

CHAPTER XI LEGAL

I) Search Warrants and Subpoenas

A) **Definitions.**

- i) Search Warrant. A written order by a judge authorizing the CSHO to search a specific place and specifies the scope of the search. KRS 338.101 authorizes the commissioner to apply to the Franklin Circuit Court for a search warrant to enforce the right of entry to inspect the premises. KY OSH seeks a search warrant when an employer refuses to allow a CSHO on its worksite to conduct an inspection.
- ii) Subpoena. A written order compelling production of documents or witness testimony. KRS 336.060 authorizes the secretary or authorized deputy to issue subpoenas and requires the secretary's or authorized deputy's signature. KY OSH enforces failure to comply with a duly served subpoena in the circuit court of the county where the principal place of business is located. A subpoena is sought when an employer does not provide copies of documents the CSHO requests.

B) **Search Warrant.**

- i) Warrant Applications in General.
 - (a) Upon refusal of entry to conduct any inspection, the supervisor may seek a civil search warrant with approval of the director and assistance of the Office of General Counsel (OGC).
 - (b) Warrant applications for establishments where the employer denied entry for a limited scope inspection such as but not limited to, complaint, referral, or accident investigation, are normally limited to the specific working conditions or practices forming the basis of the inspection. However, KY OSH may seek a broad scope warrant if there are potential violative conditions or if the establishment is on a list of establishments targeted for inspection.
- ii) General Information Necessary to Obtain a Warrant.
 - (a) The supervisor informs the director and the OGC immediately after the CSHO reports the employer denied him/her entry. The OGC is responsible for drafting the search warrant. The supervisor provides the necessary information, documents, and search warrant form to the OGC. Once the OGC returns the drafted search warrant to OSH, no additional documents, photos, or attachments can be included.
 - (b) Information necessary to obtain a warrant includes, if known.
 - (1) Supervisor's name and title;
 - (2) CSHO's name;

- (3) Inspection number, if assigned;
 - (4) Complaint or referral number, if assigned;
 - (5) If the inspection will include safety items, health items, or both;
 - (6) Type of inspection (referral, complaint, general schedule, etc.);
 - (7) Employer's legal name(s), if known;
 - (8) Worksite address including city, state, and county;
 - (9) Establishment or site address if different from worksite;
 - (10) Estimated number of employees at site if known;
 - (11) North American Industry Classification System (NAICS) Code designation if known;
 - (12) Summary of facts leading to the refusal of entry or limitation of inspection, including date and time of attempted entry, date and time of denial, stage of denial (entry, opening conference, walkaround, etc.);
 - (13) A narrative of CSHO actions leading up to, during, and after refusal, including full name and title of the person(s) to whom CSHO presented credentials, full name and title of person(s) refusing entry, reason(s) for refusal CSHO's response, if any, to the denial, and the name of any witnesses to the denial, if known.
 - (14) Documentation of violations in plain view observed prior to denial.
 - (15) Property description including boundaries, description of building(s) (color, construction, size, etc.), signage (color, location, shape, etc.), presence of fencing (description, construction, color, etc.), and any photos of the property.
- iii) Specific Information Based on Inspection Type. Document specific reasons for the establishment's selection for inspection including proposed scope of the inspection.
- (a) *Imminent Danger.*
 - (1) Description of alleged imminent danger hazard or situation.
 - (2) Information received date.
 - (3) Information source.
 - (4) Original allegation and any documentation that includes basis for reasonable expectation of death or serious physical harm.
 - (5) CSHO observations of the imminent danger hazard.

