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March 28, 2017

To: The Honorable Jill N. Tokuda, Chair,
The Honorable Donovan M. Dela Cruz, Vice Chair, and
Members of the Senate Committee on Ways and Means

Date: Tuesday, March 28, 2017
Time: 1:30 p.m.
Place: Conference Room 211, State Capitol

From: Linda Chu Takayama, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 1114 HD1 SD1 Relating to Occupational Safety and Health Penalties

I. OVERVIEW OF PROPOSED LEGISLATION

HB1114 HD1 SD1 proposes to increase fines for employers who violate the Hawaii Occupational and Safety rules pursuant to federal law. The civil penalties adjustments will bring the State into compliance with the federal Occupational Safety and Health Administration (OSHA) requirement that state standards and enforcement must be "at least as effective as federal OSHA's standards and enforcement program."

HB1114 HD1 SD1 will also allow the DLIR Director to adjust penalties on or about December 15 of each year and effective the following January of each year, using the guidance of the Office of Management and Budget pursuant to the 2015 Inflation Adjustment Act, section 701 of Public Law 114-74.

Staying in conformity with OSHA standards helps ensure federal funding for the Hawaii Occupational Safety and Health Division (HIOSH). Federal funding for HIOSH is $1,937,700 in the current Fiscal Year 2016-2017.

The Department strongly supports HB1114 HD1 SD1 to maintain conformity to federal law and offers amendments to help alleviate the increasing legal expenses of the Division and to address the issue flagged by the Committee on Judiciary and Labor in the committee report (S.C.R. No. 975).

II. CURRENT LAW

The federal Occupational Safety and Health Administration (OSHA) was exempt from Congress's 1990 law directing agencies to adjust their civil monetary penalties to keep up with inflation, so the agency's penalties have not increased since 1990.

On November 2, 2015 Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Inflation Adjustment Act) as part of the Bipartisan Budget Act of 2015. The new law directs agencies to adjust their civil monetary penalties for inflation every year.

III. COMMENTS ON THE HOUSE BILL

DLIR strongly supports HB1114 HD1 SD1 to maintain conformity with federal law.

Congress passed the Inflation Adjustment Act in 2015 to begin annually adjusting penalties and directs agencies across the federal government to determine the last time their penalties were increased (other than under the prior inflation act) and to adjust their penalties for inflation from that date.

OSHA's penalties – which had not been raised since 1990 – increased by 78 per cent, with its top penalty for serious violations rising from $7,000 to $12,471 and its top penalty for willful or repeated violations rising from $70,000 to $124,709.

HB1114 HD1 SD1 will improve the Department's ability to promote compliance with workplace safety and health standards by increasing monetary penalties, which have been recognized to be an effective deterrent. The public and workers will also continue to benefit from adequate enforcement of workplace safety and health laws. Moreover, greater compliance with workplace safety and health standards will reduce costly injuries and fatalities and therefore reduce Workers' Compensation costs for employers.

DLIR received a letter (attached) on July 1, 2016, from federal OSHA regarding the requirement for states to adopt OSHA's maximum penalty levels and thereafter increase maximum penalties based on inflation.

These penalties are the statutory maximum penalties, although HIOSH almost always negotiates penalties that are significantly lower after application of penalty adjustment factors for size, good faith, history and other factors.

§396-10(j) states:

> The director shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity

of the violation, the good faith of the employer, and the history of previous violations

The penalty structure in section 396-10 of the Hawaii Occupational Safety and Health Law (chapter 396, Hawaii Revised Statutes) is designed *primarily to provide an incentive for preventing or correcting violations voluntarily*, not only to the cited employer, but also to other employers. While penalties are not designed as punishment for violations, it is desired that the penalty amounts should be sufficient to serve as an effective deterrent to violations.

Both Federal OSHA and the Hawaii Occupational Safety and Health Division (HIOSH) detail the methodology of deriving penalty amounts through Field Operations Manuals (FOM). The following materials are taken from the HIOSH FOM.

For violations, the Gravity-Based Penalty is assigned as follows:

GRAVITY (Serious)		
Severity	Probability	Gravity Based Penalty – (before apply reductions)
High	Greater	$12,471
Medium	Greater	$10,689
Low	Greater	$8,908
High	Lesser	$8,908
Medium	Lesser	$7,126
Low	Lesser	$5,345
GRAVITY (Other than Serious)		
Minimal	Greater	$1,000-$12,471
Minimal	Lesser	$0

The size, good faith, and history adjustment factors would then be applied to the gravity adjusted base penalty.

SIZE REDUCTION	
Employees	Percent Reduction
1 – 10 (new level added by OSHA)	70%
11- 25	60%
26-100	30%
101-250	10%
251 or more	None

GOOD FAITH REDUCTION – Up to a maximum of 25%

A 25% reduction normally requires a written safety and health management system. In exceptional cases, an inspector may recommend a full 25% reduction for employers with 1-25 employees who have implemented an effective safety and health management system, but have not documented it in writing.
A 15% reduction is normally given for an employer with a documented and effective safety and health management system with only a few incidental deficiencies.
HISTORY REDUCTION – 10%
A reduction of 10% is given to employers who have been inspected by OSHA nationwide, or by any State Plan, and employers were found to be in compliance or not issued any Serious violations in the last five years.

The penalty adjustments are applied serially for each factor to the gravity-based amount in the following sequence: history, good faith and then size.

Example

Gravity Based Penalty – High Severity, Lesser Probability (A frayed electric cord that could cause electric shock or death to worker)	Adjustment	$8,908
History (no serious, willful, repeat in past)	10%	-$891
Good Faith (effective written S & H program	25%	-$2,004
Employment Size = 25	60%	-$3,608
Final Penalty		$2,405

HIOSH staff can only inspect a fraction of all the covered employers annually for the safety and health well-being of their employees.

Employer population (including Government)*: 37,128
Number of employees (including Government)*: 626,330
(*2014 data)

HIOSH inspection staff (range due to turnover): 11 to 17

Inspections per year (FY2016): 430

Violations citations (FY2016): 1333

- Serious: 965
- Other than Serious: 321
- Repeat: 41
- Willful: 1

The proposed penalties in HB1114 HD1SD1 reflect both minimum and maximum

amounts and the following table provides the minimum and maximum penalties:

Penalty	Minimum	Maximum
Willful	$8,908	$124,709
First Repeat Serious	$3,207	$124,709
Serious	$891	$12,471
First Repeat Other than Serious	$356	$12,471
Other than Serious	$0	$12,471

DLIR offers the following language to address the issue regarding 396-10(f) in the proposal that prescribes the amount for a minimum penalty for repeat violations. The proposed language will take away the statutory minimum penalty requirement for repeat violations. However, it will not change the statutory minimum for wilful violations. This proposed change tracks the federal language for penalties in Occupational Safety and Health Act of 1970, Section 17. Therefore, HIOSH will still be in compliance with the federal requirement that state plans must be as effective as OSHA standards. Further, this proposed language will properly reflect the procedures in the HIOSH FOM for penalty calculations and reflect how HIOSH has been calculating their penalties:

(f) Any employer who wilfully or repeatedly violates this chapter, or any standard, rule, citation, or order issued under the authority of this chapter, shall be assessed a civil penalty of not [~~less than $5,500 nor~~] more than [~~$77,000~~] $124,709 for each violation[~~.~~], but not less than $8,908 for each wilful violation.

DLIR notes that it is encountering budgetary challenges due to both the increase in citations issued and the resulting increase in litigation costs involved in securing those settlements. DLIR notes that over the past three fiscal years, $3,560,000 in penalties have been deposited in the general fund. The department is seeking $275,000 per annum to help alleviate the corresponding increase in legal costs. The following are the amounts deposited into the general fund during the last three fiscal years:

FY2014 = $1.0 Million

FY2015 = $1.3 Million

FY2016 = $1.26 Million

Therefore, DLIR offers the following language creating a limited special fund to help alleviate the budgetary problems caused by the increased legal expenses.

SECTION X. Chapter 396, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§396- Workplace safety and health special fund.** (a) There is established in the state treasury the workplace safety and health special fund into which shall be deposited:

(1) All penalties collected pursuant to this chapter;

(2) All interest and earnings accruing from the investment of moneys in the fund; and

(3) Appropriations made by the legislature to the fund; provided that of all penalties received by the State each fiscal year, the sum representing the first $275,000 of those moneys shall first be deposited in the state treasury in each fiscal year to the credit of the workplace safety and health special fund. Any amounts over $275,000 shall be deposited to the credit of the state general fund. The workplace safety and health special fund shall be administered by the department.

(b) The workplace safety and health special fund shall be used to pay for legal expenses incurred by the department in the administration and enforcement of this chapter.

(c) All unencumbered and unexpended moneys in excess of $412,500 remaining on balance in the workplace safety and health special fund on June 30 of each year shall lapse to the credit of the state general fund."

SECTION X. There is appropriated out of the workplace safety and health special fund a sum not to exceed $275,000 or so much thereof as may be necessary for fiscal year 2017–2018 and the same sum or so much thereof as may be necessary for fiscal year 2018-2019 for legal costs incurred in the administration of chapter 396.

The sum appropriated shall be expended by the department of labor and industrial relations for the purposes of this Act.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 01 2016

Ms. Linda Chu Takayama
Director
Hawaii Department of Labor
and Industrial Relations
830 Punchbowl Street – Room 321
Honolulu, Hawaii 96813-0000

Dear Ms. Takayama:

In 2015, Congress passed the Bipartisan Budget Act of 2015, which amended the Federal Civil Penalties Adjustment Act of 1990 (FCPAA), and made the FCPAA applicable to the Occupational Safety and Health Administration (OSHA). The FCPAA requires OSHA to increase its maximum penalties by the cost-of-living adjustment (according to the CPI-U) since the penalty levels were last adjusted in 1990.

