

North Carolina Department of Labor  
Occupational Safety and Health Division  
Bureau of Compliance

Field Operations Manual  
Chapter VI - Penalties



Chapter Effective: February 2000  
Revision 21: 07/01/23

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## **Chapter VI**

### **Penalties**

#### **A. General Policy.**

1. **Penalty Structure.** The division has always taken the position that the penalty structure implemented under the Act was not designed as a punishment for violations nor as a source of income for the division or the department. Penalties paid for cited violations are not expended by the division or department, but instead are paid to Civil Penalty and Forfeiture Fund in accordance with North Carolina General Statute (NCGS) §115C-457.2 – Remittance of Monies to the Fund. Penalties are designed primarily to provide an incentive toward correcting violations voluntarily prior to an enforcement inspection. The incentive is directed not only to the offending employer but, more especially, to other employers. All employers need to be aware of the standards and regulations in order to create a safe and healthful workplace for employees in North Carolina.
  - a. The General Assembly of North Carolina has made clear its intent that penalty amounts should be sufficient to serve as an effective deterrent to violations.
  - b. Further, the General Assembly recognized that large, proposed penalties serve the public purpose intended under the Act; and criteria guiding approval of such penalties by the commissioner are based on meeting this public purpose.

The penalty structure described in this chapter is part of the general enforcement policy and shall normally be applied as set forth below. The OSH director can exercise discretion to depart from the penalty policy in cases where penalty adjustments do not advance the deterrent goal of the Act. The application of penalty adjustments can therefore result in the issuance of citations with all or zero adjustments. An inspection should maintain consistent penalty adjustments throughout all recommended citations, unless otherwise specified.

2. **Penalty Adjustment.** A decision not to apply the penalty adjustments should normally be based on consideration of one or more of the factors listed below. However, this list is not intended to be exhaustive. If the decision not to apply the penalty adjustments is based on a consideration other than the factors listed below, the decision must be fully explained in the case file and approved by the OSH director or his/her designee. The factors to be considered include:
  - a. The proposed citations are related to a fatality/catastrophe;
  - b. The employer has received a willful or repeat violation within the past five years related to a fatality;
  - c. The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39 – Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye as a Result of Work-Related Incidents to OSHA;

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- d. The proposed citations are being considered for an egregious case.
- e. The employer has numerous recordkeeping violations related to a large number or rate of injuries and illnesses at the establishment;
- f. The proposed failure to abate notification is based on a previous citation for which the employer failed to submit abatement verification;
- g. The employer has been referred to debt collection for past unpaid penalties; or
- h. The employer has not complied with the provisions of a previous informal or formal settlement agreement.

B. **Civil Penalties.**

- 1. **Statutory Authority.** NCGS §95-138 – Civil Penalties, provides the commissioner with the authority to propose civil penalties for violations of the Act. Per NCGS §95-138(a1), the minimum and maximum civil penalties will be adjusted annually. This will be done in accordance with the requirements set forth in the United States Consumer Price Index (CPI) for All Urban Consumers published by the United States Department of Labor, as necessary to comply with federal law. The OSH division shall have a period of 60 calendar days from the date a final rule is published in the Federal Register to publish the civil penalties in the North Carolina Register under the North Carolina Administrative Code (NCAC), 13 NCAC 07A .0301 – Incorporation by Reference, or any related or subsequent regulations setting penalty standards in compliance with Part 1903 – Inspections, Citations and Proposed Penalties of Title 29 of the Code of Federal Regulations (CFR).
  - a. A violation determined to be serious in nature will be assessed a penalty of up to \$15,625, except that a penalty of up to \$29,000 will be assessed for each serious violation that involves injury to an employee under 18 years of age.
  - b. A non-serious violation may be assessed a penalty of up to \$15,625.
  - c. In the case of willful or repeat violations, a civil penalty of up to \$156,259 may be proposed.
  - d. For other specific violations of the Act, civil penalties of up to \$15,625 may be proposed.
  - e. Penalties for failure to correct a violation may be not more than \$15,625 for each calendar day that the violation continues beyond the final abatement date.

- 2. **Minimum Penalties.** The following guidelines apply:

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- a. The adjusted proposed penalty for any willful violation will not be less than \$11,162. This is a statutory minimum and not subject to administrative discretion.
- b. If a penalty is assessed, it will not be less than \$750.
3. **Penalty Factors.** NCGS §95-138(b) of the Act provides that penalties will be assessed on the basis of the following factors:
  - a. The gravity of the violation;
  - b. The size of the business;
  - c. The good faith of the employer, which is evaluated on the basis of safety and health programs;
  - d. The employer's history of previous violations; and
  - e. Whether the violation involves injury to an employee less than 18 years of age.
4. **Gravity of Violation.** The gravity of a violation is primarily determined by the severity and probability of the violation and will be the basis for calculating the gravity-based penalty (GBP) for both serious and non-serious violations.
  - a. To determine the gravity of a violation, the following two assessments will be made:
    - i. The severity of the injury or illness that could result from the alleged violation, following guidelines in the North Carolina Field Operations Manual (FOM) Chapter IV – Violations.
    - ii. The probability that an accident or health hazard exposure will occur as a result of an alleged violation.
  - b. The size of the business, the good faith of the employer and the history of previous violations will be taken into account in deciding whether and the extent to which the GBP will be reduced.
5. **Severity Assessment.** The classification of the alleged violation as serious or non-serious, according to instructions in FOM Chapter IV – Violations, is based on the severity of the injury or illness that could result from the violation. This classification is the first step in determining the gravity of the violation. A severity assessment will be assigned to a hazard according to the most serious injury or illness which could reasonably be predicted to result from an employee's exposure as follows:
  - a. **High Severity:** Death from injury or illness; injuries involving permanent disability; or chronic, irreversible illnesses.

- b. **Medium Severity**: Injuries or temporary, reversible illnesses resulting in hospitalization or a variable but limited disability.
- c. **Low Severity**: Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment.
- d. **Non-serious Violations**. Although such violations reflect conditions that have a direct and immediate relationship to the safety and health of employees, the resulting injury or illness would probably not cause death or serious physical harm.