- (6) Any photos of the imminent danger.
 - (b) *Fatality*. The CSHO completes the Fatality Report (OSHA-36) with as much detail as possible and attaches it to the search warrant along with any notifications.
 - (c) *Complaint or Referral*.
 - (1) Redacted complaint or referral.
 - (2) Reasons KY OSH believes a violation threatening harm exists.
 - (3) Any additional information pertaining to the complaint or referral.
 - (d) *Programmed*. Provide a copy of scheduling criteria from Chapter II and the document(s) initiating the inspection.
 - (e) *Follow-Up*.
 - (1) Original inspection dates.
 - (2) Details and reasons for follow-up.
 - (3) Copies of previous citations serving as the basis for the follow-up.
 - (4) Copies of settlement agreements and final orders, if applicable.
 - (5) Previous history of failure to correct, if any.
 - (f) *Monitoring*.
 - (1) Original inspection date.
 - (2) Details and reasons for monitoring inspection.
 - (3) Copies of previous citations and/or settlement agreements serving as the basis for the monitoring inspections.
 - (4) Petition for Modification of Abatement Date (PMA), if applicable.
- iv) Warrant Procedures.
- (a) The CSHO completes the search warrant form and gives it to the supervisor who notifies the commissioner, director, assistant director and program manager that a warrant is being sought and takes the warrant form to the general counsel or designee for processing.
 - (b) The general counsel or designee assigns an administrative staff member who drafts the administrative search warrant and the petition to the Franklin Circuit Court.
 - (c) The administrative staff member gives the draft search warrant and the petition to the general counsel or designee for signature.

- (d) After the general counsel or designee signs the search warrant and petition, OGC returns them to the supervisor for service and filing.
- (e) The supervisor makes four (4) copies of the draft search warrant for the judge's signature. After signature:
 - (1) The CSHO serves one (1) copy on the employer.
 - (2) The CSHO places one (1) copy in the casefile in an Appendix.
 - (3) The supervisor returns one (1) copy with all signatures to the Franklin Circuit Court Clerk.
 - (4) The CSHO provides one (1) copy to the employee representative, if applicable.
- (f) When the supervisor receives the draft search warrant, he/she contacts a Franklin Circuit Court Judge and schedules a time to meet with the judge to present the search warrant. The supervisor must be prepared to answer any questions the judge may have.
- (g) The supervisor files the original search warrant with the Franklin Circuit Court Clerk.
- (h) The supervisor files the original search warrant with the Franklin Circuit Court Clerk and the clerk stamps the other copies.
- (i) The CSHO completes the service section of the warrant when he or she serves the warrant.
- (j) The warrant authorizes CSHOs to conduct the inspection in accordance with the terms of the warrant.
- (k) The CSHO serves the warrant on the highest-ranking official at the facility or the company designee. The CSHO must refer all questions from employers concerning the warrant to the OGC.
- (l) KY OSH may seek a second search warrant to expand the scope of the inspection when a CSHO observes a violation in plain view.
- (m) Upon completion of the inspection, the CSHO sends a copy of the served warrant to the supervisor to file with Franklin Circuit Court Clerk.
- v) State Police Assistance.
 - (a) KY OSH may request a State Police representative accompany a CSHO to serve a warrant.
 - (b) KY OSH may request assistance after consultation with the commissioner, director and the OGC when there is a potential for violence, harassment, or interference with the inspection.
- vi) Refused Entry or Interference After Serving a Warrant.

- (a) When CSHOs encounter an apparent refusal to permit entry or inspection upon presenting the warrant, CSHOs must specifically inquire if the employer is refusing to comply with the warrant.
- (b) When the employer refuses to comply, the CSHO does not conduct the inspection and leaves the premises then advises his or her supervisor of the refusal. The supervisor immediately notifies the director or designee.
 - (1) CSHOs must document all facts relevant to the refusal including noting all witnesses to the denial of entry or interference.
 - (2) The director or designee notifies the commissioner and OGC.
 - (3) The State Police may assist with warrant compliance when the employer refuses CSHO entry.