As directed, the Department of Labor, on July 1, 2016, published an Interim Final Rule in the Federal Register initiating implementation of this penalty increase. The new penalties will take effect after August 1, 2016. In each subsequent year, maximum penalties will be increased by the cost-of-living adjustment by January 15th. These penalties are the statutory maximum penalties, although OSHA often proposes penalties that are significantly lower after application of penalty adjustment factors for size, good faith, history and other factors.

OSHA-approved State Plans must have penalty levels that are at least as effective as federal OSHA's per Section 18 (c)(2) of the OSH Act; 29 C.F.R. 1902.37(b)(12). All State Plans will be expected to adopt OSHA's new maximum penalty levels and thereafter increase this maximum each year based on inflation.

We expect states to adopt the changes within six months as specified in 29CFR1953.4(b)(3). We recognize, however, that some State Plans have varied legislative calendars that may impact timely adoption. If you would like to discuss existing legal or legislative barriers that may prevent you from adopting this structure on the timeline specified above, please contact Douglas Kalinowski, Director, Directorate of Cooperative and State Programs at (202) 693-2200 as soon as possible.

As always, we will assist you any way that we can to make these statutorily required changes occur. We look forward to working with you on this very important issue.

Sincerely,

David Michaels, PhD, MPH

The Hawaii Business League

1188 Bishop St., Ste. 1003, Honolulu, Hawaii 96813
Phone: (808) 533-6819 Facsimile: (808) 533-2739

March 28, 2017

Testimony To: Senate Committee on Ways and Means
Senator Jill N. Tokuda, Chair

Presented By: Tim Lyons
President

Subject: H.B. 1114, HD 1, SD 1 – RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES

Chair Tokuda and Members of the Committee:

I am Tim Lyons, President of the Hawaii Business League, a small business service organization. We oppose this bill on general principles.

Taking the penalties for a serious violation from $7,700 to $12,471 and for repeat violations from $77,000 to $124,709 is a major increase and we doubt its effectiveness.

We appreciate the change in the report due date made in the last Committee and believe it will serve a better purpose.

There is no doubt HIOSH (OSHA) serves an excellent purpose. There are unfortunately, some employers that do not have as much concern for their employee's safety as they should. There are however the majority of employers who are concerned about their employees safety, if for no other reason but for lost time on the job and employee relations and their welfare.

It is been said that the increase in fines is necessary in order to provide a deterrent. We would suggest to you that a $77,000 fine is about as much as a deterrent that a small business could possibly need and if it is not, then there is no amount of money beyond that that would serve to act as a deterrent. We are aware that HIOSH has a formula for helping to reduce that penalty based on the severity, the history of that employer and the size of that employer however, just the fact that they are able to exercise the discretionary authority of going to this extent ($77,000 to $124,709) is enough to put many small employers out of business. One has to remember that the penalty payment that a small business will have to make comes strictly out of the bottom line; that is, it has to be after all other expenses, payroll, rents and other fees are already paid. In most cases if a small business had an extra $124,709 sitting around, they would have found something more useful to do with it.

Please note that on page 2, Section 396-10 (e) sets up a (maximum) fine for failing to put up a piece of paper at $12,471.

Again, we are not opposed to increased penalties and we are not opposed to adding deterrents to repeat employers who ignore safety rules and regulations. We are

however opposed to penalties that are so huge that they cause employers to go out of business and cease to provide any further job opportunities or tax revenues.

Unfortunately, we are aware that the United States Department of Labor is mandating a change so our testimony is just in protest and not to support anything contrary to the federal mandate.

Thank you.

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Website: www.gcahawaii.org

GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Uploaded via Capitol Website

March 28, 2017

TO: HONORABLE JILL TOKUDA, CHAIR, HONORABLE DONOVAN DELA CRUZ, VICE CHAIR, COMMITTEE ON WAYS AND MEANS

SUBJECT: **COMMENTS REGARDING H.B. 1114, HD1, SD1, RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES.** Amends fines for Hawaii Occupational Safety and Health violations and requires the Director of Labor and Industrial Relations to adjust the penalties each year pursuant to federal law. Requires the Director of Labor and Industrial Relations to report to the Legislature each year. Takes effect on 7/1/2050. (SD1)

HEARING
DATE: Tuesday, March 28, 2017
TIME: 1:30 p.m.
PLACE: Capitol Room 211

Dear Chair Tokuda, Vice Chair Dela Cruz and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over five hundred general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA has **comments** regarding H.B. 1114, HD1, SD1, Relating to Hawaii Occupational Safety and Health Penalties, which proposes to amend fines and penalties for Hawaii Occupational Safety and Health violations to mirror federal penalties put into place by Congress late last year, increasing fines approximately 75% from current levels. While fines and penalties are important to deter unsafe workplaces and ensure safety programs are in place that will protect all workers on a worksite, particularly construction, the proposed fine increases are quite exorbitant. Furthermore, it is GCA's understanding that the State Department of Labor and Industrial Relations (DLIR) proposed this measure to meet federal standards and to bring the State into compliance with federal OSHA requirement to be "at least as effective as" federal OSHA's standards and enforcement program.

The bill as written would increase the top penalty for serious violations from $7,000 to $12,471 per violation; and the top penalty for willful or repeated violation rising from $70,000 to $124,709. These increases could significantly impact both small and large companies that may have safety programs in place but may be viewed as coming up short in its program implementation due to a jobsite inspection by a new state safety inspector. There may be other options available to ensure proper safety measures are implemented among all industries that would not have the impact of putting companies out of business.

Thank you for the opportunity to present our views on this matter.

The Twenty-Ninth Legislature
Regular Session of 2017

THE SENATE
Committee on Ways and Means
Senator Jill N. Tokuda, Chair
Senator Donovan M. Dela Cruz, Vice Chair
State Capitol, Conference Room 211
Tuesday, March 28 2017; 1:30 p.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 1114 HD 1 SD 1
RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES

The ILWU Local 142 supports H.B. 1114 HD 1 SD 1, which amends fines for Hawaii Occupational Safety and Health violations and requires the Director of Labor and Industrial Relations to adjust the penalties each year pursuant to federal law. The bill also requires the Director of Labor and Industrial Relations to report to the Legislature each year.

The Hawaii Revised Statutes explicitly provides in Chapter 396, that all employers in the State of Hawaii have a duty to provide their employees with a safe and healthy worksite. The statute provides that if this responsibility is violated fines can be assessed against the employer. Since 1990, the federal Occupational Safety and Health Administration has not increased its fines and neither has the State of Hawaii.

Most employers obey the law and out of concern for their employees, will take the steps necessary to maintain a safe and healthy environment at their worksites. However, for those employers who believe only in maximizing their bottom line, a financial deterrent is an important tool for enforcing compliance with the law.

For over two decades the fine amounts for violations of the Occupational Safety and Health Laws have not changed. During that same period of time, the effectiveness of those fines have lessened. Therefore, H.B. 1114 HD 1 SD 1 will restore maximum effectiveness of the economic deterrents, and allow the Department of Labor and Industrial Relations to make best use of these tools when necessary to carry out the intent of the law.

This makes sense in the context of the federal law, passed in 2015, which directs agencies to adjust their civil monetary penalties for inflation every year. We feel that H.B. 1114 HD 1 SD 1 will position the Depart of Labor to most effectively administer compliance with the law, and lead to saving many lives and preventing serious injuries. Prevention of these deaths and injuries at the worksite, will also decrease employers' costs for workers' compensation insurance.

The ILWU Local 142 urges passage of H.B. 1114 HD 1 SD 1. Thank you for the opportunity to share our views on this matter.

Via E-mail: WAMTestimony@capitol.hawaii.gov
Facsimile: (808) 587-7220

March 28, 2017

TO: HONORABLE JILL TOKUDA, CHAIR, HONORABLE DONOVAN DELA CRUZ, VICE CHAIR, COMMITTEE ON WAYS AND MEANS

SUBJECT: **OPPOSITION TO H.B. 1114, HD1, SD1,** RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES. Amends fines for Hawaii Occupational Safety and Health violations and requires the Director of Labor and Industrial Relations to adjust the penalties each year pursuant to federal law. Requires the Director of Labor and Industrial Relations to report to the Legislature each year. Takes effect on 7/1/2050. (SD1)

HEARING

DATE: Tuesday, March 28, 2017
TIME: 1:30 p.m.
PLACE: Capitol Room 211

Dear Chair Tokuda, Vice Chair Dela Cruz and Members of the Committee,

I personally **oppose** H.B. 1114, HD1, SD1 proposing an amendment for fines and penalties for Hawaii Occupational Safety and Health violations to mirror federal penalties. These penalty increases became effective in late 2016 increasing penalties by 78% and allowing inflation adjustments. HIOSH is entitled to enforce its regulations and issue penalties to deter unsafe workplaces and ensure safety programs are in place. The increases in penalties do not necessarily protect all workers on a worksite, particularly construction.

The current bill as written proposes to increase the top penalty for serious violations from $7,000 to $12,471 per violation; and the top penalty for willful or repeated violation rising from $70,000 to $124,709. A single violation alone could significantly impact a small business' ability to not only contest the allegation, but also pay such fine if found to be in violation. While the Department of Labor and Industrial Relations has a methodology in place that allow adjustments in penalties to be made depending on the company size, a smaller company could still be significantly impacted. Furthermore, a larger company (100 or more employees) could also be negatively impacted whereby there is only a 10% reduction in penalty applied and for companies with over 250 employees there is no reduction in penalty afforded.

The bill includes a special fund to cover fees in anticipation of contests of employer citations. This is flawed. The agency should focus on improving inspection quality and target employers effectively. Currently, HIOSH is driven by the number of inspections and not the number of quality inspections. This "spaghetti on the wall" approach uses unfair leverage against small employers or those burdened by the penalty increase.

