

2024 CFLCA Labor Forum

- ▶ **Cal/OSHA Safety & Citations**
- ▶ **William Krycia, MPH, CIH** (1985-2023)

Disclaimer

- ▶ The information contained in this presentation is provided for informational purposes only and should not be construed as legal advice on any subject matter. I am not an attorney. Any recommendations are not a substitute for legal advice. Please consult with an attorney if you need legal advice.



Attorney Consultation

Explore CFLCA's member benefits including free legal consultations, training services, and advocacy. Eligible members can schedule consultations based on company size.

CFLCA Members-Only Benefit: Free Attorney Consultation

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Are you a CFLCA member and need a legal question answered by a qualified attorney?

CFLCA members are eligible to receive one complimentary attorney consultation in the calendar year with Erica Rosasco from [Rosasco Law Group](#).



Call length is based on the following membership criteria:

- Small FLC companies -- 20 minutes
- Medium FLC companies -- 40 minutes
- Grower companies -- 40 minutes
- Large FLC companies -- 60 minutes

To take advantage of this special membership benefit and schedule your consultation, complete the request form on this page. Suggested question topics can include any of the following (or more):

- Wage and hour claims
- Meal & rest period disputes
- Class actions
- Private Attorney General Act (PAGA)
- Wage and hour audits
- COVID-19 compliance and regulations
- Vineyard management contracts
- Employment law services
- Farm labor contracts
- I-9 compliance
- California Labor Commissioner
- DFEH & EEOC
- Occupational Health and Safety
- Worker's Compensation Appeals Board
- US Department of Labor

Document review is not included with free consultation.

**We wish to express confidence in the consultation information provided by Erica Rosasco. However, the content of these*

Cal/OSHA Safety and Citations

- ▶ Citation process (Cal/OSHA P&P)
 - ▶ Citation types and penalties
 - ▶ Cal/OSHA 1BY form
- ▶ Frequent citations
- ▶ FAME Report
- ▶ The Process
 - ▶ Informal Conference
 - ▶ Appeal
 - ▶ OASIS
- ▶ Review

Cal/OSHA Safety and Citations

- ▶ **Cal/OSHA citation types**
(<https://www.dir.ca.gov/DOSH/pol/P&pc-1B2.pdf>)
 - ▶ General
 - ▶ Regulatory
 - ▶ Serious
 - ▶ Willful Serious

Cal/OSHA Safety and Citations

- ▶ Cal/OSHA citation types

- ▶ General

- ▶ A violation should be classified as “general” if the violation (1) has a direct relationship to the occupational safety and health of employees, and (2) is specifically determined not to be of a serious nature.

- ▶ Penalties: Up to \$15,873

Cal/OSHA Safety and Citations

- ▶ **Cal/OSHA citation types**

- ▶ **Regulatory**

- ▶ Classified as “regulatory” if it (1) pertains to a permit, posting, reporting, or recordkeeping requirement established by regulation or statute
 - ▶ Penalty: Up to \$15,873

Cal/OSHA Safety and Citations

- ▶ Cal/OSHA citation types

- ▶ Serious

- ▶ Concept of “realistic possibility” of serious injury vs “substantial probability”

- ▶ Realistic possibility means “a prediction clearly within the bounds of human reason, not pure speculation.”

- ▶ Penalties: Up to \$25,000

Cal/OSHA Safety and Citations

▶ Cal/OSHA citation types

- ▶ **Willful Serious:** : (1) the employer knew the provisions of the cited regulation and intentionally violated them, or (2) the employer had actual knowledge of an unsafe or hazardous condition and made no reasonable effort to correct it.
- ▶ **Penalty range:** \$11,337-\$158,727
- ▶ **Note:** Willfull Serious citations have a higher probability of being associated with separate criminal legal action

Cal/OSHA Safety and Citations

- ▶ **“Notice of Intent to Classify as Serious”
(Cal/OSHA 1BY notice)**
- ▶ **“The purpose of the 1BY process is to clearly communicate to the employer that the Division believes there is a serious violation and to give the employer an opportunity to show why a serious violation does not exist”**

Cal/OSHA Safety and Citations

- ▶ **Notice of Intent to Classify as Serious” (Cal/OSHA 1BY notice)**
- ▶ “... inform the employer that because the investigation is still open, any information or statements the employer provides could potentially be used to support citations issued against the employer.”
 - ▶ **From LC 6432:**
 - ▶ If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b), the employer shall not be barred from presenting that information at the hearing and no negative inference shall be drawn.

