1910.1200 and 1926.59).

- a. Where employees are exposed or potentially exposed to a hazardous chemical; **and** labeling, MSDS, chemical inventory, and training requirements are met; **but** there is no written plan; **then** violations of 1910.1200(e) shall be issued *as other than serious*.
- b. Where employees are exposed to a hazardous chemical and, for example, they did not receive the information necessary to safely handle or use the substance, and the employer had developed no written program (or a deficient one), one citation item shall be issued for the grouped violations of (1) lack of written program, and (2) the most directly applicable portion of the standard.

EXAMPLE: Where employees were exposed to a hazardous substance because the appropriate control measures had not been covered in training, and where there was no written plan, violations of 1910.1200(e) and 1910.1200(h)(2)(ii) shall be grouped to make one citation item.

- c. For specific guidance on the application of the Hazard Communication Standard to consumer products and articles, refer to the March 21, 1995 memorandum to Regional Administrators from John B. Miles, Jr., Director of Compliance Programs. This memorandum is included as Appendix A of this directive.
- d. **Violations of the “written plan” portion of the Hazard Communication Standard normally are to be grouped into a single citation item.**

C. Ray Davenport
Commissioner

Attachment: Appendix A, Memorandum to Regional Administrators from John B. Miles, Jr., Director of Compliance Programs, OSHA Instruction CPL 02-00-111 [CPL 2.111] (March 21, 1995)

Distribution: Commissioner of Labor and Industry
Assistant Commissioner - Programs
VOSH Directors and Managers
Cooperative Programs Director and Manager
VOSH Compliance and Cooperative Programs Staff
Legal Support and IMIS Staffs
OSHA Region III and Norfolk Area Offices

APPENDIX A

March 21, 1995

Memo To: ALL REGIONAL ADMINISTRATORS

FROM: JOHN B. MILES, JR., DIRECTOR
DIRECTORATE OF COMPLIANCE PROGRAMS

Subject: Hazard Communication Standard: Documentation of Citations Related to the Exposure to Hazardous Substances and Consumer Products

This memorandum provides clarification and guidance for the Hazard Communication Standard (HCS), 29 CFR 1910.1200, 1915.1200, 1917.28, 1918.90, and 1926.59, when applied to the standard's provisions for exemptions of consumer products and articles.

OSHA has reviewed its enforcement history with respect to instances where the consumer product safety/hazardous substance (1910.1200(b)(ix)) or article (1910.1200(b)(v)) exemptions could have been applied. HCS citations have been issued for materials, such as bricks, rebar, lubricating oils, welding rods and dishwashing liquid without adequate documentation of employee exposure to a specific hazardous chemical or that their use fails to meet OSHA's consumer product exemption. It is not the intent of the standard that we issue citations for consumer products and articles except for conditions of use that greatly exceed those of a normal consumer or are outside the product's normal intended use. As a matter of policy, OSHA Compliance Officers shall not issue HCS citations for consumer products unless there is documentation that exposure(s) causing serious injury or illness are occurring. Please be aware that exposure is defined in the HCS to include potential exposure.

The performance-oriented nature of HCS makes it difficult to draw clear, exact lines for the number of times a consumer product or the circumstances under which an article can be used before the provisions of the rule apply. During the course of an inspection, to justify a citation, it is imperative that the compliance officer document that employee use of a consumer product containing hazardous ingredients at his or her workplace is such that frequency or duration clearly exceeds what a reasonable person would concede to be normal consumer use in a home or household environment. Situations where employee use of a consumer product is similar to the way a consumer would use a product or where the hazardous chemical under consideration meets the definition of an article shall not be cited as a violation of HCS.

To ensure that citations of HCS for consumer products are appropriate, the following elements must be included as documentation in the case file:

1. Document what information establishes the chemical as a consumer product. Was the container labeled with a label that is subject to the regulations of the Consumer Product Safety Act?

2. Document the hazardous chemical(s) present in the consumer product that employees were exposed to. Does the chemical present an acute or chronic hazard? Was the chemical on the employer's hazardous chemical inventory?
3. Document the duration of use, the period of time the chemical was used during the workshift and week. Did it greatly exceed normal or expected use by a consumer?
4. Document the frequency or pattern of use. Did it greatly exceed normal or expected use by a consumer?
5. Document the purpose of use. Was the consumer product used as recommended by the manufacturer or proscribed by the manufacturer?
6. Document the manner of use; was the consumer product used in a concentrated form or solution? What amount (i.e., the liters or grams) of the chemical was used?
7. Attach the MSDS, where available, for the cited product, i.e, is it defined as a hazardous chemical; what is its intended use(s)?

When citing HCS violations involving consumer products, identify in the citation the specific hazardous chemical and the concentration of the hazardous chemical present in the consumer product. In addition, the frequency and duration of use that resulted in exposures significantly greater than those of a consumer must be documented. The Agency shall not issue any citations simply stating that "glue" or "dishwashing liquid" was the hazardous chemical.

In a similar fashion, for HCS violations involving manufactured items or commercial products which under normal conditions of use may release hazardous chemicals and do not meet the criteria of the "article" exemption (1910.1200(c)), the specific hazardous chemical identified in the specific item shall be described in the citation. In the case of mixtures, the concentration of the specific hazardous chemicals shall be included in the citation. For example, the Agency shall not issue any citations specifically for brick. In this case, compliance officers shall identify the specific hazardous chemical, such as silica, present in the item, the concentration of the specific hazardous chemical in the item, the product name of the item, the specific operation(s) where an employee is or may be exposed to a physical or health hazard and the duration of employee exposure.

To ensure that citations of HCS for items that appear to be "articles" (rebar, bricks, structural steel beams, etc.) are appropriate, the following elements must be included as documentation in the case file:

1. Document the hazardous chemical(s) and the concentration that was present. What was in the item that employees were exposed to? Was the chemical on the employer's hazardous chemical inventory?
2. Document the activities or operations that resulted in employee exposure to the hazardous chemical(s) in the item and the duration of use.
3. Attach the MSDS, where available, for the cited product, i.e., does it define it as a hazardous chemical and any statements of its intended use(s)?

In summary, the specific hazardous chemical identity shall be provided in any HCS citation. The commercial or product name shall not be used by itself to identify a hazardous chemical. If the hazardous chemical is an ingredient in a mixture, compliance officers shall identify in the citation the specific hazardous chemical(s) present, and the relative concentration(s) of the chemical(s) in the mixture. In addition, the specific operations where an employee is or may be exposed to a physical or health hazard and the duration of employee exposure shall also be identified.

Should you have any questions regarding this issue, please call Tom Galassi in the Office of Health Compliance Assistance at (202) 219-8036.