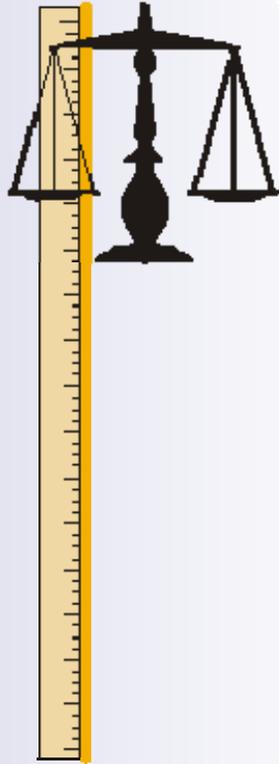


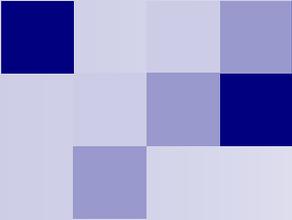
Training Module



Three

Enforcement Procedures

*Training for the
Weights and Measures Official*

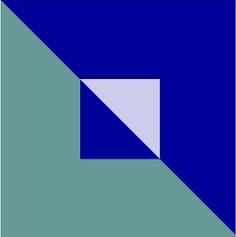


TRAINING FOR THE WEIGHTS AND MEASURES OFFICIAL

CURRICULUM

MODULE 3 - ENFORCEMENT PROCEDURES

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- Module 2 - Laws and Regulations**
- Module 4 - Legal Action**
- Module 5 - Legal Metrology**
- Module 6 - Field Standards and Test Equipment**
- Module 7 - Basic Weighing and Measuring Principles**
- Module 8 - Device Type Evaluation**
- Module 9 - Weighing Devices**
- Module 10 - Measuring Devices**
- Module 11 - Weighmaster Enforcement**
- Module 12 - Petroleum Products**
- Module 13 - Quantity Control**
- Module 14 - Service Agencies and Agents**



Acknowledgment

Developing a training program for weights and measures officials is a challenging and ambitious project. It requires time, dedication, and expertise from many individuals.

It is impossible to list the names of the many people who contributed to the development of this course. However, gratitude is extended to the following groups whose dedication and commitment made this training module a reality.

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Module Three

Enforcement Procedures

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Introduction

Welcome to “Enforcement Procedures”. This is the third module in the series “Training for the Weights and Measures Official.” It will introduce you to the enforcement philosophy of the Division of Measurement Standards and the actions available to you to obtain compliance with the regulations you enforce.

At the end of each segment in this module you will find a series of self-evaluation questions to test your knowledge. Although you are not required to complete the self-evaluation, we encourage you to take a few minutes to read the questions before moving on to the next segment. Answers are provided at the end of the module. If you are unsure of a response, reread the training material and it will give you the information you need.

Module Objectives

When you have completed this module you will be able to:

- Understand the enforcement philosophy of the Division.
- Appreciate the need for and be able to provide due process.
- Be aware of the use of notices of violation.
- Understand your authority to remove items from sale or commercial service.
- Be able to determine and use the appropriate criminal or civil proceedings.

Enforcement Philosophy

The mission of weights and measures:

“To preserve and maintain the standards of measurement essential in providing a basis of value comparison and fair competition in the marketplace.”

While we are often seen as protecting consumers by providing the ability to value compare in making purchasing decisions, our role in providing fair competition to businesses is every bit as essential. Businesses cannot fairly compete if one is able to offer less quantity than advertised. In evaluating complaints, we apply the tenets of the mission statement to determine if fair competition or value comparisons are issues.

It is our philosophy, and makes good sense from an efficiency standpoint, to take care of problems at the lowest level possible and only escalate to higher levels of enforcement, when it becomes necessary to achieve compliance. Sometimes all that is necessary to achieve compliance with the laws is to inform the businesses of the applicable laws. The better informed the businesses are about the requirements of the laws and the potential penalties, the less likely that they will violate them.

If this approach does not work and a business violates one or more of the laws that we are responsible for, the next step is a written warning, otherwise known as a “Notice of Violation”. Again, along with the “Notice of Violation” should be the appropriate information about the requirements of the laws and any potential penalties for violating the laws. It is always a good idea to keep a record of what information was provided; who the information was provided to; and the date, time, and location in case further action is warranted. Although most of our weights and measures laws do not require proof of the intent to violate the law (“Strict Liability”), it is a firmly established tenet of criminal law and basic fairness that a person should not be penalized for inadvertent or unintentional violations of the law.

When further action is necessary, using one of the following enforcement procedures contained in this module, you will need to be able to prove your allegations and ensure “Due Process of Law”.

What is “Due Process of Law”? It is the Right of every person, guaranteed by the United States Constitution. Remember that the consequences of your inspection or investigation may be a deprivation of personal property (“Red Tagging” a device or “Off Sale” of a commodity) or liberty (Arrest/Citation).

Constitutional Due Process and the Taking of Property

Federal Guarantees

U.S. Constitution, Amendment V (1791)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

Required State Guarantees

U.S. Constitution, Amendment XIV (1868)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens or the United States; **nor shall any state deprive any person of life, liberty or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

What are our obligations regarding Due Process Protection?

1. Notification of action and options.
2. Opportunity to be heard.
3. Right to review procedures and authority.
4. Fundamental fairness, reasonableness of enforcement action.
(Are there less punitive alternatives?)

As soon as you present yourself as a government official, you have an obligation to explain: (1) who you are; (2) why you are there; (3) what your authority for being there is; and (4) what you are planning to do. You may also be asked what the potential consequences are if the person does or does not allow you to conduct your inspection or investigation. This allows the person the freedom and opportunity to make an informed decision to submit to the government or not. If the person does not voluntarily allow you to conduct your inspection or investigation, you may be required to obtain an “Inspection Warrant” or “Search Warrant” before proceeding.

Due Process and Daily Operations

LEVEL	CONSIDERATION
Field	<ul style="list-style-type: none"> • Notify person in charge of the facility before beginning and before leaving. • Use adopted procedures or defensible investigative procedures (e.g., representative random sample selection). • Use accurate, certified standards and calibrated scales. • Explain procedures, findings, action, and remedy options. • Provide telephone, fax, address and/or e-mail contact information for further information and questions.
Supervisory	<ul style="list-style-type: none"> • Respond with information to any request from the field. • Provide legal authority, procedural information, and listen to explanations. • Be impartial. Consider specific situation, perishability of market/product versus potential public harm if action continues. • Have all interested parties been notified of the action? • Make and document reasonable attempts to contact.
Administrative	<ul style="list-style-type: none"> • Provide ongoing inspector training. • Provide information to inspectors and supervisors to answer questions. • Provide an opportunity to owner/operator, and interested parties to be heard before action causes harm.

Legal Theory and Considerations

Due Process Requires:

- Adequate Notice and
- Meaningful Opportunity to be Heard

Decision to Act

The manner in which due process is applied may be different in each case and depends on the interest and needs of both the state/county and the offender.

- First - The private interest that will be affected by the official action.
- Second - The risks of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute safeguards.
- Third - The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Right to Be Heard

- There is no precise manner of hearing which must be afforded.
- The particular interests at issue must be considered in determining what kind of hearing is appropriate.
- A formal hearing, with full rights of confrontation and cross-examination, is not necessarily required.