I personally **oppose** H.B. 1114, HD1, SD1 and recommend the bill's deferment to allow the state to look at other alternatives to meet the criteria of the federal government to

make such State Plan penalties “as effective as” our federal counterparts. The “as effective as” is based on HIOSH’s ability to manage safety and health compliance in the state, not just copy everything the federal government does. Attached is a study completed in 2012 identifying states’ compliance with “as effective as.”

Joaquin M. Diaz, MM, CSP

OSHA's Increased Pressure on State Plans - What Has it Wrought?

American Bar Association
Occupational Safety and Health Law Committee
Mid-Winter Meeting
March 14, 2012

Panel Participants:

Ronald W. Taylor, Esq.
Venable LLP
Baltimore, MD
Moderator

Frances Schreiberg, Esq.
Kazan, McClain, Lyons, Greenwood & Harley
Los Angeles, CA

Jay W. Withrow, Esq.
Director, Division of Legal Support
Virginia Department of Labor
Richmond, VA

Fred Walter, Esq.
Walter & Prince LLP
Healdsburg, CA

OSHA's Increased Pressure on State Plans - What Has it Wrought?

TABLE OF CONTENTS

1. Office of Inspector General Report - OSHA Has Not Determined If State OSH Programs Are At Least As Effective In Improving Workplace Safety And Health As Federal OSHA's Programs, March 31, 2011

2. OSHA Reply to the OIG Report, March 31, 2011

3. Testimony of Elliot P. Lewis, Assistant Inspector General for Audit, OIG, DOL, June 16, 2011

4. Letter from Occupational Safety & Health State Plan Association (OSHSPA) to Dr. David Michaels, Assistant Secretary, OSHA, dated May 13, 2011

5. Letter from OSHSPA to Dr. David Michaels, Assistant Secretary, OSHA, dated July 6, 2010 regarding State Plan Adoption of NEP's

6. Letter from OSHSPA to Dr. David Michaels, Assistant Secretary, OSHA, dated August 6, 2010 regarding State Plan Adoption of Penalty Procedures

7. Letter (enclosing testimony) from OSHSPA to Honorable George Miller, Chair, and Honorable John Kline, Ranking Member, Committee on Education and Labor, dated November 10, 2009

U.S. Department of Labor

Office of Inspector General—Office of Audit

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

OSHA HAS NOT DETERMINED IF STATE OSH PROGRAMS ARE AT LEAST AS EFFECTIVE IN IMPROVING WORKPLACE SAFETY AND HEALTH AS FEDERAL OSHA'S PROGRAMS

Date Issued: March 31, 2011
Report Number: 02-11-201-10-105

U.S. Department of Labor
Office of Inspector General
Office of Audit

BRIEFLY...

Highlights of Report Number **02-11-201-10-105**, to the Assistant Secretary for Occupational Safety and Health

March 2011

OSHA HAS NOT DETERMINED IF STATE OSH PROGRAMS ARE AT LEAST AS EFFECTIVE IN IMPROVING WORKPLACE SAFETY AND HEALTH AS FEDERAL OSHA'S PROGRAMS

WHY READ THE REPORT

The role of the Occupational Safety and Health Administration (OSHA) is to promote workers' safety and health. Through its programs and partners, OSHA claimed it reduced work-related fatalities, injuries, and illnesses. The Bureau of Labor Statistics reported 4,340 fatalities and 965,000 non-fatal injuries and illnesses for 2009. Liberty Mutual Annual Workplace Safety Index reported over $53 billion in workers compensation costs for 2008.

The Occupational Safety and Health Act of 1970 (OSH Act) authorizes States to assume some responsibilities to develop and enforce safety and health standards, and authorizes grants of up to 50 percent of costs to States with programs ***at least as effective as*** the Federal program. Since 1972, States were granted $2.4 billion to develop and operate effective Occupational Safety and Health (OSH) programs.

WHY OIG CONDUCTED THE AUDIT

In 2009, complaints filed with OSHA and congressional interest prompted OSHA to conduct a special review of Nevada OSH. Prior to the review, Nevada OSH received favorable monitoring reports while it was sharply criticized in media coverage on the handling of 25 fatalities. The special review revealed significant operational issues. Subsequently, OSHA expanded monitoring of other States' programs to include on-site case reviews.

The objective of this audit was to answer the question: Has OSHA ensured that State Plans operate OSH programs that are ***at least as effective as*** Federal OSHA? The audit covered OSHA's monitoring of all 27 State Plan programs operating in Fiscal Year 2010.

READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency response, go to: http://www.oig.dol.gov/public/reports/oa/2011/02-11-201-10-105.pdf

WHAT OIG FOUND

OSHA has not yet designed a method to examine the impact of State OSH programs to ensure they are ***at least as effective as*** Federal programs. State officials generally believed their programs were effective, but there was no quantifiable data to demonstrate effectiveness. OSHA officials acknowledged that effectiveness measures would be desirable, but difficult to develop. As a result, OSHA lacks critical information needed to make informed decisions.

- Defining Effectiveness. State officials expressed concerns regarding the lack of clear expectations for effective programs and that some program changes required by OSHA may not necessarily increase effectiveness of their states' programs.
- Measuring Effectiveness. OSHA officials admitted OSHA does not have outcome measures to gauge effectiveness. States were evaluated on activity-based data, which OSHA officials stated would provide valuable operational information and proxy measures of effectiveness.
- Establishing Minimum Criterion. OSHA has not evaluated the impact of its own enforcement program in order to establish the minimum criterion to evaluate state programs.
- Monitoring Effectiveness. In 2009, OSHA expanded monitoring to include on-site case file reviews, but had neither changed nor expanded the measures it used to evaluate performance.

WHAT OIG RECOMMENDED

We made four recommendations to the Assistant Secretary for Occupational Safety and Health to define effectiveness, design measures to quantify impact, establish a baseline for State Plan evaluations, and revise monitoring to include an assessment of effectiveness.

In responding to our report, OSHA agreed with the intent of the recommendations, but had concerns that defining effectiveness by relying exclusively on impact or outcome measures would be extremely problematic.

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Table of Contents

Assistant Inspector General's Report 1

Results In Brief 2

Objective — Has OSHA ensured that State Plans operate OSH programs that are at least as effective as Federal OSHA? 3

OSHA has not determined the effectiveness of State OSH programs. 3

Finding — OSHA Has Not Determined If State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health as Federal OSHA Programs. 3

Recommendations 9

Exhibits

Exhibit 1 Comments of State OSH Officials on OSHA Monitoring 13
Exhibit 2 Data Used by OSHA in Annual Review of State Plans 15

Appendices

Appendix A Background 19
Appendix B Objective, Scope, Methodology, and Criteria 21
Appendix C Acronyms and Abbreviations 23
Appendix D OSHA Response to Draft Report 25
Appendix E Acknowledgements 29

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U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210

March 31, 2011

Assistant Inspector General's Report

Dr. David Michaels
Assistant Secretary for
Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

The role of the Occupational Safety and Health Administration (OSHA) is to promote workers' safety and health by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual process improvement. The Occupational Safety and Health Act of 1970 (OSH Act) authorizes States[1] to assume some responsibilities to develop and enforce safety and health standards, and provides for grants of up to 50 percent of operational costs to States with programs ***at least as effective as*** Federal OSHA. Over a period of nearly 40 years, OSHA granted $2.4 billion to States to develop and operate effective Occupational Safety and Health (OSH) programs.

In Fiscal Year 2010, OSHA granted $104 million for State OSH programs. We audited OSHA's monitoring of all 27 State Plan programs to answer the question:

- Has OSHA ensured that State Plans operate OSH programs that are ***at least as effective as*** Federal OSHA?

For the audit, we evaluated internal controls over the monitoring of State Plan programs. We reviewed OSHA policies and procedures, and related audit reports from OIG and Government Accountability Office (GAO), and OSHA internal monitoring reports. We tested compliance with monitoring procedures through interviews and examination of documents in two regions (New York City and Philadelphia). We interviewed officials at OSHA National and 10 Regional Offices, and the states of New Jersey and Maryland. We surveyed all 27 State Plan administrators regarding OSHA monitoring.

[1] Includes the District of Columbia, Puerto Rico, U.S. Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

RESULTS IN BRIEF

OSHA is responsible for ensuring the effectiveness of State OSH programs. While it collects statistics on program activities, this is not sufficient to assess a state's effectiveness in protecting workers. OSHA has not designed a method to determine that State Plans are at least as effective as Federal OSHA in reducing injuries and illnesses. Moreover, OSHA has not evaluated the impact of its own enforcement program in order to arrive at minimum criterion to evaluate state programs. State officials generally believed their programs were effective, but there was no quantifiable data to demonstrate program effectiveness. OSHA required States to make program changes, but did not explain how the changes would improve effectiveness.

In an attempt to ensure quality State programs, OSHA made several revisions to its monitoring procedures and measures reviewed. Monitoring was enhanced to include on-site reviews of case files. OSHA's enforcement programs (both State and Federal OSHA) were evaluated on (1) injury and illness data, and (2) fatality data. Individual States were evaluated on activity-based data including inspection counts, penalty amounts, injury and fatality rate trends, Integrated Management Information System (IMIS) and recordkeeping, measures for timeliness and completion of inspections, violation classification, staffing benchmarks, and timely adoption of standards. Officials stated these activity-based measures can be valuable in assessing program operations – especially when coupled with on-site reviews. However, OSHA has not developed measures to address the core issue of whether State Plans are or are not at least as effective as Federal OSHA. State-level injury and illness data were not sufficient for comparing outcomes for State Plans with outcomes for states covered by Federal OSHA. Also, according to OSHA, injury, illness, and fatality data are unpredictable and may be impacted by economic and other factors.