**Note:** NCGS §97-2.9 – Definitions section of the Workers’ Compensation Act, defines disability as “the... incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment”. Additionally, under the statutes of Worker’s Compensation permanent disability is divided into three periods of time as follows: **“1) Temporary Total Disability** is that period in which the injured person is totally unable to work. During this time, he receives medical treatment; **2) Temporary Partial Disability** is that period when recovery has reached the stage of improvement so that the person may begin some kinds of gainful employment; and **3) Permanent Disability** applies to permanent damage or to loss of use of some part of the body after the stage of maximum improvement from medical treatment has been reached and the condition is stationary”.

For purposes of OSH Compliance, we will use the information above to determine if a violation should be classified as “high” severity. If an injury is nonreversible, and results in permanent damage or loss to any body part, the item should be classified as “high” severity. In addition to medical treatment and wages, the North Carolina Industrial Commission (NCIC) compensates employees for any injury considered to be a permanent disability. It is the belief of OSH management that if an injury is severe enough to cause permanent damage or loss and it is severe enough for the NCIC to provide compensation, then OSH should consider it severe enough to be classified as a “high” severity. The NCIC does not have a definition for “limited” disability, however we will consider all disabilities that do not fall under the guise of “permanent” disabilities as “limited” disabilities. If the most serious injury or illness which could reasonably be predicted to result from an employee's exposure to a violation would be reversible and would not result in “permanent loss or damage” to a body part, the item may be classified as “low” severity.

- 6. **Probability Assessment**. The probability that an accident or health hazard exposure will result from a hazard has no role in determining the classification of a violation but does affect the amount of the penalty to be proposed.
  - a. **Factors Affecting Probability**. The following circumstances will be considered and will be documented in the case file: (See Appendix VI-A – Guidelines for Rating Severity and Probability Factors).

- i. Number of workers exposed to the hazardous conditions.
- ii. Frequency and duration of exposure, including one-time, short exposures, through more frequent exposures (i.e., once a week, more than once a week), up to continuous daily exposure.
- iii. Employee proximity to the hazardous conditions likely to lead to an accident, anywhere from the fringe of the danger zone up to the point of actually coming in contact with the hazard. The proximity may also be affected by the following:
  - A. Use of appropriate personal protective equipment (PPE); whether, for example, such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect, down to whether such equipment is not utilized by any of the exposed employees and the employer has no program in effect.
  - B. Whether a medical surveillance program is in place that appropriately and effectively protects the employees, versus a defective program which only partially and inadequately protects employees, or whether no medical surveillance program is in effect.
- iv. Other Factors. Other factors may significantly affect the probability that the hazard will produce an accident or health hazard exposure, and they may also be considered and documented as appropriate. Other factors should not be frequently used by the Compliance Safety and Health Officer (CSHO) and should never be used solely to raise or lower an employer's penalty.
  - A. Mitigating circumstances, such as specific safety or health instructions, effective training programs, a comprehensive safety and health program, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete, protection will be documented and considered in the final evaluation of probability. If the CSHO can document that significant mitigating circumstances are applicable, other factors will be assigned a value of "one" in the guidelines that appear in Appendix VI-A.
  - B. Contributing circumstances, such as inappropriate or inadequate safety or health instructions, inadequate or no training, a poor or nonexistent safety and health program, or widespread hazardous conditions or faulty equipment, with little or no attempt to

control them, will be documented and considered in the final evaluation of probability.

Also, working conditions including environmental and other factors (e.g., speed of operations, lighting, temperature, weather conditions, noise, housekeeping) may cause employee stress and increase the likelihood of an accident. If the CSHO can document that significant contributing circumstances are applicable, other factors will be assigned a value of "eight" in the guidelines that appear in Appendix VI-A.

- C. If the hazardous violative condition for a particular citation is determined to be a proximate cause of an accident, then the default probability should be "greater," regardless of the calculated probability rating. It is not appropriate to say there is a "lesser" probability that an accident or health hazard exposure will result from a hazard if that accident has already occurred.
  
- b. Categorization. Probability will be categorized as greater or lesser based upon the likelihood that an accident or health hazard exposure will occur.
  - i. Greater probability results when there is a greater likelihood that an injury or illness will occur as evidenced by an overall value of 4.6 or higher in the guidelines that appear in Appendix VI-A.

EXAMPLE: Electrical hazard with exposed live parts, wet or damp location, one or more employees at the point of danger frequently throughout the workday, and no ground fault circuit interrupter (GFCI) protection.

EXAMPLE: Continuous noise exposure at 100 decibels on the A scale (dBA) level, employees exposed daily on a continuous basis, no hearing conservation program, and no PPE.
  - ii. Lesser probability results when there is a less than greater likelihood that injury or illness will occur as evidenced by an overall value of 4.5 or less in the guidelines that appear in Appendix VI-A.

EXAMPLE: Electrical hazard with exposed live parts; dry location; wood floor; employees not normally exposed, but may come in close proximity to the hazard on an infrequent, irregular basis; non-GFCI protection.

EXAMPLE: Continuous noise exposure; above 92 dBA level; employees exposed more than once a week for about four hours per day; deficient hearing conservation program; PPE available and used appropriately.

- c. Final Probability Assessment. All of the factors outlined above will be considered together in arriving at a final probability assessment.
  - i. A factor will not materially affect the final probability assessment if, based on the professional judgment of the CSHO as documented in the case file, it:
    - A. Does not significantly influence the probability of an accident or health hazard exposure-causing condition; or
    - B. Would tend to dilute the penalty excessively.
  - EXAMPLE: In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that otherwise might be given to the number of employees exposed.
  - ii. When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity the CSHO may use professional judgment to recommend to the district supervisor additional adjustment to the probability. Such recommendations will be documented in the case file.
7. Gravity-Based Penalty. The gravity-based penalty (GBP) is an unadjusted penalty and is calculated in accordance with the following procedures:
  - a. The GBP for each violation will be determined based on appropriate and balanced professional judgment combining the severity assessment and the final probability assessment.
  - b. For serious violations, the GBP will be assigned on the basis of the following scale:

