

## Appendix E

### Citing Employers or Employees for PPE Violations

Interprets 3 CCR section 6131 and B&PC section 8616.9

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**Introduction** This Appendix provides background and guidance to CACs on whether to cite employers or employees for Personal Protective Equipment (PPE) violations.

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**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 DPR's 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 and regulations enacted to protect employees, public health and the environment.

As discussed below, there are some very narrow exceptions to this rule in the case of violations involving PPE requirements.

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**Application of 3 CCR section 6131** 3 CCR section 6131 allow CACs to cite certified private or commercial applicator-employees for failing to use PPE provided by their employer.

The provisions of 3 CCR section 6131 and B&PC section 8616.9(a) place limitations on when an employee can be cited. These sections are related 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.

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**Caution** Consult the current codes prior to taking action. The table on the following page should be considered informational, i.e. for the purpose of discussion in this Appendix, and is not specific legal advice.

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## Citing Employers or Employees for PPE Violations, Continued

**Structural actions**

Refer to B&PC section 8616.9 when initiating an administrative civil penalty action for employee failure to wear required PPE under the authority of B&PC section 8617. This section assumes that the employer is responsible for PPE violations, but also provides the CAC the option to cite both the employer and employee or to cite the employee only if all the listed criteria in section 8616.9(a) can be established. It should be noted that 3 CCR section 6131 also applies to structural civil penalties.

	Agricultural Civil Penalty	Structural Civil Penalty
<b>Authority</b>	FAC section 12999.5	B&PC section 8617
<b>Key points</b>	<ul style="list-style-type: none"> <li>• 3 CCR section 6131 applies</li> <li>• All of the criteria must be met to take an enforcement action against an employee</li> </ul>	<ul style="list-style-type: none"> <li>• 3 CCR section 6131 applies first, then</li> <li>• B&amp;PC section 8616.9 must be applied</li> <li>• All of the criteria in both sections must be met to take an enforcement action against an employee</li> </ul>
<b>Summaries of codes</b>	3 CCR section 6131: <ol style="list-style-type: none"> <li>1. Structural licensed operators (OPR), field representatives (FR), or applicators (RA); individuals with a Pest Control Aircraft Pilot Certificate (PCAPC), Qualified Applicator License (QAL), Qualified Applicator Certificate (QAC), Private Applicator (PAC)</li> <li>2. Employer-provided equipment was at available work site and could be used for intended purpose</li> <li>3. Employer has written disciplinary policy requiring PPE use</li> <li>4. Employee acknowledged by signature having read and understood the policy</li> <li>5. Employer complied with applicable training requirements</li> </ol>	B&PC section 8616.9: <ol style="list-style-type: none"> <li>(a) Employer has a written training program, has provided training to the employee, and has maintained a record of training as required by regulation</li> <li>(b) Employer provided required PPE, PPE was available at use site, PPE was properly maintained and in good working order</li> <li>(c) Employer in compliance with regulations relating to workplace and supervision of employees</li> <li>(d) Employer implemented written disciplinary action policy for employees who violate company policy or state or local laws or regulations</li> <li>(e) Employer has no history of repeated violations of this section</li> </ol>

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## Citing Employers or Employees for PPE Violations, Continued

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**Employer’s responsibilities**

While a certified applicator is exempt from handler training under 3 CCR section 6724(d), it is important to consider the employer’s general responsibilities under 3 CCR section 6702. The employer has a duty to inform the employee of safe use requirements of pesticide labels and laws and regulations; pesticide hazards; PPE to be used; safety or work procedures to be followed; and pesticide labeling requirements. The employer’s responsibility is to assure (that is, to “make certain”) the licensed or certified employee is aware of these general requirements. 3 CCR section 6131(a)(5) requires the CAC to make a determination that this has occurred. The County Advocate must present evidence in the hearing to support this determination.

