

CHAPTER 321. ENFORCEMENT PROCEDURES AND PENALTIES

Sec.	
321.1.	Purpose and scope.
321.2.	Complaint and investigation procedure.
321.3.	Issuance and content of order.
321.4.	Determination of penalty amount.
321.5.	Hearings.
321.6.	Preliminary relief.
321.7.	Interference with inspection.
321.8.	Judicial review and enforcement.
321.9.	False statements and intentional omissions.

Source

The provisions of this Chapter 321 adopted August 1, 1986, effective December 1, 1986, 16 Pa.B. 2909, unless otherwise noted.

Cross References

This chapter cited in 34 Pa. Code § 319.2 (relating to prohibition of discharge or discipline); and 34 Pa. Code § 319.3 (relating to burden of proof).

§ 321.1. Purpose and scope.

The purpose of this chapter is to implement the complaint and investigation procedures, civil penalties assessment, judicial review and enforcement requirements set forth in sections 14, 15 and 16 of the act (35 P. S. §§ 7314—7316).

§ 321.2. Complaint and investigation procedure.

(a) A person who believes there is a violation by an employer or supplier of the act or this part may file a complaint, within 180 days of the violation, with the Department. The complaint shall be in writing, verified and shall set forth the grounds for the complaint. Upon request of the complainant, the complainant's identity may not be revealed. The identity of the complaining party will be disclosed if, in the course of attempting to prove the existence of a violation, the complaining party testifies or if a court orders disclosure.

(b) Within 30 days after receipt of the complaint, the Department will notify the respondent in writing and permit the respondent to demonstrate compliance under the act.

(c) If compliance has not been demonstrated by clear and convincing evidence within 14 days of the mailing of the notification, and if the facts in controversy are susceptible to verification by inspection, a representative of the Department will:

(1) Inspect, at reasonable times, the employer's workplace and conditions relevant to the complaint.

(2) In a reasonable manner, make additional investigation considered necessary for a determination of the employer's or supplier's compliance with the act.

(d) Whenever a representative of the Department proceeding under this section is denied admission to a place of employment, the representative may obtain a warrant to make an inspection of the place of employment from the appropriate judicial authority upon a showing of the following:

(1) That the individual seeking the warrant is an authorized agent of the Department.

(2) That the individual has established, under oath, that the place of employment to be investigated under this section is to be inspected to determine compliance with the requirements of the act and this part.

(e) Upon application to the appropriate judicial authority, and upon good cause shown, the Department may obtain an inspection warrant prior to the 14-day period set forth in subsection (c) and prior to a refusal by respondent to voluntarily admit a representative of the Department.

Cross References

This section cited in 34 Pa. Code § 305.2 (relating to maintenance and disclosure of Hazardous Substance Survey Forms); 34 Pa. Code § 305.6 (relating to public access); and 34 Pa. Code § 307.15 (relating to public access).

§ 321.3. Issuance and content of order.

If, upon investigation of a complaint, the Department finds that a respondent has violated the act or this part, within 7 days it will issue to the respondent an order to comply. This order will be in writing, specifically describe the nature of the violation and state a reasonable time period, not to exceed 90 days, within which the violation shall be corrected by the employer. The order shall contain other information that the Department will require.

§ 321.4. Determination of penalty amount.

(a) *Power of assessment.* The Department has the authority to assess civil penalties from \$500 to \$10,000 for each violation of the act, unless a greater amount is specified elsewhere in the act, giving consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the respondent and the history of previous violations. The amount of the civil penalty shall be based upon the point-system formula set forth in this section.

(b) *Calculation of penalties.* Four criteria will be used to determine the penalty amount. The criterion will be assigned points under the schedule in paragraph (1):

(1) *Size of business.* This criterion will take into consideration the number of employees on the date of the violations who are regularly assigned to the workplace where the violation occurred. A maximum of 25 points may be assigned to this criterion under the following:

<i>Number of employes</i>	<i>Points</i>
1 to 9	5
10 to 19	10
20 to 29	15
30 to 49	20
more than 50	25

(2) *Gravity of violation.* The criteria will be based upon two factors—the type of information which appropriate persons are not able to obtain under the act, and the extent to which the information is not provided. A factor may be assigned points under the schedule in this paragraph. Total points may not exceed 25 for both factors combined.

(i) The type of information involved in the violation:

<i>Type of Information</i>	<i>Points</i>
Material Safety Data Sheets	1-5
Labels	1-5
Notice of Employees Rights	5-10
Training	5-10
Any List of Hazardous Substances	5-10

(ii) Extent to which information is not provided:

<i>Information</i>	<i>Points</i>
Not prepared	5-15
Incomplete	1-5
Inaccurate	1-10
Out-of-Date	1-5
Prepared but Not Accessible	5-15

(3) *History of previous violations.* This criterion shall be based on the number of assessed violations in the subject workplace in a preceding 12 month period. Only violations for which penalties are paid and which are not subject to further appeal may be included. These criteria may account for up to 25 penalty points:

<i>Number of violations in the subject workplace over preceding 12-month period</i>	<i>Points</i>
0-5	0
6-10	5
11-15	10
Over 15	25