Severity	Probability	GBP
High	Greater	\$15,625
High	Lesser	\$10,000
Medium	Greater	\$10,000
Medium	Lesser	\$6,500
Low	Greater	\$6,500

Severity	Probability	GBP
Low	Lesser	\$3,000
Non-serious	Greater	\$3,000
Non-serious	Lesser	\$0

- c. For non-serious safety and health violations, there is no severity assessment. The director or assistant director may authorize a penalty of not more than \$15,625 for a non-serious violation if it is determined to be appropriate to achieve the necessary deterrent effect. The reasons for such a determination will be documented in the case file.
- d. Penalties to be proposed for non-serious regulatory violations (29 CFR 1903/1904) are discussed at Section B.13. – Violations of Regulatory Requirements.
- e. A GBP may be assigned by the director or assistant director without using the severity and the probability assessments outlined in B.6. – Probability Assessments, when these procedures cannot appropriately be applied.
- f. The Penalty Calculation Table, in Appendix VI-D, can be used for determining appropriate adjusted penalties for serious and non-serious violations after appropriate reductions have been determined. All penalty calculation amounts are to be rounded up to the nearest whole dollar.

8. Gravity Calculations for Combined or Grouped Violations. The following procedures apply to the calculation of penalties for combined and grouped violations:

- a. The severity and the probability assessments for combined violations will be based on the instance(s) with the highest gravity.
- b. For grouped violations, the following guidelines will be used:
  - i. Severity Assessment. There are two considerations for calculating the severity of grouped violations:
    - A. The severity assigned to the grouped violation will be no less than the severity that would be assigned to the most serious individual violation if grouping did not occur.

EXAMPLE: Two violations are grouped. Individually, one violation is assessed a medium severity and the other a low severity. Item 1a will have the higher penalty and Item 1b will have the lower penalty, regardless of the numerical ordering of the cited standard numbers.

B. If the most serious reasonably predictable injury or illness from the grouped items is more serious than would result from any single violation item, the more serious injury or illness will serve as the basis for the calculation of the severity factor of the grouped violation.

EXAMPLE: Three violations are grouped. Individually, each violation would normally be assessed a low severity, but due to grouping, the severity rises to medium. In this case, Items 1a, 1b, and 1c will be assessed a medium severity and the items will be arranged in ascending numerical order according to the cited standard numbers.

ii. Probability Assessment. There are three considerations to be kept in mind in calculating the probability of grouped violations:

A. The probability assigned to the grouped violation will be no less than the probability of the item which is most likely to result in an accident or health hazard exposure.

EXAMPLE: Two violations are grouped. Individually, one violation is assessed a greater probability and the other a lesser probability. Item 1a will be the item with the higher penalty and Item 1b will be the item with the lower penalty, regardless of the numerical ordering of the cited standard numbers.

B. If the overall probability of accident or health hazard exposure is higher with the grouped violation than with any single violation item, the higher probability of accident or health hazard exposure will serve as the basis for the calculation of the probability assessment of the grouped violation.

EXAMPLE: Two violations are grouped. Individually, each violation would be assessed a lesser probability, but due to grouping, the probability rises to greater. In this case, Items 1a and 1b will be assessed a greater probability, and the items will be arranged in ascending numerical order according to the cited standard numbers.

C. Some individual probability factors may be increased by grouping and others may not. For example, the number of employees exposed may be increased while the proximity factor may not. The increased values will be used in the probability calculation.

iii. Grouped violations will be considered as one for penalty purposes. Gravity based factors will be individually calculated and completed for each grouped item. A proposed adjusted penalty will appear only on the first (highest severity/probability or highest penalty) of the grouped items.

9. **Penalty Adjustment Factors**. The GBP may be reduced depending upon the employer's "good faith" (based on safety and health programs), "size of business," and "history of previous violations."

a. **Reduction Factors**. The amount of penalty reduction for size of business, employer's good faith, and employer's history of previous violations will be determined on the basis of the criteria described in the following paragraphs:

i. **Size**. "Size of business" will be measured on the basis of the maximum number of employees of an employer at all workplaces nationwide at any one time during the previous 12 months. The rates of reduction to be applied are as follows:

<b>Employees</b>	<b>% Reduction</b>
1-25	70
26-55	60
56-90	50
91-130	40
131-175	30
176-250	20
251 or more	None

ii. **Good Faith**. A penalty reduction of up to 40 percent is permitted in recognition of an employer's demonstration of good faith. The factor being evaluated here is the existence of an overall safety and health program. To give an employer a good faith reduction, the safety and health program must be evaluated during an inspection. However, deficiencies in programs not related to partial inspections will not be cited. Instead, recommendations for improvements will be made and noted in the case file.

A. **Safety and Health Program**. Good faith may be applied when the employer has shown a management commitment to employees' safety and health in the workplace as demonstrated by the presence of an effective safety and health program. A penalty reduction of 10%, 25% or 40% may be applied based upon the

employer's overall safety and health program. If the employer does not have enough elements to meet the developmental program, no reduction will be given for good faith.

The following criteria may be considered in evaluating the employer's safety and health program. The CSHO will document in the case file the reasoning for giving an employer a good faith reduction. It is not necessary for the program to contain all the elements in each category for the employer to receive the reduction for that category.

1. Developmental: A ten percent (10%) reduction is allowed for an employer with a safety and health program determined to be developmental. Developmental programs are normally evidenced by the following:
  - Safety and health policies are communicated (either verbally or in writing) to employees;
  - Employees are allowed to participate in programs;
  - A management individual on site has authority to abate hazards;
  - Accidents and complaints are investigated;
  - Supervisors have basic oversight for safety and health practices;
  - Maintenance is performed;
  - Some emergency planning exists;
  - First aid or nearby community aid is available;
  - Orientation training is conducted;
  - Employer has a low injury or illness rate; and
  - Consultation has been requested.
2. Basic: A 25 percent (25%) reduction is allowed for an employer with a safety and health program determined to be basic. Basic programs are normally evidenced by the following:

- Management compliance with and enforcement of safety and health rules;
- All required standard specific safety and health programs are in existence with only minor deviations;
- Employees are involved in safety and health programs and inspections;
- Contractors' safety and health plans are monitored;
- Hazard analyses are conducted;
- Safety and health inspections are conducted;
- A hazard reporting system is maintained;
- Recordkeeping is maintained (e.g. Injury and illness logs);
- Hazard controls are implemented for significant hazards;
- Preventive maintenance is performed;
- Employer has a low injury/illness rate; and
- Consultation has been requested.