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**Employee’s responsibilities**

California law recognizes that employees also bear some responsibility for their own safety when using pesticides in the workplace. 3 CCR section 6702(c) requires employees to use the PPE and other safety equipment required by regulation or labeling, *which has been provided by the employer at the work site in a condition that will provide the intended safety or protection.*

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**Do not cite both the employer and employee for the same code section violation**

There is a presumption the employer is responsible for the actions or conduct of the employee within the scope of the work. Cite the certified private or commercial applicator-employee *only* when the evidence tends to show that the employer has done everything reasonable to “make certain” it complied with PPE requirements.

In most cases CACs *should not cite both the employer and the employee with a violation of the same code section.* For example, a code section which places the responsibility on the employer (as is the case with most worker safety regulations) would be inappropriate to use to cite an employee with a violation. Cite the section most specific and appropriate for the role of each person who failed to meet a specific requirement.

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## Citing Employers or Employees for PPE Violations, Continued

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**Citing the most appropriate Respondent**

CACs who wish to bring civil penalty actions against certified private or commercial applicator employees as a tool in their enforcement program may do so under the very limited circumstances that are set forth in 3 CCR section 6131 and B&PC section 8616.9. The appropriate regulation to cite for the employee's failure to wear the required PPE is 3 CCR section 6702(c).

3 CCR section 6131 and B&PC section 8616.9 identify the key information that the CAC must obtain before reaching the decision to bring an administrative civil penalty action against a certified private or commercial applicator employee for a violation of 3 CCR section 6702(c).

Proceeding step by step through 3 CCR section 6131 and B&PC section 8616.9 should lead to the correct decision as to whether an employee can be charged with the PPE violation in a given situation and greatly reduce the risk of reversal of the CAC's decision if it is appealed to the Director or the DRC.

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**Citing both parties**

For structural civil penalties, when a PPE violation is discovered during an inspection or investigation B&PC section 8616.9(a) allows the CAC to take an action against the employer, both the employer and employee, or the employee alone provided the requirements listed in the law are met.

For agricultural civil penalties, DPR believes that citing both the employer and the employee for an employee's failure to wear the required PPE can rarely be justified as an appropriate exercise of discretion because it does not advance the goal of compliance or deterrence. Policy and regulations provide CACs with ample and effective tools to determine the most responsible party when an employee is not wearing the required PPE. The party ultimately responsible should be held accountable if future compliance is the goal.

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**Elements of the Violation analysis**

As noted in Chapter 2, perform an "Elements of the Violation" analysis for each violation, listing the elements and specific evidence for each element. After doing this analysis there may not be sufficient evidence to prove a potential violation in a hearing. This analytical exercise may result in a lower number of violations suitable for prosecution in a pesticide administrative civil penalty action.

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## Citing Employers or Employees for PPE Violations, Continued

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### Guidance

Except as provided for in B&PC section 8616.9(a), if the CAC can take an action against the employer in most cases the CAC should not charge the employee.

Scrutiny of the **employer's** actions (or lack thereof) may reveal one or more violations of the applicable 3 CCR worker safety regulations that contributed to a certified private or commercial applicator-employee not wearing the required PPE. The employer should then be cited for the applicable violation of 6723 through 6746.

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### Employer's assertion that it is not responsible for acts of its employees

As stated elsewhere in this Volume, the test for relevancy is very broad in informal, administrative pesticide civil penalty hearings: any relevant evidence may be admitted. The Respondent has the right to enter anything into the hearing record they feel is germane to the case. The Hearing Officer can weigh and consider any information presented by either side. The County Advocate should be prepared for an employer to claim it "made certain" it met its worker safety responsibilities.

If the CAC cites an employer for a violation of a PPE regulation, to hold the employer responsible the County should have evidence to prove the violation occurred. At a hearing, the County Advocate should be prepared for the employer to claim it "made certain" it met its worker safety responsibilities.

As noted in Section 3.2, if the CAC cited an employer under FAC section 12973 and not a specific worker safety regulation the CAC cannot argue the case based on the employer-employee responsibilities in 3 CCR section 6702.

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