As a result, OSHA lacks evidence to demonstrate the effectiveness of State Plans and the merits of any program changes which may impact its decisions on policies, enforcement priorities, and funding. OSHA officials admitted to not currently having extensive, quantitative performance measures to evaluate the State Plans. They acknowledged these measures would be desirable, but difficult to develop. Officials agreed that many measures were, by necessity, activity-based rather than outcome measures. This was, in part, because outcome data were lacking.

We made four recommendations to the Assistant Secretary for Occupational Safety and Health: (1) define effectiveness; (2) design measures to quantify impact; (3) establish a baseline using Federal OSH programs to evaluate State Plans; and (4) revise

monitoring processes to include assessments about whether State Plans are at least as effective as Federal OSHA programs.

In response to the draft report, the Assistant Secretary for Occupational Safety and Health agreed with the intent of the recommendations, and stated OSHA will continue to develop additional impact measures for both Federal OSHA and the States. However, the Assistant Secretary expressed concern that attempting to define the effectiveness of State Plans by relying exclusively on a system of impact or outcome measures is not only extremely problematic, but would not fulfill the more specific and extensive requirements of the OSH Act.

We agree with the Assistant Secretary that OSHA should continue to develop impact measures to ensure that State programs are effective, and that these measures should be used in conjunction with activity-based measures to ensure compliance with OSH Act requirements. The Assistant Secretary's response is included in its entirety as Appendix D.

RESULTS AND FINDINGS

Objective — Has OSHA ensured that State Plans operate OSH programs that are at least as effective as Federal OSHA?

OSHA has not determined the effectiveness of State OSH programs.

Finding — OSHA Has Not Determined If State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health as Federal OSHA Programs.

Through FY 2010, OSHA granted $2.4 billion to States to develop and operate effective OSH programs. Section 23(g) of the OSH Act authorizes grants for up to 50 percent of total operational costs to States with standards and enforcement programs that are at least as effective as the Federal OSHA program. However, OSHA has not yet designed a method to examine the impact of State programs on workplace safety and health to ensure they are effective, and to fully evaluate the merits of any program changes. This was identified as an issue by 70 percent of States surveyed. As a result, OSHA lacks critical information on performance, which may impact its decisions on policies, enforcement priorities, and funding.

Occupational injuries and illnesses significantly impact worker lives in addition to profits and employment. The Bureau of Labor Statistics (BLS) reported 4,340 work-related fatalities and 965,000 major non-fatal injuries and illnesses for 2009. According to the 2010 *Liberty Mutual Annual Workplace Safety Index*, the cost of the most disabling workplace injuries and illnesses in 2008 amounted to $53.42 billion in workers compensation costs, averaging more than one billion dollars per week.[2] Through its

[2] *Annual Workplace Safety Index* is published by Liberty Mutual Research Institute for Safety to provide scientific, business-relevant knowledge in workplace and highway safety, and work disability.

programs and partners, OSHA claimed it impacted workplace safety and health by reducing work-related fatalities, injuries, and illnesses. However, OSHA has not quantified the extent of impact, and therefore lacks the requisite information needed to make informed decisions.

States need to maintain valuable and efficient OSH programs with the current strain on resources. Both state and local governments are facing budget crises, and must target resources more efficiently without sacrificing quality. The majority of the states (63 percent) are concerned about recent challenges over budgets and resources. The association representing the State Plan states reported for 2009 that the budget for State Plans has remained stagnant since 2001 and the 'real dollars' available to states significantly decreased considering inflation. According to OSHA officials, 2010 State Plan funding was increased by $11.8 million in response.

Defining Effectiveness

OSHA has not defined effectiveness in the context of State Plan programs. Without qualitative factors defining effectiveness, OSHA cannot ensure that State Plans are operating in an effective manner. Moreover, OSHA needs to define when State programs would be deemed as performance failures, to serve as a basis for using its ultimate authority to revoke State Plan approval.

State Plan Administrators are concerned about a lack of clear expectations, which has led to confusion. Federal OSHA has not provided the states the evidence to show that their activity-based framework (i.e. number of inspections) correlates to effectiveness. Although states think their plans are effective, without an outcome-based framework, they cannot show that their activities have improved workplace safety and health.

GAO had already highlighted many of these issues in their 1988 report, *OSHA's Monitoring and Evaluation of State Programs*, report number GAO/T-HRD-88-13:

> OSHA Needs to Know the Impact of State Programs on Worker Safety and Health
> OSHA's legislation does not specifically define 'effectiveness,' but it does require that the states' standards and their enforcement should be at least as effective as those of the federal government 'in providing safe and healthful employment and places of employment.' OSHA, however, defines the effectiveness of state programs in terms of program activities, giving little attention to determining what characteristics of state programs have contributed to the reduction (or lack of reduction) in workplace injuries and illnesses so that program improvements could be made.

According to OSHA's State Plan Policies and Procedures Manual, a State OSH program is judged to be at least as effective as Federal OSHA if the State is making reasonable progress toward meeting its established performance goals and is fulfilling its mandated responsibilities. OSHA officials stated that effectiveness "*... is not a static*

expectation but rather one that changes as the Federal OSHA program changes. Whenever a new standard, a new policy, a new emphasis program is implemented, the States must respond." OSHA (1) has not developed fundamental principles of effectiveness, and (2) is not required to justify program changes imposed on states, while requiring states to do so. In comments to the Federal Register, OSHA stated:

> OSHA believes it would not be practicable or advisable to issue guidance defining the term 'at least as effective.' ... OSHA must and should continue to rely on the States to demonstrate that particular State-developed alternative standards or procedures are 'at least as effective.' ... if OSHA disagrees, it must institute an adjudicatory rejection proceeding in which the burden of proof rests with OSHA, not the State.[3]

State Plan Administrators expressed concerns that OSHA's "moving target" approach resulted in a lack of clear expectations for programs to be at least as effective, and that some of OSHA's required program changes, such as increasing penalty amounts, may not necessarily increase the effectiveness of their states' programs. Officials for 21 of 27 states generally believed their programs were effective, based on comprehensive knowledge of local employers. (See Exhibit 1 for detailed survey responses from the State officials.)

Most of the States (63 percent) questioned the impact of some of OSHA's required program changes – whether the changes necessarily increased effectiveness. Many states claimed to have created unique safety and health initiatives; however, they, along with OSHA, lack the data to adequately evaluate the merits of these innovations. As one state administrator commented:

> State programs believe that a national dialogue must be undertaken about the OSHA paradigm itself, including how OSHA and the state programs can come to a clearer understanding of what it means for a state program to be at least as effective as OSHA, and how to move cooperatively forward to improve workplace safety and health. ... If state programs and Federal OSHA have disparate views of effectiveness, and what constitutes effectiveness, then a significant philosophical disagreement exists.

Measuring the Effectiveness of State Plan Programs

Refining the expectation for effectiveness, the Federal Chief Performance Officer (CPO) in September 2010 emphasized that government needed to work better, faster, and more efficiently. To achieve these goals the CPO stated that "Empirical evidence is an essential ingredient for assessing whether government programs are achieving their intended outcomes and guiding continuous improvement." The current administration's strategy for performance management was described in the FY 2012 Analytical

[3] Federal Register, volume 67, number 186, 25 Sep 2002, pp 60123

Perspectives Budget Chapter 7 – Delivering High Performance Government,[4] as follows:

> ... Federal agencies must adopt an evidence-based culture in which decisions are made using information collected in a timely and consistent manner about the effectiveness of specific policies, practices, and programs. Strategies for developing evidence exist along a continuum from the basic collection of program and outcomes information, to more sophisticated performance measurement and formative evaluation methods, to rigorous evaluation techniques that measure program and practice impacts against a comparison group.
>
> Transparent, coherent performance information contributes to more effective, efficient, fair, inclusive, and responsive government. Communicating performance information can support public understanding of what government wants to accomplish and how it is trying to accomplish it. It can also support learning across government agencies, stimulate idea flow, enlist assistance, and motivate performance gain.

In an attempt to measure the quality of state programs, OSHA evaluates individual states using activity-based data including inspection counts, penalty amounts, injury and fatality rate trends, IMIS/recordkeeping, measures for timeliness and completion of inspections, violation classification, staffing benchmarks, and timely adoption of standards. However, OSHA has not developed measures to address the core issue of whether State Plans are or are not at least as effective as Federal OSHA. This was identified as an issue by 70 percent of States surveyed. (See Exhibit 2 for details on data collected during OSHA's annual review of State Plans.)

OSHA needs to develop measures that can quantify the effect of State Plan programs activities on occupational safety and health. OSHA officials admitted to not currently having extensive, quantitative performance measures to evaluate the State Plans. The officials agreed that many measures were by necessity activity-based because outcome data were lacking. Officials stated that activity measures provided valuable information on State program operations and were helpful proxy measures of effectiveness.

Officials from 17 states (63 percent) commented that OSHA's performance measures needed to be re-evaluated. As one state plan administrator stated:

> In the end, the gold standard for success is the reduction of workplace fatalities, injuries, and illnesses, as well as fostering concrete changes in workplace behavior to increase safety performance, and we will not be able to address effectiveness adequately until we have metrics in place that tell us how much progress we are making in these areas. ...neither

[4] Source – http://www.whitehouse.gov/omb/budget/Analytical_Perspectives/ Chapter 7-2012

OSHA nor any of the state plans have yet progressed to the point of having metrics like these in place.

Establishing a Minimum Criterion for State Plan Effectiveness

OSHA has not evaluated the impact of its own enforcement program in order to arrive at a minimum criterion to evaluate state programs. Since 1993, the Federal Government required effectiveness to be measured through the Government Performance Results Act (GPRA) where Federal agencies had to establish objective quantifiable performance goals and to measure program results. With its goal to improve workplace safety and health, OSHA measures its results using rates for injuries and illnesses, and fatalities. However, these measures are not sufficient to conclude on program effectiveness because the data are incomplete, unverified, and may be impacted by economic factors. OSHA has incomplete information on Federal OSHA states, and consequently lacks the requisite baseline against which to gauge state performance.