3. Superior: A 40 percent (40%) reduction is allowed for an employer with a safety and health program determined to be superior. Superior programs are normally evidenced by the following:

- Full management participation/leadership in safety and health activities;
- A comprehensive, integrated written safety and health program, which exceeds all required programs, is maintained;
- Trained employees actively participate in safety and health activities;

- Employer's injury/illness rates are below industry average;
- Safety and health meetings are frequently held;
- Safety and health programs receive periodic review;
- Accident or near-miss investigations are always conducted;
- Onsite medical aid is available for all shifts, or a plan exists to ensure that prompt first-aid is available;
- Emergency preparedness programs and drills are held;
- A competent/qualified safety and health coordinator is designated;
- All required training with competency tests is performed;
- Hazard controls are fully in place;
- Frequent safety and health inspections are held with documentation and abatement; and
- Outside consultation has been performed in the past two years.

iii. History/Record of Previous Violations. A reduction of 10 percent will be given to employers who have not had a final order entered against them for any serious, willful, or repeated violation(s) cited by the division at any location in North Carolina in the three calendar years prior to the opening conference. [See NCGS §95-138(a)]

b. Exceptions. Penalty adjustment factors will generally be calculated only once and applied to all violations, subject to the following exceptions:

- i. Penalties assessed for violations that are classified as high severity and greater probability will be adjusted only for size and history, where appropriate. All other violations found during the inspection may be adjusted for size, good faith, and history, unless prohibited by other exceptions.

- ii. Penalties assessed for violations that are classified as repeated will be adjusted only for size, as appropriate. All other violations found during the inspection may be adjusted for size, good faith and history unless prohibited by other exceptions.
- iii. Penalties assessed for violations that are a proximate cause of a fatality or serious injury will be adjusted only for size, as appropriate. All other violations found during the inspection may be adjusted for size, good faith and history, unless prohibited by other exceptions.
- iv. If one violation is classified as willful, or if an Failure to Abate (FTA) notice is issued with the citations, only the size reduction can be applied to any of the violations found during the same inspection. The employer cannot willfully be in violation of the Act and, at the same time, be acting in good faith with OSH.
- v. Penalties assessed for certain administrative violations will be adjusted only for size and history, where appropriate. Good faith reductions have been turned off in OSHA Express (OE) for affected administrative violations. (See the Forms section in the Field Information System (FIS) on the OSH One Stop Shop for a list of the affected standards.) All other violations found during the inspection may be adjusted for size, good faith, and history, unless prohibited by other exceptions.

c. If joint health and safety inspections are performed at one location, the same penalty reduction factors will be applied to both inspections.

10. **Failure to Abate.** An FTA notice (OSHA-2B Form) will be issued in cases where violations have not been corrected as required.

- a. **Failure to Abate.** FTA penalties will be applied when an employer has not corrected a previously cited violation which had become a final order and that was not appealed or a final order affirmed and/or modified upon appeal.
- b. **Employer Contest.** If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, as to those items contested, until the day following the entry of the final order by the OSH Review Commission affirming the citation.
  - i. If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
  - ii. If an employer contests an abatement date in good faith, an FTA notice will not be issued for the item contested until a final order affirming a date is entered, the new abatement period (if any) has been completed, and the employer has still failed to abate.

- c. Calculation of Additional Penalties. A GBP is to be calculated for each failure to abate violation on the basis severity and probability documented by the facts noted upon reinspection. This recalculated GBP, however, will not be less than that proposed for the item when originally cited, except as provided in B.10.e. – Good Faith Effort to Abate.
  - i. The daily proposed penalty will be multiplied by the number of calendar days that the violation has continued unabated, except as provided below:
    - A. The number of days unabated will be counted from the day following the abatement date specified in the citation or the final order. It will include all calendar days between that date and the day before the date of reinspection.
    - B. Normally the maximum total proposed penalty for failure to abate a particular violation will not exceed 30 times the amount of the daily proposed penalty.
    - C. At the discretion of the director or assistant director, a lesser penalty may be proposed with the reasons for doing so (e.g., achievement of an appropriate deterrent effect) documented in the case file (See Appendix VI-B – Procedures for Recommending Reduction to FTA Penalties).
  - ii. Only the adjustment factor for size, based on the total number of employees noted during the reinspection, will be applied to arrive at the daily proposed penalty. The reductions for good faith and history will not be given.
  - iii. In those instances where no original penalty was proposed, an appropriate penalty will be determined after consulting with the district supervisor. In no case will the penalty be less than \$750 per day.
  - iv. In unusual circumstances, such as where the gravity of the violation is at the highest level (high severity and greater probability), or the employer has willfully failed to abate the violation, or has failed to abate a second time, higher penalties will be proposed. In such situations, the proposed penalty will be approved by the director or assistant director.
- d. Partial Abatement. When the original citation has been partially abated, the district supervisor may authorize a reduction of 25 to 75 percent to the amount of the proposed FTA penalty calculated as outlined in Section B.10.c. – Calculation of Additional Penalties. The reason for this action will be documented in the case file.

- i. When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional daily proposed penalty should take into consideration the extent that the violation has been abated.

EXAMPLE: Where three out of five instances have been corrected, the daily proposed penalty (calculated as outlined in Section B.10.c. without regard to any partial abatement) may be reduced by 60 percent.

- ii. In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements will generally incur a full failure to abate penalty.
- iii. On those occasions when the district supervisor decides to issue a notice for failure to comply with procedural requirements, the calculation of the daily proposed penalty will consider the extent to which a violation has been substantially abated, with the daily proposed penalty (calculated as outlined in Section B.10.c. without regard to any partial abatement) reduced accordingly.