Due Process

Court Decisions

In 1978, the California Appellate Court addressed due process in its review of the Rath and General Mills decisions relating to removal from sale of short weight commodities. California weights and measures off-sale procedures were found **not** to meet the due process test for **perishable commodities**.

In 1988, the California Appellate Court again addressed due process in its review of the Menefee decision relating to seizure of crops treated with an unauthorized economic poison.

In this case, the fact that the crop had been treated with an unapproved economic poison early in the season and the ensuing three and a half month time until the crop was seized, led the court to determine that this was not an emergency situation.

Rath Interpretations

The California Appellate Court held that for not highly perishable products, California's procedures for court review of off-sale actions met the test for due process. However, for highly perishable products (such as bacon), the court held that the packer must be notified in writing of the short measure finding, provided a copy of the inspection report, and be given an opportunity to dispute the charge prior to any off-sale action.

Menefee and Son v. Department of Food and Agriculture

The California Appellate Court held that the minimum due process requires notice and an opportunity for a hearing. The court stated that normally, notice and an opportunity for a hearing must precede even a temporary deprivation of a property interest. The court held that the fact that the affected party may institute a judicial action is not a sufficient opportunity for a hearing. Perishability seems to have no bearing on this decision.

In light of these decisions, due process hearings become a serious consideration for weights and measures officials when contemplating action that may deprive a person of his/her property rights. Several avenues are available to weights and measures officials to handle due process concerns and protect weights and measures interests at the same time.

Notices of Violation

One of the major causes of failure in legal actions is insufficient or improper documentation. In the course of any inspection or enforcement action, due process requires notification to the violator, and whenever a violation occurs documentation is vital.

The initiation of any legal action must start somewhere. This is in the hands of the inspector. Very often for minor problems an inspector might verbally notify the violator. This is often all that is needed to obtain compliance but does not memorialize the notification. For all violations, although no further action may be anticipated, it is crucial that official notification (or documentation) is given to the violator as soon as possible. If a citation is not issued this is typically achieved by issuing a Notice of Violation (NOV).

STATE OF CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE DIVISION OF MEASUREMENT STANDARDS				ORIGINAL TO COUNTY YELLOW TO OWNER OR AGENT PINK TO STATE
NOTICE OF VIOLATION				
COUNTY				
BUSINESS NAME	ADDRESS	CITY	ZIP	PHONE
NAME	HOME ADDRESS	CITY	ZIP	PHONE
YOU ARE HEREBY NOTIFIED THAT YOU ARE IN VIOLATION OF SECTION(S)				
SECTION(S)	<small>Check Appropriate Boxes</small>	BUSINESS AND PROFESSIONS CODE OF CALIFORNIA		
SECTION(S)		CALIFORNIA CODE OF REGULATIONS		
SECTION(S)		PENAL CODE OF CALIFORNIA		
DESCRIPTION OF OFFENSE(S)				
SIGNATURE OF OWNER OR AGENT OF OWNER	TITLE	DATE	TIME	
THESE VIOLATIONS MAY SUBJECT YOU TO PENALTIES AS PROVIDED FOR IN DIVISION 5 OF THE BUSINESS AND PROFESSIONS CODE OF CALIFORNIA OR THE PENAL CODE OF CALIFORNIA.				
BY	TITLE	PHONE		
40-033 (Rev. 11/01)				

While an NOV, in and of itself, cannot be used as evidence of a crime it is evidence of the notification and thus part of due process. Many times minor violations do not warrant the time and expense of legal action, but such violations repeated will eventually require prosecution or civil action. The absence of documentation that the violator knew of past criminal action may jeopardize the successful outcome of an action. Many violations in the codes that we enforce fall under strict liability sections which means intent to commit the crime is not needed to prove the case. However,

for those few sections where it is necessary to show intent, the proof that a person knew the action they took was criminal is important. Evidence that NOV's were issued can help in this area. The issuing of an NOV also achieves the inform/warn philosophy advocated before prosecution.

Thus, it is appropriate to issue an NOV for any violation no matter how minor it appears to the inspector.

When issuing a Notice of Violation several things must be considered:

- **To whom is the notice issued?**

Ordinarily this would be the perpetrator of the offense, the person who committed the act that constituted the crime. However, it is very common for that person to be the employee of another. Under California law, except in rare circumstances, an employer is responsible for the action of his or her employees. Therefore, it would be appropriate to issue an NOV to the employee and another to the company. Issuing an NOV to a company could be achieved in a couple of ways. If a suitable representative of the company, say a manager, is available at the location of the violation, issue the NOV to that person. If no representative of the company is available or the violation is product related (quality, quantity, or labeling) then mailing an NOV to the company is an alternative. In this instance, because there will be no signature, proof of service is needed. Use certified mail with return receipt for proof of delivery.

- **What should the NOV contain?**

- Name and address of the violator.
- Date and location of the violation.
- Code section violated with a brief description of the action causing the violation.
- Name of the official alleging the violation.
- Space for the recipient to sign.
- Additional information may include county, telephone numbers, time, and titles.

- **Does it need to be a separate form?**

The most versatile use of an NOV is a form specifically designed for the purpose. With the heading "Notice of Violation" it is instantly identifiable for what it is and has some impact. Some of the more frequently encountered code violations may be preprinted and have check boxes. They are frequently numbered for filing and future reference. This does not prevent an NOV from being incorporated into some other document. Some jurisdictions find it convenient to include wording on their inspection forms that doubles as an NOV if a box is checked and the appropriate code section added. Several Division forms contain NOV's specific to the task. The package inspection report and labeling violation forms and the Weighmaster and Petroleum Products Audit Reports all contain NOV's for specific violations. The format of a NOV is not critical provided the essential elements discussed above are addressed.

Sample Exercise

After reading the following scenario, complete the NOV below using the accompanying code sections.

Robert B. Forest, an employee of DMS Corporation Inc., purchased aluminum cans from a weights and measures inspector in an undercover sale. During the sale, the inspector was unable to see the scale indication. Mr. Forest paid the inspector for 7 lb. which was the correct weight of the cans.

STATE OF CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE DIVISION OF MEASUREMENT STANDARDS				ORIGINAL TO COUNTY
NOTICE OF VIOLATION				YELLOW TO OWNER OR AGENT
				PINK TO STATE
COUNTY <i>Oceanside</i>				
BUSINESS NAME <i>DMS Corporation</i>	ADDRESS <i>2748 Sierra Blvd.</i>	CITY <i>Lewisville</i>	ZIP <i>92415</i>	PHONE <i>(612) 938-7245</i>
NAME <i>Robert B. Forrest</i>	HOME ADDRESS <i>1749 Cedar Ave.</i>	CITY <i>Utopia</i>	ZIP <i>92403</i>	PHONE <i>(612) 974-1103</i>
YOU ARE HEREBY NOTIFIED THAT YOU ARE IN VIOLATION OF SECTION(S)				
SECTION(S) <small>Check Appropriate Boxes</small>		BUSINESS AND PROFESSIONS CODE OF CALIFORNIA		
SECTION(S)		CALIFORNIA CODE OF REGULATIONS		
SECTION(S)		PENAL CODE OF CALIFORNIA		
DESCRIPTION OF OFFENSE(S)				
SIGNATURE OF OWNER OR AGENT OF OWNER <i>R</i>	TITLE <i>Manager</i>	DATE <i>Feb. 4, 2004</i>	TIME <i>11:35 a.m.</i>	
THESE VIOLATIONS MAY SUBJECT YOU TO PENALTIES AS PROVIDED FOR IN DIVISION 5 OF THE BUSINESS AND PROFESSIONS CODE OF CALIFORNIA OR THE PENAL CODE OF CALIFORNIA.				
BY <i>M. Griffin</i>	TITLE <i>W&M Inspector</i>	PHONE <i>(919) 611-2911</i>		

