

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

Field Operations Manual
Chapter V - Citations



Chapter Effective: February 2000
Revision 6: 10/01/2012

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Chapter V

Citations

A. **Pre-Citation Consultation.**

1. **General.** In order to ensure uniformity, consistency, and the legal adequacy of a limited category of citation items, there should be appropriate consultation between the CSHO, supervisor, bureau chief, and the Attorney General's (AG's) Office.
 - a. Pre-citation consultation will be conducted at the earliest stage possible of an investigation in order to assist in developing an investigation strategy, particularly in cases involving fatalities, catastrophes and cases of significant public concern.
 - b. All citations from an inspection are normally issued at the same time; however, the director's office may modify this procedure as the situation dictates.
 - c. Where required as a result of pre-citation consultation, the supervisor will undertake additional investigation, which may involve obtaining expert assistance.
 - d. Nothing in the above procedures will affect the division's responsibility and final authority to issue citations.

B. **Writing Citations.**

1. **General.** NCGS 95-137(a) of the act controls the writing of citations.
 - a. NCGS 95-137(a). ". . . the Director or his authorized representative . . . will with reasonable promptness issue a citation to the employer." The time that has elapsed from the completion of the inspection or investigation until the issuance of citation(s) will be closely monitored and kept as short as possible by the director.
 - b. NCGS 95-137(b)(3). "No citation may be issued . . . after the expiration of six months following the occurrence of any violation." Accordingly, a citation will not be issued where any violation alleged therein last occurred six months or more prior to the date on which the citation is actually signed and dated. Where the employer fails to report a fatality, accident, or punch press injury, the time limitation begins at such time that the division learns or could have learned of the incident. The AG's office will be consulted.
2. **Specific Instructions.** The proper writing of citations is an essential part of the enforcement process. Information regarding the completion of information necessary to issue a citation is found on-line in the NCR system.
 - a. **Standards and Regulations.** After identifying a hazardous condition, the CSHO will review existing standards and regulations to ensure that the hazardous condition noted is covered within the scope and application of the standard. Citations will not be issued unless the citation is based on mandatory language in OSH standards (e.g., no "should" standards) and, when applicable, in referenced

standards. Standards legally incorporated by reference have the same force and effect as OSH standards. (See 29 CFR 1910.6.)

- b. **SAVEs**. The Standard Alleged Violation Elements (SAVEs) are incorporated into an automated citation processing system. The SAVE is a tool to assist in report preparation and is not to be used without ensuring that the standard or regulation is applicable.
- c. **SAVEs Already on the NCR**. When applying SAVEs that are already on the NCR system, the CSHO will:
 - i. Determine which specific and applicable standard or regulation is to be cited.
 - ii. Search the SAVEs on the NCR system for one that corresponds to the specific standard or regulation. If one is listed, compare the SAVE to the standard or regulation to ensure that it is appropriate for the alleged violation.
 - iii. Enter the SAVE on the OSHA 1-B in the appropriate field in accordance with the on-line instructions.
- d. **SAVEs not on the NCR**. If there is not an appropriate SAVE on the NCR system, the CSHO will be required to compose one in a format similar to existing SAVEs, and as follows:
 - iv. Wording will not be added or deleted so that the standard is changed. The CSHO will notify their supervisor that they have composed a SAVE for a violative condition.
 - ii. It is preferable to use the entire standard for the SAVE. However, if only a portion of the standard is needed to adequately describe the violative condition, the CSHO may use only the entire applicable sentence or clause.
 - iii. The wording of the SAVE should make it clear to the employer what condition they are alleged to be violating. It may be necessary to include some wording from a previous clause, sentence or standard to clarify the wording of the SAVE that is being composed (e.g. The second sentence of 1910.215(b)(1)(iii) reads, "they shall be made of steel or other material with adequate strength and shall enclose the wheel sides upward from the back for one-third of the wheel thickness." To clarify the condition to the employer, the word "They" needs to be replaced with "Revolving cup guards" from the first sentence.
 - iv. Change all the verbs in the new SAVE to the past tense to reflect the specific condition the CSHO observed at the facility (e.g. 'shall be' changed to 'were not', 'did not', 'was not'). Using the example above, the SAVE composed by the CSHO would read, "Revolving cup guards were not made of steel or other material with adequate strength and did not enclose the wheel sides upward from the back for one-third of the wheel thickness".