Cal/OSHA Safety and Citations

- ▶ Frequently cited Cal/OSHA standards for Agriculture in California
- ▶ Data updated to reflect FY24 (10/1/23-9/30/24)

The screenshot shows the OSHA website interface. The URL in the browser is `osha.gov/ords/imis/citedstandard.naics?p_esize=&p_state=CACalifornia&p_naics=11`. The page title is "Frequently Cited OSHA Standards Results" with sub-headers "NAICS Code: 11 Agriculture, Forestry, Fishing and Hunting" and "Establishment Size: ALL sizes". A note states: "Listed below are the standards which were cited by California OSHA for the 11 NAICS Code for establishments with ALL sizes employees, that were issued during the period October 2023 through September 2024. Penalties shown reflect current rather than initial amounts. For more information, see definitions." Below this is a table with columns for Standard, Citations, Inspections, Penalty, and Description.

Standard	Citations	Inspections	Penalty	Description
Total	714	284	\$2,375,143	All Standards cited for Agriculture, Forestry, Fishing and Hunting
3395(I)	50	50	\$21,920	--- No Description Found ---
3203(A)(X)	46	42	\$185,053	--- No Description Found ---
3203(A)	43	43	\$82,200	--- No Description Found ---
3457(C)(X)	39	26	\$24,980	--- No Description Found ---
342(A)	28	28	\$98,500	--- No Description Found ---
3441(A)(X)	24	20	\$228,630	--- No Description Found ---
3395(C)	18	18	\$53,220	--- No Description Found ---
3395(D)(X)	14	14	\$125,725	--- No Description Found ---
3395(H)(X)	13	13	\$36,840	--- No Description Found ---
3328(A)(X)	11	11	\$101,450	--- No Description Found ---
3203(B)(X)	8	8	\$2,590	--- No Description Found ---
3276(E)(X)	8	8	\$13,695	--- No Description Found ---
461(A)	8	8	\$2,450	--- No Description Found ---
24730001	7	7	\$5,430	--- No Description Found ---
3314(C)	7	7	\$47,325	--- No Description Found ---
3328(G)	7	7	\$40,530	--- No Description Found ---
3382(A)	7	7	\$22,010	--- No Description Found ---
3650(T)(X)	7	6	\$25,265	--- No Description Found ---
3668(F)	7	7	\$2,365	--- No Description Found ---
4002(A)	7	7	\$61,160	--- No Description Found ---
3314(G)(X)	6	6	\$2,885	--- No Description Found ---
3380(F)(X)	6	5	\$20,685	--- No Description Found ---

Cal/OSHA Safety and Citations

- ▶ **Frequently cited Cal/OSHA Title 8 standards:**
 - ▶ **3395 Outdoor heat**
 - ▶ **3203 IIPP**
 - ▶ **3457 Field Sanitation**
 - ▶ **342 Reporting serious injury**
 - ▶ **3441 Operation of Ag equipment**

Cal/OSHA Safety and Citations

- ▶ **High Impact cited Cal/OSHA standards**
 - ▶ 342 Reporting serious injury, ~\$5k
 - ▶ 3441 Operation of Ag equipment, ~\$9.5k
 - ▶ 3328 Machinery and Equipment, ~\$9.2k
 - ▶ 3314 Lock out/Tag out, ~\$15k
 - ▶ 3440 Ag equipment (power transmission components), ~\$15k

Cal/OSHA Safety and Citations

- ▶ Cal/OSHA has 6 months to complete it's inspection
- ▶ The inspector will call or email to schedule a “closing conference”
- ▶ May be virtual and citations may be initially emailed.
- ▶ Time starts!