Business and Professions Code Sections for Use With Sample Exercise**Business and Professions Code****12510 Misdemeanors Declared: Presumption Of Intent To Violate Law**

(a) Any person, who by himself or herself, or through or for another, does any of the following is guilty of a misdemeanor:

- (1) Uses, for commercial purposes, or retains in his or her possession an incorrect weight or measure or weighing or measuring instrument.
- (2) Sells any weight or measure used for commercial purposes, or weighing or measuring instrument which has not been sealed within one year, except weighing or measuring instruments required to be assembled prior to use.
- (3) Uses any condemned weight or measure or weighing or measuring instrument contrary to law.
- (4) Uses, for commercial purposes, or for determining the charge for a service, any weight or measure or weighing or measuring instrument which is not kept at a fixed location, which does not bear a current or previous year's seal, and which, upon test by the sealer, is found to be incorrect, unless a written request for an inspection of the weighing or measuring instrument has been made to the county sealer. However, the use of any weight or measure or weighing or measuring instrument used by a public utility in connection with measuring gas, electricity, water, steam, or communication service subject to the jurisdiction of the Public Utilities Commission is exempt from this chapter.
- (5) Sells or uses any device or instrument to be used or calculated to falsify any weight or measure.
- (6) So locates or positions a weighing or measuring device used in retail trade, except as used exclusively in preparation of packages put up in advance of sale, that its indications cannot be accurately read by the purchaser under ordinary circumstances.
- (7) Uses, for commercial purposes, a weighing or measuring device designed to automatically compute price unless the computed price is a true mathematical computation of the amount times the price per unit.
- (8) Willfully and knowingly uses, for commercial purposes, a measuring device designed to automatically compute price unless the indicators of quantity and the total computed price on the device has been returned to zero prior to the beginning of each delivery of that commodity or thing.
- (9) Fails to deliver for test to a designated location after receipt of a written notice from a weights and measure official, any device that is ordinarily tested at a central location.
- (10) Sells, rents, leases, loans, or knowingly installs an incorrect weighing or measuring instrument for commercial purposes.

(b) The possession of an incorrect weight or measure or weighing or measuring instrument or records thereof is prima facie evidence of intention to violate the law.

Sample Exercise Answer

The violations would be:

- B&P Code 12510(a)6 - So locates equipment that its indications cannot be read by the purchaser.

STATE OF CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE DIVISION OF MEASUREMENT STANDARDS				ORIGINAL TO COUNTY
NOTICE OF VIOLATION				YELLOW TO OWNER OR AGENT
YOU ARE HEREBY NOTIFIED THAT YOU ARE IN VIOLATION OF SECTION(S)				PINK TO STATE
COUNTY	Oceanside			
BUSINESS NAME	ADDRESS	CITY	ZIP	PHONE
DMS Corporation	2748 Sierra Blvd.	Lewisville	92415	(612) 938-7245
NAME	HOME ADDRESS	CITY	ZIP	PHONE
Robert B. Forrest	1749 Cedar Ave.	Utopia	92403	(612) 974-1103
SECTION(S)	<small>Check Appropriate Boxes</small>			
	BUSINESS AND PROFESSIONS CODE OF CALIFORNIA			
	CALIFORNIA CODE OF REGULATIONS			
	PENAL CODE OF CALIFORNIA			
DESCRIPTION OF OFFENSE(S)	Located or positioned a weighing device used in retail trade so that its indications could not be accurately read by the purchaser.			
SIGNATURE OF OWNER OR AGENT OF OWNER	TITLE	DATE	TIME	
<i>[Signature]</i>	Manager	Feb. 4, 2004	11:35 a.m.	
THESE VIOLATIONS MAY SUBJECT YOU TO PENALTIES AS PROVIDED FOR IN DIVISION 5 OF THE BUSINESS AND PROFESSIONS CODE OF CALIFORNIA OR THE PENAL CODE OF CALIFORNIA.				
BY	TITLE	PHONE		
<i>[Signature]</i>	W&M Inspector	(919) 611-2911		



SELF-EVALUATION QUESTIONS

1. What is the mission of weights and measures?
2. What does the term “strict liability” mean?
3. Where does “due process of law” come from?
4. What two considerations does “due process” require?
5. When is it appropriate to issue a Notice of Violation (NOV)?
6. Why are verbal warnings generally inadequate?
7. What purpose does an NOV serve?
8. To whom would you normally issue an NOV?
9. What precautions would you take if mailing an NOV?
10. What form should an NOV take?

Removal from Sale or Commercial Service

One of the most powerful enforcement tools we have in weights and measures is our authority to remove product from sale or devices from service for violations of the Business and Professions Code. In addition, there are certain instances when an official can seize product or a device. What we must never forget, however, is that although we have this authority, the owner of the product must still be afforded due process. We cannot be arbitrary or capricious in our actions. The following will outline the power and authority to remove product from sale and remove devices from service, but will also cover the basic procedures necessary to ensure we preserve a violator's constitutional rights. We will not deal here with the procedures used to determine if a violation has been committed, just those actions on an item shown to be violative. Specific seizure and removal procedures will be discussed separately later in this section.

Removal from Commercial Service - Authority

Removal of instruments or devices from commercial service is authorized and required by the following sections of the Business and Professions Code

Section 12500.10(a)	Unapproved instruments.
Section 12506	Incorrect weights, measures, or instruments.

Removal from Sale - Authority

Four sections of the Business and Professions Code authorize (two actually require) an official to take product off sale, effectively depriving the owner of their property.

Section 12211	When the quantity of packaged commodity is less than represented (removal required).
Section 12607	Where a packaged commodity does not bear a statement of quantity (removal required).
Section 13595	For non-conforming petroleum products (removal permissive).
Section 13731	When automotive products are adulterated or mislabeled (removal permissive).

It should be noted that Sections 12211 and 12607 apply to packaged products only, but Sections 13595 and 13731 apply to both bulk and packaged products.

In addition, Section 4512.3 of the California Code of Regulations permits a sealer to forbid the display, sale, or transport of packages which do not bear labeling information required by the California Fair Packaging and Labeling Act (Chapter 6, Division 5, Business and Profession Code).

Seizure - Authority

Seizure of instruments, items, or product is also removal from sale or service but final disposition is subject to a decision by a court.

The following sections authorize seizure. With the exception of the specific circumstance in Section 12506, these sections are permissive.

Section 12211	As evidence – package or container containing amount less than represented.
Section 12500.10(a)	Unapproved instrument if not tagged.
Section 12500.10(c)	Unapproved instrument not brought into compliance after 30 days.
Section 12506	Incorrect weights, measures or weighing and measuring instruments not susceptible to repair.
Section 12507	Tagged devices not repaired or corrected within 30 days.
Section 12606(c)	Non food container that facilitates perpetration of deception or fraud.
Section 12606.2(c)	Food container that facilitates perpetration of deception or fraud (containers subject to Section 403(d) of Federal Food, Drug, and Cosmetic Act).