- v. Insert the necessary information when the SAVE ends with a blank. The blank implies that the CSHO is to substitute applicable wording from the standard.
- e. **AVDs**. The Alleged Violation Description (AVD) is used to provide the employer with information about an alleged violative condition that is specific to their establishment. The AVD needs to be written such that anyone at the establishment could take the AVD wording and know the exact location and violative condition. The appearance of the AVD should look substantially similar to the employer, regardless of which district issues the citation. Since many employers have facilities located throughout the state, the following standardized format will be followed in writing AVDs:
 - i. Where there are more than one location of alleged violations of the same standard (SAVE), letters, beginning with 'a', will be used to identify the different locations. [E.g. three separate locations will each be designated as a), b), c)] The CSHO should not confuse this type of combining with the instructions for grouping.
 - ii. The CSHO's notes should enable them to give a specific location of each violative condition. The description of each location needs to go from general to specific. [E.g. a) Building A, welding department, north wall, resistance welding station].
 - iii. Following the description of the location, the CSHO needs to give the details of the equipment and/or condition that they are alleging to be in violation of the standard. The CSHO's notes should enable them to give these details, such as brand names, serial numbers, id numbers, colors, etc. To enable the employer to more easily separate the location from the equipment/condition, use a dash (-) to delineate the separation. [e.g. a) Building A, welding department, north wall, resistance welding station - DeWalt right angle grinder, S.N. 1234567890, was not provided with a revolving cup guard.]
 - iv. The CSHO can add notes to the end of the AVD to provide useful information, such as abatement information, to the employer. When General Duty (NCGS 95-129(1)) citations are alleged, the following note is mandatory: "Among others, one feasible and acceptable method of abating this violation is to..."
 - v. If any alleged violation refers to an exposure that occurred outside of the dates of the inspection (e.g. the violation is related to an accident that occurred prior to the opening conference, or any documented one-time exposure occurred prior to the opening conference), the AVD will begin with, "On or about MM/DD/YYYY the following conditions occurred:".
 - vi. For multi-step abatements, the information must include a description of each step together with the date by which each step must be completed. This information will appear on the citation.
- f. **Alternative Standards**. In rare cases, the same factual situation may present a possible violation of more than one standard. For example, the facts that support

a violation of 29 CFR 1910.28(a)(1) may also support a violation of 1910.132(a) if no scaffolding is provided when it should be and the employer does not require the use of seat belts.

- i. Where it appears that more than one standard is applicable to a given factual situation and that compliance with any of the applicable standards would effectively eliminate the hazard, it is permissible to cite alternative standards using the words "or in the alternative" after the AVD for the first standard and before the SAVE wording for the second standard on the citation. A reference in the citation to each of the standards involved will be accompanied by a separate AVD which clearly alleges all of the necessary elements of a violation of that standard.
- ii. Where alleged violations are "in the alternative", only one penalty, not one penalty for each standard cited, will be proposed for the violative condition.

Note: NCGS 95-129(1) may be cited "in the alternative" when the specific standard cited to cover the hazardous condition may not apply. (See Chapter IV on violations)

- g. Ordering of Violations on the Citation. Violations will normally be in numerical order by standard number, within each classification in which they appear. Grouped violations should also be in numerical order within the grouping. However, when several violations are written relating to the same hazard, it is preferable to place the most serious violations first. For example, a violation written for an unsupported or unsloped trench would be placed in order before the violation for not providing a means of egress from the same trench. If penalties are to be proposed for grouped violations, the penalty should appear across from the first violation item appearing on the OSHA-2.
- h. Ordering Citations in the Citation Package. Citations are ordered as follows: Willful Serious, Willful Nonserious, Repeat Serious, Repeat Nonserious, Serious, and Nonserious. If each type existed in a file, they would be numbered as Citations 1 through 6 in the stated order. If only Serious and Nonserious exist, they are Citations 1 and 2 respectively. Notices of Failure to Abate are separate from other citations. They have the same classification, citation number, and item number that they had in the original inspection citation package.

C. **Grouping and Combining of Violations.**

1. Definitions. For the purpose of this section the following definitions apply:
 - a. Combining. The gathering of all instances of violations of a specific standard into one citation item during the inspection/investigation of a single establishment or worksite.
 - b. Grouping. The joining of violations of two or more specific standards under an individual citation item during the inspection/investigation of a single establishment or worksite.
2. Combining. Violations of a single standard having the same classification found during the inspection of an establishment or worksite generally will be combined into one

alleged violation. Different options of the same standard may also be combined. Each instance of the violation will be separately set out within that item of the citation. Nonserious violations of a standard may be combined with serious violations of the same standard when appropriate.

- a. Except for standards that deal with many unrelated hazards [e.g., Table Z-1 at 29 CFR 1910.1000], the same standard may not be cited more than once on a single citation. The same standard should be cited on different citations on the same inspection, however (e.g., as Serious and Nonserious).
- b. For the purpose of applying these guidelines in the construction industry, an establishment is normally the site of the construction job; e.g., the building site, the dam site, etc. Where the construction site extends over a large geographical area; e.g., road building, the entire site will be considered a single establishment; and all instances of the same violation with the same classification discovered during a single inspection will constitute one alleged violation.
 - o EXAMPLE 1. The CSHO documents five instances of unguarded open-sided platforms in five different locations throughout the facility in serious violation of 29 CFR 1910.23 (c) (1). These five instances of the violation are combined into one serious citation item containing five subparts (a, b, c, d, e).
 - o EXAMPLE 2. The CSHO documents three instances of unguarded open-sided platforms and two instances of platforms without required toe-boards in different locations throughout the facility in serious violation of 29 CFR 1910.23 (c) (1). These five instances of the violation are combined into one serious citation with two items using the two SAVE options of 29 CFR 1910.23 (c) (1), with instances a, b, and c, on the one and instances a. and b. on the other.
 - o EXAMPLE 3. The CSHO documents five instances of unguarded open-sided platforms in five different locations throughout the facility. Three instances are classified as serious and two as nonserious. The three serious instances are combined into one serious item. The two nonserious instances may be combined with them or issued as a separate nonserious item.
- c. In special circumstances, as deemed appropriate by the commissioner of labor, each violation of the same standard may be cited as a separate citation item. Each violation (citation item) may be assessed a separate penalty in accordance with NCGS 95-138.