For 2009 GPRA reporting, OSHA used two nationwide measures for performance – the Bureau of Labor Statistics (BLS) – *Days Away, Restricted, or Transferred* (DART)[5] rate from the Annual Survey of Occupational Injuries and Illnesses; and a fatality rate using data from the OSHA Integrated Management Information System (IMIS) and BLS' Current Employment Statistics. For 2010, OSHA used measures from their IMIS on fatalities associated with the four leading causes of workplace death.

However, 2009 and 2010 GPRA data are not adequate measures to determine effectiveness.

- State-level DART rate data is not sufficient to present a complete picture of injuries and illnesses for comparing outcomes for State Plans with outcomes for states covered by Federal OSHA. Private sector state-level DART data was not available for 10 states – 20 percent of workplaces and employees covered by Federal OSHA. According to BLS, the number of States with available data varies from year to year because not all States have sample sizes sufficient to generate specific estimates of workplace injuries and illnesses. Industry specific data within states also varies, primarily due to the differences in industry concentration and sample size from one State to the next.

- Fatalities are also not adequate measures. As stated by OSHA in the FY 2010 Performance Report, fatalities cannot be predicted and lower fatality numbers may be related to economic conditions.

GAO reported on the lack of program impact data in their 1994 report, *Changes Needed in the Combined Federal-State Approach*, report number GAO/HEHS-94-10:

[5] Source – http://www.bls.gov/iff/oshState.htm. Data set included 41 states and 3 territories for 2009.

> The experience in these states, as well as the results of several empirical studies, lead us to believe that using worksite-specific data in addition to industry-aggregated data could improve OSHA's inspection targeting, education and training efforts, and evaluations of program impact.

Since OSHA has not established a baseline to evaluate its own program, OSHA's current measures to conclude on state program effectiveness are not sufficient. Consequently, OSHA lacks the clear understanding of the impact of State programs on safety and health.

Monitoring for Effectiveness

The Act does not specifically require OSHA to monitor for effectiveness, but it is implied in its requirements, such as the criterion that grants are to be awarded to States with plans at least as effective as Federal OSHA. The State Plan Policies and Procedures Manual states the purpose of Chapter 9 -- Evaluation of State Performance and Annual Reports, is to describe the methods used to evaluate States' effectiveness. However, these guidelines require that States progress toward their activity goals, and these goals are not tied to maintaining effective programs. As a result, OSHA lacks procedures to evaluate the effectiveness of State Plans and the merits of any program changes.

The OSH Act required continuing evaluations of states operating under approved plans to ensure that the programs are at least as effective as Federal OSHA. Additionally, the Assistant Secretary will determine whether the State plan provides an adequate method to assure that its standards will continue to be at least as effective as Federal standards, including Federal standards relating to issues covered by the plan, which become effective subsequent to any approval of the plan. OSHA is required to determine potential outcomes of departures from the Federal program, and if the differences have an adverse impact on the "at least as effective as" status of state programs.

Over the years, OSHA's monitoring has changed from a system of measuring the states against Federal performance on various indicators to the current reviews that measure state performance against the state's own goals. OSHA also varied its level of oversight between desk and on-site reviews. In the 1970s, monitoring was on-site, intensive, and included reviews of state enforcement case files, accompanying inspectors to observe their work, and manual data gathering. In the mid-1980s, OSHA discontinued routine accompanied visits and case file reviews. In the mid-1990s, oversight was again reduced to a goal-based system whereby states developed 5-year strategic and annual performance plans that included goals of reducing workplace injuries, illnesses and fatalities. OSHA evaluated state performance in relation to the planned goals by performing the following tasks: (1) verifying state-supplied data with data from BLS; (2) tracking timely adoption of new Federal OSH standards by the States; and (3) meeting quarterly with State OSH officials.

In 2009, OSHA initiated significant changes in monitoring to increase comprehensive oversight of all state programs due to problems found in the Nevada program. In 2008, Nevada OSH received favorable monitoring reports. While in media coverage, Nevada OSH was sharply criticized on the handling of 25 fatalities. Complaints filed with OSHA and congressional interest prompted OSHA to conduct a special on-site review of the state program, which revealed significant operational issues. Congressional staffers expressed concern that OSHA's Federal monitoring reports were inadequate since Nevada OSH received glowing reviews despite having serious problems.

Subsequently, OSHA decided to conduct special on-site reviews of the other State Plans. These Enhanced Federal Annual Monitoring and Evaluation (EFAME) reviews provided detailed findings and more than 650 recommendations on the structure and processes for 25 of the 27 State Plan OSH programs.[6] The EFAME reviews required more on-site monitoring that focused on compliance with Federal OSHA program structure and procedures. Generally, State officials considered OSHA recommendations to be feasible, but some commented on the substance of the recommendations.

RECOMMENDATIONS

We recommend that the Assistant Secretary for Occupational Safety and Health:

1. Define effectiveness in terms of the impact of State OSH programs on workplace safety and health.

2. Design measures to quantify the impact of State OSH on workplace safety and health.

3. Measure Federal OSH program to establish a baseline to evaluate State OSH effectiveness.

4. Assure effectiveness by revising the monitoring processes to include comparison of the impact of State OSH and Federal OSHA.

We appreciate the cooperation and courtesies that OSHA personnel extended to the Office of Inspector General during this audit. OIG personnel who made major contributions to this report are listed in Appendix E.

Elliot P. Lewis

Elliot P. Lewis
Assistant Inspector General for Audit

[6] Illinois was excluded from the process due to the fact that it is a developmental program. Nevada was excluded due to the fact that the EFAME process was triggered by issues discovered in the State.

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Exhibits

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Exhibit 1

Comments of State OSH Officials on OSHA Monitoring

A. Narrative Comments Expressed by the Majority of State Officials Surveyed

	Comment	Number of States	Percent of States
State OSH Program Background			
1	State plans are more tailored / responsive to needs of the State.	21	78%
2	Concern over recent challenges with staffing/training/funding.	17	63%
Federal Monitoring			
3	Federal OSHA does not define effectiveness.	19	70%
4	Mandated activities have little impact/no added-value to program effectiveness.	17	63%
5	Findings and recommendations were either not supported; not applicable to the State; or changed in post-monitoring process.	16	59%
Suggestions for Improving Federal Monitoring			
6	OSHA's effectiveness measures need to be re-evaluated and more outcome, rather than, output-oriented.	17	63%
7	Federal OSHA should be more knowledgeable of State Plans, so that monitors can be flexible and account for their uniqueness.	15	56%
8	States want more consistency/direction in monitoring, so expectations are made clear.	12	44%

B. Selected Answers to Survey Multiple Choice Questions

For questions 1, 2, and 4, only the top (over 50 percent) answers for advantages, disadvantages and challenges are summarized below. For questions 3 and 5 rating the feasibility of recommendations and overall opinion of monitoring, all answers are included.

Survey Multiple Choice Questions	Number of States	Percent of States
1. What are the advantages to having your own State OSH? *(Check all that apply)*		
More flexibility in response to specific needs of the workforce in the state.	27	100%
Maintaining state autonomy over worker safety and health programs.	25	93%
Federal funding to assist with program costs	21	78%
More comprehensive safety and health program in comparison to Federal OSHA.	21	78%
Federal technical assistance in setting enforcing standards	14	52%
Creating employment within state	14	52%
2. What are the disadvantages to having your own State OSH? *(Check all that apply)*		
Mandated activities and programs do not apply to state needs	17	63%
3. From the most recent annual report, how feasible are recommendations from Federal OSHA? *(Check one)*		
Very feasible (i.e. feasible 75% - 100% of the time)	5	19%
Usually feasible (i.e. feasible 50% - 74% of the time)	**15**	**56%**
Usually not feasible (i.e. feasible 25% - 49% of the time)	4	15%
Unacceptable (i.e. feasible 1% - 24% of the time)	1	4%
Unfeasible (i.e. never feasible)	1	4%
No Response	1	4%
4. What challenges does your State face in addressing the recommendations? *(Check all that apply)*		
Not necessary - disagree with OSHA about problem	17	63%
5. What is your overall opinion of Federal OSHA monitoring of your State OSH program? *(Check one)*		
Excellent	2	7%
Very Good	5	19%
Neutral opinion	4	15%
Needs improvement	**13**	**48%**
Needs a total revamp	3	11%

Exhibit 2

Data Used by OSHA in Annual Review of State Plans

A. Enforcement Activity – Compare the State; all state plans; and Federal OSHA

1. **Total Inspections - Number**
   a. Safety Inspections – Number and Percent
   b. Health Inspections – Number and Percent
   c. Construction Inspections – Number and Percent
   d. Public Sector Inspections – Number and Percent
   e. Programmed Inspections – Number and Percent
   f. Complaint Inspections – Number and Percent
   g. Accident Inspections - Number
   h. Inspections with Violations Cited – Number and Percent
   i. Inspections with Violations Cited – Percent with Serious Violations

2. **Total Violations - Number**
   a. Serious Violations – Number and Percent
   b. Willful Violations - Number
   c. Repeat Violations - Number
   d. Serious/Willful/Repeat Violations – Number and Percent
   e. Failure to Abate - Number
   f. Other than Serious – Number and Percent
   g. Average # Violations per Initial Inspection

3. **Total Penalties – Dollar Value**
   a. Average Current Penalty/Serious Violation
   b. Average Current Penalty/Serious Violation -Private Sector Only
   c. Percent Penalty Reduced

4. **Percent Inspections with Contested Violations**
   a. Average Case Hours per Inspection - Safety
   b. Average Case Hours per Inspection - Health
   c. Lapsed Days from Inspection to Citation Issued – Safety
   d. Lapsed Days from Inspection to Citation - Health
   e. Open, Non-Contested Cases with Incomplete Abatement Over 60 days

