

## CHAPTER V IMMINENT DANGER

### I) General

- A) **Definition.** Per 803 KAR 2:100, an imminent danger is any condition or practice in a place of employment where a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by KRS Chapter 338.
- B) **Requirements.** The following conditions must be met before a hazard becomes an imminent danger:
- i) Death or serious physical harm must be threatened. Serious physical harm is impairment of the body such as to render the part of the body affected functionally useless or substantially reduced in efficiency.
  - ii) For a health hazard there must be a reasonable expectation that toxic substances or other health hazards are present and exposure to them will cause harm to such a degree as to shorten life or cause substantial reduction in physical or mental efficiency even though the resulting harm may not manifest itself immediately. The required imminence exists where it is reasonable to believe that death or serious physical harm could occur or significantly worsen before KY OSH could respond through complaint, referral or programmed inspection procedures.

### II) Pre-inspection Procedures for Handling Imminent Danger Situations.

- A) **When an Imminent Danger is Reported to the Office.** Any allegation of imminent danger received by the office must be handled in accordance with the following procedures:
- i) The supervisor immediately determines whether there is a reasonable basis for the allegation and alert the director, program manager, and the other supervisors of the situation.
  - ii) When the imminent danger allegation appears to have merit, the Supervisor makes an evaluation of the inspection requirements and selects a CSHO to conduct the inspection.
  - iii) Imminent danger investigations must be scheduled the same day that the report is received, if possible, but not later than the employer's next working day after receipt of the report.
  - iv) The inspection of a workplace believed to contain an imminent danger must be thoroughly planned and expeditiously accomplished in accordance with the procedures given in the chapter.
  - v) When an immediate inspection cannot be opened within one (1) working day from the time the report is received, the supervisor or CSHO will contact the employer immediately, if possible, and obtain as many pertinent details as possible concerning the situation and attempt

to have any employees affected by the imminent danger voluntarily removed. A record of the steps, if any, the employer intends to initiate in order to eliminate the danger must be attached to the casefile. Such notification will be considered advance notice authorized pursuant to 803 KAR 2:080.

**B) Technical Considerations.** The supervisor and the CSHO selected to perform the inspection review the known facts and will ascertain what technical equipment and personnel may be necessary to conduct the inspection.

i) In highly complex situations, consideration is given to the use of specialists such as staff from Federal Regions, National Office staff, staff of the National Institute of Occupational Safety and Health and other governmental agencies, or, if the situation warrants their use, specialists from outside government. When the decision is made to use experts, follow the procedures in Chapter IV.

ii) Calibration and testing of equipment to be used will be currently valid.

iii) If samples are required to determine whether there is an imminent danger situation, rapid analysis is essential.

(a) The Program Manager makes advance arrangements with the laboratory for rapid analysis of samples from suspected imminent danger situations which require immediate action.

**C) Scheduling.** Any allegation of imminent danger received by the office, whether written or oral, must be handled on a highest priority basis. Other commitments, weekends, holidays, leave and other considerations cannot interfere with the expedited and thorough handling of these cases.

i) The imminent danger allegation must be evaluated immediately and, if appropriate, scheduled for investigation as soon as possible. Except in extraordinary circumstances, the inspection must be conducted no later than the employer's next workday after receipt of the report of imminent danger.

ii) When the time necessary to obtain special equipment or technical personnel for inspection would unduly delay the inspection, it may nevertheless be advisable to schedule and conduct a preliminary inspection within the time limits given in the preceding subparagraph. The required equipment and/or personnel can be brought in later.

### **III) Inspection.**

**A) Scope.** Any alleged imminent danger situation brought to the attention of or discovered by the CSHO must be inspected immediately, whether or not the inspection was initiated in response to an allegation of imminent danger. Additional inspection activity should take place only after resolution of the imminent danger situation. After the imminent danger situation is resolved, a determination is made by the director as to what extent the inspection should be expanded.

- B) **Procedures.** Any inspection that involves an imminent danger situation must be conducted as expeditiously as possible. The opportunity to accompany the CSHO must be offered to employer and employee representatives, unless the imminence of the hazard makes it impractical to delay inspection in order to afford any or all such representatives time to reach the area of the alleged imminent danger.
- i) Advance Notice. 803 KAR 2:080 authorizes advance notice of an inspection of an apparent imminent danger situation to enable the employer to eliminate the dangerous condition as quickly as possible.
    - (a) When an immediate inspection cannot be made, the CSHO gives notice of the impending inspection to the employer after the known facts are reviewed with the supervisor and it is concluded that advance notice would speed the elimination of the hazard.
    - (b) When advance notice is given to the employer, the authorized employee representative is also notified. When the inspection is in response to a complaint, advance notice is given to the complainant unless such a procedure will cause a delay in speeding the elimination of the hazard.
    - (c) *Refusal to Permit Inspection.* When an employer refuses a CSHO entry while attempting to investigate an alleged imminent danger complaint, a warrant must be obtained as quickly as possible.
    - (d) *Preemption Question.* If the report of imminent danger involves a potential dispute with another agency, the CSHO must consult the supervisor.
- C) **Elimination of the Imminent Danger.** As soon as it is concluded that the conditions or practices exist which constitute an imminent danger, the employer must be so advised and requested to notify his employees of the danger and remove them from the area of imminent danger. It is the duty of the CSHO at the site of an imminent danger situation to encourage the employer to do whatever is possible to eliminate the danger.
- i) Voluntary Elimination of the Imminent Danger. The employer may voluntarily and permanently eliminate the imminent danger as soon as it is pointed out. In such cases, no imminent danger proceeding will be instituted; and, therefore, no Notice of Alleged Imminent Danger will be completed, although an appropriate citation and notification of penalty must be issued.
    - (a) *What Constitutes Voluntary Elimination?* Although there may be instances when the employer is not able to eliminate the danger permanently as soon as it is pointed out, voluntary elimination of the danger is accomplished when the employer:
      - (1) Removes employees from the danger area(s); and