- e. Good Faith Effort to Abate. When the CSHO finds an FTA and their documentation in the case file supports that the employer has made good faith efforts to correct the violation and had good reason to believe that it was fully abated, the district supervisor and bureau chief will be consulted. The district supervisor and bureau chief may prepare a Citation Authorization Form to recommend an elimination of the FTA notice or a reduction of the daily proposed penalty that would otherwise be justified. The employer would still be responsible for ensuring that the final abatement is attained.

EXAMPLE: The employer may in good faith hire an outside contractor to complete necessary changes, relying on the contractor's expertise. Therefore, the inferior work is the responsibility of the contractor, not the employer. This may justify the elimination of the FTA notice or a reduction of the daily proposed penalty.

11. Repeat Violations.

- a. Gravity-Based Penalty Factors. Each violation will be classified as serious or non-serious and the GBP will be calculated for each repeat violation based on facts noted during the current inspection. Only the adjustment factor for size appropriate to the facts at the time of the reinspection, will be applied to the repeat violations.
- b. Penalty Increase Factors. NCGS §95-138(a) of the Act provides that an employer who repeatedly violates the Act may be assessed a civil penalty of up to \$156,259, for each violation. In accordance with FOM Chapter IV – Violations, Section F.5. – Repeat Violations, a multiplier of the amount of the

penalty assessed for each repeat violation will be as follows: The GBP will be doubled for the first repeat violation, multiplied by five if the violation has been cited twice before, and multiplied by ten if the violation has previously been cited three or more times.

c. Non-serious, No Initial Penalty. For a repeat non-serious violation that had no initial penalty, a \$750 GBP will be assessed. This GBP will be reduced by the appropriate size factors. It will then be doubled for the first repeat violation, multiplied by five if the violation has been cited twice before, and multiplied by ten if the violation has previously been cited three or more times. In no case will the final penalty be less than \$750.

12. Willful Violations. NCGS §95-138(a) of the Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than \$156,259, but not less than \$11,162 for each violation.

a. Gravity Based Penalty Factors. Each willful violation will be classified as serious or non-serious. After determining the gravity of a violation, a GBP will be determined based on the facts noted during the inspection. The adjustment factor for size will be applied. The district supervisor and bureau chief will prepare a Citation Authorization Form for case files involving willful violations.

i. Serious Violations. For willful serious violations, the adjusted GBP will be multiplied by ten.

A. In no case will the penalty be less than \$11,162.

B. The director or assistant director may assess a higher penalty (up to the statutory maximum of \$156,259) or a lower penalty, upon consideration of such factors as the degree of willfulness involved in the violation and the achievement of an appropriate deterrent effect. The reasons for such action will be documented in the case file.

ii. Non-serious Violations. For willful non-serious violations, a minimum penalty of \$11,162, after adjustment for size, will be assessed.

b. Regulatory Violations. In the case of regulatory violations that are determined to be willful, the unadjusted initial penalty will be multiplied by ten. In no event will the penalty, after adjustment for size, be less than \$11,162.

13. Violation of Regulatory Requirements. Except as provided in the Appropriations Act, NCGS §95-138(a) of the Act, provides that an employer who violates any of the posting requirements will be assessed a civil penalty of not more than \$15,625 for each violation or may be assessed a like penalty for recordkeeping violations. In each case, appropriate penalty adjustment factors will be applied to the unadjusted penalty according to Section B.9. –Penalty Adjustment Factors. Unless specifically approved by the director or

assistant director, violations of regulatory requirements will be classified as non-serious. Also reference Compliance Directive (CPL) 02-00-051 – Enforcement Exemptions and Limitations Under the Appropriations Act.

a. Posting Requirements.

- i. Poster. Citations and/or penalties will not be issued for lack of displaying an OSH Notice to Employee poster (Required by 29 CFR 1902.9 – Requirements for Approval of State Posters), unless approved by the director or assistant director. If a complaint item associated with the lack of poster display is substantiated, the employer should be furnished a copy of the OSH poster and advised of the legal requirement to display it for employees. In this case, a citation or penalty will not be issued.

In the event the employer refuses to comply with the posting requirement, the employer will be informed of the consequences of failure to display the OSH poster. These actions will be noted in the case file. Citations and/or penalties for failure to post the OSH poster shall only be recommended by the CSHO if the employer demonstrates a consistent disregard for their responsibilities under the Act, and interviews show that employees are unaware of their rights under the Act, or the employer has been previously cited or advised by the OSH division of the posting requirement. The unadjusted penalty for this alleged violation will be \$2,000. Citation issuance regarding posters must be approved by the director or assistant director.

- ii. Annual Summary. A citation will normally be issued if an employer fails to properly create, certify, or post the OSHA 300A, Annual Summary, no later than February 1 of the year following the year covered by the records, as required by 29 CFR 1904.32 – Annual Summary. Citations will be issued as follows:

- A. The failure to create the OSHA 300A will be cited under 29 CFR 1904.32(a)(2). If there are inaccuracies on the OSHA 300A or the evidence supports the OSHA 300 log entries were not reviewed extensively enough when creating the annual summary, 29 CFR 1904.32(a)(1) shall be cited.
- B. The failure to certify the OSHA 300A will be cited under 29 CFR 1904.32(a)(3). If the OSHA 300A is certified by someone other than a company executive, then 1904.32(b)(3) shall be cited.
- C. The failure to post the OSHA 300A will be cited under 29 CFR 1904.32(a)(4). If the OSHA 300A was not posted properly, such as in an inconspicuous location, 29 CFR 1904.32(b)(5) shall be

cited. If it was posted, but not during the appropriate time-period, then 29 CFR 1904.32(b)(6) shall be cited.

The unadjusted penalty for each of these violations will be \$2,000.

Where no injuries or illnesses actually occurred, a citation will not be issued if the summary is not created, certified, or posted. The CSHO will verify that there were no recordable injuries or illnesses through employee interviews and by review of workers' compensation or other records, including medical records.