C) **Subpoena.**

- i) Types of Subpoenas. KY OSH has two (2) types of subpoenas available to obtain evidence during an investigation:
 - (a) *Subpoena Duces Tecum.* KY OSH uses a Subpoena Duces Tecum to obtain documents. It orders a person or organization to appear at a specified time and place to produce certain documents, as well as testify to their authenticity. Employers are not required to create a new record in order to respond to these types of subpoenas.
 - (b) *Subpoena Ad Testificandum.* A Subpoena Ad Testificandum commands a named individual or organization to appear at a specified time and place, such as the Education and Labor Cabinet, to provide testimony under oath. A verbatim transcript is made of this testimony.
- ii) Authority to Issue Subpoenas.
 - (a) KY OSH may issue subpoenas for any record or document relevant to an inspection or investigation including:
 - (1) Injury and illness records such as the OSHA-300, OSHA-301, and OSHA-300A;
 - (2) Required written programs such as Hazard Communication, Lockout/Tagout, etc.;
 - (3) General safety and health programs;
 - (4) Contracts;
 - (5) Inspection documentation;
 - (6) Disciplinary records;
 - (7) Training records;

- (8) The production of physical evidence, such as samples of materials, videos, photos, etc.; and
- (9) Medical records.
- (b) KY OSH requests information from the employer or holder of records, if known. KY OSH representatives are encouraged to request the documents, evidence, photos, etc., prior to issuing a subpoena.
 - (1) When the employer refuses to provide requested information or evidence, the KY OSH representative serving the subpoena may explain the reason for the request.
 - (2) If the employer still refuses to produce the information or evidence requested, the KY OSH representative informs the employer that the agency may take further legal action.
- (c) The CSHO and supervisor evaluate the circumstances and decide whether to issue a subpoena.
- (d) The CSHO and the supervisor must consult with the OGC, who drafts the subpoena.

iii) Subpoena Procedures.

- (a) The CSHO requesting the subpoena provides the following information to the attorney drafting the subpoena:
 - (1) The legal name and site address of the company;
 - (2) Federal inspection number;
 - (3) OSH optional report number (CSHO number and fiscal year numbers);
 - (4) Name and title of the individual upon whom the subpoena will be served;
 - (5) Name and title of CSHO requesting the information;
 - (6) A list of each document, record, or piece of evidence requested; and
 - (7) Date, time, and location of document production.
- (b) The CSHO and the attorney drafting the subpoena confer if there are questions regarding requested documents.
- (c) KY OSH prepares the subpoena for the appropriate party and normally serves by hand delivery to the party named in the subpoena. Leaving a subpoena at a place of business, residence, or with an individual unnamed in the subpoena is not service.
 - (1) KY OSH may accomplish service by certified mail with return receipt requested or via email when the parties agree.

- (2) When an individual's name is not available, the subpoena can be addressed to a business' or organization's custodian(s) of records.
- (d) Prior to service, the CSHO forwards copies of signed subpoenas to the OGC attorney who prepared the subpoena.
- (e) KY OSH retains a copy of all subpoenas in the casefile.
- iv) Compliance with the Subpoena. The person / entity served may comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.
 - (a) The CSHO and supervisor must agree on the period necessary for the employer to respond to the subpoena.
 - (b) Circumstances such as the volume of documents requested and their location are factors to consider when making the determination.
- v) Refusal to Honor Subpoena.
 - (a) When the person / entity served refuses to comply with, or only partially honors, the subpoena, the CSHO must document all relevant facts and advise the supervisor.
 - (b) The CSHO or supervisor refers subpoena enforcement to the OGC.

D) Service of Subpoena on KY OSH Personnel.

- i) Proceedings to which the Education and Labor Cabinet, Secretary of the Education and Labor Cabinet, or Commissioner of Workplace Standards is a Party. When any KY OSH personnel is served a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Education and Labor Cabinet, secretary or commissioner is a party, he or she immediately notifies his or her supervisor who refers the matter to the OGC.
- ii) Proceedings to which the Education and Labor Cabinet, Secretary of the Education and Labor Cabinet, or Commissioner of Workplace Standards is Not a Party.
 - (a) When any KY OSH personnel is served a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Education and Labor Cabinet, secretary, or commissioner is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), he or she immediately notifies his or her supervisor who refers the matter to the OGC.
 - (b) The OGC is responsible for responding.