Removal from Commercial Service

Section 12500.10(a)(c) - Unapproved instruments

All weighing and measuring devices in California are required to be approved before commercial use (Section 12500.5). If a sealer finds a non-approved device in commercial use, he has one of two options. He may seize the device or mark it "unapproved device". Marking is normally done with a tag which for convenience and conformity is yellow.

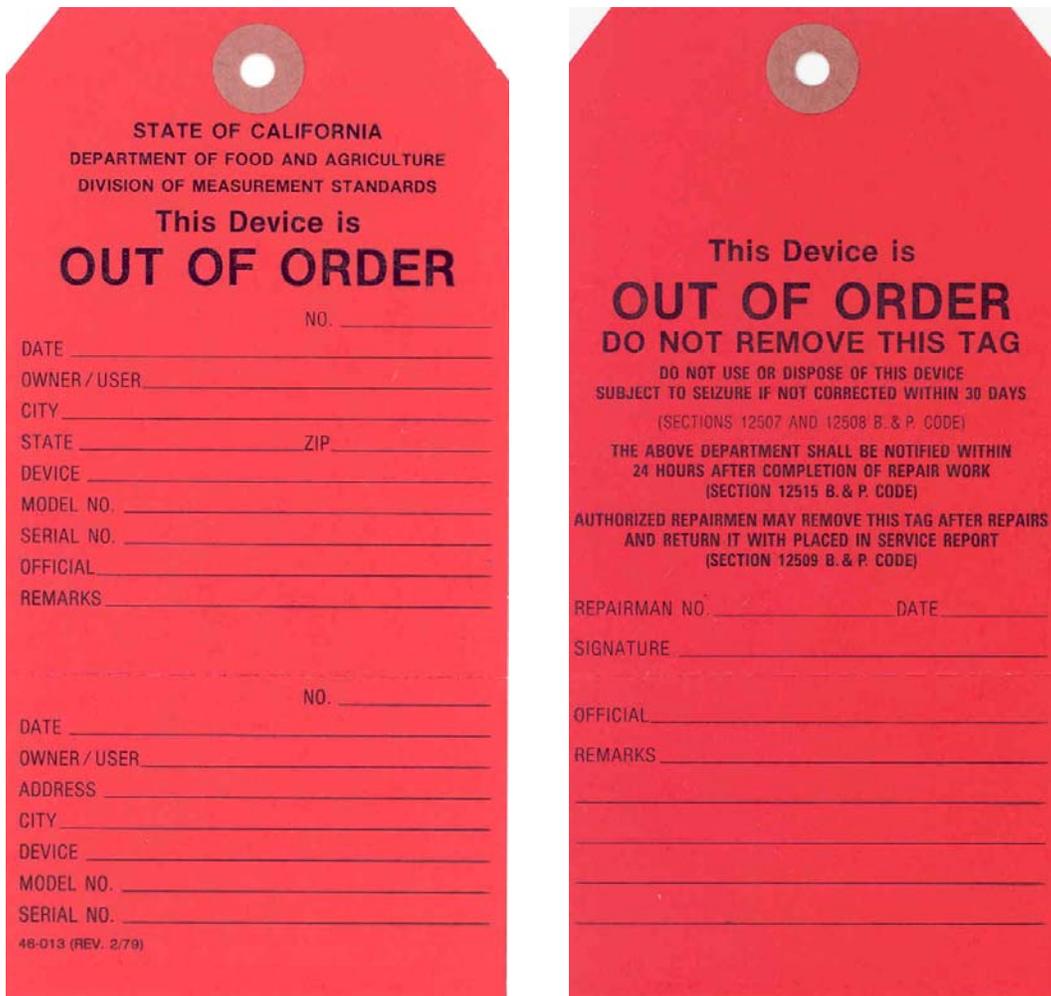


This, as you would expect, is commonly referred to as a "yellow tag" and "yellow tagging a device" has come to mean "removing a device from service because it is unapproved". If after 30 days the "yellow tagged" device has not been brought into

compliance the sealer has the option of seizure. From a practical standpoint, when a non-approved device is found in a field application, dialogue with the manufacturer is started on the need for evaluation and approval. It is often found that manufacturers are unaware of this requirement and are more than willing to submit their device for evaluation. The matter is then passed to the California Type Evaluation Program and further field enforcement is usually unnecessary (see **Module 7, Device Type Evaluation**).

Section 12506 - Incorrect Weights, Measures, or Instruments

If a sealer determines that weights, measures or weighing and measuring instruments are incorrect, he has two options. If in his or her opinion they are not susceptible to repair, the sealer must seize them. If however they can be repaired, the sealer must then mark them with the words "Out of Order". The tags used for this purpose are red and thus "red tagging a device" has come to mean "removing an incorrect device from service".



Communicate to the owner or user why the device is incorrect and explain the reason you are taking the action you are. From a practical standpoint, almost all devices a sealer will encounter will be repairable. Instances where this would not be possible include linear measures, berry basket, glass measures, etc. Red tagged devices can only be placed back into service by a sealer or a registered service agent after being repaired (see **Module 14, Service Agencies/Agents**). Red tagged devices not repaired within 30 days are subject to seizure.

Keep a record of all tagged devices so you can follow up with appropriate enforcement action.

Removal from Sale

Packaged products in violation of Business and Professions (B&P) Code Sections 12211 or 12607 must be removed from sale. If they violate B&P Code Sections 13595 or 13731, or California Code of Regulations Section 4512.3 the sealer may remove them from sale. Typically, when product is removed from sale it is accompanied by an off-sale order and a tag placed on the lot of commodities.

STATE OF CALIFORNIA, DEPARTMENT OF FOOD AND AGRICULTURE
DIVISION OF MEASUREMENT STANDARDS

DATE: _____
OFF SALE ORDER NO. _____

HOLD - OFF SALE

49-002 (REV1/97)

WARNING: THESE PACKAGES HAVE BEEN ORDERED OFF SALE. DO NOT REMOVE THIS IDENTIFICATION CARD OR IN ANY WAY DISPOSE OF, TRANSPORT OR SELL THIS COMMODITY WITHOUT AUTHORIZATION FROM A WEIGHTS AND MEASURES OFFICIAL. VIOLATION OF THIS ORDER IS A MISDEMEANOR, AND MAY RESULT IN A FINE OF UP TO \$1,000 AND/OR 1 YEAR IN JAIL. BUSINESS & PROFESSIONS CODE, SECTION 12025.5

PERSON IN POSSESSION:	BRAND NAME AND COMMODITY	LABELED CONTENTS	LOT CODES OR IDENTIFICATION	NUMBER OF PACKAGES
DO NOT DESTROY THIS CARD - TO THE RELEASING AGENCY: INDICATE THE DATE AND FINAL DISPOSITION BELOW AND RETURN THIS CARD TO THE AGENCY ON REVERSE.			TOTAL	

ISSUING AGENCY TELEPHONE NUMBER: _____ (NAME AND ADDRESS ON REVERSE)

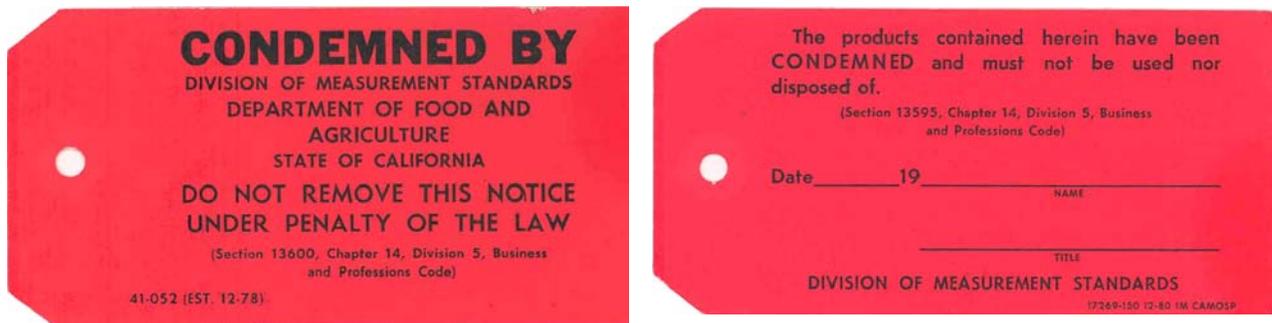
Additionally, self-adhesive labeling (usually red) is attached to indicate the product is off-sale.