(4) *Good faith of respondent.* This criteria may be used to reduce the point calculation, based upon credits given for the respondent's good faith in abating the violation and will result in a reduction of total penalty points as follows:

	<i>Points</i>
Abate the violation within 1 working day of receipt of an order to comply.	25
Abate the violation within the time given in the order to comply, without extensions.	20
Abate the violation within the time period given in the order to comply, with extensions.	15
<i>(c) Determination of penalty.</i>	
(1) The net total penalty points will be applied to the following penalty schedule to determine the penalty:	
	<i>Penalty</i>
<i>Points</i>	
0-25	\$0
26	\$500
(2) For each penalty point from 27 to 75, \$194 may be added to the penalty. A penalty calculated under this section may not exceed \$10,000.	
<i>(d) Special assessments.</i>	
(1) If the violation has not been abated within the time period provided for in an order to comply, the Department may levy a further civil penalty of not more than \$5,000 per day for a violation.	
(2) If the employer fails to abate a violation for which no penalty has been assessed, the Department may assess a civil penalty of \$500.	
(3) If the employer fails to abate a violation for which a penalty has been assessed, the Department may assess a daily civil penalty equal to the amount calculated under the penalty system, but not to exceed \$5,000 per day.	
<i>(e) Director responsibilities.</i> Penalty assessments will be determined initially by the Director or a designee.	
(1) The penalty assessment may not be determined by the inspector who issued the order containing the violation being assessed; however, the inspector may provide information regarding the criteria upon which the penalty is assessed.	
(2) The Director may conduct informal conferences with the parties prior to a formal review under this chapter.	
<i>(f) Waiver of point system.</i> The Director has the authority to waive application of the point system for good cause shown.	

§ 321.5. Hearings.

(a) The respondent may, in writing, request the Department to provide a hearing concerning orders to comply or penalties levied upon the employer under this chapter within 30 days of the respondent's receipt of the notice. The request shall be filed as a petition under 1 Pa. Code § 35.17 (relating to petitions generally).

(b) The hearing will be held under 2 Pa.C.S. §§ 501—508 and 701—704 (relating to Administrative Agency Law), and 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

(c) After the hearing, the Department will affirm, reverse or modify its original determination.

(d) The validity of an order underlying a penalty assessment may be an issue in a hearing on the penalty assessment conducted under subsection (a), whether or not a request for a hearing on the order was previously sought.

§ 321.6. Preliminary relief.

(a) If the Department determines that reasonable cause exists to believe a violation has occurred, and that the violation may present an imminent danger to an employe or member of the public, the Department will seek a preliminary or special injunction in the appropriate court of common pleas.

(b) The courts of common pleas are empowered to and shall issue injunctive relief upon a *prima facie* showing by the Department of a violation and a showing by a preponderance of the evidence that an imminent danger situation is present.

§ 321.7. Interference with inspection.

(a) An employer or individual who wilfully impedes an authorized representative of the Department from carrying out an investigation or inspection under the act or this part or who refuses entry to an authorized representative of the Department to a workplace where the inspection is authorized by a warrant shall be assessed a civil penalty of not more than \$1,000.

(b) A person who gives advance notice of an inspection to be conducted under the act without authority from the Department shall be assessed a civil penalty of not more than \$1,000.

§ 321.8. Judicial review and enforcement.

(a) *Appellate review.*

(1) A person aggrieved by a final determination of the Department under sections 11 and 14 of the act (35 P. S. §§ 7311 and 7314) may file a petition for review within 30 days of determination in Commonwealth Court, 42 Pa.C.S. § 763(a) (relating to direct appeals from government agencies).

(2) The decision of the Department may not be reversed or modified, unless the decision is found to be arbitrary, capricious, illegal or not supported by substantial evidence.

(b) *Original action.*

(1) An aggrieved person may bring a civil action in the appropriate court of common pleas on his own behalf against an employer or supplier for a violation of the act, except section 11 of the act (35 P. S. § 7311), or Chapter 317

(relating to trade secrets) or may bring suit in Commonwealth Court against the Department for failure to enforce the act or this part.

(2) Where the action involves the rights of more than one employe, a certified or recognized collective-bargaining representative has standing to sue on behalf of the employes.

(3) The court may issue, whenever it deems appropriate, a preliminary, permanent or special injunction.

(4) Under no circumstances may the act or this part be construed to require, and under no circumstances may a court award compensatory and liquidated damages, costs and expenses of litigation, including expert witness fees and reasonable attorney fees.

§ 321.9. False statements and intentional omissions.

(a) A person who knowingly makes a false statement, representation or certification in a list, record or other document required to be maintained under the act or this part or who intentionally or deliberately refrains from complying with the act shall be assessed a civil penalty of not more than \$10,000 or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both.

(b) An employer or supplier who wilfully or recklessly prepares an MSDS for the purpose of withholding or falsifying relevant information concerning the nature and severity of the hazardous nature of the substance shall be assessed a civil penalty of not more than \$10,000 or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both.

[Next page is 323-1.]