

Enforcement Guidelines – Enforcement Statement and Goals

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Background

Weights and Measures is guided by principals of equity, due process, objectivity and accountability to the people of Wisconsin. In order to accomplish our mission we are required to enforce the statutes and administrative rules regulating weights and measures in Wisconsin. To achieve our objectives fairly and equitably, this uniform enforcement policy was established to:

- Provide uniform guidelines for enforcement actions
- Allow staff to exercise judgment more consistently
- Create a process for handling critical and chronic violations
- Identify responsibilities of staff in dealing with enforcement issues.

Procedure

The guidelines set forth in the Uniform Enforcement Policy should be followed whenever possible to ensure equitable treatment of the law while striving to achieve the program's goal of maximum compliance.

UNIFORM ENFORCEMENT POLICY

PURPOSE:

This policy is your guide to achieve uniform enforcement of the laws and rules under the jurisdiction of the Weights and Measures unit. Their uniform enforcement should encourage and promote voluntary compliance by the regulated public.

INTENT:

This policy does not supplant your judgment; it is impossible to foresee every conceivable situation involving violations. It does provide uniform enforcement guidelines for action in routine situations and the proper procedure to be used when taking enforcement actions. Actions proposed in this policy are to be followed whenever possible. In unusual circumstances where normal procedures may not apply you must decide what enforcement action is appropriate by drawing on your training, experience, and judgment or by seeking counsel from supervisors or program staff. In such cases you must exercise caution in determining if an unusual circumstance exists that may have a bearing on the violation. At all times your decisions must be based upon the given situation while serving the best interest of the public.

ENFORCEMENT:

Overview

The Department's philosophy is to gain voluntary compliance whenever possible through informing and educating individual businesses. However, when violations occur, weights and measures inspectors have a variety of enforcement tools available to direct correction. Inspectors use these tools to gain compliance in their inspection areas and document their actions.

The immediate, short-term goal of enforcement actions is to gain correction of observed individual deficiencies. The immediacy and severity of enforcement action depends upon the seriousness of the violation. Minor violations posing low risk to the consumer are treated differently than violations which present a high risk. In severe cases, swift and immediate enforcement action is necessary to stop the violation and protect consumers.

If violations go uncorrected or recur frequently, the Department's policy is to initiate progressively more stringent enforcement action. Any progressive enforcement action should be administered as quickly and fairly as possible. The objective is to raise the consequence of non-compliance to the appropriate level that gains permanent, continuous compliance. Inspectors should identify violations which, in their judgment, require progressively more stringent enforcement action and report such violations to their immediate supervisor.

Compliance actions are to be enacted at the lowest possible staff level. Continuous communications should occur between all involved staff while enforcement actions proceed.

1. ENFORCEMENT OPTIONS

When an inspection uncovers violations of law, the Department has a number of enforcement options available. The major options available are summarized below. One of these options or a combination of several of them may be used to assure compliance with the statutes and rules that we administer.

INFORMATION AND EDUCATION

The program relies heavily upon voluntary compliance. Most people want to comply with the law but may at times fall short due to inadvertent errors or being unaware of certain requirements. Inspectors play a vital role in disseminating the necessary information to regulated persons. The violator may then be given an opportunity to correct violations on-site, bringing them into immediate compliance.

This option may be exercised on site or by mail. Weights and measures staff are encouraged to utilize any related pamphlets, brochures, or other informational items that may aid the violator in achieving compliance.

REJECTION

Pursuant to s. 98.05(2), Stats. sealers or inspectors "may seize as evidence, or reject and mark or tag as "rejected" those which are incorrect."

Rejection is the removal of a commodity from sale or a device from commercial use found to be in violation of law (i.e. tagging an LMD out of tolerance, ordering off sale a commodity that is found to be short weight). Inspection staff may execute this option to prevent the illegal operation of equipment and to prohibit the sale of non-conforming products.

WARNING LETTER

Pursuant to s. 93.06(10), Stats. the Department is authorized to:

"Dispose of minor violations of the laws under its supervision without prosecution by issuing written notice or warning whenever it appears that the public interest will be adequately protected."

Weights and measures staff are authorized to issue warning letters to law violators, where more drastic enforcement actions are not considered appropriate. Warning letters do not prove that a violation occurred, but puts alleged violators on notice for the future. The letters often provide information on how to comply and the potential consequences for non-compliance.