As to the disposition of the product, an owner has several options. Which one he chooses depends on the time and effort he wants to expend. Where a product was sampled and the lot rejected based on that sample there is the possibility that some packages may be in compliance. He can go through the entire lot, sorting the good

from the bad. For standard weight packages this is an entirely feasible proposition. For volume, quality, and random packages the time and cost of labor would prohibit this approach. It may be expedient to repackage or relabel the entire lot. More typical is the situation where the person you are dealing with will not be the person who packed the product. In this case, the usual action is to return the product to the packer. Tracking the progress of the returned product is especially challenging. If further legal action is anticipated, seizure of a package for evidence should be considered.

In addition to the above mentioned prepackaged items, Business and Professions Code Section 13595 applies to **petroleum products** and Section 13731 applies to **automotive products** in packaged and bulk storage. Products in bulk storage are not so different if you consider it as one large package and use similar techniques. These products are removed from sale with a red tag with the word “condemned”.



Do not confuse these tags with those used to remove devices from service. Take care when referring to these tags as service agents have mistakenly removed them thinking they were device red tags. Generally, these products will be stored in drums or tanks. In addition to labeling them as “Condemned”, you must ensure that both inlet and outlet are sealed.

Seizure

Seizure of items is generally reserved for those occasions where removal from sale or service has not resulted in corrections, or further legal action is anticipated and evidence must be preserved.

Although it is not mandated in the Business and Professions Code, it is imperative that a dated, signed receipt describing the seized item be given to the person in charge of the item and a copy retained by the official.

STATE OF CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE DIVISION OF MEASUREMENT STANDARDS 49-009 (EST. 6/86)	COUNTY _____	DATE _____	TIME AM PM	NO. _____
OFFICIAL PROPERTY RECEIPT				
RECEIVED FROM _____		TITLE _____		
LOCATION _____				
DESCRIPTION OF PROPERTY _____				
<input type="checkbox"/> EVIDENCE <input type="checkbox"/> FOR TEST <input type="checkbox"/> FOR SAFE KEEPING <input type="checkbox"/> OTHER SEC. VIOLATED				
STATE SEALER _____		INVESTIGATOR _____		
DATE RETURNED _____	SIGNATURE OF PERSON _____	TITLE _____	INVESTIGATOR _____	
OWNER MUST PRESENT THIS RECEIPT WHEN CLAIMING PROPERTY				
WHITE - OWNER CANARY - STATE PINK - ATTACH TO PROPERTY	REMARKS: _____			

Due Process Consideration

Be aware, that if the instrument, item, or product you are concerned with does not violate any of these sections, you have no authority under the B&P Code to deprive the owner of his or her property by seizure or removal from sale or service. You may have additional authority to seize items for evidence under other codes but that is outside the scope of this session and will be covered separately in **Module 4 “Legal Action”**.

If the product you are dealing with does violate one of these sections, you must still take care to follow the proper steps to ensure you give the owner “due process” under the law.

- First, ensure the code violated is one that authorizes you to seize or remove an item from sale or service.
- Remember to notify the owner of the specific violation (see section on “Notices of Violation”).
- Notify the owner or the person in possession that you are going to remove the item from sale or service or seize it.
- Provide documentation of the seizure or removal. Most sections require notification in writing, for the others it is a prudent measure. Specifics will vary depending on the section, item, and situation.
- Secure the item from tampering or unauthorized use by physical means or labeling.
- It is imperative to give detailed instructions to the owner or person in possession on how to handle items removed from service or sale, including how to get them returned to service or sale.
- Follow up on the action you have taken in a timely manner.

Summary

As a weights and measures official you have the authority and, in certain instances, the duty to remove items from sale or service and the ability to seize items violating the B&P Code. Eight B&P Code sections and one California Code of Regulations section cover this authority, four require the official to remove the item from sale or service, and one requires seizure for a specific circumstance. The rest are permissive.



SELF-EVALUATION QUESTIONS

1. What does “Red Tagging a Device” mean?
2. Why should you be careful when referring to the color of a “Condemned” tag?
3. How do the procedures for removing bulk gasoline from sale differ from those used with 1 gallon packages of antifreeze?
4. Can an owner decide what to do with product that is removed from sale?
5. You seize an unapproved device, what documentation must you make sure you have?
6. Under what circumstances does a sealer have justification to seize an incorrect device?
7. In those sections authorizing a weights and measures official to remove violative items from sale or service is the official required to do so in all instances?
8. Does the authority to remove from service apply to all weighing and measuring devices?
9. Is an official required to seize violative items?
10. Can an official decide what to do with seized items?
11. What could be the repercussions of not notifying the owner or the person in possession that you are going to remove the item from sale or service or seize it?

Levels and Types of Enforcement and Appropriate Use

As previously stated, Business and Professions Code Section 12015 requires weights and measures officials to cause the prosecution of violators of weights and measures law.

Enforcement actions generally start at the lowest level and work up to higher levels. The first step may be a **verbal warning** for a minor technical violation that can be corrected immediately. A **Notice of Violation** should be issued for any violation that you observe that can not be corrected immediately, to document a violation, or if you feel the violator will not maintain compliance after you leave.

In situations where the commercially used weighing and measuring equipment is found to be out of tolerance, the use of an **out of order “red tag”** to prevent the equipment’s use until it is repaired is required. Packaged commodities that fail to meet the labeled net quantity statement are removed from sale by the use of an **“Off Sale Order”** until the violation is corrected. Petroleum and automotive products that fail to meet the minimum quality specifications or that are mislabeled are removed from sale by the use of a **“Condemned Product Tag and Order”**.



The **civil administrative penalty (CAP)** process allows the sealer to impose a penalty upon a violator for weights and measures violations without having to go through the district attorney’s office and the court. As a general rule, all the legal requirements that apply to a case handled in the court system also apply to a CAP. The rules of evidence are somewhat relaxed and if a hearing is requested, it is much less formal than in a courtroom. Lawyers are not required to represent the respondent in the CAP process. Technical violations of the law are an appropriate use of this tool.

For serious violations that involve monetary loss to consumers or are fraudulent in nature, a **Notice to Appear (direct court citation) or a criminal filing with the district attorney** is appropriate.

Businesses that are operating in violation of weights and measures law such that they are involved in unfair business practices or unfair competition with other businesses may be appropriately considered for a **civil filing with the district attorney or California Attorney General**.

