

Inside Cal/OHSA – First Person Narrative

DIR's Micro-Managing and Open Door for Political Favoritism

By Garrett Brown, July 2014

In an unprecedented expansion of the Department of Industrial Relations' "micro-managing" of Cal/OSHA District Offices, DIR has ordered the local enforcement offices to submit for review – prior to any issuance to employers – hundreds of the Cal/OSHA "Form 1BY" that are required before any Serious citation can be issued to these employers. The policy announced in a May 27, 2014, memo (see attached) will allow DIR and DOSH Headquarters to pass judgment on hundreds of Serious citations before they are issued by local District Offices – for the first time in the agency's 41-year history.

The new review by DIR Director Christine Baker, DIR Public Information Office manager Erika Monterroza, and Cal/OSHA HQ executive staff also opens the door to simply disallowing District Offices to issue Serious citations against politically connected employers. At the very least, the policy will substantially increase the workload of Cal/OSHA's six Regional Managers, the two Acting Deputy Chiefs for Enforcement, and the already hard-pressed Legal Unit attorneys.

History of the Form 1BY

In September 2010, then-Governor Arnold Schwarzenegger signed into law AB 2774 requiring Cal/OSHA to provide to every employer to whom the agency intends to issue a Serious citation a "Form 1BY" explaining the legal and factual grounds for the intended Serious citation. Serious citations are issued when Cal/OSHA finds a hazard or employer non-compliance that can lead to serious injury or death to exposed workers.

Ever since Cal/OSHA was established in 1973, Serious citations have been issued by District Offices without mandatory higher office review. The citations are proposed by the compliance safety and health officer (CSHO), and then reviewed and approved by the District Manager (DM).

As shown in the attached chart from DOSH, the Division issued 2,169 Serious citations in 2011; 2,652 Serious cites in 2012; and 2,156 Serious citations in just the first three quarters of 2013.

The employer has the right to respond to the Form 1BY with information and argumentation about why a Serious citation is not warranted. The employer is not required to respond to the Form 1BY, and many employers have followed their legal counsel's advice not to respond, but the Division is prohibited from issuing any Serious citation without providing the employer with 15 days to respond to the Form 1BY.

Central to the District Manager's approval of any Form 1BY is taking into account all the information and evidence contained in the entire inspection case file, not just the wording on the form. It appears that DIR and DOSH HQ will be reviewing just the text of the Form 1BY and not the supporting evidence.

Impact of AB 2774 on DOSH Operations

The impact of AB 2774 since it went into effect in 2011 has been to shave at least one month off of the six-month period – from opening date of an inspection to the “drop-dead” date after which no citations can be issued – that Cal/OSHA has for its investigation. The California Labor Code prohibits the issuance of any citation after six months from the date of the opening conference with the employer.

The month has been lost because of the deadlines for the combined time needed for mailing the Form 1BY, the 15-day period employers have to respond, and the time to evaluate any employer response. So any Form 1BY generally must be issued by the end of the 5th month of the six-month investigative period. If the local District Office does not issue the Form 1BY at least 15 days before the end of the six-month investigative period, then no Serious citation can be issued, according to state law as amended by AB 2774.

The May 27th memo does not say what “problem” these new procedures are designed to fix. If DOSH Headquarters or the DIR Director felt that District Offices have regularly sent inadequate or incomplete Form 1BYs to employers, the most efficient and cost-effective correction would be an intensive training for CSHOs and DMs.

Instead, a massive increase in workload for Regional Managers, Deputy Chiefs and Legal Unit staff has been ordered. The three types of inspections where the new review of Form 1BYs is now required could easily amount to 10% to 20% of all the Form 1BYs generated by District Offices. Ten per cent of 2012's Serious citations would mean 265 Form 1BYs to be reviewed, while 20% would be 530 Form 1BYs to be evaluated annually. Moreover, the number of Form 1BYs to be reviewed could be even higher than 20%, depending on how many inspections are deemed to meet the memo's “high profile case” criteria.

Section 1.a. of the May 27th memo actually requires any and all citations to be issued to public sector employers to be reviewed by DIR and DOSH Headquarters. Section 2.b. requires that all citations, not just Form 1BYs and Serious citations, to be issued to “high profile” employers be reviewed by DIR and Cal/OSHA HQ. It is not clear whether two rounds of review – first for the Form 1BYs and a second for all citations – are required for high profile employers.

