

Citing Employers/Employees for Worker Safety Violations

Purpose This document discusses employer and employee responsibilities for worker safety and provides guidance when citing employers and employees for worker safety violations.

Introduction The employer's responsibility to assure employee behavior found in Title 3, California Code of Regulations (3 CCR) section 6130(b) and the Independent Employee Action Defense (IEAD) are related concepts in the sense that each addresses the issue of employer and employee responsibility for compliance with worker safety requirements. However, they address that issue in different contexts, and have distinct applicability and functions within the regulatory scheme that should not be confused.

Employers are responsible for compliance Employers are responsible for the actions of their employees in the course of carrying out the work of the employer. It is unfair for an individual employee acting on the employer's behalf to bear the ultimate responsibility for violations, while the employer initiates, directs, and benefits from the regulated activity.

The employer is in a better position to ensure a high level of compliance with the Department of Pesticide Regulation's (DPR) regulations than an individual employee. The employer has superior resources and expertise, the authority to control other employees, and responsibility for the conduct of its business. As a general rule, allowing employers to avoid responsibility for violations is not an effective way to obtain a high level of compliance, and thus, not appropriate enforcement policy for laws enacted to protect public health and the environment.

As discussed below, DPR regulations and policy recognize some very narrow exceptions to this rule in the case of violations involving worker safety requirements.

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Employer responsibilities under §6702

The employer has primary responsibility for employee safety. Specifically, 3 CCR section 6702(a) and (b) require employers to:

- Comply with regulations applicable to employer conduct;
- Know about applicable safe use requirements on pesticide labeling and in regulation;
- Provide employees with comprehensive pesticide-related safety information;
- Supervise employees to assure compliance with applicable requirements and safe handling practices;
- Provide a safe work place and require employees to follow safe work practices; and
- Take all reasonable measures to assure employee compliance with applicable laws, regulations, and pesticide label requirements.

Employee responsibilities

Employees also bear some responsibility for safety in the pesticide work place. Title 3, CCR section 6702(c) requires employees to use the personal protective equipment (PPE) and other safety equipment required by regulation or label, which has been provided by the employer at the work site. The PPE and other safety equipment must be in a condition that provides the safety or protection intended by use of that PPE or equipment.

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Civil penalty actions against employees under §6130(b)

It is rarely appropriate to fine employees for violation of worker safety regulations because they are the intended beneficiaries of the law. Nevertheless, 3 CCR section 6130(b) does allow County Agricultural Commissioners (CAC) to levy fines on employees under very narrow circumstances.

To cite an employee for failing to use PPE, the CAC must show all of the following:

- 1) The employed person is licensed or certified pursuant to Chapter 14, Division 3, of the Business and Professions Code (BPC), Chapters 5 or 8, Division 6, of the Food and Agricultural Code (FAC); or Chapters 3.4 or 3.6, Division 7, of the FAC; **and**
- 2) The employer provided the equipment to the licensee or certificate holder and the equipment was available at the work site in a condition that would have provided the safety or protection intended by the equipment; **and**
- 3) The employer, through its written workplace disciplinary action policy, required the licensee or certificate holder to utilize the equipment; **and**
- 4) The employer has complied with applicable training requirements of Division 6, Pesticides and Pest Control Operations, prior to the time the licensee or certificate holder failed to utilize the equipment; **and**
- 5) The employer supervised the licensee or certificate holder to assure that the equipment was properly used by the licensee; **and**
- 6) At the time of the licensee's or certificate holder's failure to utilize the equipment, the licensee or certificate holder has knowledge of the discipline that could be imposed under the employer's written workplace disciplinary action policy for failure to utilize the equipment.

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**Structural
actions**

Refer to BPC section 8616.9 when initiating a civil penalty action under the authority of BPC section 8617. Section 8616.9 has specific requirements to consider before deciding not to cite the employer when an employee is found not wearing required personal protective equipment.

**3 CCR
§6130(b) is not
a defense for an
employer**

Section 6130(b) is not a defense for an employer. If the *employee* is charged with the violation, the respondent *employee* has an opportunity to challenge the county's evidence, offer evidence, and get a determination by the hearing officer as to whether the section 6130(b) criteria are met.

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In an action against the employer for a worker safety violation based on an employee's act, cite the regulations, rather than FAC §12973, whenever possible

The FAC and DPR's implementing regulations have equal force of law. When initiating a civil penalty action, CACs should cite the section that is most specific to the particular act, omission, or circumstances that they are targeting. Where a general and more specific law conflict (when applied to the circumstances) the more specific law controls. Where a general and specific law can be reconciled, both control.