The bottom line to keep in mind is that you are trying to gain compliance with the law. Your enforcement action should be appropriate for the magnitude of the violation you observed.

How Do I Decide Which Type of Filing is Appropriate?

Weights and measures officials have several types of legal action avenues available to them to handle violations of the Business and Professions Code. Those avenues can be generalized as Civil Administrative Penalty Actions, Criminal Actions, and Civil Actions. The following are the general guidelines for determining which type of action may be appropriate.

Civil Administrative Penalty Actions

Typical Civil Administrative Penalty cases involve:

- infraction and/or misdemeanor charges only, generally technical violations;
- a preponderance of evidence proof burden;
- penalties in the \$50 - \$1,000 range as specified in regulation;
- relatively minor resources needed for investigation and prosecution (as most cases are settled with a stipulated plea).

Criminal Actions

Typical Criminal cases involve:

- infraction and/or misdemeanor charges only;
- beyond a reasonable doubt proof burden;
- fines in the \$50 - \$1,000 range and possible incarceration;
- probation, usually summary probation, with a maximum term of three years;
- relatively modest resources needed for investigation and prosecution.

Civil Actions

Typical Civil cases involve:

- deceptive practices and unfair competition allegations, under Business and Professions Code Sections 17200 and 17500;
- preponderance of evidence proof burden;
- a limited term or a permanent injunction prohibiting the unlawful practices;
- potential civil penalties of \$2,500 per violation to millions;
- agency costs may be recovered;
- restitution for injured consumers or businesses;
- substantial investment of resources in relatively complex civil litigation process; most cases are settled through negotiations, but litigated cases require extensive discovery and trial preparation.



Civil Administrative Penalty

Authority for Civil Administrative Procedure

The Business and Professions Code, Division 5, Section 12015.3 gives a sealer the ability to levy a civil penalty of up to \$1,000 for each violation against a person violating any provision of Division 5 or a regulation adopted pursuant to any of those provisions. This section makes the assessment and payment of a civil penalty a complete defense to a criminal prosecution for a violation of the same act or acts constituting the violation handled as a civil administrative procedure.

When to use a Civil Administrative Penalty

Typical civil administrative penalty actions involve cases that are infraction and/or misdemeanor charges only and are generally technical violations. The burden of proof from the sealer is a preponderance of evidence and penalties range from \$50 - \$1000 range as specified in regulation. Relatively minor resources are needed for investigation and prosecution and most cases are settled with a stipulated plea.

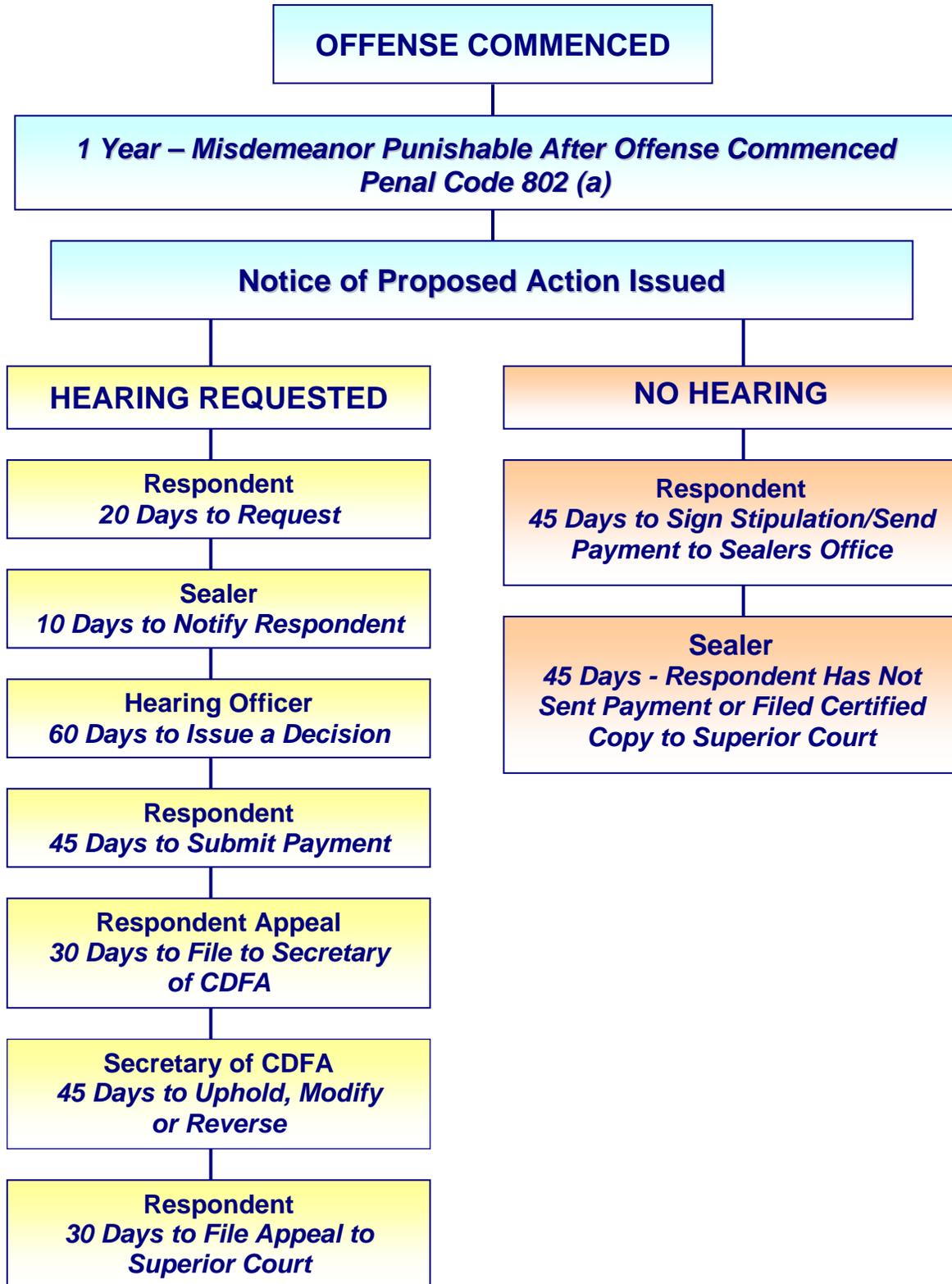
The evidentiary requirements of a sealer's Civil Administrative Penalty (CAP) hearing are quite similar to the requirements of most other courtroom hearings. Policy considerations as well as judicial decisions dictate the rules of evidence used. It must be remembered that a CAP hearing is not a criminal or civil trial in a court of law.

The Civil Administrative Procedure

When a county sealer takes administrative action, the person charged with a violation(s) must be notified of the proposed penalty(s) and the right to request a hearing. This Notice of Proposed Action (NOPA) is prepared by the sealer and is generally sent to the respondent by certified mail. The NOPA outlines the alleged violations committed by the respondent, quotes the sections violated, and specifies the proposed penalty being imposed. The notification must also include the right to appeal to the Secretary pursuant to the procedures provided in Section 12015.3(c) of the Business and Professions Code. The appellant may also seek review of a decision of the Secretary within 30 days of the date of the decision pursuant to Section 1094.5 of the Code of Civil Procedure.