Cal/OSHA Safety and Citations

- ▶ **Penalty calculations for each type of citation are affected by multiple factors:**
 - ▶ Good faith
 - ▶ Size of establishment
 - ▶ History
 - ▶ Severity
 - ▶ Extent
 - ▶ Likelihood
 - ▶ Abatement credit

- ▶ Note: a few citations have fixed or minimum penalties
 - ▶ Field Sanitation, minimum of \$750
 - ▶ Reporting Serious injury, \$5,000



Cal/OSHA Safety and Citations

- ▶ The FAME Report
- ▶ Federal Annual Monitoring Evaluation
- ▶ Period 10/1/22-9/30/23
- ▶ California had a contest rate of 49.04% during FY 2023
- ▶ Recent Federal monitoring (FAME) reports highlight that approximately 24% of inspection case files with citation did not have adequate justification for the citation.

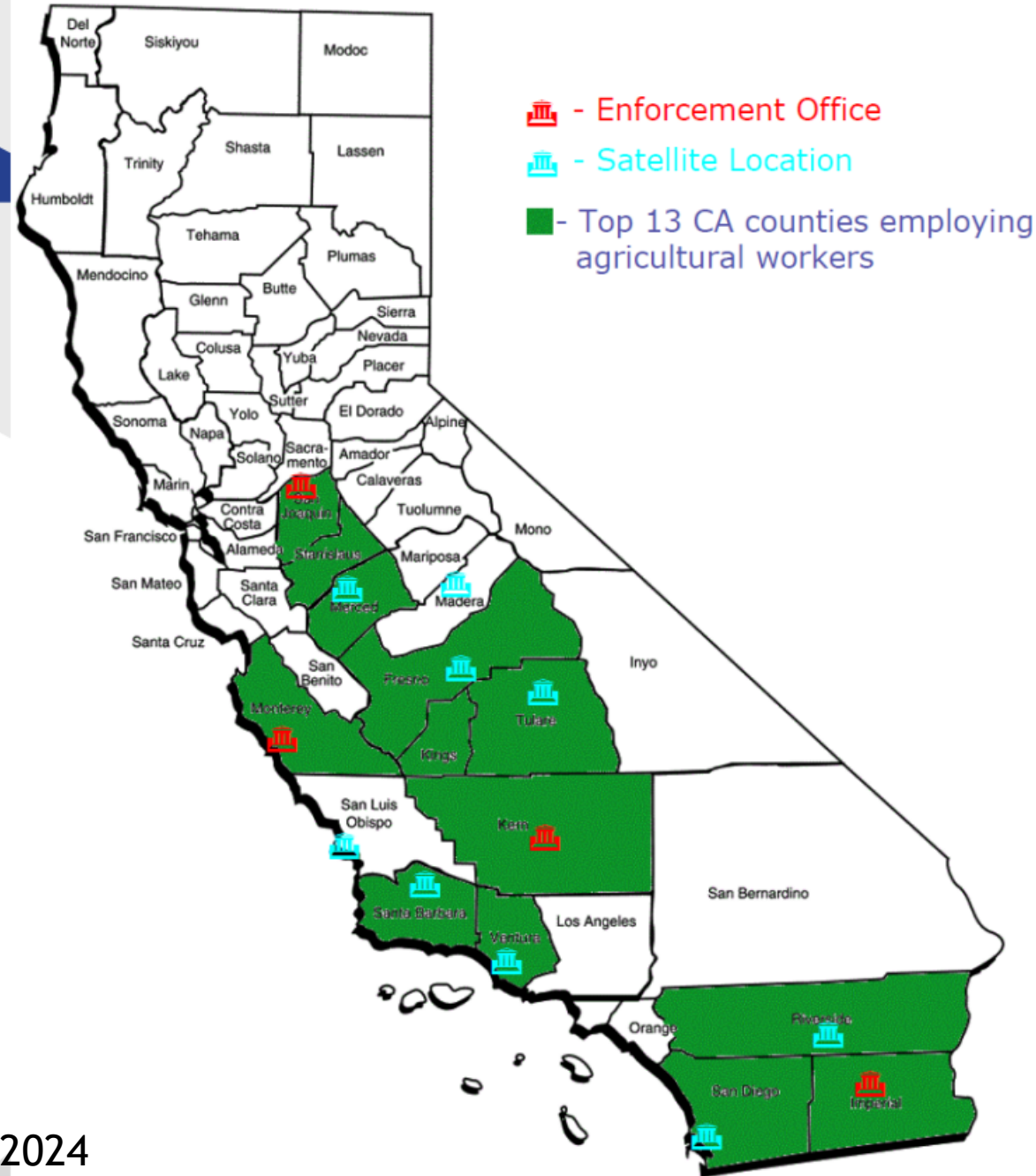
Agricultural Enforcement Task Force and Outreach Unit (AETFO)

