

453 CMR 9.00: CIVIL ADMINISTRATIVE PENALTIES

Section

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9.01: Authority, Purpose, Scope and Severability

- (1) Authority. 453 CMR 9.00 is promulgated in accordance with and under the authority of M.G.L. c. 111, § 197B, M.G.L. c. 140, § 46R, and M.G.L. c. 149, § 6F½.
- (2) Purpose. 453 CMR 9.00 is intended to:
  - (a) Promote the health, safety, and welfare of workers, businesses, and the general public by deterring noncompliance with the laws, regulations, and related requirements to which 453 CMR 9.00 applies.
  - (b) Ensure that the Division assesses civil administrative penalties lawfully, fairly, and consistently.
- (3) Scope. 453 CMR 9.00 applies to M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; and M.G.L. c. 149, §§ 6A through 6F½.
- (4) Severability. If any provision of 453 CMR 9.00 shall be held inconsistent with the laws of the Commonwealth, or held unconstitutional, either on its face, or as applied, the inconsistency or unconstitutionality shall not affect the remaining provisions.

9.02: Definitions

As used throughout 453 CMR 9.00, the following terms shall have the following meanings, unless the context clearly indicates otherwise:

Civil Citation. A citation issued by the Commissioner pursuant to 453 CMR 9.00 for a violation or violations of a law or regulation enforced by the Division, as set forth at 453 CMR 9.01(3). Such citation shall identify each violation upon which it is based and may include an Order that the infraction be rectified or a civil penalty imposed or both.

Civil Penalty. A monetary penalty, payable to the Commonwealth of Massachusetts, ordered as part of a Civil Citation issued by the Commissioner pursuant to 453 CMR 9.00 for a violation or violations of a law or regulation enforced by the Division, as specified in 453 CMR 9.01(3).

Commissioner. The Commissioner of the Massachusetts Division of Occupational Safety who has been authorized to administer and enforce 453 CMR 9.00 by the Director of the Massachusetts Department of Labor.

Division. The Division of Occupational Safety of the Massachusetts Department of Labor.

License. Any document issued by the Division of Occupational Safety pursuant to M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½, that is nominally referred to as a "license", "certification", or "registration" and that authorizes the holder to exercise a certain privilege that would otherwise be prohibited without such license, certification, or registration.

Order. Any order issued by the Commissioner under the provisions of 453 CMR 9.00, including, but not limited to, an order for the cessation of all relevant activities of the person, firm, corporation, or other entity for failure to comply with the requirements of a Civil Citation.

## 9.02: continued

Specific Intent. The mental purpose, aim, or design to accomplish a specific act prohibited by a law or regulation enforced by the Division, as specified in 453 CMR 9.01(3).

Violation. Any act or failure to act that results in one or more of the following:

- (a) engaging in any business or other activity without a license, certification, registration, or approval whenever such a license, certification, registration, or approval is required by the applicable regulation or statute.
- (b) engaging in any activity prohibited by, or not in compliance with, any requirement of an applicable regulation or statute.
- (c) not fully doing, or not doing in a timely fashion, anything required by any applicable regulation or statute.

Written Warning. A warning issued in writing by the Commissioner pursuant to 453 CMR 9.00 for a violation or violations of a law or regulation enforced by the Division, as set forth at 453 CMR 9.01(3).

9.03: Issuance of Written Warnings

The Commissioner, at his or her discretion, may issue a Written Warning for Violations of requirements of regulations and statutes to which 453 CMR 9.00 applies. Written Warnings shall identify the specific requirement(s) of the applicable regulation or statute that has been violated and shall serve as official, legal notice to the person, firm, corporation, or other entity of the occurrence or existence of the Violation(s). Said Written Warning may contain an Order to correct the Violation and specify a period of time for the correction of said Violation. Failure to correct the Violation within the period of time specified may result in the issuance of a Civil Citation or other enforcement action.

9.04: Civil Citations

(1) General. In addition to the penalties provided for by M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; and M.G.L. c. 149, §§ 6A through 6F½, the Commissioner may issue a Civil Citation for each Violation of the same. Said Civil Citation may include an Order to correct the deficiency or infraction that resulted in the issuance of the Civil Citation, a Civil Penalty, or both. Said Civil Citation shall include:

- (a) A statement of the alleged act or omission for which the Civil Citation is issued.
- (b) Identification of the law, regulation or order that has not been complied with as a result of such alleged act or omission.
- (c) If a Civil Penalty is issued, the amount of the Civil Penalty for each alleged act or omission for which the Civil Penalty is assessed.
- (d) A statement that the person to whom the Civil Citation is issued has a right to appeal the Civil Citation through an adjudicatory hearing.
- (e) A statement that sets forth the actions that must be taken by the person to whom the Civil Citation is issued in order for said person to avoid being deemed to have waived his or her right to an adjudicatory hearing.
- (f) If a Civil Penalty is assessed, a statement of how and when the Civil Penalty must be paid.