3. **Grouping**. When a source of a hazard is identified which involves interrelated violations of different standards, the violations may be grouped into a single item.

- a. **When to Group**. The following situations normally call for grouping violations:
 - i. **Grouping Abatement Related Violations**. When the CSHO believes that violations classified either as serious or as nonserious are so closely related as to constitute a single hazardous condition and to have a single method of abatement, the violations may be grouped into one citation item.

EXAMPLE: 29 CFR 1910.219 (d) (1) for an unguarded pulley and 29 CFR 1910.219 (e) (1) (i) for and unguarded belt on a mechanical power transmission system can both be abated with the same guard.

ii. **Grouping Condition Related Violations.** When the CSHO believes that violations classified either as serious or as nonserious are closely related, the violations may be grouped into one citation item.

EXAMPLE: 29 CFR 1910.215 (a)(2), (a)(4), and (b)(9) for the work rest, tongue guard and spindle end cover on an abrasive grinding wheel, may be grouped into one citation item.

iii. **Grouping Nonserious Violations Where Grouping Results in a Serious Violation.** When two or more individual violations are found which, if considered individually represent nonserious violations, but if grouped create a substantial probability of death or serious physical harm, the violations may be grouped and alleged as a single serious violation.

iv. **Where Grouping Results in Higher Probability Nonserious Violation.** Where the CSHO finds during the course of the inspection that a number of nonserious violations are present for the same condition which, considered in relation to each other affect the overall probability of possible injury resulting from an accident involving the combined violations, then they may be grouped. The violations may be grouped in a manner similar to that indicated in the preceding paragraph, although the resulting citation will be for a nonserious violation of higher probability.

v. **Violations of Posting and Recordkeeping Requirements.** Violations of the posting and recordkeeping requirements which involve the same document; e.g., OSHA-300 Form was not posted or maintained, will be grouped. (See Chapter VI for penalty amounts.)

b. **When Not to Group.** There are times when grouping is normally inappropriate.

i. **Single Inspection.** Only violations discovered in a single inspection of a single establishment or worksite may be grouped. An inspection in the same establishment or at the same worksite will be considered a single inspection even if it continues for a period of more than one day or is discontinued with the intention of resuming it after a short period of time if only one OSHA-1 is completed.

ii. **Separate Inspections of the Same Establishment.**

A. Where inspections of the same establishment of an employer are conducted on two different occasions resulting in completion of two OSHA-1 forms (e.g. safety and health inspections) and instances of the same violation are disclosed during each inspection, the second instance of such violation should be grouped with the first instance if a citation for the first has not yet been issued.

- B. When the citations are final order and abatements were verified, and if the same hazards were found during the second inspection, such second instances may constitute grounds for a repeated or a willful violation.
- C. Where a follow up inspection is conducted to determine whether a violation has been abated, it may be appropriate to issue a notice of failure to abate where one instance or more of the cited violations remains uncorrected.

- iii. Separate Establishments of the Same Employer. Where inspections are conducted, either at the same time or different times, at two establishments of the same employer and instances of the same violation are discovered during each inspection, the employer will be issued separate citations for each establishment.
- iv. General Duty Clause Violations. Because NCGS 95-129(1) of the act is cited so as to cover all aspects of a serious hazard for which no standard exists, no grouping of separate NCGS 95-129(1) violations is permitted except as provided in C.3.a(1) and (2). This provision, however, does not prohibit grouping a NCGS 95-129(1) violation with a related violation of a specific standard.
- v. Serious Violations. As noted in C.3.a.i, a serious violation may be grouped or cited separately as conditions warrant. Serious violations that are not so closely related as to constitute a single violative condition will not be grouped.

EXAMPLE: 29 CFR 1910.304(f)(1) for an incomplete path to ground will not be grouped with 29 CFR 1910.213(c)(1) for an unguarded ripsaw blade just because both conditions exist on the same piece of equipment.

- vi. Repeat Violations. If the repeated items were not grouped in the original inspection, they will not be grouped in the current inspection. If these items had been grouped in a prior inspection, they may be grouped again. Newly observed hazards will not be grouped with repeated items
- vii. Failure to Abate. Notices of Failure to Abate (FTA) will not be grouped, even if grouped in the original inspection. Each FTA will carry its own penalty.

D. **Employer/Employee Responsibilities.**

- 1. NCGS 95-130(1). "Employees will comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Article which are applicable to their own actions and conduct."
 - a. The act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.