Civil Administrative Penalty Time Line

Business and Professions Code Section 12015.3



Citations (Notice To Appear)

A citation issued to an individual is a notification to appear in court and to answer charges for an alleged misdemeanor or infraction violation. When the violator signs the citation, they are not admitting guilt but only promising to appear at the time and place indicated on the citation.

Section 12013 of the Business and Professions Code explains weights and measures officials' power to arrest as a public officer.

Business and Professions Code

§ 12013. Sealers as Having Powers of Public Officer to Arrest: Procedure to be Followed: Liability, Service of Processes and Notices

(a) Any sealer shall have the authority, as a public officer, to arrest, without a warrant, any person whenever such officer has reasonable cause to believe that the person to be arrested has, in his presence, violated any provision of this division, the violation of which is declared to be a public offense.

In any case which an arrest is made pursuant to this authority for an offense declared to be a misdemeanor or an infraction, the arresting officer may, instead of taking the person arrested before a magistrate, follow the procedure prescribed by Chapter 5C (commencing with Section 835.5) of Title 3 of Part 2 of the Penal Code, unless the arresting person demands to be taken before a magistrate. The provisions of such chapter shall thereafter apply with respect to any proceeding based upon the issuance of a citation pursuant to this authority.

This subdivision shall not be interpreted to prevent further restriction by the board of supervisors of a county or the authority or a county sealer or his deputies to make arrests.

(b) There shall be no civil liability on the part of, and no cause of action shall arise against, any person, acting pursuant to subdivision (a) and within the scope of his authority, for false arrest or false imprisonment arising out of any arrest which is lawful or which the arresting officer at the time of such arrest, has reasonable cause to believe was lawful. No such officer shall be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

(c) Any sealer may serve all processes and notices throughout the state; provided, that county sealers and their deputies are authorized to serve processes and notices only within the boundaries of the county which employs them.

Department of Food and Agriculture County - State Weights and Measures		<input checked="" type="checkbox"/> MISDEMEANOR	
Agency: <u>Division of Measurement Standards</u>			
NOTICE TO APPEAR		NONTRAFFIC	
Date	Time	Day of Week	Case No.
<u>10/28</u> 19 <u>92</u>	<u>11:20</u>	<input checked="" type="checkbox"/> AM <u>Wednesday</u>	<u>22352</u>
Name (First, Middle, Last) <u>Cottonwood Canyon Ranch / Elizabeth Cruz</u>			
Mailing Address		City	State/Zip
<u>Rt. 4 Box 15</u>		<u>Bishop</u>	<u>CA 93514</u>
Business Address		City	State/Zip
<u>Rt. 4 Box 15</u>		<u>Bishop</u>	<u>CA 93514</u>
Driver's License No.	State	Birthdate	
<u>Y1151868</u>	<u>CA</u>	<u>12/23/30</u>	
Sex	Hair	Eyes	Height
<u>F</u>	<u>Red</u>	<u>Grn</u>	<u>5'5"</u>
Employed By		Occupation	Other Description
<u>Cottonwood Canyon Ranch</u>		<u>Owner</u>	
Vehicle License No.	State	Business License No.	
Offense(s)	Code	Section	Description of Offense
<u>1 CT.</u>	<u>BPC 12918(e)</u>		<u>Issued false weight cert.</u>
<u>1 CT.</u>	<u>BPC 12721</u>		<u>Issued tare weight w/o weighing</u>
<u>1 CT.</u>	<u>BPC 12724(a)</u>		<u>Weighted w/ person in vehicle</u>
	<u>BPC 12710</u>		<u>Strict liability</u>
Evidence Seized <input type="checkbox"/> Booking Required			
Location of Offense(s)		City of Occurrence	
<u>Rt. 4 Box 15 Hwy 6-22 miles N of Bishop, CA</u>		<u>Bishop, CA</u>	
<input type="checkbox"/> Violation(s) not committed in my presence, declared on information and belief.			
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.			
Date	Arresting or Issuing Officer	Badge No.	
<u>10/30/92</u>	<u>Robert B. Voss</u>	<u>101</u>	
Name of Arresting Officer, if different from Issuing Officer			
WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AT THE TIME AND PLACE INDICATED BELOW			
X Signature: <u>Elizabeth Cruz</u>			
BEFORE A JUDGE OR CLERK OF THE MUNICIPAL OR JUSTICE COURT			
ADDRESS <u>Mono County Courthouse</u>			
CITY <u>Bridgeport</u>		TELEPHONE (619) <u>932-5203</u>	
on the <u>8th</u> day of <u>December</u> 19 <u>92</u> at <u>9:00 a.m.</u>			
22352			
 * 2 2 3 5 2 *			
Form approved by the Judicial Council of California Rev. 1-1-90 P.C. 853.9, 521-005 (Rev. 6-91)		COURT'S COPY SEE REVERSE SIDE	

The Investigation Report

An investigation report must be completed for every Notice to Appear issued (citation). Three copies of the report are needed. One copy is kept by the issuing agency, one goes to the district attorney, and one to the judge.

Conclusion

Remember you are a public officer and not a peace officer. Do not use force – call a peace officer when necessary.

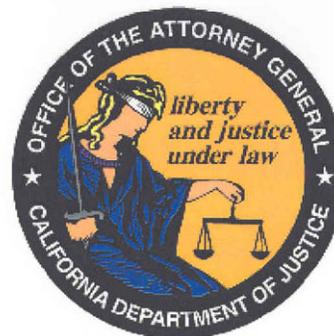
Civil Filing

For some violations of Business and Professions (B&P) Code, Division 5, criminal prosecution may not be the best approach for achieving compliance with the laws. In many cases violations of laws in Division 5 “Weights and Measures” are also violations of B&P Code Section 17200 “Unfair Competition, False or Deceptive Business Practices” or Section 17500 “False Advertisement”. The decision to proceed with a civil filing will be made by the District Attorney’s office or the Attorney General’s office, depending on which office decides to file the case. In some cases it may be a joint effort by both offices, or several District Attorneys may also join in the same case. The cases will be filed on behalf of and in the name of the people of the State of California.



Upon the completion of an investigation that appears to fit the criterion for a civil filing, the investigator will need to schedule a meeting with the District Attorney or appropriate Deputy Attorney General to present the case to them. Remember that it is best to deal with a Deputy District Attorney or Deputy Attorney General who is familiar with consumer protection and prosecutions under B&P Code Sections 17200 and 17500, and preferably familiar with weights and measures violations.

Prior to meeting with the District Attorney’s office or Attorney General’s office to present your case, you should review your complete case file and make copies of your report and evidence. You should be prepared to explain the importance of your case, the possible consumer harm or monetary loss to a consumer, what you feel the appropriate penalty should be, and the justification for and the amount of cost recovery you are requesting.