For example, FAC section 12973 requires pesticides not be used in conflict with the registered label or permit conditions. DPR has adopted comprehensive pesticide worker safety regulations (3 CCR §6700, et seq.) encompassing the worker safety requirements on product labels, and imposing additional and more specific standards and requirements, including various requirements that employers "assure" their employees compliance with worker safety rules.

In the absence of DPR's PPE regulations, a CAC could cite an employer under FAC section 12973 for its employee's failure to wear label required PPE because an employer is responsible for the acts of its employees committed within the scope of their employment. When it is the employee that physically committed the act, the CAC, by citing the employer is really targeting, and enforcing the employer's responsibility to prevent the violation.

When initiating a civil penalty action, CACs should cite the section that is most specific to the particular act, omission, or circumstance they are targeting.

The CAC should nearly always cite employers under the regulations for an employee's failure to use PPE. For other types of violations, section 12973 may be the correct section to cite. For example, where the act involves use conflicting with a particular permit condition.

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Exceptions to compliance with 3 CCR §6720

Title 3, CCR, section 6720 contains exceptions that allow an employer to comply with certain DPR regulations by demonstrating compliance with corresponding sections of Title 8, CCR, regarding antimicrobial agents. **Title 3, CCR section 6720 does not exempt the employer from complying with the label requirements under FAC section 12973.**

Charging an employer with failing to “assure” its employee’s compliance

Various worker safety regulations require an employer to “assure” the behavior of its employees. “Assure,” as used in DPR’s regulations, has a specific legal definition, that is, “to take all reasonable measures so that the behavior, activity, or event in question occurs.” (3 CCR §6000) Reasonable measures an employer may take to assure employee behavior include determining the employee has the knowledge to comply; providing the means to comply; supervising the work activity; and having and enforcing a written workplace disciplinary action policy covering the employer's requirements, as well as other measures required by pesticide law. Ordinary usage of “assure” suggests the duty to take “all reasonable measures” is a *very high standard* of care for the employer. Nevertheless, under that standard the employer is not *automatically* liable for its employees’ behavior.

When charging an employer with failing to assure its employee’s compliance, the CAC must identify, allege, and prove some element in which the employer failed to undertake “all reasonable measures” so the employee would comply. In other words, the CAC should be able to tell the hearing officer something about what the employer could have done, but did not do, to avoid the violation. **The CAC may not simply allege that the employee did not comply without providing any evidence of what the employer did or failed to do.**

The CAC should investigate, obtain and present any evidence that tends to show the employer did not do everything it could have to avoid the violation. For example, if the same or other employees failed to comply in the past, the CAC could present this as circumstantial evidence of inadequate implementation of disciplinary policies or inadequate supervision. If the accumulated evidence allows an average person to infer that the employer did not take all reasonable measures to assure employee compliance, then the employer is liable under the “assure” standard.

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The following table suggests how to build adequate proof of “failure to assure” argument in the context of an action to enforce section 6738 related to PPE.

Did the employer assure...	By taking reasonable measures¹, such as....
Knowledgeable employees?	<ul style="list-style-type: none"> • Implement a written training program that complies with 3 CCR §6724; • Conduct training in the language understood by the employee; • Provide qualified trainers; • Conduct surprise inspections to test employee knowledge; • Stage formal and “tailgate” training sessions that match employee needs and knowledge.
The means to comply?	<ul style="list-style-type: none"> • Train employees on proper PPE use, fit, and maintenance; • Provide all required PPE; • Make all required PPE available at the work site; • Require the use of PPE (as documented through the training and disciplinary programs); • Require the employee to inspect PPE before use and reject inadequate equipment; • Require proper cleaning of the PPE after use; • Repair or replace worn, damaged, or heavily contaminated PPE; • Assure the proper storage of PPE at all times; • Conduct surprise inspections to assure employees use provided supplies, equipment in good condition, and heat stress prevention.
Adequate supervision?	<ul style="list-style-type: none"> • Match the supervision method to the activity’s hazard and complexity and the employee’s competency and history; • Provide a means to contact the supervisor in case the employee has questions; • Conduct surprise and routine “in person” inspections to check PPE use and condition; • Correct unsafe work practices when they are observed and document the correction; • Provide a safe workplace by enforcing employer and regulatory requirements.
An effective workplace disciplinary action program?	<ul style="list-style-type: none"> • Implement a written workplace disciplinary action policy; • Train employees about the policy; • Enforce the policy by citing, in writing, employees who violate employer and regulatory requirements.

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¹ Assumes the employer can provide documentation where appropriate.