- b. Although the employer is not the absolute guarantor or insurer of all employee actions, reasonable steps must be taken by the employer to protect employees from hazards that may result from failure to comply with the standards; e.g., informing employees of hazards and how to protect themselves, enforcing safety and health rules, and the like.
2. **Employee Refusal to Comply.** In cases where the CSHO determines that employees are systematically refusing to comply with a standard applicable to their own actions and conduct, the matter will be referred to the supervisor who will consult with the bureau chief. Under no circumstances is the CSHO to become involved in an onsite dispute involving labor-management issues or interpretation of collective-bargaining agreements. The CSHO is expected to obtain enough information to understand whether the employer is using all appropriate authority to ensure compliance with the act. Concerted refusals to comply will not bar the issuance of an appropriate citation where the employer has failed to exercise full authority to the maximum extent reasonable, including discipline and discharge, to ensure compliance with the act.

E. Affirmative Defenses.

1. **Definition.** An affirmative defense is any matter that, if established by the employer, will excuse the employer from a violation which has otherwise been proved by the CSHO.
2. **Burden of Proof.** Although affirmative defenses must be proved by the employer at the time of the hearing, the division must be prepared to respond whenever the employer is likely to raise or actually does raise an argument supporting such a defense. The CSHO, therefore, will keep in mind the potential affirmative defenses that the employer may make and, when appropriate, attempt to gather contrary evidence.
3. **Explanations.** The following are explanations of the more common affirmative defenses with which the CSHO should become familiar. There are other affirmative defenses besides these, but they are less frequently raised or are such that the facts that can be gathered during the inspection are minimal.
 - a. **Documentation Requirements.** Where it becomes evident, either from statements made during the inspection by the employer or other persons or from the circumstances surrounding the apparent violation(s) that one or more of the affirmative defenses may be an issue, the CSHO will make reasonable efforts to gather and record facts relevant to the defense. The CSHO will bring the documentation of the hazards and facts related to possible affirmative defenses to the attention of the supervisor. Where it appears that each and every element of an affirmative defense is present, the supervisor may decide, after consultation with the bureau chief and the AG's Office, that a citation will not be issued.
 - b. **Isolated Employee Misconduct (Unforeseeable Actions).**
 - i. The violation resulted exclusively from employee misconduct; and
 - ii. The violation was not participated in, observed by, or performed with the knowledge and/or consent of any supervisory personnel; and
 - iii. The employee conduct was in conflict with a well established company policy or work-rule which was in effect at the time, and was actively enforced through disciplinary action or other appropriate procedures. In,

addition, in determining whether the employer has a pertinent and effective company policy or work-rule, the CSHO must find that the employer has a specific program for instructing employees in safe work practices.

EXAMPLE: While driving down the highway, a CSHO observes an employee working on a billboard without proper fall protection. If this is the only employee, the necessary fall protection is on the truck, the company has rules, training and disciplinary procedures set up, and the employee states, "I'm going to be fired," there is a strong likelihood that this affirmative defense applies.

c. Impossibility. Compliance with the requirements of a standard is:

- i. Functionally impossible or would prevent performances of required work; and
- ii. There are no alternative means of employee protection.

EXAMPLE: During the course of the inspection an unguarded table saw is observed. The employer states that the nature of its work makes a guard unworkable. Facts which the CSHO will document may include:

- o Would a guard make performance of the work impossible or merely more difficult?
- o Could a guard be used part of the time?
- o Has the employer attempted to use guards?
- o Has the employer considered alternative means or methods of avoiding or reducing the hazard?

d. Greater Hazard.

- i. Compliance with a standard would result in greater hazards to employees than noncompliance; and
- ii. There are no alternative means of employee protection; and
- iii. An application of a variance would not be appropriate.

EXAMPLE: The CSHO observes an employee working on a bridge over water with the proper fall protection. However, the employee is not wearing a personal floatation device (PFD). The company's position is that the employee cannot wear the PFD as it would interfere with the proper functioning of the fall protection equipment. In this case, the greater hazard could be determined to be the fall.

F. Issuing Citations - Special Circumstances.

1. Follow up Inspections. Follow up inspections may be conducted during the 15-day working period for requesting an informal conference or contesting citations provided the employer has not actually made a request. Normally, however, only those serious

violations considered high probability, high severity serious will be subject to being scheduled for follow up during the contest period. If such a follow up inspection reveals a failure to abate, and the time specified for abatement was passed, a Notification of Failure to Abate Alleged Violation (OSHA-2B) may be issued immediately without regard to the contest period of the initial citation.

2. **Multi-Employer Worksites.** On multi-employer worksites, both construction and non-construction citations will be issued to employers whose employees are exposed to hazards (the exposing employer).
 - a. Additionally, the following employers will be cited, whether or not their own employees are exposed:
 - i. The employer who actually creates the hazard (the creating employer);
 - ii. The employer who is responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who has the authority for ensuring that the hazardous condition is corrected (the controlling employer);
 - iii. The employer who has the responsibility for actually correcting the hazard (the correcting employer).
 - b. It must be shown that each employer to be cited has knowledge of the hazardous condition or could have had such knowledge with the exercise of reasonable diligence.
3. **Legitimate Defense.** Prior to issuing citations to an exposing employer, it must first be determined whether that employer has a legitimate defense to the citation. An exposing employer will not be cited if they meet all the conditions listed below. All these items must be documented in the case file.
 - a. The employer did not create the hazard;
 - b. The employer did not have the responsibility or the authority to have the hazard corrected;
 - c. The employer did not have the ability to correct or remove the hazard;
 - d. The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, have been specifically notified of the hazards to which his/her employees are exposed;
 - e. The employer has instructed his/her employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it when the hazard was known or with the exercise of reasonable diligence could have been known.
 - i. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard.