- iii. Citation. If an employer has not posted a citation as required in 29 CFR 1903.16 – Posting of Citations, a citation will be issued. The unadjusted penalty will be \$6,000.
- b. Reporting and Recordkeeping Requirements. NCGS §95-138(a) provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of not more than \$15,625 for each violation.
  - i. Injury and Illness Log and Supplemental Forms. The employer must record cases on the OSHA 300 – Log of Work-Related Injuries and Illnesses, and on the OSHA 301 – Incident Report (or equivalent form such as the NCIC's Worker's Compensation Form 19), as prescribed in Subpart C – Recordkeeping Forms and Recording Criteria, of 29 CFR Part 1904 – Recordkeeping. Where no records are kept **and** there have been injuries or illnesses which meet the requirements for recording, as determined by a review of other records or by employee interviews, a citation for failure to keep records will normally be issued.

When the required records are kept **but** no entry is made for a specific injury or illness which meets the requirements for recording, a citation for failure to record the case will normally be issued.

Where no records are kept **and** there have been no injuries or illnesses, as determined by employee interviews, a citation will normally not be issued. See Section 13.a.ii. – Posting Requirements, regarding OSHA 300A – Annual Summary.

When the required records are kept **but** have not been completed with the detail required by the regulation, or the records contain minor inaccuracies, the records will 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 defects in the records materially impair the understandability of the nature of the hazards, injuries and/or illnesses at the workplace, a citation will normally be issued.

A. Cases Incorrectly Recorded on the OSHA 300 or OSHA 301. If the deficiencies on the OSHA 300 or OSHA 301 do not affect the CSHOs ability to understand the information, normally no citation will be issued. For example, an employer should not be cited solely for misclassifying an injury as an illness, or vice versa. The employer will be provided information on keeping the records for the employer's analysis of workplace injury trends and on the means to keep the records accurately. The employer's actions to correct the deficiencies will be recorded and no citation will be issued.

B. One Citation Item per Form. Recordkeeping citations for improper recording of a case will be limited to a maximum of one citation item per form. This applies to both the OSHA 300 and the OSHA 301. Where the conditions for citation are met, an employer's failure to accurately complete the OSHA 300 for a given year would normally result in one citation item. Similarly, an employer's failure to accurately complete the OSHA 301, or equivalent, would normally result in one citation item. Multiple cases which are unrecorded or inaccurately recorded on the OSHA 300 or 301 will normally be reflected as instances of the violation under that citation item.

EXAMPLE: A single citation item for an OSHA 300 violation would result from a case where the employer did not properly count the days away, checked the wrong column, and did not adequately describe the injury or illness, or where the employer in several cases checked the wrong columns and/or did not adequately describe the injury or illness, and these errors materially impair the understandability of the nature of the hazards, injuries and/or illnesses at the workplace. **Note:** As stated above, an employer should not be cited solely for misclassifying injuries as illnesses, or vice versa.

EXAMPLE: A single citation item for an OSHA 301 violation would result when an OSHA 301 had not been completed, or where so little information had been put on the OSHA 301 for multiple cases as to make the OSHA 301 materially deficient.

C. Penalties. If the employer does not maintain the required records (OSHA 300 or OSHA 301), the instances will be combined/grouped, and will be assessed an unadjusted penalty of \$2,000 for each OSHA-1B (Citation Form).

ii. Reporting requirements.

A. Recordkeeping and Reporting. In accordance with 29 CFR

1904.39 – Recordkeeping, paragraph (a)(1) – Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye as a Result of Work-related Incidents to OSHA, an employer is required to report the death of any employee to the OSH division within eight hours of the employer's knowledge of the death. Additionally, in accordance with 29 CFR 1904.39(a)(2), the employer must report the in-patient hospitalization of one or more employees, a work-related amputation or a work-related loss of an eye to the OSH Division within 24 hours of the employer's knowledge of these events. Per 1904.39(b)(5), the employer must report all fatal heart attacks that occur at work regardless of whether it is known that the work-environment was the cause of the heart attack. Per 1904.39 (b)(3) and (b)(4), certain work-related motor vehicles accidents and certain commercial and public transportation accidents do not have to be reported.

A non-serious citation will normally be issued for failure to report such incidents. The unadjusted penalty will be \$10,000 for failure to report: a work-related fatality, more than one in-patient hospitalization, an amputation of more than one digit or the loss of an eye. The unadjusted penalty will be \$5,000 for failure to report any other non-fatal reportable incident. If the bureau chief determines that it is appropriate to achieve the necessary deterrent effect, the unadjusted penalty may be \$15,625 for failure to report fatalities or serious injuries.

If an employer does not report an incident required to be reported per 29 CFR 1904.39, but the OSH division is notified before the end of the required reporting period through other means (i.e., media, family member, fire department, police, insurance company), a citation for failure to report will normally not be issued. If an employer fails to report a fatal heart attack that occurs in the work environment and an investigation or inspection determines that the heart attack was not work-related (natural causes), the employer will not be cited. However, the CSHO will remind the employer, either orally or in writing, of the reporting requirement. The CSHO will document the means by which the employer was reminded in the case file.

If the OSH division becomes aware of a fatality by the complaint desk receiving a “Report of Investigation by Medical Examiner” or other means, the complaint desk will attempt to contact the employer to gather information and to inform the employer of the requirement to report the fatality. The complaint desk will document the contact with the employer on the Fatality/Catastrophe Report.

B. Mechanical Power Presses. 29 CFR 1910.217 – Mechanical Power Presses, paragraph (g)(1) – Reports of Injuries to Employees Operating Mechanical Power Presses, requires the employer to report, within 30 days of the occurrence, all point-of-operation injuries to operators or other employees to the OSH division. This may be done by calling 1-800-NCLABOR during normal business hours. This may also be done in writing. A citation will normally be issued for failure to report such an occurrence. The unadjusted penalty will be \$5,000.

If the OSH division becomes aware of an incident required to be reported per 29 CFR 1910.217(g)(1) through means other than an employer report, a citation for failure to report will normally not be issued if an investigation/inspection is opened prior to the end of the required reporting period. However, mechanical power press accidents that result in an employee fatality, in-patient hospitalization, amputation or loss of an eye must follow the reporting requirements in 29 CFR 1904; therefore, citations will be issued in accordance with the reporting guidance for 29 CFR 1904 in Section 13.ii.A. – Recordkeeping and Reporting.

c. Migrant Housing Act Violations.