ASSURANCE OF DISCONTINUANCE

An Assurance of Discontinuance is a written statement, signed by an alleged violator, which states that the alleged violator understands the law and will comply in the future. An Assurance of Discontinuance serves much the same purpose as a warning letter but goes one step further. It spells out agreed-upon standards of compliance and includes an affirmative commitment by the alleged violator to comply in the future.

COMPLIANCE CONFERENCE

A compliance conference may be held with the violator and the inspection staff to discuss the violations and determine if solutions to the problems can be reached. Compliance conferences are usually held in the central regional office. The staff member presiding over the conference or his/her designee should prepare a summary of the results for recording purposes.

SPECIAL ORDER

A Special Order (as distinguished from a warning letter or assurance) is an enforceable order which has the full force and effect of law. A Special Order applies specifically to the parties named prohibiting them from engaging in certain conduct. Special Orders are ordinarily signed by the Department Secretary following the filing of a formal complaint by the division, and an affected party is entitled to a formal public hearing. Any person found violating a Special Order may be subjected to serious penalties.

INJUNCTION

An injunction is a court order prohibiting a person from engaging in certain conduct. Under s. 98.26(2):

"a circuit court may grant a temporary or permanent injunction restraining any person from violating any provision of this chapter." Any person found violating an injunction may be subjected to serious penalties.

CIVIL FORFEITURE

To obtain a civil forfeiture judgment, the Department must file a lawsuit in a court having jurisdiction. Civil forfeiture cases are ordinarily prosecuted by a county district attorney or the Department of Justice, and must contain proof which is "clear and convincing."

CRIMINAL PROSECUTION

Cases warranting criminal prosecutions are generally referred to county district attorneys. To have a successful criminal prosecution, a case must involve intentional violations and contain sufficient evidence to prove guilt "*beyond a reasonable doubt.*"

2. TYPES OF VIOLATIONS

The enforcement process begins with identification of violations. It is important that staff are able to identify violations during inspections and take proper corrective action. Categories were created to help inspection staff make better and uniform decisions when determining appropriate enforcement actions.

There are three types of violations: **Negligible, Minor, and Major.** The type of violation is determined by the risk and potential harm to consumers if the violation was not corrected.

NEGLIGIBLE VIOLATIONS

Negligible violations are those which, if left uncorrected, have little potential to cause harm to consumers.

Negligible violations are handled on an individual basis. Some negligible violations can be satisfactorily and immediately corrected through on-site notification during an inspection. If an inspection uncovers only negligible violations of law and, in the inspector's judgment, information and education will have a sufficient affect in achieving compliance, the inspector on site may exercise that option. The violations should be discussed with the responsible party and noted on any applicable forms. Have the responsible party sign the form, and provide them with a copy. The documenting of negligible violations provides a record for future reference.

If negligible violations remain uncorrected or recur frequently after reasonable efforts have been made to gain voluntary compliance, they may be considered minor violations for enforcement purposes and handled accordingly.

MINOR VIOLATIONS

Minor violations are those which, if left uncorrected, are likely to cause harm to consumers.

A warning letter should be issued whenever an inspection uncovers a minor violation of weights and measures law and, in the judgment of the inspector and his/her immediate supervisor, a warning letter is warranted to achieve compliance.

If minor violations remain uncorrected or recur frequently, they may be considered major violations for enforcement purposes and handled accordingly.

MAJOR VIOLATIONS

Major violations are those which, if left uncorrected, are certain to cause harm to consumers.

Major violations are defined as:

- Violations which have the potential to cause an immediate, adverse impact on consumers;
- Violations which present evidence of an actual ongoing instance of economic fraud; and
- Minor violations which remain uncorrected or recur frequently after reasonable efforts to gain voluntary compliance have failed.

Inspection staff must rely upon their training, experience, and judgment to determine the seriousness of a violation and associated immediacy and stringency of enforcement response.

Classification of violations involves what is known for a fact and what is reasonable to conclude based on immediate observations and information available. This policy provides staff with a rational foundation for taking appropriate enforcement action and communicating the reason for the chosen action to the business operator and supervisory staff.