EXAMPLE: An employer may require his employees to walk around a construction site and climb a hill to enter the second floor from the back of the building rather than use unguarded stairs.

- ii. When extreme circumstances justify it, the exposing employer will have removed his/her employees from the job to avoid the hazard.
4. **Citing Non-exposing Employer.** If all employers on a worksite with employees exposed to a hazard meet the conditions in F.3, then the citation will be issued to only the employers who are responsible for creating the hazard and/or who are in the best position to correct the hazard or to ensure its correction. In such circumstances the controlling employer and/or the hazard-creating employer will be cited even though no employees of those employers are exposed to the violative condition. (See, however, F.2.) Penalties for such citations will be calculated as indicated in Chapter VI on violations, using the exposed employees of all employers as the basis for the probability assessment.
5. **General Duty Clause Violations.** In the case of general duty clause violations, only employer(s) whose own employees are exposed to the violation may be cited.
6. **Willful, FTA and Repeat Citations.** For all employers who have been issued willful, failure to abate, or repeat citations, a copy of the citations will be mailed to the employer's national headquarters (if the employer has more than one fixed establishment). If a determination is made that an establishment's safety and health issues should be addressed at the corporate level, contact may be made between the CSHO or compliance supervisor and the employer's national headquarters.
7. **State-wide Settlement Agreements.** State-wide Settlement Agreements may be entered into under special circumstances to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control in the state. The state's decision on whether to honor federal corporate-wide settlement agreements, potentially affecting sites in North Carolina, will be made based on a case by case review of such agreements.

G. **Abatement Verification.** Abatement of violations will be conducted in accordance with 29 CFR 1903.19.

1. **Definitions.**
 - a. Abatement verification includes abatement certificates, abatement documents, abatement plans, progress report, and photographs.
 - b. Affected employee means those employees who are exposed to the hazard(s) identified as violation(s) in a citation.
 - c. Movable equipment means a hand-held or non-hand-held machine or device, powered or not powered, that is used to do work and is moved within or between worksites.
 - d. Hand-held equipment is equipment that can be picked up and operated with one or two hands, such as a hand grinder, skill saw, portable electric drill, nail gun, etc.
 - e. Worksite, for the purpose of enforcing this regulation, is the physical location specified in the citation; if no location is specified, the worksite will be the inspection site where the cited violation occurred.

2. Abatement of Citations.

- a. Except for the application of tags on movable equipment, [see 1903.19(I), which requires attachment of the tag or citation immediately after receiving the citation], the abatement verification regulation does not impose any requirements on the employer until a citation item has become a final order of the Review Board.
- b. All "final order" citation items, no matter what the characterization, require abatement certification within 10 calendar days of the abatement. Where there has been a contest of a violation or abatement date (not penalty), the abatement date is calculated by adding the original amount of time for abatement to the final order date.
- c. Employers are not required to certify abatement for violations which they promptly abate during the on-site portion of the inspection and whose abatement the CSHO observes. Observed abatement will be documented on the OSHA-1B for each violation, as well as on the citation.
- d. By regulation [paragraph (d)(1)], all willful and repeat citations require abatement documentation, such as written, video graphic or photographic evidence of abatement.
- e. Also the employer must provide abatement documentation for any serious violation for which the supervisor indicates on the citation that such abatement documentation is required.
 - i. OSH Division policy is that all high gravity serious citations will require abatement documentation. Where, in the opinion of the supervisor, abatement documentation is not required for a high severity, high probability serious violation, the reasoning will be noted in the case file.
 - ii. Normally, medium or low gravity serious citations will not require abatement documentation. The exceptions are:
 - A. If the establishment had been issued a citation for a willful violation or a failure-to-abate notice for any standard which had become final order in the previous 3 years; OR
 - B. If the employer has any history of a violation that resulted in a fatality or an OSHA 300 log entry indicating serious physical harm to an employee in the past 3 years. The standard being cited MUST be similar to the standard cited in connection with the fatality or serious injury or illness.
- f. For abatement periods greater than 90 calendar days, the regulation allows flexibility in requiring monitoring information. For abatement periods less than 91 days or for nonserious citations, progress reports may not be required unless abatement plans are specifically required.

- i. The requirement for abatement plans and progress reports must be indicated for the citation item to which they relate.
- ii. The regulation requires employers, where necessary, to identify how employees are to be protected from exposure to the violative condition during the abatement period. The need for interim protection should be noted on the citation.
- iii. There are no limitations to progress reports that may be specified in a settlement agreement.
- iv. Only equipment which is moved within the worksite or between work sites, is required to be tagged until the hazards associated with it are abated. The tag is intended to provide an interim form of protection to employees through notification for those who may not have knowledge of the citation or the inherent hazardous condition. CSHOs should make every effort to be as detailed as possible when documenting the initial location where the violation occurred. This documentation is critical to the enforcement of the tagging requirement because the tagging provision is triggered upon movement of the equipment.