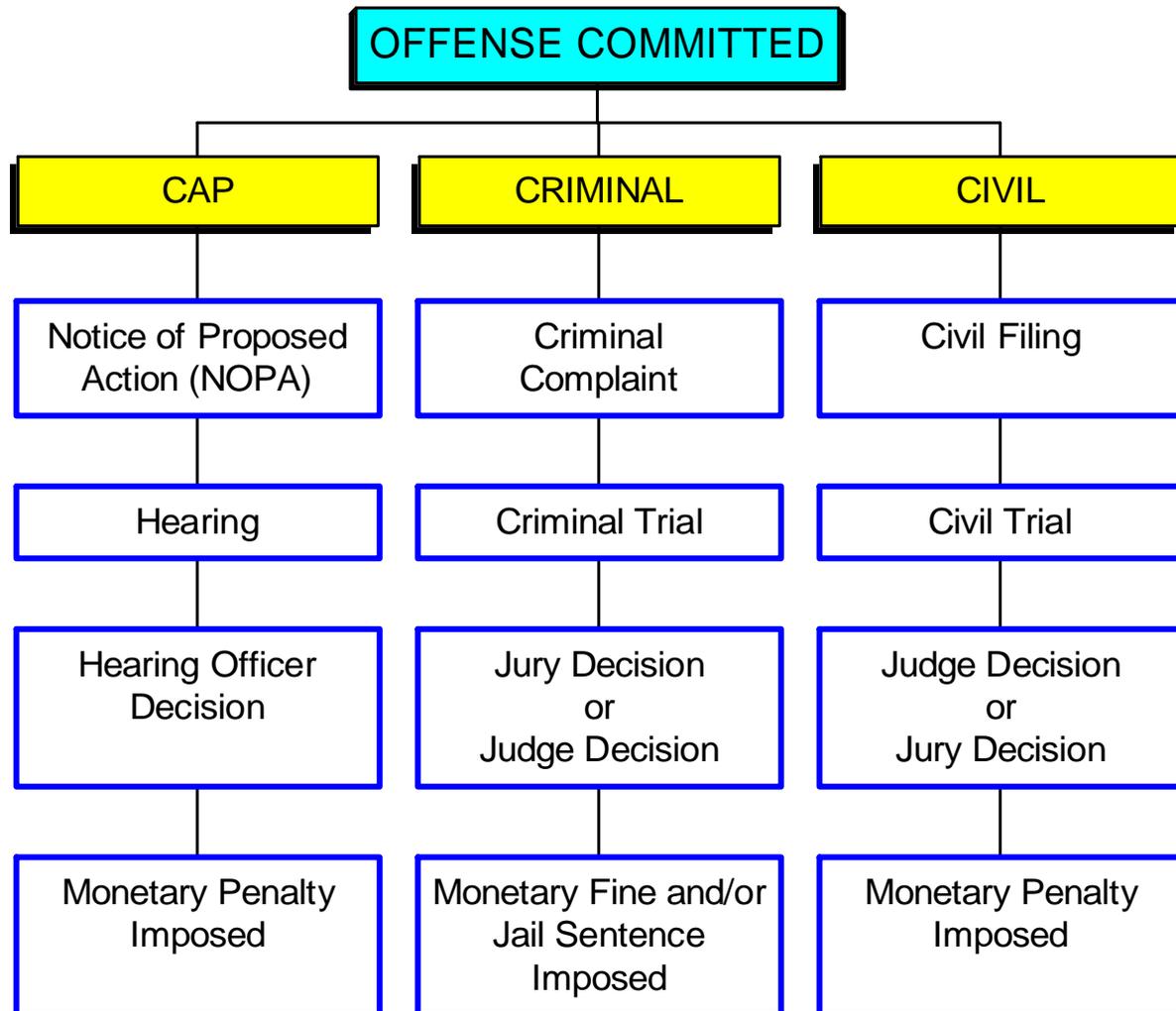
Civil Fling Statutes

Relevant Business and Professions Code Sections

17200	As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.
17203	Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.
17204	Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.
17205	Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.
17206(a)	Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

<p>17206(b)</p>	<p>The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.</p>
<p>17207(a)</p>	<p>Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.</p>
<p>17500</p>	<p>It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine.</p>

Comparison of the Steps in Civil Administrative Penalty, Criminal and Civil Actions





SELF-EVALUATION QUESTIONS

1. What is the benefit of using the Civil Administrative Procedure?
2. What types of violations would be suitable for filing with the district attorney or the California Attorney General.
3. Who has the authority to levy a civil administrative penalty?
4. To whom may a respondent to civil penalty appeal?
5. Under what circumstances does a sealer have the authority to arrest without a warrant?



GLOSSARY

A LISTING OF TERMINOLOGY AND ACRONYMS MOST COMMONLY USED BY WEIGHTS AND MEASURES OFFICIALS.

NOV – Notice of Violation

Yellow Tag – Tag used to identify an unapproved device (so called because of its color).

Red Tag – Tag used to denote that a device is out of order and removed from commercial service (so called because of its color). Note: The tags used to remove bulk automotive products from sale are also red.

CAP – Civil Administrative Penalty

Citation – Notice to appear in court.



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Rath Packing Company v. Becker – 357 F. Supp. 529

Rath Packing Company v. Jones – 430 U.S. 519



SELF-EVALUATION ANSWERS

Segment 1

1. "To preserve and maintain the standards of measurement essential in providing a basis of value comparison and fair competition in the marketplace."
2. Proof is not required of the intent to violate the law.
3. The U.S. Constitution, fifth and fourteenth amendments.
4. Adequate notice and meaningful opportunity to be found.
5. It is appropriate to issue an Notice of Violation for any violation.
6. Lack of documentation may jeopardize future legal action.
7. Notifies the violator of the crime. Is evidence of the notification. May help to show intent in the commission of the crime.
8. The actual perpetrator of the crime and/or their employer.
9. Use certified mail with return receipt for proof of delivery.
10. May be a specially designed form or incorporated into other documents such as field inspection reports.

Segment 2

1. The tags used to mark a device "out of order" are red and the "red tagging a device" has come to mean "removing incorrect device from service".
2. The color of a "condemned tag" is red and may be confused with the tag used to remove incorrect devices from service.
3. The tags used are different. Bulk gasoline will be removed from sale with a "condemned tag", the packages of antifreeze are accompanied by an off-sale order and a "hold-off sale" tag.



SELF-EVALUATION ANSWERS

4. He has several options. Sort the good from the bad, rework the product, relabel or return to the packer.
5. A copy of a dated signed receipt describing the seized item.
6. When he determines that it is not susceptible to repair or it has not been repaired within 30 days of being “red tagged”.
7. Generally yes except for non conforming petroleum products and adulterated or mislabeled automotive products when removal is permissive.
8. Yes, but only those in commercial service that are unapproved or incorrect.
9. No, except for incorrect devices not susceptible to repair.
10. No, final disposition is subject to a decision by a court.
11. The person could claim they were not afforded due process and any further legal action may fail.

Segment 3

1. It allows the sealer to impose a penalty for violations without having to go through the district attorney or the court. (Page 23)
2. Weights and measures violations involving unfair business practice or unfair competition. (Page 23)
3. A sealer. (Page 25.)
4. To the Secretary of the California Department of Food and Agriculture. (Page 25)
5. When the sealer has reason to believe that the person has violated any provision of Division 5 of the Business and Professions Code in the sealer’s presence. (Page 27)



We would appreciate your taking a few moments to complete our training evaluation feedback form. We welcome your comments and any suggestions you might have regarding Training Module 3. You may E-mail your response to us at DMS@cdfa.ca.gov or mail to Division of Measurement Standards at 6790 Florin Perkins Road, Suite 100, Sacramento CA 95828-1812.

1. Did this module fulfill your expectations?
2. What did you like/dislike about this module?
3. What areas would you like to see improved?
4. What specific changes, if any, would you recommend?
5. How could this module be better organized to make it easier to follow and learn from?
6. Was this module too basic or too advanced for someone with an entry level background in weights and measures?
7. Additional comments or suggestions.