• Enforcement District Offices

- Lodi
- Salinas
- Bakersfield
- El Centro

• Satellite Locations

- Merced
- Madera
- Fresno
- Tulare
- San Luis Obispo
- Santa Barbara
- Ventura
- Riverside
- San Diego



Source: Cal/OSHA Advisory Meeting August 2024

Cal/OSHA Safety and Citations

- ▶ **Why appeal?**
 - ▶ **Citation not warranted**
 - ▶ **Penalty reduction**
 - ▶ **“Protect the brand”**
 - ▶ **To avoid having a base for a potential repeat citation**
 - ▶ **Other reasons**

Cal/OSHA Safety and Citations

- ▶ **Contesting and appealing a citation**
 - ▶ **Time limits**
 - ▶ **Informal Conference**
 - ▶ **Formal appeal**

Cal/OSHA Safety and Citations

- ▶ **Contesting and appealing a citation**
 - ▶ **Time limits**
 - ▶ **An employer may contest any Division enforcement action within fifteen (15) working days of the receipt of an enforcement action.**

Cal/OSHA Safety and Citations

- ▶ **Contesting and appealing a citation**
 - ▶ **Informal Conference**
 - ▶ **“At the informal conference, the employer may discuss requests for extension of abatement dates, evidence that indicates that no violation exists, proposed penalty amounts, violation classifications, or any other matter relating to the health and safety investigation.”**
 - ▶ **From “Guide to Cal/OSHA” from DIR**
 - ▶ **See: <https://www.dir.ca.gov/DOSHPOI/P&PC-20.pdf>**

Cal/OSHA Safety and Citations

- ▶ **Contesting and appealing a citation**
 - ▶ **Informal Conference**
 - ▶ **Timing**
 - ▶ **Within 10 days of citation issuance or:**
 - ▶ In the event an informal conference cannot be held within the 10-working day period, the District Manager, or his or her designee, shall telephone the employer to explain the employer's 15- day right to appeal, document the reasons in the case file why an informal conference cannot be held within the 10-working day period, and schedule an informal conference at the Division's and the employer's earliest opportunity.

Cal/OSHA Safety and Citations

▶ Contesting and appealing a citation

▶ Informal Conference

▶ Recommendations:

- ▶ Request a full and complete copy of your inspection case file prior to your meeting
- ▶ Pay particular attention to the Cal/OSHA form 1B which should document the Division's evidence supporting the violation
- ▶ Have the Division's representative explain the evidence for the citation, the penalty calculations, and the requested abatement first



► Discussion and Recommendations

Cal/OSHA Safety and Citations

► Contesting and appealing a citation

► Formal appeal

► The Cal/OSHA Appeals Board:

<https://www.dir.ca.gov/oshab/oshab.html>

The screenshot shows the official website of the Occupational Safety & Health Appeals Board (OSHAB). At the top, there is a navigation menu with links for Labor Law, Safety & Health, Workers' Comp, Self Insurance, and Apprenticeship. The main heading is "Occupational Safety & Health Appeals Board (OSHAB)". Below this, a mission statement reads: "The mission of the Appeals Board is to fairly, timely and efficiently resolve appeals and to provide clear, consistent guidance to the public, thereby promoting workplace safety and health." A paragraph explains that the board is a three-member, judicial body appointed by the Governor and confirmed by the Senate, handling appeals from private and public-sector employers regarding citations issued by the Division of Occupational Safety and Health for alleged violations of workplace safety and health laws and regulations.