II) Evidentiary Issues

A) Preservation of Evidence

- i) CSHOs do not take physical evidence from a worksite. CSHOs must document the physical evidence, if available, on site by photographs, video recording, audio recording of interviews, and a physical examination of the evidence.

NOTE. Evidence exempt from the policy against taking physical evidence includes, but is not limited to, samples of materials to be analyzed/tested, written programs and records, photographs, and videos from the employer or employee(s).

- ii) In rare circumstances when a CSHO comes into the possession of physical evidence, the CSHO completes an Evidence Receipt Form to provide to the employer, keeping a copy in the casefile. The CSHO enters the evidence he or she is taking into possession in an evidence log and completes a chain of custody form. Evidence must be stored in a secured location with limited access.

B) **Litigation Hold Letter**

- i) A litigation hold letter puts an employer on notice not to destroy or alter evidence. The letter applies to paper documents, electronically stored information, and physical evidence. When necessary, KY OSH submits a Preservation of Evidence letter to the highest-ranking company official at the site.

NOTE. Nothing in this subsection prevents an employer from immediately correcting a hazardous condition.

- ii) The CSHO enters the evidence he or she is requesting the employer preserve in the letter. Be specific. The CSHO wants the employer put on notice of the exact evidence the CSHO is requesting be preserved.
- iii) Due to the potential lack of copying devices available at some sites, the CSHO may complete two (2) copies of the letters and forms. The CSHO retains one (1) copy for the casefile and gives the employer a copy.

III) **Copyrighted Documents.** The CSHO must not reproduce copyrighted documents in any manner. When the employer provides copyrighted documents, include them in the casefile.

IV) **Affirmative Defenses.** An affirmative defense is a claim excusing the employer from a citation.

- A) **Burden of Proof.** Employers have the burden of proving an affirmative defense at the time of a hearing. CSHOs must consider all potential affirmative defenses and gather evidence refuting or supporting the affirmative defense. The CSHO must be alert to employer comments made during an inspection. CSHOs must bring all documentation of hazards and facts related to possible affirmative defenses to the attention of the supervisor.

B) **Common Defenses.**

- i) Unpreventable Employee or Supervisory Misconduct or “Isolated Event.”

(a) To establish this defense, an employer must prove all the following:

- (1) A work rule adequate to prevent the violation;

- (2) Effective communication of the rule to employees;
 - (3) Methods for discovering violations of work rules; and
 - (4) Effective enforcement of rules when it discovers violations.
- (b) The CSHO must document all elements above for each hazardous condition when the employer asserts the defense.
- (c) When documenting this defense, the CSHO must attempt to address:
- (1) Whether the employer had a work rule addressing the hazardous condition;
 - (2) Whether the employer communicate the work rule to the employees;
 - (3) Managements' presence in the area during employee exposure to the hazard. If so, address who and when;
 - (4) Whether the employer conducted and documented periodic inspections;
 - (5) Whether the employer has a history of disciplining employees for violating safety rules occurring prior to the instance at hand;
 - (6) Who created the hazard and why;
 - (7) Length of time hazardous condition existed; and
 - (8) Why the hazardous condition existed.
- (d) The CSHO must obtain copies of all documentation relevant to this defense.
- ii) Impossibility / Infeasibility. Compliance with the requirements of a standard or regulation is impossible or prevents performance of required work and the employer took reasonable alternative steps to protect employees or there are no alternative means of employee protection available.
- (a) To establish this defense, an employer must prove:
- (1) Its implementation would have been technologically or economically infeasible **or** necessary work operations would be technologically or economically infeasible after its implementation, and
 - (2) Either an alternative method of protection was used **or** there was no feasible alternative means of protection.
- (b) The CSHO must document all elements above for each hazardous condition when the employer asserts the defense.
- (c) When documenting this defense, the CSHO must attempt to address:

- (1) Whether abatement makes performance of the work impossible or merely difficult;
 - (2) Whether the employer could use the abatement measure some of the time or for some of the operations;
 - (3) Whether the employer attempted to abate the hazard;
 - (4) Whether the employer considered any alternative means of avoiding or reducing the hazard;
 - (5) Whether technology exists to abate the hazard;
 - (6) The cost of abating the hazard;
 - (7) Whether the employer took alternative steps to protect employees; and
 - (8) Whether the employer has a variance or an interim order.
- (d) The CSHO must obtain copies of all documentation relevant to this defense.
- iii) Greater Hazard. Compliance with a standard or regulation results in a greater hazard(s) to employees than non-compliance and the employer took reasonable alternative protective measures, or there are no alternative means of employee protection.
- (a) In order to establish the greater hazard defense, an employer must prove each of the following three (3) elements:
 - (1) The hazards created by complying with the standard are greater than those of noncompliance;
 - (2) Other methods of protecting its employees from the hazards are not available; and
 - (3) A variance is not available or that application for a variance is inappropriate.
 - (b) The CSHO must document all elements above for each hazardous condition when the employer asserts the defense.
 - (c) When documenting this defense, the CSHO must attempt to address:
 - (1) Whether a safeguard was initially installed and used;
 - (2) Whether a different type of safeguard eliminates the greater hazard;
 - (3) Employee injuries or illnesses, if any;
 - (4) Whether personal protective equipment eliminates the greater hazard;
 - (5) Whether the employee's conduct created the greater hazard;
 - (6) Whether the employer attempted to correct the employee's conduct;

(7) Whether the employer has a variance or an interim order; and

(8) Whether the employer tried any other type of safeguarding.

(d) The CSHO must obtain copies of all documentation relevant to this defense.

V) **Notice of Contest.**

A) **In General.** The Review Commission is an independent state agency created to decide contests of citations or penalties resulting from KY OSH inspections. The Review Commission functions as an administrative court with established procedures for conducting hearings, receiving evidence, and rendering decisions. KRS 338.071 establishes the Review Commission to hear and rule on appeals from citations, notifications, and variances issued under the provisions of this chapter and adopt and promulgate rules and regulations with respect to the procedural aspect of its hearings.

i) **Time Limit for Filing a Notice of Contest.**

(a) KRS 338.141(1) provides employers 15 working days following receipt of a Citation and Notification of Penalty to notify the commissioner of its desire to contest a citation and / or proposed penalty.

(b) When a notice of contest is not postmarked (including fax, email, or hand delivery), within the 15 working day period allowed for contest, the program manager must follow the instructions for late notices of contest described below. KY OSH retains a copy of any untimely notice of contest in the casefile.

ii) **When Intent to Contest is Unclear.**

(a) When the intent to contest is unclear in the written communication, KY OSH treats it as a notice of contest.

(b) KY OSH treats an employer's written communication requesting an informal conference and expressing an intent to contest as a notice of contest.

(c) When KY OSH receives a notice of contest, the program manager transmits it to the OGC within five (5) days.

(d) KY OSH retains all envelopes containing notices of contest in the casefile.

B) **Late Notice of Contest.**

i) When the employer fails to notify the commissioner of its intent to contest a citation or penalty within 15 working days following the receipt of a citation, the citation and proposed penalties become final orders of the Review Commission.

ii) When the commissioner receives the notice of an employer's intent to contest beyond the 15 working day period, the program manager informs the employer in writing that the commissioner does not accept the untimely notice of contest, but forwards it to the Review Commission. The letter includes:

- (a) Inspection number;
- (b) Citation number(s);
- (c) Proposed penalties;
- (d) Date the commissioner believes the employer received the Citation and Notification of Penalty; and
- (e) Date the commissioner received the employer's notice of contest, as well as any additional information the program manager believes pertinent.