B. State Activity Mandated Measures – Compare State with standard/negotiated goal

1. Average number of days to initiate Complaint Inspections
2. Average number of days to initiate Complaint Investigations
3. Percent of Complaints where Complainants were notified on time
4. Percent of Complaints/Referrals responded to within 1 day –Imminent Danger
5. Number of Denials where entry not obtained
6. Percent of Serious/Willful/Repeat Violations verified (Private/Public
7. Average calendar days from Opening Conference to Citation Issue (Safety/Health)
8. Percent of Programmed Inspections with Serious/Willful/Repeat Violations (Safety/Health)
9. Average Violations per Inspection with Violations (Serious/Willful/Repeat and Other)

10. Average Initial Penalty per Serious Violations (Private Sector Only)
11. Percent of Total Inspections in Public Sector
12. Average Lapse Time from Receipt of Contest to First Level Decision
13. Percent of 11c (Whistleblower) Investigations Completed Within 90 Days
14. Percent of 11c (Whistleblower) Complaints that are Meritorious
15. Percent of Meritorious 11c Complaints that are Settled

C. State Indicator Report – Compare State against Federal OSHA

1. Enforcement (Private Sector)

a. Programmed Inspections – Safety/Health (number and percent)
b. Programmed Inspections with Violations – Safety/Health (number and percent)
c. Serious Violations – Safety/Health (number and percent)
d. Abatement Period for Violations – Safety > 30 days and Health > 60 days
e. Average Penalty – Other than Serious – Safety/Health
f. Inspections per 100 hours – Safety/Health
g. Violations Vacated (number and percent)
h. Violations Reclassified (number and percent)
i. Penalty Retention (number and percent)

2. Enforcement (Public Sector)

a. Programmed Inspections – Safety/Health (number and percent)
b. Serious Violations – Safety/Health (number and percent)

3. Review Procedures

a. Violations Vacated (number and percent)
b. Violations Reclassified (number and percent)
c. Penalty Retention (number and percent)

D. BLS Rates/Data

1. Days, Away, Restricted, or Transferred (DART) rate and related trends.
2. On-the-job Total Recordable Case rate and related trends.

E. Information Management

1. Types of reports and frequency of use for IMIS generated forms.
2. Quantification of the upkeep of IMIS forms.

F. Staffing Benchmarks and Training

1. Staffing levels for both safety and health personnel (actual versus goal).
2. Compliance with OSHA's training requirements for OSH personnel.

G. Standards adoption tracking

1. Time elapsed by state to adopt new OSHA standards.
2. Tracking of standards not adopted within the requisite 6 months.

Appendices

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Appendix A

Background

The role of OSHA is to promote the safety and health of workers by setting and enforcing standards; providing training, outreach and education; establishing partnerships; and encouraging continual process improvement in workplace safety and health. The OSH Act of 1970 authorizes States to assume some responsibilities to develop and enforce safety and health standards, and provides for grants of up to 50 percent of operational costs to States with programs ***at least as effective as*** Federal OSHA. With OSH Act funding match, Congress encouraged States to operate effective OSH programs and develop innovative approaches to safety and health. By 2011, 22 States and Territories operated OSH plans covering public and private employees, while 5 States and Territories operated OSH plans covering only public employees.

Table 1: State Plans – Covered Sectors and Approval Dates

State Plans	Covered Sectors: Public / Private	Covered Sectors: Public Only[9]	Initial Approval	Date Certified[7]	Final Approval[8]
Alaska	X		7/31/73	9/09/77	9/28/84
Arizona	X		10/29/74	9/18/81	6/20/85
California[10]	X		4/24/73	8/12/77	
Connecticut		X	10/02/73	8/19/86	
Hawaii	X		12/28/73	4/26/78	4/30/84
Illinois		X[11]	9/01/09		
Indiana	X		2/25/74	9/24/81	9/26/86
Iowa	X		7/20/73	9/14/76	7/02/85
Kentucky	X		7/23/73	2/08/80	6/13/85
Maryland	X		6/28/73	2/15/80	7/18/85
Michigan[10]	X		9/24/73	1/16/81	
Minnesota	X		5/29/73	9/28/76	7/30/85
Nevada	X		12/04/73	8/13/81	4/18/00
New Jersey		X	1/11/01		
New Mexico[10]	X		12/04/75	12/04/84	
New York		X	6/01/84	8/18/06	
North Carolina	X		1/26/73	9/29/76	12/10/96
Oregon	X		12/22/72	9/15/82	5/12/05
Puerto Rico[10]	X		8/15/77	9/07/82	
South Carolina	X		11/30/72	7/28/76	12/15/87
Tennessee	X		6/28/73	5/03/78	7/22/85
Utah	X		1/04/73	11/11/76	7/16/85
Vermont[10]	X		10/01/73	3/04/77	
Virgin Islands		X[12]	7/01/03		
Virginia	X		9/23/76	8/15/84	11/30/88
Washington[10]	X		1/19/73	1/26/82	
Wyoming	X		4/25/74	12/18/80	6/27/85

[7] OSHA determined that developmental steps were satisfactorily completed.
[8] OSHA relinquished concurrent Federal jurisdiction.
[9] Plan covered State and local government employees only.
[10] OSHA accepted operational status agreement and suspended concurrent Federal jurisdiction.
[11] State received developmental plan covering State and local government employees only.
[12] State granted final approval in 1984, but voluntarily withdrew from private sector jurisdiction (68 FR 43457, 7/23/03)

The following describes the basic steps for developing and approving State Plans.

Developmental Plans – States must assure that all the structural elements for an operational OSH program will be in place within 3 years. These elements include: appropriate legislation; standards and procedures for standard setting, enforcement, appeal of citations and penalties; and a sufficient number of competent enforcement personnel. Appropriate state legislation must be enacted and matching Federal funds available prior to OSHA approval.

Certified Plans – States have completed and documented its developmental steps. Certification does not include decisions on actual performance.

Operational Status Agreement – OSHA may offer to States that appear capable of independently enforcing standards. OSHA voluntarily limits discretionary Federal enforcement in all or certain activities covered by the plan.

Final Approval Plans – OSHA relinquishes its authority to cover OSH matters covered by the plan. After at least 1 year of certification, the state may request final approval. OSHA determines whether the State program is providing worker protection ***at least as effective as*** the Federal program. State also must meet established staffing benchmarks[13] and participate in IMIS.

For FY 2010, States were granted funding between $201,000 (Virgin Islands) and $23,013,900 (California). Total funding over the last 5 years is summarized below.

Table 2: State Plan Funding

FY	Funding[14]
2010	$104.4 million
2009	$92.6 million
2008	$89.5 million
2007	$91.1 million
2006	$91.1 million

According to OSHA officials, State Plans were originally approved and funded at whatever level the State requested. Over a period of time, some States increased their funding contribution, but OSHA no longer had sufficient grant funds to match the States' expanded contribution. A funding formula was developed by a Federal/State task group with the goal of moving toward more equitable, consistent funding nationwide – to establish a uniform base and help the "under-funded" without taking money away from the other states. OSHA used the DART rate as objective criterion and granted the largest allocations to "under-funded" states with highest rates. The funding formula was used on rare occasions when Congress allocates additional funds, beyond a cost-of-living adjustment, and was applied only to the increase.

[13] In the 1978 decision AFL-CIO v. Marshall, U.S. Court of Appeals for the District of Columbia, the court ruled that States must provide sufficient compliance personnel for a "fully effective" program.
[14] Excludes Recovery Act funds of $1.5 million to 7 States for ARRA-related inspections (7/09-9/10)

Appendix B

Objective, Scope, Methodology, and Criteria

Objective

Has OSHA ensured that State Plans operate OSH programs that are ***at least as effective as*** Federal OSHA?

Scope

The audit covered 27 States with OSH programs in FY 2010 – 22 States cover both public and private sectors employers, and 5 States cover only public sector employers. OSHA granted $2.4 billion to develop and operate State OSH programs since 1972. FY 2010 funding totaled $104 million.

Methodology

A performance audit includes an understanding of internal controls considered significant to the audit objective and testing compliance with significant laws, regulations, and other requirements. In planning and performing our audit, we considered internal controls significant to the audit were properly designed and placed in operation. This included reviewing OSHA's policies and procedures for monitoring State Plan programs. We confirmed our understanding of these controls and procedures through interviews and documentation review.

Specifically, we reviewed OSHA policies and procedures, related OIG and GAO reports, and OSHA internal monitoring reports. We tested compliance with monitoring procedures through interviews and examination of documents in two regions (New York and Philadelphia) and two states within the regions (New Jersey and Maryland) selected judgmentally based on characteristics of the state program including workers covered, injury rates, and funding. We interviewed officials at OSHA National and all 10 Regional Offices. We surveyed all 27 State Plan Administrators regarding OSHA monitoring.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Criteria

- Occupational Safety and Health Act of 1970, Public Law 91-596, December 29, 1970, as amended, Sections 6, 18, and 23

- Code of Federal Regulations, 29 CFR Parts 1902 and 1952 thru 1956
- OSHA's State Plan Policies and Procedures Manual, OSH directive nos. STP 2-0.22B and STP 2-0.22A, Change 3
- Government Performance Results Act (Public Law 103-62, August 3, 1993) and GPRA Modernization Act (Public Law 111-352, January, 4, 2011)

Appendix C

Acronyms and Abbreviations

BLS	Bureau of Labor Statistics
CPO	Federal Chief Performance Officer
DART	Days Away, Restricted, or Transferred
DOL	U.S. Department of Labor
EFAME	Enhanced Federal Annual Monitoring and Evaluation
GAO	U.S. Government Accountability Office
GPRA	Government Performance Results Act of 1993
IMIS	Integrated Management Information System
OIG	Office of Inspector General
State OSH	State Plan Occupational Safety and Health Programs
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration

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Appendix D

OSHA Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

MAR 31 2011

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: DAVID MICHAELS, PhD, MPH

SUBJECT: Response to OIG's Draft Audit Report
02-11-201-10-105
"OSHA Had Not Determined if State OSH Programs Were at Least as Effective in Improving Workplace Safety and Health As Federal OSHA's Programs"

This memorandum is in response to your March 21, 2011, transmittal of the Office of Inspector General (OIG) Draft Audit Report No. 02-11-201-10-105, "OSHA Had Not Determined if State OSH Programs Were at Least as Effective in Improving Workplace Safety and Health As Federal OSHA's Programs." We appreciate the opportunity to respond to the findings and recommendations of the OIG. While we agree with the intent of the recommendations, we are also concerned that attempting to define the effectiveness of State plans by relying exclusively on a system of impact or outcome measures is not only extremely problematic, but would not fulfill the more specific and extensive requirements of the Occupational Safety and Health Act of 1970 (The Act).