There is a section titled "File Your Appeal Online:" featuring the OASIS logo (California Occupational Safety and Health Appeals Board) and instructions: "Click on the OASIS logo to file your appeal. You can also view all the instructions and FAQs about the new online system. Parties to the case may also upload documents to the case or view the hearing calendar." Below this are links for "Appeal Information in Additional Languages" (Español, Mandarin, Cantonese, Vietnamese, Korean) and "Learn More About Video Hearings:" (Click on the OASIS logo, or Click Here).

Other sections include "To File Your Appeal by Mail:" (Appeal Form and Instructions), "COVID-19 Procedures for Remote and In-Person Operations" (COVID-19 Remote and In-Person Office Operations), "Participating in an Appeal" (How Workers May Participate in the Appeal Process, Disability Accommodations, Translations), "Meetings" (Public Meetings, Rulemaking), "Decisions" (Precedential Decisions of the Appeals Board, Appeals Board Decisions and Denials of Petitions for Reconsideration, Administrative Law Judge Decisions), and "Other Information" (Laws and Regulations, Public Records Requests).

A blue box highlights "PANDEMIC-RELATED APPEALS LISTED" with the text: "A list of appeals involving citations related to COVID-19 can be found on the Public Meetings listing page." At the bottom, a "What's New" section lists a "Stakeholder Roundtable Discussion on October 15, 2024".

Cal/OSHA Safety and Citations

- ▶ **Timing is critical!!!**
 - ▶ You only have a maximum of 15 working days to file for an appeal
 - ▶ Late filings are usually rejected
 - ▶ You may drop the appeal anytime you wish
 - ▶ If dropped, means accepting the citations and owing the penalty amount



Cal/OSHA Safety and Citations

▶ Two ways to appeal

▶ In writing:

▶ <https://www.dir.ca.gov/oshab/appealf orm.pdf>

STATE OF CALIFORNIA
Department of Industrial Relations
Occupational Safety and Health Appeals Board

Clear Form

Please mail all correspondence to:
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

OSHAB APPEAL FORM

Note: You have a total of 15 working days from receipt of a citation to file an appeal. Failure to file a completed form may result in dismissal of the appeal. Late appeals will not be accepted unless good cause is shown.
Please print legibly or type all information.

A. CITATION INFORMATION		
<i>Please complete the following information as indicated on your citation.</i>		
1. Case (Inspection) #:	Issuance date:	Reporting ID#
2. Employer:	Date Citation Received:	
3. Employer legal name or DBA (Optional):		
4. Employer contact:		
5. Address:		
City:	State:	ZIP code:
6. Primary phone:	Secondary phone:	
7. Email address:		
8. Preferred method of service: <input checked="" type="radio"/> U.S. Postal Service OR <input type="radio"/> Email <i>(Choose one only)</i>		
B. REPRESENTATIVE INFORMATION (if any)		
1. Firm name:		
2. Representative name:		
3. Address:		
City:	State:	ZIP code:
4. Primary phone:	Secondary phone:	
5. Email address:		
6. Preferred method of service: <input checked="" type="radio"/> U.S. Postal Service OR <input type="radio"/> Email <i>(Choose one only)</i>		
C. CONTACT INFORMATION and SIGNATURE		
I am the: Representative <input type="checkbox"/> Employer <input type="checkbox"/> Other <input type="checkbox"/>		
<i>I understand that it is my responsibility under Appeals Board regulations to notify the Appeals Board in writing if there are any changes to either employer or representative address, telephone number, and/or email address.</i>		
Signature of employer or employer's representative		Date
Print name and title		Phone No.