- g. Tag-related citations must be observed by a CSHO before a citation can be issued for failure to initially tag cited movable equipment. Where there is insufficient evidence to support a violation of the employer's initial failure to tag or post the citation on the cited movable equipment, a citation may be issued for failure to maintain the tag or copy of the citation.
- h. A minor non-substantive omission in an abatement certificate (e.g., lack of a definitive statement stating that the information being submitted is accurate) should not be cited as a violation of the regulation. If there are minor deficiencies such as omitting the signature or date, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the district office can serve as the date on the document. A certification with an omitted signature should be returned to the employer to be signed.
- i. Evidence of an employer's failure to notify employees by posting must be obtained at the worksite. Where an employer claims that posting at the location where the violation occurred would ineffectively inform employees, the employer may post the document or a summary of the document in a location where it will be readily observable by affected employees and their representatives or may otherwise communicate fully with affected employees and their representatives about abatement activities. The CSHO must determine not only whether the documents or summaries were appropriately posted but also whether, as an alternative, other communication methods, such as meetings or employee publications, were used.
- j. The receipt of a Petition for Modification of Abatement Date (PMA) will suspend the ten day time period for the abatement certification for the item in the PMA request. If the PMA is denied, the ten day time period for submission begins on the abatement date or the day the employer receives notice of the denial, whichever is later.

3. Citation Issuance Procedures. Citations for failure to certify can be issued without formal follow-up activities by following the procedures below.

- a. If abatement certification and any required documentation are not received within thirteen calendar days after the abatement date, the CSHO will telephone the employer, determine the status of the items, request the employer submit the abatement material and tell the employer that a citation may be issued.
- b. If abatement verification documents are not received within seven calendar days after the telephone call, the CSHO will issue a dunning letter to the employer.
 - i. During the time between the reminder letters and citation issuance, efforts should be made to speak with the employer and determine why he/she has not complied. All communication efforts will be documented in the case file.
 - ii. In the event the reminder letter is returned as undeliverable and telephone contact efforts fail, the supervisor has the discretion to assign a follow up inspection or close the file based on available information. Appropriate information will be put in the case file.
- c. If the certification and/or documentation are not received within the next seven calendar days, a single nonserious citation will be issued combining all the individual instances where the employer has not submitted abatement certification and/or abatement documentation. This nonserious citation will be issued under the same inspection number that contained the original violations cited. The abatement date for this citation will be set thirty days from the date of issuance.

Note: Each violation of 1903.19(c), (d), (e), or (f) with respect to each original citation item is a separate item.

- d. If abatement certification and/or documentation are not received by the time the abatement period expires, consult the bureau chief to discuss the suitability of further enforcement action or the necessity for a follow-up inspection.
- e. For those situations where the abatement date falls within the fifteen day informal conference time period, and an informal conference request is likely, enforcement activities should be delayed for these citations until it is known if the citation characterization or abatement period is to be modified.

4. Enforcement for Construction.

- a. Construction site closure or hazard removal due to completion of the structure or project will only be accepted as abatement without certification where a CSHO directly verifies the site closure. Without CSHO observed verification, the employer must certify to OSHA that the hazards have been abated by the submission of an abatement certificate. Site closure is an acceptable method of abatement.
- b. Site closure or project completion is not an acceptable abatement method for equipment related or program related violations. These violations (e.g., crane

inspection, HAZCOM, respiratory protection, training, competent person, qualified persons. etc.) will require employer certification of abatement.

5. Case File Management.

- a. The closing of a case file without abatement certificate(s) must be justified through a statement in the file by the supervisor or CSHO, addressing the reason for accepting each uncertified violation as an abated citation.
- b. The CSHOs are encouraged to review employer-submitted abatement verification materials as soon as possible but no later than thirty calendar days after receipt.

6. Employer Education.

- a. Opening conference. During the opening conference the CSHO should explain to the employer the advantages of immediate abatement and that there are no certification requirements for violations quickly corrected during the inspection.
- b. Closing conference. During the closing conference the CSHO should thoroughly explain to the employer the abatement verification requirements.
 - i. Abatement certification is required for all citation item(s) that the employer receives except for those citation items that are identified as "Corrected during Inspection."
 - ii. Abatement documentation is required to be submitted along with each willful, repeat and designated serious violation. To minimize confusion, the distinction between abatement certification and abatement documentation should be discussed during the closing conference.
 - iii. Where abatement periods for citations are expected to exceed ninety calendar days, the submission and requirements of abatement plans and progress reports are to be explained.
 - iv. The required placement of tags or the citation must also be discussed at the closing conference, if it has not been discussed during the walk around portion of the inspection.

H. Undelivered Citations.

1. General.

The commissioner of labor has the authority to issue notices and citations pursuant to NCGS 95-133 (b) (9). These notices and citations may be undeliverable or returned to the district office for various reasons. This section will ensure proper handling of undelivered citations, by the field office.