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IEAD

The IEAD is an affirmative defense an *employer* may assert if it is charged with not following the label requirements under FAC section 12973 based on its *employee* not wearing label-specified PPE, since PPE is equipment worn by an individual *solely* for the protection of that person.

The *employer* **may not** assert the IEAD if the requirement cited could or is intended to mitigate risks to other people, including other workers, or the environment.

If an employer provides proof that it undertook all reasonable measures necessary to ensure the employee would wear the required PPE, and that employee nevertheless made an informed decision to violate a requirement that is *solely* for his or her own protection, then it is appropriate to deem that employee solely responsible.

IEAD applies only to FAC §12973

The IEAD is **only** available when the employer is charged with a violation of FAC section 12973. The Department's regulations related to PPE hold the employer responsible for its *own failure to assure* that an employee wore PPE. The CAC must show the employer failed to take some reasonable step to avoid the employee's action in order to hold the employer liable.

In other words, under the regulations, the employer is charged based on its *own* act or omission, not the employee's action. **Thus, the IEAD is inapplicable in actions brought under DPR's regulations.**

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Employer bears the burden of proving the IEAD for worker safety violations

To successfully assert the IEAD at the hearing, **the employer must**, at a minimum, prove each of the following:

- 1) The employer has a comprehensive, written training program that includes training employees in matters of pesticide safety with respect to their particular job assignments; **and**
- 2) The employer complied with all applicable training requirements in DPR's pesticide worker safety regulations, with respect to the employee; **and**
- 3) The employer has a written workplace disciplinary action policy that it enforces against employees who violate the employer's safety requirements, and the employer enforced the policy against the employee for the incident; **and**
- 4) At the time of the incident, the employee knew, through his/her pesticide safety training and the employer's work place disciplinary action policy, that employer required employees to wear the PPE at issue, and that they could be subject to discipline for not doing so; **and**
- 5) The employer provided the PPE to the employee and the PPE was available at the work site in a condition that would have provided the safety or protection intended by the equipment; **and**
- 6) The employee was adequately supervised to assure that the PPE was used.

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Summary

The following is a brief summary of the issues and concepts addressed in this guidance. Please refer to the specific sections in this letter, as well as the laws and regulations cited.

Employer

- The employer has primary responsibility for employee safety as outlined in 3 CCR section 6702(a) and (b).
- The employer's responsibility to assure employee behavior is an element of a violation under certain citeable sections [3 CCR §§6702(b)(5) and 6738(b)] of the worker safety regulations.
- The CAC must allege and present evidence of the employer's failure to "assure" the employee would wear protective eyewear, essentially that the employer could have done something more than it did to avoid the violation. This is a very high standard of care for the employer.
- There is no need to reference 3 CCR section 6130(b) in actions against employers since its only relevance is to provide examples, though not an exhaustive list, of "reasonable measures."
- In structural actions, BPC section 8616.9 restrains the CAC's discretion in regards to citing the employer.
- **Employee**
- Employees have a responsibility to use the PPE and other safety equipment as outlined in 3 CCR section 6702(c).
- Title 3, CCR section 6130(b) constrains the CAC's discretion to charge an employee for failing to use PPE as required by section 6702(c). An employee may challenge whether the criteria in 6130(b) are met.

Independent Employee Action Defense

- The IEAD is an affirmative defense an employer may assert if it is charged with not following the label under FAC section 12973 based on its employee not wearing label-specified PPE.
- An employer may **not** assert the IEAD in action brought to enforce DPR's regulations.
- Since the CAC should rarely, if ever, cite section 12973 for worker safety violations, the IEAD should rarely, if ever, be available.
- The elements of the IEAD provide examples, though not an exhaustive list, of possible "reasonable measures."

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Do not cite both with the same section for PPE violations

There is a presumption that the employer is responsible for the actions or conduct of his or her employee, within the scope of the work. Cite the licensed employee only when the evidence tends to show that the employer has done everything reasonable to assure compliance with PPE requirements.

It is strongly advised that counties not cite both the employer and the employee with the same section in the case of PPE violations. Cite the section most specific and appropriate for the role of each person who failed to meet a specific requirement.

Revision

This document supersedes Enforcement Letter ENF 2001-55, “Guidance for Civil Penalty Actions Against Employers or Employees for Matters Involving Pesticide Worker Safety,” effective immediately.

References

- FAC section 12973
 - 3 CCR section 6700 et seq., generally
 - 3 CCR sections 6130, 6702, 6720, 6724, and 6738, specifically
 - Hearing Officer Roundtable Project’s specific guidance on “Employer's Failure to ‘Assure’ Compliance,” “Citations Strategies for Worker Safety Violations,” and “General and Specific Code Sections.”
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