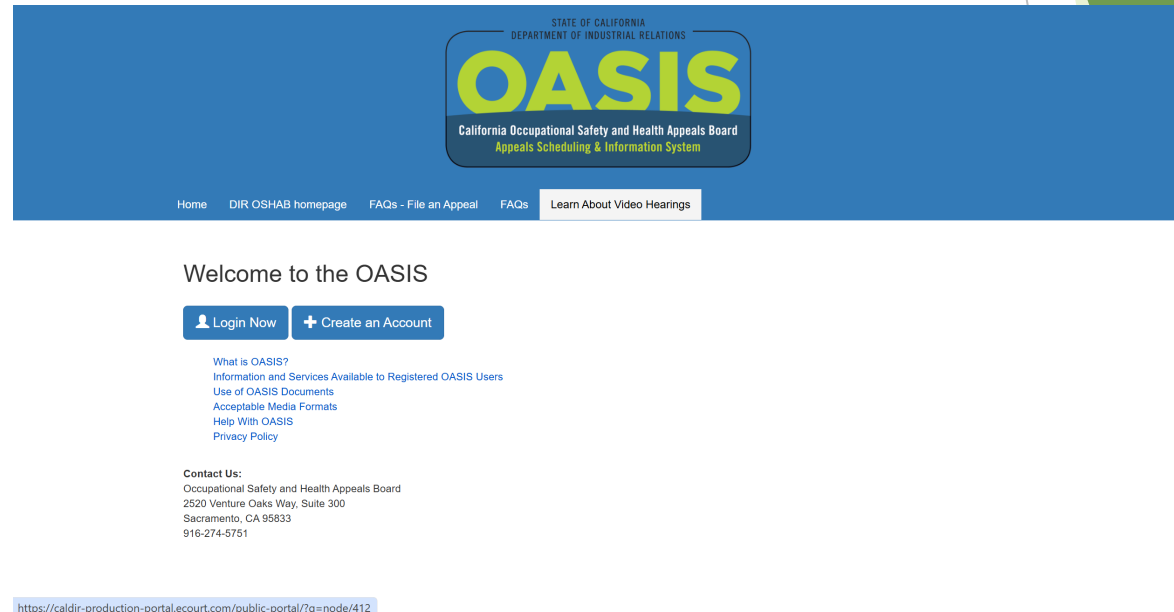
OSHAB Appeal Form 100 (Rev. 10/20) Page 1 of 2

Cal/OSHA Safety and Citations

▶ Two ways to appeal

▶ Online:

▶ <https://caldir-production-portal.ecourt.com/public-portal/>



The screenshot shows the OASIS website interface. At the top, there is a blue header with the OASIS logo, which includes the text "STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS" and "California Occupational Safety and Health Appeals Board Appeals Scheduling & Information System". Below the header is a navigation menu with links for "Home", "DIR OSHAB homepage", "FAQs - File an Appeal", "FAQs", and "Learn About Video Hearings". The main content area features a "Welcome to the OASIS" message, followed by "Login Now" and "Create an Account" buttons. A list of links includes "What is OASIS?", "Information and Services Available to Registered OASIS Users", "Use of OASIS Documents", "Acceptable Media Formats", "Help With OASIS", and "Privacy Policy". A "Contact Us" section provides the address and phone number for the Occupational Safety and Health Appeals Board. At the bottom, a URL bar shows the current page address: "https://caldir-production-portal.ecourt.com/public-portal/?a=node/412".

Cal/OSHA Safety and Citations

- ▶ **Grounds for appeal:**
 - ▶ Specific ground(s) for this appeal are:
 - ▶ The safety order was not violated.
 - ▶ The classification (i.e. serious, willful, repeat) is incorrect.
 - ▶ The abatement requirements are unreasonable:
 - ▶ Required changes Time allowed to complete changes
 - ▶ The proposed penalty is unreasonable.

Cal/OSHA Safety and Citations

- ▶ **Discussion and recommendations**

Cal/OSHA Safety and Citations

▶ Review

- ▶ If you are a CFLCA member, you have a member benefit of a free attorney consultation
- ▶ Don't be afraid to contest citations!
- ▶ Know that if you don't the citations go on your record as a potential basis for a repeat citation for 5 years
- ▶ Strongly recommend that you:
 - ▶ Have an updated and implemented IIPP
 - ▶ Keep training and inspection records
 - ▶ Read the damn CFLCA Newsletter!

Cal/OSHA Safety and Citations 2024 CFLCA Labor Forum

- ▶ **Thank you!**
- ▶ **Bill Krycia MPH, CIH** (1985-2023)
- ▶ Wjkycia02@outlook.com