When a citation has been returned to the field office as undelivered, the citation case file will be given to the CSHO who conducted the inspection or to the appropriate district supervisor. It is the responsibility of the CSHO to ensure the subsequent delivery of the citation, including recommending the best delivery method.

The commissioner has the authority under NCGS 95-133 (b) (11) to require "papers and documents necessary for any hearing or other proceeding...to be served by the process

officers in the state." Process officers are county sheriffs and their deputies. Therefore, the local sheriff may be the best choice for redelivery. Other options are to deliver the citation to the corporation's registered agent, service on the North Carolina Secretary of State under NCGS 55D-33(b), or hand delivery.

The CSHO often determines that the most expeditious means to redeliver the citation is hand delivery. The undelivered citation will be processed in at least one of the methods delineated in Section H. Once the citation has been processed according to Section H., it will be considered to have been served on the employer and the violation(s) will be used by the CSHO to determine if the employer has subsequent repeat violations.

2. Responsibility.

The appropriate CSHO and district supervisor will share the responsibility for processing the undelivered citation. Once the CSHO determines the way to handle the undelivered citation, the admin staff will assist with redelivery of the citation.

3. General Procedures.

- a. The field office will ensure that undelivered citation is processed as follows:
 - i. The undelivered citation will be evaluated to determine whether any apparent errors (e.g. incorrect address) could have affected the delivery.
 - ii. The district supervisor and CSHO should ensure that all citations issued for each week have been delivered.
 - iii. The "green card" (certified mail receipt) is not always returned to the field office in a timely manner. However, the mail (e.g. citation package, settlement agreement, no change letter) can be traced on the United States Postal Service web site.
 - iv. The district supervisor should utilize NCR reports to identify unabated violations that may be the result of undelivered citation packages.
- b. The district office admin staff will forward the case file and the undelivered citation to the CSHO to initiate the redelivery process.
- c. The CSHO evaluates the undelivered citation and determines the appropriate plan of action, including method of redelivery.
- d. The CSHO follows appropriate steps to ensure redelivery.

4. Reasons to Redeliver or Reissue Citations.

- a. The original citation will be redelivered when any of the following apply:
 - i. The employer is at a fixed location and there is an incorrect address.
 - ii. Contact with the employer reveals that a subsequent delivery will be accepted.
 - iii. Contact with the employer reveals that they have moved to a new location and a subsequent delivery will be accepted.

Note: Any address or company name, etc., changes must be made on the IMIS/NCR and NCOSH data bases. (Targeting System and Site Info Change Request)

- b. Citations will normally not be reissued. However, the district supervisor will request that the district office admin staff reprocess the citations for reissuance when either of the following apply:
 - i. The establishment name or place of business is listed incorrectly in the inspection file.
 - ii. The inspected establishment is under new ownership with a new name.

Note: Any address or company name, etc., changes must be made on the IMIS/NCR and NCOSH data bases. (Targeting System and Site Info Change Request)

5. Redelivery via regular mail to the Employer or their Successors.
 - a. The CSHO will confirm that the mailing address for the inspected establishment is correct and current.

Note: Options for confirming the address include: calling the company, the owner, directory assistance, the Secretary of State, the Register of Deeds (county office) and/or the county tax office.
 - b. The CSHO will make the necessary address corrections to update the IMIS/NCR system and the Targeting System Database.
 - c. The CSHO selects the delivery method and forwards the file to the admin staff for delivery to the employer (original or reissued citation) unless otherwise noted in these procedures.
 - d. The CSHO obtains proof of delivery of the citation.
6. Delivery by Local Sheriff.

For difficult service situations, contact the county Sheriff's department where the employer is physically located. *This includes sheriff's departments in other states for employers with an office or residence outside of North Carolina.* Provide the sheriff's department, either by mail or in person, the service package containing a cover letter requesting delivery, the citation, and a "Return of Service" form as follows:

- a. Service of Process.
 - i. If personal delivery of notices, citations, cease and desist orders, or any other document necessary to enforce compliance will require excessive travel time or if it is likely that the employer will avoid delivery, Sheriff's service is a cost-effective option.
 - ii. The commissioner of labor has the authority to issue notices and citations pursuant to NCGS 95-133(b) (9). The commissioner is given authority

under NCGS 95-133(b) (11) to require "papers and documents necessary for any hearing or other proceeding...to be served by the process officers of the State." Process officers are county sheriffs and their deputies.

- iii. Pursuant to NCGS 7A-311(a) a fee will be assessed for every item of civil process. When two or more items of civil process are served simultaneously on one party, a single fee is assessed; however, a separate service charge is imposed for each separate entity served. The county retains that fee whether process is served or only attempted.

For example, the county sheriff's department may deliver OSH notices and citations within county lines for a fee per person or per company served. The total fee must be paid when the citations or other document are delivered to the sheriff's department. The CSHO may pay this fee and request reimbursement through an expense statement or, when there is sufficient time, a request for a check may be sent through the department budget office in advance.

The ["Return of Service" form](#) should be fixed to the document so the serving deputy can certify the date of service, location/address, and the person with whom the documents were left. CSHOs can search for the address and phone number of the each county sheriff's department by clicking on the following link: [NC County Government Officials](#). **Note:** At this website, scroll to the bottom of the page and click on one of the four alphabetized county sections. Next, scroll down the screen until you find the county information.