- i. Violations of the Migrant Housing Act of North Carolina (NCGS §95-222, et seq.) will be documented and citations issued in accordance with FOM Chapter XI – Agricultural Safety and Health Inspections.
- ii. Violations of NCGS §95-226(a) – Application for Inspection, for failing to register migrant housing, and NCGS §95-226(d) for occupying migrant housing without a certificate, will be documented and citations issued (see FOM Chapter XI). The unadjusted penalty for NCGS §95-226(a) will be \$10,000. The unadjusted penalty for NCGS §95-226(d) will be \$6,000. For both citations, adjustment factors shall be given in accordance with Section B.9. – Penalty Adjustment Factors, for size and good faith.

d. Grouping. Violations of the posting and recordkeeping requirements which involve the same document (e.g., if the summary portion of the Injury and Illness Log was neither posted nor maintained) will be grouped for penalty purposes. The unadjusted penalty for the grouped violations would then take on the highest dollar value of the individual items.

e. Penalties for Abatement Verification.

- i. The penalty provisions of the Act apply to all citations issued under 29 CFR 1903.19 – Abatement Verification. The adjustment factors for size

and history will apply. No "good faith" reduction will be given to employers cited for failure to abate.

- ii. The unadjusted penalty for failing to submit abatement certification documents will be \$2,000. However, the penalty for failure to submit abatement verification documents will not exceed the penalty for the original citation.
- iii. The unadjusted penalty for failure to notify affected employees of the abatement or placing the warning tag (copy of citation) on the equipment will be \$6,000 and will follow the same penalty structure applied for failure to post citations.

f. Access to Records.

- i. Recordkeeping. If the employer fails upon request to provide copies of records required in 29 CFR 1904.29(a) – Forms, to any employee, former employee, personal representative, or authorized employee representative by the end of the next business day, a citation for violation of 29 CFR 1904.35(b)(2) – Employee Involvement, will normally be issued. The unadjusted penalty will be \$2,000 for each form not made available.

EXAMPLE: If the OSHA 300 or the OSHA 300A for the current year and the three preceding years is not made available, the unadjusted penalty will be \$8,000.

EXAMPLE: If the employer does not make the OSHA 301 available, the unadjusted penalty will be \$2,000 for each OSHA 301 not provided, up to a maximum of \$15,625.

When the employer is cited for failure to keep records (OSHA 300, OSHA 300A, or OSHA 301) under 29 CFR 1904.4 – Recordkeeping Criteria, no citation for failure to give access under 29 CFR 1904.35(b)(2) will be issued.

- ii. Exposure and Medical Records. If the employer is cited for failing to provide records as required under 29 CFR 1910.1020 – Access to Exposure and Medical Records, for inspection and copying by any employee, former employee, or authorized representative of an employee, the unadjusted penalty will be \$2,000.

EXAMPLE: If all the necessary evidence is established where an authorized employee representative requested exposure and medical records for three employees and the request was denied by the employer, a citation would be issued for one violation of 29 CFR 1910.1020, with an unadjusted penalty of \$2,000.

FOM Chapter VI, cont'd.

- g. Notification Requirements. When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by 29 CFR 1903.6 – Advance Notice of Inspections, a citation will be issued with an unadjusted penalty of \$4,000.

C. **Criminal Penalties**.

1. The Act provides for criminal penalties in the following cases:
  - a. Willful violations causing death.
  - b. Giving unauthorized advance notice.
  - c. Giving false information.
  - d. Killing, assaulting or hampering the work of a CSHO.
2. Criminal penalties are imposed by the courts after trials and not by the NC Department of Labor or the OSH Review Commission.

## **APPENDIX VI-A: Guidelines for Rating Severity and Probability Factors**

### **Severity:**

The CSHO must first determine the incident the violated standard is designed to prevent. Then, using all the variables involved with the observed hazard, the CSHO must determine the most serious of all likely injuries or illnesses that might result.

High:	Death, permanent disability, cancer, chronic illness.
Medium:	Injury or illness requiring hospitalization, temporary disability, or anything that prevents the employee from doing their normal job.
Low:	Injury or illness requiring medical treatment, but not requiring hospitalization.

### **Probability:**

Probability that an accident or incident will occur is evaluated on several factors: the number of employees involved, their frequency of exposure to the hazard, their proximity to the hazard, and other conditions that may contribute to or mitigate the hazard. The importance of each factor in determining the degree of probability that an injury would occur may vary with each violation. For example, although only one employee may be in a trench that is not shored, there is a high probability of injury since 100% of all trenches collapse given enough time.

<b>Rating:</b>	1	2	3	4	5	6	7	8
<b># of Employees:</b>	1	2	3	4	5	6	7	8 or more
<b>Frequency:</b>	< 1/wk	1/wk	2-6/wk	< 2h/dy	2-3h/dy	4-5h/dy	6-7h/dy	8+h/dy
<b>Proximity:</b>	6+ ft	5-6 ft	4-5 ft	3-4 ft	2-3 ft	1-2 ft	< 1 ft	point of danger
<b>Other Factors:</b>	1							8

Add the rating for each factor used; divide the sum by the number of factors used, and round the result to the nearest tenth. (e.g.,  $5+4+5=14$ ;  $14/3=4.67$ ; rounded to 4.7)

Lesser:	1.0 – 4.5
Greater:	4.6 – 8.0

Proximity may be affected by proper use of PPE or effective safety and health program.

Mitigating factors may include an effective hearing conservation program; effective training; comprehensive safety and health program; evidence of correction underway; warning signs, labels, or special procedures; mandatory administrative controls that provide some protection; or medical surveillance programs. Mitigating factors must be a specific recommendation documented by the CSHO in the case file for each OSHA-1B where the mitigating factors are recommended.

Contributing factors may include high speed of operation; poor lighting; extreme temperatures; adverse weather conditions; noise; housekeeping problems; inadequate or inappropriate safety and health training and/or programs; widespread hazardous conditions with little attempt to control them; or factors inherent to the hazard (e.g., given enough time, trenches will collapse 100% of the time due to the Law of Gravity.) Contributing factors must be a specific recommendation documented by the CSHO in the case file for each OSHA-1B where the contributing factors are recommended.

FOM Chapter VI, cont'd.

