



MNOSHA Instruction **STD 5-0.1C**

July 13, 2021

SUBJECT: Citation Guidelines for the Enforcement of MN Stat. § 182.653 subd. 8 (AWAIR).

Purpose:

To clarify the citation policy for MN Stat. § 182.653 subd.8 (AWAIR).

Scope:

This instruction applies to both general industry and construction sites.

Cancellation:

This instruction supersedes MNOSHA Instruction STD 5-0.1, "Citation Guidelines for the Enforcement of MN Stat. 182.653 subd. 8 (AWAIR)" dated September 15, 2016.

Background:

MN Stat. 182.653 subd. 8 (AWAIR) requires that a covered employer must establish a written workplace accident and injury reduction program that promotes safe and healthful working conditions and is based on clearly stated goals and objectives for meeting those goals.

Initially, covered employers were those with a Standard Industrial Classification (SIC) industries with a lost workday injury rate (LWDIR) and/or incidence rate (IR) at or above the Minnesota average LWDI/IR for all industries. During 2003-2004, OSHA transitioned to using North American Industrial Classification System (NAICS) data. During 2005, The Minnesota Legislature amended the statute to allow the list to be compiled using NAICS data. Beginning with the October 16, 2006 adoption, MNOSHA lists of covered industries were based on NAICS data. The new NAICS list includes industries above the statewide incidence rate and/or above the statewide severity rate, using the most current data available at the time of the update. On April 1, 2010, the MNOSHA Field Compliance Manual was revised to stipulate that penalties will be issued for all AWAIR Act violations.

The current NAICS list is contained in Minnesota Rules 5208.1500. When originally adopted, Minn. Stat. 182.653 required the list to be updated every two years. Effective August 1, 2016, Minn. Stat. 182.653 was amended to change the frequency of updating the list from every two years to every five years.

Employers within the NAICS that have been added to the list as part of the most recent rulemaking must be in compliance within six months of the date that the NAICS that applies to them was added to the current list. Guidelines for establishing an effective AWAIR program are contained in the MNOSHA Workplace Services Division publication, "An Employer's Guide to Developing a Workplace Accident and Injury Reduction (AWAIR) Program," which is made available to employers at: <https://www.dli.mn.gov/sites/default/files/pdf/awair.pdf>.

Action:

- A. **Who Must Comply with the AWAIR Act?** The determination of who must comply with AWAIR is generally based on the primary NAICS code for the establishment. However, if a secondary NAICS code applicable to the employer is on the list, the employer is required to have an AWAIR program to cover at least that part of the operation which falls within the secondary NAICS code. A secondary NAICS classification must contribute distinct economic value to the establishment.

NAICS codes are assigned on the basis of an establishment's primary activity which is determined by its principal product or group of products produced or distributed, or services rendered. The principal product or service is usually determined by its relative share of value to the establishment. Where distinct and separate economic activities are performed at a single physical location (such as construction activities operated out of the same physical location as a lumber yard), each activity is treated as a separate establishment (and assigned a separate NAICS code) where: (1) no one NAICS classification includes such combined activities; (2) the employment in each economic activity is significant; and (3) separate company records can be prepared on the number of employees, their wages and salaries, sales or receipts, and other types of establishment data.

- B. **Evaluating Compliance with AWAIR.** When an inspection is conducted at a workplace with a NAICS that is covered by AWAIR, the OSHI will use the following guidelines in the determination of the employer's compliance with AWAIR for citation purposes:
1. Initial evaluation of the AWAIR Program will be made based on a written program that describes the steps that will be taken by the company to reduce accidents and injuries. This program must address each of the performance areas outlined in the statutory language of the AWAIR Act. Citations for violations of MN Stat. §182.653, subd.8, shall be issued for the following:
 - a) No written program; or
 - b) An AWAIR program that does not include the elements of an effective safety and health program set forth in the statute.

2. In order to evaluate the effectiveness of an AWAIR program, the OSHI may use the form provided in Appendix A of this directive, or an equivalent evaluation tool to determine if there are areas that need improvement. The OSHI should document the information obtained in the Credits/Evaluation subtab in the inspection case file. Any deficiencies will be discussed with the employer at the time of the closing conference. For an AWAIR program that is deficient, e.g., lack of management policy, no safety and health rules, inadequate assignment of responsibility, or poor employee awareness/participation, a citation of MN Stat. §182.653 subd.8 may be written.
3. In the Construction industry, all employers covered in NAICS are expected to have a written AWAIR program that may be either general in nature or site-specific.
4. On multi-employer worksites, the site-controlling contractor may require subcontractors to adopt the controlling employer's AWAIR program. However, each employer is ultimately responsible for developing its own written AWAIR program, and MNOSHA will not require the controlling employer to be responsible for the subcontractors' AWAIR programs.
5. For employers with multiple worksites under their control, the written program may be kept either at each location or at the main office location. OSHIs should always request to review the AWAIR program, either on site, at the employer's office, or by mail, e-mail or fax.

C. AWAIR Violation Classification, Penalties, and Effect on Good Faith Credits.

In accordance with Minn. Stat. § 182.653, subd. 8, certain employers are required to establish a written workplace safety and health program. A citation issued for lack of an AWAIR program will be classified as serious and rated as a "C" with an unadjusted penalty of \$1,000. The probability level for AWAIR citations is related to the number of employees affected only, thus all other probability categories will not be rated. The proposed penalty will be adjusted for good faith, size, and history and any appropriate penalty multiplier will be applied. The minimum adjusted penalty will be \$100.

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For the MNOSHA Management Team

Distribution: OSHA Compliance and WSC Director
Attachments: Appendix A - AWAIR Checklist

NOTICE: Minnesota OSHA Directives are used exclusively by MNOSHA personnel to assist in the administration of the OSHA program and in the proper interpretation and application of occupational safety and health statutes, regulations, and standards. They are not legally binding declarations and they are subject to revision or deletion at any time without notice.

Appendix A

AWAIR CHECKLIST - ELEMENTS OF AN EFFECTIVE WRITTEN AWAIR PROGRAM

I. The Program is in Writing. **Yes Partial No**

II. Management Commitment and Planning **Yes Partial No**

1. Have policies and objectives been established and communicated to all employees?
2. Have responsibilities been defined and authority assigned?
3. Have adequate company resources been allocated for safety and health (staff, equipment, safety promotion, etc.)?

DETAILS:

III. Hazard Assessment and Control **Yes Partial No**

1. Has a comprehensive safety and health survey been done?
2. Is there a reliable procedure for employees to use to report possibly hazardous conditions?
3. Are accidents and/or near-miss incidents that may result in an injury or illness reviewed?
4. Is there an equipment maintenance program?
5. Are engineering and PPE controls in place as appropriate?
6. Are administrative controls, including safety and health rules, established and implemented?

DETAILS:

IV. Communication **Yes Partial No**

1. Is management involved in employee safety and health?
2. Are there clear lines of communication for safety and health concerns? Do employees know whom to notify, fear no reprisal, and receive timely and appropriate responses?

DETAILS:

V. Accident Investigation/Corrective Action **Yes Partial No**

1. Are there procedures to be followed for investigating accidents?
2. Are emergency planning and response procedures in place?

DETAILS:

VI. Enforcement Procedure **Yes Partial No**

1. Is there is an established system in place for fair and uniform enforcement of company safety and health rules?

DETAILS:

VII. The Program is annually reviewed. **Yes Partial No**