(2) Maximum Amounts of Civil Penalties. The maximum amounts of Civil Penalties that may be assessed under 453 CMR 9.00 are as follows:

- (a) A monetary penalty of not more than \$1,000 may be issued for each Violation if:
  1. the person, firm, corporation or other entity has not previously been criminally convicted of a Violation of M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½; or been issued a Civil Citation pursuant to 453 CMR 9.00; and
  2. the Commissioner has determined that the person, firm, corporation or other entity lacked Specific Intent to violate M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½; or 453 CMR 9.00.

## 9.04: continued

- (b) A monetary penalty of not more than \$2,500 may be issued for each Violation if:
  1. the person, firm, corporation or other entity has not previously been criminally convicted of a Violation of M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½; or been issued a Civil Citation pursuant to 453 CMR 9.00; and
  2. the Commissioner has determined that the person, firm, corporation, or other entity possessed a Specific Intent.
- (c) A monetary penalty of not more than \$5,000 may be issued for each Violation if the person, firm, corporation or other entity has previously been criminally convicted of a Violation of M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½; or been issued a Civil Citation pursuant to 453 CMR 9.00.

(3) Determination of the Amount of a Civil Penalty. In determining the amount of each Civil Penalty, the Division shall include, but not be limited to, the following considerations:

- (a) The actual and potential impact on public health, safety and welfare, and the environment of the failure to comply;
- (b) Whether the person, firm, corporation, or other entity being assessed the Civil Penalty took steps to prevent noncompliance, to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance;
- (c) Whether the person, firm, corporation, or other entity being assessed the Civil Penalty has previously failed to comply with any regulation, order, license, or approval issued or adopted by the Division, or any law which the Division has authority or responsibility to enforce;
- (d) The deterrence of future noncompliance by the person, firm, corporation, or other entity, or by other such persons, firms, corporations or entities;
- (e) The financial condition of the person, firm, corporation, or other entity being assessed the civil penalty; and
- (f) The public interest.

(4) Payment of a Civil Penalty. Payment of a Civil Penalty shall be made by certified check, cashier's check, or money order payable to the order of the Commonwealth of Massachusetts. No other form of payment shall be accepted. Payment of Civil Penalties shall be made within 21 days of the issuance of a Civil Citation or, if the Civil Citation is appealed, within 21 days of settlement or final administrative or judicial adjudication of the appeal, whichever is later.

(5) Consequence(s) of Failure to Comply with the Requirements of a Civil Citation.

- (a) If a person, firm, corporation, or other entity to whom a Civil Citation is issued fails to pay a Civil Penalty or otherwise fails to comply with the requirements set forth in a Civil Citation, the Commissioner may order the cessation of all relevant activities of the person, firm, corporation, or other entity. Said Order shall be effective immediately upon service.
- (b) If a person, firm, corporation, or other entity to whom an Order has been issued pursuant to 453 CMR 9.04(5)(a) is also the holder of a License issued by the Division pursuant to M.G.L. c. 111, § 197B; M.G.L. c. 140, §§ 46A through 46R; or M.G.L. c. 149, §§ 6A through 6F½, the Commissioner shall propose the suspension or revocation of the License at the same time the Order is issued and shall schedule an administrative hearing on said proposed suspension or revocation, within ten days after such Order is issued. Said administrative hearing shall be held in accordance with the requirements of M.G.L. c. 30A and 801 CMR 1.00. Any License suspension or revocation shall also apply to all affiliates of the person, firm, corporation, or other entity, as well as to any successor company or corporation that the Commissioner, upon investigation, determines not to have true independent existence apart from that of the violating person, firm, corporation, or other entity.
- (c) No officer of any corporation which has failed to pay a Civil Penalty issued pursuant to 453 CMR 9.04 shall incorporate or serve as an officer of any corporation which did not have a legal existence as of the date that the penalty became due and payable to the Commonwealth.