#### **APPENDIX VI-B: Procedures for Recommending Additional Reductions to FTA Penalties**

Bureau chiefs and district supervisors may recommend additional reductions in FTA penalties pursuant to Chapter VI, paragraph B.10.c. – Calculation of Additional Penalties. The director or assistant director may authorize reducing proposed FTA penalties. Factors to be considered in recommended reductions of FTA penalties are as follows:

Size:	Small businesses may be given additional reductions. Large employers receive no reduction for size.
Effort:	Demonstrated efforts by the employer to abate the hazard (beyond credit given for partial abatement), inadvertent oversight of abatement or other material factors which indicate that the employer was in good faith trying to abate all violations.
Ability to pay:	Limited financial resources which prohibit the employer from absorbing the cost of the penalty.
Severity:	Conditions which do not represent significant danger to employees (some types of unsanitary conditions, some non-serious violations, etc.)
Documentation:	<p>Case files are to be developed according to the FOM. The OSHA-2B (Failure to Abate) form is to be used to document the FTA. The instance description will be written in the same format as that of the OSHA-1B, completed to identify the current conditions. Original FTA penalties are calculated and also entered in the instance description.</p> <p>Each FTA for which the district supervisor recommends penalty reductions will be annotated with an evaluation using the factors described above. For each factor, select an adjustment credit between 0 and 100% (in 10% increments). Tabulate the reduction percentages and total. Adjust the FTA penalty accordingly.</p> <p>Each OSHA-2B instance description must contain both the original and the proposed penalties.</p> <p>Since all FTAs require approval, the district supervisor and bureau chief must complete and submit a Citation Authorization Form and indicate that additional penalty adjustments are being recommended.</p>

**APPENDIX VI-C: Severity Quotients for Falls Applicable to General Industry and Construction**

The following scenario should be classified non-serious:			
FALL DISTANCE (in feet)	CONDITIONS		
= 4 but < 8	1. Fall to soft surface; <b>and</b> , 2. No items or equipment that could cause injury would be struck.		
The following scenarios should be classified as serious:			
FALL DISTANCE (in feet)	HIGH SEVERITY	MEDIUM SEVERITY	LOW SEVERITY
= 4 but < 8	1. Fall into or upon dangerous equipment (e.g., augers, mixers, protruding rebar); <b>or</b> ,  2. Fall into vats, pits, etc. where dangerous chemicals, moltens, etc. are found.	Not applicable.	If the standard is applicable and employee(s) are working above a hard surface and/or items or equipment that could be struck, then evaluate for potential serious violation. If serious, classify as LOW severity.
= 8 but < 10	1. Fall into or upon dangerous equipment (e.g. augers, mixers, protruding rebar); <b>or</b> ,  2. Fall into vats, pits, etc. where dangerous chemicals, moltens, etc. are found.	Fall to hard, solid surface.	Fall to normal (grass covered) earth, soft earth, or sand.
= 10 but < 15	1. Fall into or upon dangerous equipment (e.g. augers, mixers, protruding rebar); <b>or</b> ,  2. Fall into vats, pits, etc. where dangerous chemicals, moltens, etc. are found; <b>or</b> ,  3. Fall upon items which could impale, severely lacerate, etc.; <b>or</b> ,  4. Fall to hard, solid surface.	Fall to normal (grass covered) earth, soft earth, or sand.	To be determined on a case-by-case basis, discuss with district supervisor.
$\geq 15$	Always High Severity		

**APPENDIX VI-D: Penalty Calculation Table**

Total % Reduction	Admin See Note	Admin See Note	Admin See Note	Non-serious Greater (NG)	Low Lesser (LL)	Low Greater (LG)	Medium Lesser (ML)	Medium Greater (MG)	High Lesser (HL)	High Greater (HG)
0	2,000	6,000	10,000	3,000	3,000	6,500	6,500	10,000	10,000	15,625
5	1,900	5,700	9,500	2,850	2,850	6,175	6,175	9,500	9,500	14,843.75
10	1,800	5,400	9,000	2,700	2,700	5,850	5,850	9,000	9,000	14,062.50
15	1,700	5,100	8,500	2,550	2,550	5,525	5,525	8,500	8,500	13,281.25
20	1,600	4,800	8,000	2,400	2,400	5,200	5,200	8,000	8,000	12,500.00
25	1,500	4,500	7,500	2,250	2,250	4,875	4,875	7,500	7,500	11,718.75
30	1,400	4,200	7,000	2,100	2,100	4,550	4,550	7,000	7,000	10,937.50
35	1,300	3,900	6,500	1,950	1,950	4,225	4,225	6,500	6,500	10,156.25
40	1,200	3,600	6,000	1,800	1,800	3,900	3,900	6,000	6,000	9,375.00
45	1,100	3,300	5,500	1,650	1,650	3,575	3,575	5,500	5,500	8,593.75
50	1,000	3,000	5,000	1,500	1,500	3,250	3,250	5,000	5,000	7,812.50
55	900	2,700	4,500	1,350	1,350	2,925	2,925	4,500	4,500	7,031.25
60	800	2,400	4,000	1,200	1,200	2,600	2,600	4,000	4,000	6,250.00
65	750	2,100	3,500	1,050	1,050	2,275	2,275	3,500	3,500	5,468.75
70	750	1,800	3,000	900	900	1,950	1,950	3,000	3,000	4,687.50
75	750	1,500	2,500	750	750	1,625	1,625	2,500	2,500	3,906.25
80	750	1,200	2,000	750	750	1,300	1,300	2,000	2,000	3,125.00
85	750	900	1,500	750	750	975	975	1,500	1,500	2,343.75
90	750	750	1,000	750	750	750	750	1,000	1,000	1,562.50
95	750	750	750	750	750	750	750	750	750	750
≥100	750	750	750	750	750	750	750	750	750	750

**\*NOTE:** The administrative columns should be used for penalties in Section B.13. – Violation of Regulatory Requirements. Use the column corresponding to the appropriate unadjusted penalty. Non-serious Lesser (NL) has \$0 penalty attached so it is not listed in the table above (Reference the table in Section B.7. – Gravity-Based Penalty).