NOTE. The program manager sends a copy of the letter to the Review Commission along with a copy of the Citation and Notification of Penalty, confirmation of date employer received citation, and the employer's notice of contest. KY OSH retains late notice documentation in the casefile.

- iii) Retention of Late Notice of Contest Documents. KY OSH retains employer's reasons for missing filing deadline in the casefile and any notes memorializing oral communications.
- iv) All documents are maintained in the casefile.

VI) **Contested Case Processing Procedures.**

- A) **Deadline.** KY OSH sends the notice of contest and related documents to the Review Commission within seven (7) days of receiving the employer's notification. The OGC is consulted in questionable cases.
- B) **Transmittal of the Casefile to Imaging.** Casefiles are imaged immediately upon receipt of a notice of contest.
- C) **Transmittal of File to the Office of General Counsel.** The program manager sends the notice of contest and casefile to OGC after imaging. The OGC transmits five (5) copies to the Review Commission along with:
 - i) The charging sheet;
 - ii) The employer's original notice of contest document;
 - iii) The contest envelope if mailed;
 - iv) Citation and Notification of Penalty;
 - v) Narrative; and
 - vi) Certification of the date the employer received the Citation and Notification of Penalty.
- D) **Complaint Filing.** The commissioner files a complaint with the Review Commission within 20 calendar days after receipt of a notice of contest.

VII) **Commission Procedures.**

A) **Two (2) Levels of Adjudication.** Review Commission Rules of Procedure provide for two (2) levels of adjudication. The first level is before a hearing officer. The second level is before the Review Commission.

B) **Rules of Procedure.**

i) The Review Commission Rules of Procedure are in 803 KAR 50:010.

ii) **Receipt of Case.**

(a) A prehearing date is set upon receipt of a case.

(b) The hearing officers may hold multiple prehearing conferences to allow parties to settle.

(c) The hearing is normally held as close as possible to the inspection site.

(d) The Review Commission Rules of Procedure govern the hearing.

C) **Hearing Evidence.**

i) Review includes examination of the record as well as briefs submitted by the parties.

ii) The hearing officer submits a written decision including both findings of fact and conclusions of law to the review commission.

iii) The Review Commission issues a Notice of Receipt of Recommended Order and Order of this Commission affirming, modifying, or vacating the citations, penalties, and/or abatement.

iv) The recommended order becomes final in 40 days unless one (1) or more commissioner directs the case for review.

v) Either party has 25 days from the date the Review Commission issues its recommended order to request discretionary review with the commission.

vi) A party opposing the request for discretionary review has 35 days from the date the Review Commission issues its recommended order to respond to the request for discretionary review.

D) **Review of Decision.** When one (1) of the parties requests review of the recommended order, and review is not directed by the commission, the petitioning party may request review by the Franklin Circuit Court. Review before the Franklin Circuit Court must be sought within 30 days after the commission's decision becomes final.

E) **Availability of Commission Decisions.** The Review Commission posts decisions to its website.

VIII) **Discovery Methods.**

- A) Once legal proceedings are initiated, each party has the opportunity to discover evidence in the possession of an opposing party. Traditionally, discovery methods include:
- i) Requests for Admission;
 - ii) Interrogatories;
 - iii) Requests for Production of Documents; and
 - iv) Depositions.
- B) An OGC attorney responds to discovery requests. KY OSH personnel coordinates and cooperates with the assigned attorney to ensure responses are accurate, complete, and filed in a timely manner.
- i) Interrogatories and Admissions. The OGC attorney consults with KY OSH personnel to answer interrogatories and requests for admission.
 - ii) Production of Documents. The OGC forwards requests for production of documents to a CSHO(s) or staff member(s).
 - iii) Depositions. Commission rules do not allow discovery depositions except by special order of the Review Commission or the hearing officer.

IX) **Testifying in Hearings.** CSHOs may be required to testify in administrative hearings.