- b. When the sheriff is the best form of delivery, the office procedures for preparing the citation package for delivery are as follows:
 - i. If the citations are reissued, any original abatement dates that have passed are changed to "immediate." All future abatement dates remain as originally issued. The CSHO notes any compelling reason to change abatement dates and documents in the Case File Summary.
 - ii. The CSHO forwards additional information and recommendations to the office admin staff. This information must include the federal ID number, address and telephone number of the employer.
 - iii. The admin staff prints a standard letter to the county sheriff's office, obtains a check for the amount of the service from the NCDOL Budget Division (standard memorandum), prints a return envelope for the sheriff, and prints a "Return of Service" form to be affixed to the document. The serving deputy can certify the date of service, location/address, and actual person with whom the documents were left.
 - iv. The admin staff forwards the entire package, along with the citation, to the appropriate supervisor for signature.
 - v. The admin staff mails the package to the Sheriff in the county the employer is located.

7. Delivery to a Location Other than the Establishment.

- a. Service to the registered business agent when the corporation is in bankruptcy.
 - i. The CSHO forwards the information obtained from the Secretary of State's Office (name and address), to the admin staff for delivery to the registered agent.
 - ii. The admin staff prints a cover letter and attaches it to the original citation for the district supervisor's signature.
 - iii. The admin staff mails the citation to the registered business agent.
 - iv. The admin staff mails a copy of the registered agent's cover letter and the citation to the Budget Division along with a standard letter of explanation.
- b. Service to the Secretary of State under NCGS 55D-33(b).

Note: This should be the last option for citation delivery and should only be used when no other methods are appropriate.

- i. The CSHO will forward the file to the admin staff with recommendations for delivery to the Secretary of State.
- ii. *The district supervisor will prepare the letter [located on the NCR (See example letter in Appendix A)] for the Secretary of State, service of process agent, and attach it to the citations.*
- iii. The admin staff will mail the letter and citation package to the Secretary of State's Office.
- iv. *The admin staff will mail a copy of the response letter from the Secretary of State, service of process agent (see example response letter in Appendix B) and the citations to the Budget Division along with a standard letter of explanation.*

Appendix A: Example Letter to the Secretary of State, Service of Process Agent.

[DATE]

North Carolina Department of the Secretary of State
Attn: Service of Process Agent
PO Box 29622
Raleigh, NC 27626-0622

Dear Sir or Madam:

On [INSERT DATE] the North Carolina Department of Labor – OSH Division attempted to issue citations via certified mail to [INSERT COMPANY NAME] . On [INSERT DATE], the certified mailing was returned to our office unclaimed. Since then, our Agency has unsuccessfully attempted to have the citations delivered by the [INSERT NAME OF SHERIFFS's OFFICE] to the Registered Agent/President, [INSERT REGISTERED AGENT'S NAME] which lists his office address on the Secretary of State Corporations page as [INSERT ADDRESS]. According to the [INSERT NAME OF SHERIFFS's OFFICE] the [INSERT COMPANY NAME] is no longer at this location and its current location is unknown. We have also contacted the [INSERT COUNTY OF BUSINESS LOCATION] Tax Office and Register of Deeds office to see if they could provide a mailing address and/or contact information for this employer.

North Carolina Department of Labor is forwarding a copy of the citations that were issued to [INSERT COMPANY NAME]. to the North Carolina Department of the Secretary of State per North Carolina General Statute §55-D-33(b). We are requesting your assistance in the delivery of these citations to [INSERT COMPANY NAME], Attn: [INSERT NAME], president/registered agent. If you have any information that would assist us in this matter please forward to my attention immediately. Thank you for your consideration and assistance.

Respectfully,

[SUPERVISORS NAME]
Compliance Safety and Health Supervisor

FOM Chapter V, cont'd.

Appendix B: Example of Response Letter from the Secretary of State's Office



RECEIVED

APR 09 2012

*State of North Carolina
Department of the Secretary of State*

ELAINE F. MARSHALL
SECRETARY OF STATE

April 4, 2012

[REDACTED]
NC Department of Labor
1101 Mail Service Center
Raleigh, NC 27699-1101

Re: [REDACTED]
SOS File Number: [REDACTED]
Docket Number: [REDACTED]

Dear [REDACTED]

Enclosed please find our certified mailing, which contains the documents forwarded from our office to the above referenced company as required by North Carolina General Statute 55D-33(b).

This item was returned to us by the United States Postal Service and was not deliverable at the address that we have on file for that entity and the United States Post Office was not able to forward the item. Pursuant to N.C.G.S. §55-D-33, "Service on an entity under this subsection is effective for all purposes from and after the date of the service on the Secretary of State."

If you have any questions, please feel free to call this office at (919) 807-2201.

Sincerely yours,

Service of Process Agent

Enclosure

TWO SOUTH SALISBURY STREET
PO Box 29822, RALEIGH, NC 27628-0622
919.807.2201 - FAX 807.2215
WWW.RSISNC.COM