As you note in this report, while Congress required OSHA to approve state plans that are "at least as effective" as the federal program, the Act does not specifically define "effective." In addition, the law requires federal OSHA to conduct a "continuing evaluation of the manner in which each State ... is carrying out such plan." While we agree that outcome measures are desirable for evaluating the effectiveness of both the Federal OSHA program and the programs of the 27 States that operate their own OSHA-approved State plans, OSHA does not agree with the report's dismissal of activity or performance measures as ineffective or meaningless in determining states' effectiveness or the extent to which they are carrying out their plan.

Congress did not simply direct OSHA to achieve a particular outcome. Section 18 of the Act requires OSHA to evaluate all aspects of a State program, not only its results. There are very prescriptive requirements in the Act and OSHA's implementing regulations for the organization and operation of OSHA-approved State Plans for which Federal funding is provided. For example, Section 18(c)(2) of the Act requires federal OSHA to determine that State Plan standards and their enforcement are at least as effective as federal OSHA's and mandates certain activities that constitute a system of enforcement. Section 18(c)(3) requires states to provide for

employee and employer rights, protection for whistleblowers, the identification and citation of hazards, the proposal of first instance sanctions as a deterrent to non-compliance prior to inspection and other "activities" that are integral elements of an effective program. These statutorily mandated activities must be evaluated and Section 18(f) requires federal OSHA to ensure that State Plans do not fail "to comply substantially with any provision of the State plan." We believe that activities measures are not only interim tools that can be used as the agency develops outcome measures, but are in themselves important indicators of program operation and effectiveness. An evaluation of outcomes will not necessarily reflect the quality or adequacy of these activities and therefore would fail as an evaluation of these activities.

OSHA is certainly aware of the importance – and the difficulty –of using outcome measures to determine the effectiveness of the federal or state programs. In fact, the Department of Labor's FY 2011-2016 Strategic Plan commits its agencies, including OSHA, "to measuring outcomes that describe the effect of the agencies' activities on the day-to-day lives of working families." The Strategic Plan also recognizes, however, that "worker protection agencies face a more daunting task in determining whether the enforcement strategies undertaken in a given year are having an effect on broader outcome rates" and points to the use of "outcome data trends, analysis of annual performance, and the corresponding out-puts" to measure improved performance.

Background

In order to understand OSHA's activities in this area, it is important to understand the recent history of State Plan oversight and the changes that OSHA is in the process of implementing. The monitoring system used in the evaluations of the State Plans immediately preceding the Nevada Special Study in 2009 and the Enhanced FAME effort in the other States was the system developed during the mid-to-late-1990's which focused on achievement of the State's own goals rather than extensive activities measures and on-site monitoring.

It was the more intensive review of activities measures, in addition to case file reviews and an on-site monitoring component conducted as part of the 2009 Special Study in Nevada and Enhanced FAME effort in the other States that revealed the significant operational issues. Indeed, this demonstrates the significance of activity measures and the importance of reviewing areas other than outcome data in determining the effectiveness of a State's program.

OSHA's FY 2009 Enhanced Federal Annual Monitoring and Evaluation (EFAME) Reports and guidance for FY 2011 monitoring are responses to problems identified with the current system that was developed and implemented in the mid-to-late-1990's. That system, partly a response to recommendations by the Government Accountability Office and the Government Performance and Results Act (GPRA), moved OSHA's federal oversight to a more outcome-based monitoring system, and focused on each State's own Strategic Plan and the achievement of the State's own goals, with minimal on-site monitoring activity. Experience under this system has demonstrated that some problems with State enforcement were not being identified, and that more Federal/State comparison measures and on-site monitoring are needed.

RESPONSE TO RECOMMENDATIONS

Recommendation 1: Define effectiveness in terms of the impact of State OSH programs on workplace safety and health.

OSHA Response: OSHA agrees that measuring the impact of State programs on workplace safety and health would be useful in determining the effectiveness of State programs. That is why OSHA uses reductions in injury and illness rates as well as reductions in fatality rates as outcome measures to assess the success of both the State and Federal programs. OSHA and DOL are continuing to develop additional impact measures for both Federal OSHA and the States. This is a difficult task, and OSHA would welcome any suggestions for such measures or information on studies that may have produced such measures.

OSHA is concerned, however, that attempting to define the effectiveness of State plans by relying exclusively on a system of impact or outcome measures is not only extremely problematic, but, as discussed above, would not fulfill the more specific and extensive requirements of the Occupational Safety and Health Act of 1970. Indeed, if outcome measures, such as injury, illness and fatality rates had been used as an exclusive measure of effectiveness, Nevada would have continued to receive an effective rating despite the serious problems that federal OSHA identified in its special study. OSHA believes that appropriate activity or performance measures can be useful in determining states' effectiveness and the extent to which they are carrying out their plan

As a Federally funded program, States must account for the performance of the funded activities as well as results. In addition, OSHA's activity measures are not solely counts of numbers of inspections or other activities; they focus on the timeliness of responses to complaints, fatalities, and other events, on the preservation of employee and employer rights, including the protection of whistleblowers, on the ability of States to target their inspections to those workplaces where hazards are likely to occur, and on the actions taken when hazards are discovered. OSHA believes that these and other factors, as set out in the Act, must also be considered in defining effectiveness. The DOL Strategic Plan notes that if agencies are doing their jobs properly, producing outputs in a sufficient quantity should produce the desired outcomes. Thus, while OSHA will continue to take action with regard to developing impact measures, we do not expect that they will be the only measurement of State program effectiveness.

Recommendation 2: Design measures to quantify the impact of State OSH on workplace safety and health.

OSHA Response: As discussed above, OSHA is working to develop impact measures for both Federal OSHA and State plans. The DOL strategic planning process emphasized the development of outcome measures and the need to link them to impact. DOL is working with its enforcement agencies in the development of these measures, in addition to the continued development of appropriate activity measures, particularly for the worker protection agencies. There are several ongoing DOL studies to this end.

Recommendation 3: Measure Federal OSH program to establish a baseline to evaluate State OSH effectiveness.

OSHA Response: On the Federal level, the Department of Labor FY 2011-2016 Strategic Plan envisions a review of trends in compliance, violation, or discrimination rates as measures of impact.[1] OSHA looks at injury, illness, and fatality rates in selected sectors as one indication of OSHA's impact, while acknowledging that there are inherent problems with these data, among them the reliance on employer self-reporting for injury and illness data, the data's heavy dependence on the level of economic activity and the changing composition of the economy from manufacturing to the service sector. In some state plan states, BLS has noted that the sample size is not large enough to present a complete picture of injuries and illnesses. Nevertheless, OSHA will continue to seek methods of addressing this issue and include State plans in the process as appropriate.

Recommendation 4: Assure effectiveness by revising the monitoring processes to include comparison of the impact of State OSH and Federal OSHA.

OSHA Response: Any useful impact measures will be incorporated into a new OSHA State plan monitoring system which Federal OSHA is currently developing in consultation with the states. As finalizing this system will take some time, we plan in the interim to revise OSHA's monitoring system by developing more meaningful activities measures that will directly compare State to Federal performance and strengthening monitoring procedures to mandate on-site monitoring activities including review of State enforcement case files. We are also implementing a system to give States more advance notice of, and input into, changes to the Federal program which will impact their programs, including National Emphasis programs and penalty policies. We also agree that we need to provide more explanation and justification to the States on why we are changing policies and programs that affect them. We will include more background information on the reasons behind new policies and procedures in future issuances.

We appreciate your review and assistance, and the cooperation of your staff, as we work toward our common goal of ensuring that State OSHA programs are at least as effective as the Federal program.

[1] Trends, p. 16, Department of Labor FY 2011-2016 Strategic Plan

Appendix E

Acknowledgements

Key contributors to this report were Mark Schwartz (Audit Director), Rebecca Bowen, Danielle Brown-Buzan, Sean Ally, Enrique Lozano, Reza Noorani and Mary Lou Casazza.

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We appreciate your review and assistance, and the cooperation of your staff, as we work toward our common goal of ensuring that State OSHA programs are at least as effective as the Federal program.

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WRITTEN TESTIMONY OF
ELLIOT P. LEWIS
ASSISTANT INSPECTOR GENERAL FOR AUDIT
OFFICE OF INSPECTOR GENERAL
U.S. DEPARTMENT OF LABOR

Before the House Committee on Education and the Workforce
Subcommittee on Workforce Protections
June 16, 2011

Good morning, Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to discuss our recent report on the Occupational Safety and Health Administration's (OSHA) monitoring of State Plan programs. As you know, the Office of Inspector General (OIG) is an independent entity within the Department of Labor (DOL); therefore, the views expressed in my testimony are based on the findings and recommendations of my office's work and not intended to reflect the Department's position.

