



Progressive Disciplinary Program Pursuant to 8619.9

History of Program:

In a joint endeavor, both industry and regulatory members of PCOC worked diligently a few years ago to get the statutes changed so that individual licensees could be cited when they violate worker safety code regarding the wearing of personal protective equipment. The result of the work by the industry was section 8616.9 of the B&P code. The challenge now faced by the industry is complying with the requirements outlined in 8616.9 so that pest control company owners may transfer violation responsibility from themselves to their licensed employees.

Even though Cal-OSHA and other Department of Pesticide Regulation (DPR) codes require that employers have a thorough and detailed safety training program, which includes disciplinary action, many companies are still in non-compliance. Let us review the requirements outlined by 8616.9 and their implications.

Text of 8619.9

8616.9. If an employee is found during an inspection or investigation not wearing personal protective equipment required by regulation, the commissioner shall have the option to use discretion in citing an employer only if evidence of all of the following is provided:

- (a) The employer has a written training program, has provided training to the employee, and has maintained a record of training as required by regulation.
- (b) The employer provided personal protective equipment required by regulation, the equipment was available at the site when the employee was handling the pesticide or pesticides, and the equipment was properly maintained and in good working order.
- (c) The employer is in compliance with regulations relating to the workplace and supervision of employees.
- (d) The employer has implemented and adheres to a written company policy of disciplinary action for employees who violate company policy or state or local laws or regulations.
- (e) The employer has no history of repeated violations of this section.

Breakdown of Requirements of 8619.9

As an employer you want to specifically ensure that you not only are in compliance with the requirements needed for an affirmative defense under 8616.9, but you also want to have an affirmative defense already set up.

8616.9(a) *“The employer has a written training program, has provided training to the employee, and has maintained a record of training as required by regulation.”*

This required training is only part of your overall “Written Injury and Illness Prevention Program.” Specifically DPR is looking for your hazard communication training (see Pesticide Safety Information Series N-1), which should cover the labels for the materials you use, as well as your personal protective equipment training. This training should be done when you first hire an employee (and before they spend even one day in the field) and then the training should be refreshed each year, as the subject of a monthly safety meeting.

86616.9(b) *“The employer provided personal protective equipment required by regulation, the equipment was available at the site when the employee was handling the pesticide or pesticides, and the equipment was properly maintained and in good working order.”*

You should set up a documented system to ensure that you comply with this section.

- Keep records of safety equipment purchases.
- Keep records of when you distribute safety equipment to employees.
- Document maintenance of the safety equipment.
- Document the cleaning and sanitation of their respirators or SCBAs

You should also perform spot inspections of your employees’ vehicles and safety equipment to document and ensure that your employees are maintaining their equipment properly. It is important to remember that ultimately you as the employer are responsible for ensuring that their safety equipment is maintained properly.

8616.9(c) *“The employer is in compliance with regulations relating to workplace supervision of employees.”*

If we research this section further, we need to look up section 6702 of Worker Health and Safety Regulations of DPR. In this section, we find two important sentences: *“The employer shall supervise employees so that safe work practices including all applicable regulations and label requirements are complied with.”*..... *“Employers shall take all reasonable measures to ensure that employees handle and use pesticides in accordance with the requirements of the law, regulations and label requirements.”*

Reasonable measures include performing **documented** spot checks on your employees’ performance in the field. These spot checks should utilize either an in-house form or a copy of the state’s field pesticide enforcement paperwork. You should document what your employees have done correctly and incorrectly. Document inspections of your employees’ compliance (and non-compliance) with these laws and policies. You also need to document tangible rewards and punishments for compliance and non-compliance.

8616.9(d) “The employer has implemented and adheres to a written company policy of disciplinary action for employees who violate company policy or state or local laws or regulations.”

This is the crux of the whole program. You need specific written company policies and procedures outlining proper and safe practices. As described earlier, you also need to document that your employees have been trained in these company policies, and all applicable state and local laws. Then you need to document inspections of your employees’ compliance with these laws and policies along with tangible rewards and punishments for compliance and non-compliance. You must have a record of these inspections and records of “violations” or disciplinary actions, in order to be in compliance. Employers need to be performing in-house quality control inspections of their employees to ensure their employees are following the law. Employers should document compliance and non-compliance as part of their record keeping. Employers sometimes misunderstand this section and think it is appropriate to simply wait until the County Agricultural Commissioner cites an employee before they implement any disciplinary action. The purpose of this program is for you to identify which employees are violating the law, and to discipline them and change their behavior so that when the County Agricultural Commissioner’s representative observes your employee, any tendency toward illegal practices have already been addressed internally by your firm.

Cal-OSHA’s Regulations (Section 3203 (a)(2)) also require that employers have a specific Disciplinary Policy.

SAMPLE DISCIPLINARY POLICY (GENERIC):

Employees who fail to follow safety policies will be disciplined. The initial violation will result in a verbal warning. The second violation will result in a written warning. The third violation will result in a suspension or termination. The fourth violation will result in termination. Depending on the severity of the violation the management reserves the right to speed up the process of discipline up to and including termination for a gross first violation. Under normal circumstances, however, termination will not take place unless the individual has four violations within a 12-month period.

8616.9(e) “The employer has no history of repeated violations of this section.”

A history of repeated violations of a particular type demonstrates that the employer is not taking adequate steps to ensure that their employees are complying with the law.

This article was predominantly lifted from an online continuing education course written by this same author, and may be found on PCOC.org. The original course has additional information including some sample documents, which can assist you in implementing your progressive disciplinary program