9.04: continued

(6) Appeals of Civil Citations and Orders, Penalties. Any person, firm, corporation or other entity aggrieved by a Civil Citation or Order issued pursuant 453 CMR 9.04 *et seq.* may request that an administrative hearing be held on the Civil Citation or Order by submitting a written request to the Commissioner within ten days after the receipt of the Civil Citation or Order. All administrative hearings shall be held in accordance with the requirements of M.G.L. c. 30A and 801 CMR 1.00. Any person, firm, corporation or other entity aggrieved of the decision of such an administrative hearing may appeal said decision pursuant to the provisions of M.G.L. c. 30A, § 14

9.05: Temporary Restraining Orders and Preliminary and Permanent Injunctions for Asbestos and Lead Violations

(1) Initiation. Whenever the Commissioner has reason to believe that a person, firm, corporation, or other entity is engaging in, or is about to engage in, a Violation of M.G.L. c. 111, §§197 or 197B; or M.G.L. c. 149, §§ 6A through 6E, he or she may bring an action in the name of the Commonwealth against such person, firm, corporation, or other entity to restrain the Violation by temporary restraining order or preliminary or permanent injunction. The action may be brought in the superior court of the county in which such person, firm, corporation, or other entity resides or has as his principal place of business, or the action may be brought in the superior court of Suffolk County with the consent of the parties or if the person, firm, corporation, or other entity has no place of business within the Commonwealth. If more than one person, firm, corporation, or other entity is joined as a defendant, the action may be brought in the superior court of the county where any one of the defendants reside or has his principal place of business, or in Suffolk County.

(2) Penalty for Violation of an Injunction. Any person, firm, corporation, or other entity that violates an injunction issued pursuant to 453 CMR 9.05 shall be subject to a Civil Penalty of not more than \$10,000 for each such Violation. Each day during which a person, firm, corporation, or other entity fails to correct the Violation that formed the basis for the injunction shall be considered a separate Violation. For the purposes of 453 CMR 9.05(2), the Division may petition the court retaining jurisdiction for recovery of this Civil Penalty.

9.06: Service of Written Warnings and Civil Citations

(1) Date of Issuance.

(a) Service in Hand. Written Warnings and Civil Citations issued by the Division pursuant to 453 CMR 9.00 shall be deemed to have been issued on the date delivered, when served in hand to:

1. the person, firm, corporation, or other entity to whom the Written Warning or Civil Citation is addressed;
2. any officer, employee, or agent of the person, firm, corporation, or entity to whom the Written Warning or Civil Citation is addressed, who has been authorized by said person, firm, corporation, or entity, or by law, to accept service;
3. the last known address of said person, firm, corporation, or other entity; or
4. the last known address of any officer, employee, or agent of the person, firm, corporation, or entity to whom the Written Warning or Civil Citation is addressed, who has been authorized by said person, firm, corporation, or entity, or by law, to accept service.

(b) Mail Delivery. If served by First Class or Certified Mail, the notice shall be deemed to be issued when postmarked by the U.S. Postal Service.

(2) Date Received.

(a) Service in Hand. Written Warnings or Civil Citations issued by the Division pursuant to 453 CMR 9.00 shall be deemed to have been received on the date delivered, when served in hand to:

1. the person, firm, corporation, or other entity to whom the Written Warning or Civil Citation is addressed;

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2. any officer, employee, or agent of the person, firm, corporation, or entity to whom the Written Warning or Civil Citation is addressed, who has been authorized by said person, firm, corporation, or entity, or by law, to accept service;
  3. the last known address of said person, firm, corporation or other entity; or
  4. the last known address of any officer, employee, or agent of the person, firm, corporation, or entity to whom the Written Warning or Civil Citation is addressed, who has been authorized by said person, firm, corporation, or entity, or by law, to accept service
- (b) Mail Delivery. Written Warnings and Civil Citations posted as First Class Mail with the U.S. Postal Service shall be deemed to have been received no later than the third business day after mailing, or when returned by the U.S. Postal Service to the Division as unclaimed, unless the Commissioner determines that the said Written Warning or Civil Citation was not claimed for reasons beyond the control of the person to whom the Written Warning or Civil Citation was sent. Written Warnings or Civil Citations posted with the U.S. Postal Service by Certified Mail shall be deemed to have been received when signed for by:
1. the person, firm, corporation, or other entity to whom the Written Warning or Civil Citation is addressed; or
  2. any officer, employee, or agent of the person, firm corporation, or entity to whom the Written Warning or Civil Citation is addressed, who has been authorized by said person, firm, corporation, or entity, or by law, to accept service.

#### REGULATORY AUTHORITY

453 CMR 9.00: M.G.L. c. 111, § 197B; c. 140, § 46R; and c. 149, § 6F½.