- (2) After removal of employees from the hazard, the employer initiates immediate corrective action designed to bring the dangerous condition, practice, means or method of operation or process into compliance, which, when completed, permanently eliminates the dangerous condition.
- ii) Action Where Voluntary Elimination Is Accomplished. When the employer agrees and proceeds to eliminate the imminent danger immediately and permanently, the CSHO and any other technical support staff present advises the employer to the maximum extent possible. However, the employer is ultimately responsible for determining the manner in which the hazardous condition is to be eliminated.
- (a) If elimination of the imminent danger is achieved voluntarily, the CSHO must make the appropriate notation on the OSHA-1B Form. Appropriate citation(s) and notice(s) of proposed penalties may be issued regarding the hazard.
- (b) The CSHO must inform affected employees or their authorized representative(s) that, although an imminent danger existed, the CSHO determined that such danger no longer exists. The affected employees or their authorized representative(s) must be informed of the steps to be taken by the employer to eliminate the dangerous condition.
- (c) No Notice of Alleged Imminent Danger form should be prepared and no imminent danger proceedings instituted when voluntary elimination of the imminent danger is accomplished.
- iii) Action Where Voluntary Elimination Is Not Accomplished. The following applies when the employer cannot or does not voluntarily eliminate the hazard.
- (a) The CSHO calls the supervisor, who decides:
- (1) Whether to contact the general counsel through the director to obtain a Temporary Restraining Order (TRO) pursuant to KRS 338.133; and
  - (2) Whether to post the Notice of Alleged Imminent Danger form.
  - (3) If it is not feasible to contact the supervisor, the CSHO must contact the program manager and should contact the supervisor as soon as possible thereafter.
  - (4) The director and the general counsel must make immediate arrangements for the initiation of court action.
  - (5) The CSHO must give priority in scheduling activities to prepare for TRO litigation in imminent danger matters.
- D) **Issuing Notice of Alleged Imminent Danger.** If the employer does not immediately eliminate the imminent danger or give satisfactory assurance that the danger will be voluntarily eliminated

before any employee exposure occurs, the CSHO must contact the Supervisor for approval to complete and post the Notice of Alleged Imminent Danger form, immediately.

- i) The supervisor may not authorize this action without prior consultation with the general counsel, commissioner, director, and/or program manager.
- ii) The Notice of Alleged Imminent Danger does not constitute a citation of alleged violation or a notice of proposed penalty. It is only a notice that an imminent danger is believed to exist and that the commissioner must seek a court order to restrain the employer from permitting employees to work in the area of the danger until it is eliminated.
- iii) The CSHO must fill out, sign, and post the original Notice of Alleged Imminent Danger at or near the area in which the exposed employees are working. A copy must be retained in the casefile, until the original is available. When a copy is not practicable, a photo of the posted form must be included.
- iv) Where there is not a suitable place for posting the Notice of Alleged Imminent Danger form, the CSHO must request the employer(s) provide a means for posting.
- v) The CSHO must orally inform the affected employees of the location of the Notice of Alleged Imminent Danger, after taking adequate precautions not to be exposed to the danger.
- vi) The CSHO must advise the employer KRS Chapter 338.131 gives Franklin Circuit Court jurisdiction to restrain any condition or practice which is an imminent danger to employees.

**NOTE.** The CSHO has no authority either to order the closing down of the operation or to direct employees to leave the area of the imminent danger or the workplace.

- vii) KRS 338.131 gives the commissioner the authority to issue an order requiring the employer immediately abate the danger. This step is normally taken prior to going before Franklin Circuit Court.

#### IV) **Citations and Proposed Penalties.**

- A) **Citations and Penalties.** All violations discovered during the inspection must be cited and penalties proposed, whether or not they relate to the imminent danger situation.
- B) **Effect of Court Action.** No citation is issued when court action is being, or will be, pursued relative to the issuance of a Notice of Alleged Imminent Danger.

#### V) **Follow up Inspection.**

- A) **Court Action.** Where a court has issued an injunction in an imminent danger situation, the follow up inspection must take place immediately after the court order is issued to determine if the employer is complying with the terms of the order.

- B) **No Court Action.** No court proceeding is initiated when the imminence of the danger was voluntarily eliminated, but permanent correction of the condition is not achieved at the time of the inspection, appropriate citations are issued promptly and a follow up inspection conducted on the date set for abatement.
  - C) **Immediate Correction.** When the dangerous condition was permanently corrected at the time of the inspection, the program manager determines if a follow up inspection is necessary in accordance with the guidelines in Chapter II.
- VI) **Removal of Imminent Danger Notice.** When a Notice of Imminent Danger form is posted at the worksite, the CSHO removes the notice as soon as the imminent danger situation is eliminated or it is determined that a temporary restraining order is not sought. When available, the original Notice of Alleged Imminent Danger form is included in an appendix.