3. PROGRESSIVE ENFORCEMENT

Progressive enforcement is initiated when businesses demonstrate an unwillingness or inability to maintain their operations in compliance with regulatory requirements. When violations are uncorrected or an inspector's enforcement actions are not enough to gain permanent, continuous compliance, the inspector will normally use the progressive enforcement system, which includes progressively more stringent and formal enforcement actions. The goal is to increase the level of enforcement just enough to gain permanent correction of serious or chronic violations.

Program staff must identify progressive compliance situations and determine an appropriate enforcement remedy; clarify responsibilities and communicate expectations; and shorten times for evaluation of compliance at each level of enforcement action.

The following is a guide to taking progressive enforcement action, beginning with the least stringent level and *progressing* toward more assertive levels. Due to varying factors and seriousness of offenses, the appropriate level of action may begin at any stage, or a combination of several of them may be used to effectively assure compliance.

INFORMATION AND EDUCATION

While at the inspection site, discuss the violations with business personnel in an effort to obtain immediate compliance. Violations should be recorded on any applicable forms and signed by the responsible party. A copy should be provided to the business.

When deemed appropriate, the information and education option may be exercised by mail.

WARNING LETTER

A warning letter should be issued when the information and education option has been previously exercised and the action has failed to achieve compliance.

Document violations on the appropriate inspection reports and forward them to the field supervisor. Include with this documentation any known prior history of similar violations.

Warning letters should be issued to the responsible business or party, including any corporate office. Whether a written response is requested in the warning letter is left to judgment and discretion. However, it is advisable to request a written response to all major violations. Copies of all warning letters and written responses should be forwarded to the central office.

ASSURANCE OF DISCONTINUANCE

Obtaining a written letter of assurance should be considered whenever a warning letter has been previously issued for the same violation. This option may be exercised by mail but may be utilized in conjunction with a compliance conference when appropriate. A copy of the signed assurance of compliance should be forwarded to the central office.

COMPLIANCE CONFERENCE

Identify any prior attempt(s) to obtain compliance. Assist the supervisor in his/her review. Provide documentation as necessary. Assist the supervisor in any communications with business representatives and attend the compliance conference.

The following issues should be discussed at a compliance conference:

- 1) The violations
- 2) Any prior attempts to obtain compliance
- 3) The potential ramifications for committing violations

- 4) A plan for corrective action, including time table
- 5) Any proposed settlement (i.e. written assurance, consent judgment)

Following the compliance conference, summarize the meeting in writing and submit a copy (including any written letter of assurance) to the central office.

FORMAL LEGAL ACTION

Formal legal actions include civil prosecutions, criminal prosecutions, injunctions, and special orders.

Complete a summary investigative report (S.I.R.) and submit it to the field supervisor for review.* Continue to monitor the status of non-compliance and report findings to the field supervisor. After approval by the Bureau Director, deliver a copy of the S.I.R. and referral letter to the assigned attorney. Participate in formal proceedings by providing evidence, testimony, etc.

*** If the department succeeds in proving the facts of a case, it must also convince a prosecutor to pursue legal action.** For all enforcement actions, inspectors can substantially affect the outcome by the quality and timeliness of their investigations and reports. Good documentation is necessary. All proper procedures should be followed during inspections. Reports must be clear, legible, and uniform.

All supportive evidence (e.g. field test reports, statements, photographs, samples) along with any evidence of former enforcement action(s) should accompany all enforcement referrals on cases requiring progressive enforcement action. A well organized, clear and timely investigation, backed by solid evidence, will facilitate prompt and favorable action.

The compliance officer will assist inspectors and field supervisor with case development as needed, facilitate the legal process, and work with any assigned department counsel or prosecutor. The compliance officer will also monitor progress of the case through the attorney's office and keep all staff informed on developments.

4. PRIVATE REMEDIES

Whether or not the Department takes enforcement action in response to an administrative rule violation, under section 100.20(5), Wis. Stats.

"Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefore in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee."

This private remedy applies to all Department administrative rules promulgated under this section. The Wisconsin Supreme Court has held that due to the sheer number of violations which occur, it is impossible to proceed against each and every violator. As a result, the court has empowered the consumer to act as their own "private attorney general" to enforce their rights set forth in the administrative regulations.