Reduced Time for Investigation

In addition to the increased workload for DOSH staff above the District Office level, these new procedures will shave even more time off the six-month period available to

investigate employer non-compliance, especially for hazards that meet the legal definition of Serious violations and citations.

The memo says the proposed Form 1BYs must be sent to DOSH HQ and DIR at least 7 days in advance of when the District Office plans to issue the Form 1BY to the employer. This will likely mean any Serious citation must be decided upon no more than 4½ months into the six-month period – cutting six weeks off the investigative period.

The impact of this greatly reduced investigative period will be that serious, life-threatening hazards will not be fully evaluated and/or related citations will not be properly classified as Serious.

Fewer Serious Citations Will be Issued

Because of the already overwhelming work load at the Regional Offices, the Legal Unit, and Cal/OSHA Headquarters, the added burden of these new procedures will likely mean District Offices will not receive approval to issue the Form 1BYs in time to meet the legally-required time frameworks. So no Serious citation can be issued in these cases.

Because DOSH HQ and DIR will not be assessing the inspections where District Offices have not proposed a Form 1BY and Serious citation – but perhaps could or should issue Serious cites – the overall number of Serious citations can only be the same or fewer than what the District Offices have proposed.

Overall, fewer Serious citations will be issued as a result of this change. Federal OSHA, which has repeatedly criticized Cal/OSHA in its annual FAME audits of DOSH for not issuing a sufficient number of Serious citations to match Fed OSHA guidelines, will not be pleased.

Door Wide Open for Political Intervention

The May 27th memo represents a entirely new level of intervention by DIR and DOSH HQ into the standard operations of compliance District Offices. Now any Serious citation can be blocked by the DIR Director or DIR’s public relations manager, as well as by DOSH Headquarters staff.

This policy change also leaves the door wide open for intervention to protect or to provide favors to specific employers in both the public and private sectors.

The list of examples of a “household name” employer in Section 1.b. of the May 27th memo is quite revealing:

- “Disney” is a household name and one of the major corporate campaign contributors for Governor Jerry Brown. Disney has contributed millions of dollars, according to state campaign finance reports, to Brown and his political campaigns (including ballot initiatives like Prop 30), and Disney Studios

Chairman Alan Horn has hosted multi-million dollar fundraisers for Brown at Horn's Bel Air mansion in Los Angeles;

- "Tesla" is not likely to be a household name, but it is a major manufacturing enterprise in Fremont, CA, and the auto maker is playing California off against four other states seeking the most generous subsidies and regulatory relief in determining where to locate a new \$4 billion battery factory; and
- "Grimmway" is definitely not a household name, but is a major producer grower in the state's \$45 billion agricultural sector and a big player in various ag trade associations and their political action committees.

Also listed in the memo as "high profile" employers are public sector employers like BART (multiple fatalities and numerous Serious citations) and the Department of State Hospitals (endemic workplace violence, including fatalities, resulting in Serious citations).

"High profile hazards," which frequently generate Serious citations where employers fail to follow state regulations to protect workers, include heat illness (construction and agricultural employers), STDs in adult film (another multi-billion dollar California industry), and workplace violence (major hospitals and healthcare facilities).

For four decades Cal/OSHA, local District Offices which actually conduct the inspections and evaluate the evidence have taken the lead in determining the classification of citations based on the facts. If specific CSHOs or DMs fail to follow the Division's extensive Policies & Procedures manual, Regional and HQ staff have gotten involved in particular cases. But in the thousands of on-site inspections done by District Offices every year, these cases have been the exception.

Micro-Managing on Steroids

Now the DIR Director and her staff will have a direct path to veto the investigative work of the District Offices. The road is open to eliminate any Serious citation to politically sensitive or connected employer before it is even issued by the District Office. No need for publicity-generating citations and appeals when the whole process can be nipped in the bud before anything happens.

Even without this political mischief, the new Form 1BY review policy will mean hundreds of hours of additional work at the regional and headquarters level by people who are already maxed out. It will mean less time to investigate serious hazards that might result in Serious citations. It will mean fewer Serious citations are issued – if only because the time lines for review and issuance will not be met.

This memo is a textbook example of what micro-managing and "control freak" administration does to regulatory enforcement.