Background

Protecting the health and safety of our nation's workers is one of the most important responsibilities of the Department. The Occupational Safety and Health Act (OSH Act) of 1970 provides the mandate for OSHA to ensure the safe and healthy working conditions for working men and women by: setting and enforcing standards; providing training, outreach, and education; and encouraging continuous improvement in workplace safety and health. With few exceptions, the OSH Act covers most private sector employers and their employees in the 50 states and six territories, either directly through Federal OSHA or through an OSHA-approved state safety and health plan.

Currently, 27 states and territories have been approved by Federal OSHA to operate their own worker safety and health programs. The OSH Act also authorizes OSHA to provide funding through Federal grants for up to 50 percent of state operational costs. In FY 2010, states were granted $104 million to develop and operate State Plans.

Under Section 18 (c)(2) of the OSH Act, Federal OSHA is responsible for ensuring that State Plans are at least as effective as Federal OSHA. Once OSHA approves a plan, the state assumes full responsibility for operating its occupational safety and health program. However, Federal OSHA remains responsible for ensuring that the state complies with the OSH Act and may revoke approval of the State Plan if it does not.

Mr. Chairman, our audit was conducted to determine whether OSHA ensured that safety and health programs operated under State Plans were at least as effective as the Federal OSHA program, as required by law. We concluded that increased accountability is needed at both the Federal and state level, because neither Federal OSHA nor the states have outcomes-based performance metrics to measure and demonstrate the causal effect of their programs on the safety and health of workers.

Audit Findings

As part of our audit, we surveyed all 27 State Plans. We found that states generally believed their programs were effective. This belief was often based on their comprehensive knowledge of local employers. Many states indicated that they have created unique safety and health initiatives that reduce the number of workplace fatalities, injuries, and illnesses. States measure their own performance by measuring changes in the number of worker injuries and illnesses. However, as with the Federal OSHA, none of the states provided us with information to show that they have established a causal relationship between their activities and reductions in injuries and illnesses. It is important to consider that these rates can be impacted by external factors. These include economic conditions in the states, such as levels of employment and changes in the mix of industries.

All of the states believe that operating their own safety and health programs allows for more flexibility in response to specific needs of the workplace in their state. We found that 78 percent (21 of 27) of states also believe that their programs are more comprehensive than Federal OSHA. For example, 19 states believe that their health and safety standards exceed OSHA's regarding permissible exposure limits for hazardous substances. Further, all 27 states indicated that their State Plans had responded more quickly to local needs citing more aggressive whistleblower deadlines, more timely review of contested cases, and faster adoption of standards.

Our survey found 75 percent of the states (20 of 27) believed that recommendations made by OSHA Federal monitors were usually feasible or very feasible. However, the states did not always agree that program changes required by OSHA would improve the effectiveness of their programs. One example they cited was OSHA's change to its penalty structure, which would significantly increase penalty amounts. OSHA required states to adopt either the Federal penalty structure or a similar one. States were reluctant to adopt this Federal policy, indicating that OSHA has not explained how higher penalties would result in more effective enforcement.

In addition, 48 percent (13 of 27) of states believe that OSHA's monitoring of their state programs needs improvement, but only 3 (or 11 percent) believed that a total revamp of OSHA's monitoring is needed. Fourteen states responded that OSHA's "one-size-fits-all" approach is not effective, noting deviations from the Federal program do not equate to a state being less effective. Eleven states noted that OSHA needs to be more consistent in monitoring and reporting results. Finally, 6 states mentioned that improved communications are needed between the states and Federal OSHA.

Many states believed that there is a large variance between what OSHA requests from them at one point in time to another, especially when there are changes in Administration. The survey indicated that 70 percent (19 of 27) of states expressed concerns that this "moving target" approach regarding desired program performance resulted in a lack of clear expectations.

Mr. Chairman, we recognize that there will be differences between state-run safety and health programs and Federal OSHA. We do not disagree that there can be more than

one approach to safety; however, all programs must ultimately meet the mandate of the OSH Act. Effectiveness measures are needed to make this determination. In fact, in response to our survey, 63 percent (17 of 27) of states said that effectiveness measures need to be re-evaluated and made outcome, rather than output-based. A particularly good observation we received was that a national dialogue should be initiated to explore how best to measure improvements in worker safety and health programs, as opposed to measuring outputs such as citations and penalties issued.

In addition, many states expressed concerns that their programs would be impacted by budget cuts. One state noted that its current fiscal crisis resulted in furloughs, which impacts their ability to meet program goals. Another noted that because of state budget reductions, it was unable to accept additional grant funds being offered by Federal OSHA to state programs due to the lack of matching funds from the state. Many also believed that there is a scarcity of qualified staff and a high turnover rate due to a lack of resources to fund competitive salaries. This is compounded by state hiring freezes that result in vacant positions and a significant decrease in the number of inspections, surveys, and other activities. These concerns by the states are all the more reason to know whether we are getting the most benefit from the resources invested.

Mr. Chairman, our audit found OSHA has not defined effectiveness for health and safety programs, whether operated by the states or Federal OSHA. This not only limits OSHA's ability to ensure its own program operates in an effective manner but also to determine whether State Plans are, or are not, at least as effective as Federal OSHA. OSHA reviews individual State Plans by evaluating data such as inspection counts, penalty amounts, injury and fatality rate trends, measures for timeliness and completion of inspections, violation classification, and timely adoption of standards. While these measures may be appropriate, they do not necessarily measure the effect of these actions on achieving safety and health improvements.

OSHA has taken steps recently toward improving oversight, but the approach continues to focus on State Plan program outputs. As mentioned in our audit, OSHA's Enhanced Federal Annual Monitoring and Evaluation (EFAME) process requires more on-site monitoring of compliance with Federal OSHA program structure and procedures. However, EFAME does not measure program effectiveness from an outcomes perspective.

Audit Recommendations

Our audit contained four recommendations to OSHA. Specifically, we recommended that OSHA:

- Define effectiveness in terms of the impact of state programs on workplace safety and health.
- Design measures to quantify the impact of State Plans on workplace safety and health.
- Measure Federal OSHA program performance to establish a baseline to evaluate State Plan effectiveness.

- Revise the monitoring processes to include comparison of the impact of state and Federal programs.

OSHA Response

In response to our audit, OSHA stated that it:

- Intends to continue to use appropriate activity measures to evaluate the effectiveness of state programs and ensure that they are meeting the requirements for State Plan approval and funding.
- Formed a task force with State Plan representatives and is working to define effectiveness and expand its scope to review appropriate impact measures.
- Is developing additional impact measures for both Federal OSHA and the states.
- Envisions a review of trends and compliance, violations, or discrimination rates as measures of impact within in its FY 2011-2016 Strategic Plan.

Mr. Chairman, we recognize that defining and measuring effectiveness of safety and health programs is difficult to do. However, in order to meet the OSH Act requirements that state programs be at least as effective as the Federal program, effectiveness must be defined and measured.

OSHA noted in its response to our audit report that it is committed to defining and measuring effectiveness. Possible ways OSHA could do this include:

- Continuing to work through the Federal/State task force to determine how effectiveness can be measured.
- Evaluating states with model plans to identify best practices that have resulted in successful program outcomes for possible implementation on a wider scale.
- Developing metrics and pilot testing them in several states to see whether they are actually measuring safety and health program outcomes rather than outputs.

Conclusion

In conclusion, Mr. Chairman, we believe that there is room for greater accountability at the Federal and state levels in demonstrating the impact of safety and health programs funded by the taxpayers. We believe that current program evaluation should be augmented with outcome-based performance measures. In our opinion, it is critical to measure the impact of specific program strategies on protecting the safety and health of our nation's workers – regardless of whether a program is operated by the state or the Federal government.

Thank you for the opportunity to testify on our work. I would be pleased to answer any questions that you or any Members of the subcommittee may have.

Occupational Safety & Health State Plan Association

May 13, 2011

David Michaels, PHD, MPH
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

SUBJECT: Legal Basis of Requirement for Mandatory State Plan Adoption of National Emphasis Programs

Dear Assistant Secretary Michaels:

Thank you for your detailed letter of October 12, 2010, responding to the Occupational Safety and Health State Plan Association's (OSHSPA) letter on the above subject of July 6, 2010.

First, I wanted to express the appreciation of the OSHSPA Board of Directors and OSHSPA's membership as a whole for the discussions initiated on the broad issue of "as effective as" criteria for State Plans at the OSHSPA Board/Federal Steering Committee meeting in Chicago last month. The recent Office of Inspector General (OIG) report, entitled "OSHA Has Not Determined if State OSH Programs Are At Least As Effective in Improving Workplace Safety and Health as Federal OSHA's Programs", serves as a very timely and appropriate starting point for discussions of this issue, which lies at the core of State Plan monitoring and evaluation.

National Emphasis Programs (NEP)

OSHSPA fully supports OSHA's efforts to develop and use NEPs to address workplace hazards that pose a real and significant threat to employee and employer safety and health in federal and state jurisdictions. Many State Plans have benefitted over the years from OSHA's identification and development of NEPs to address existing or emerging hazards that threaten the lives of America's working men and women. As stated in previous communications with your office, OSHSPA is more than willing to work with OSHA on the identification and development of NEPs and to encourage our membership to participate.

However, for the reasons stated below, OSHSPA does not believe that OSHA has the legal authority nor is correct from a policymaking standpoint to require State Plans to adopt NEPs to maintain their "as effective as" status.

The OSH Act is clear that State Plans must:

- adopt standards that are at least as effective as those of OSHA; and
- must meet other basic requirements such as adequate personnel, adequate funding, right of entry, and coverage of public sector employees.

As you noted in your letter, OSHA regulations for State Plans further provide that whenever a "significant change in the federal program would have an adverse effect on the 'at least as effective as' status of the State if a parallel State change were not made," a State Plan change "shall be required."

You have interpreted the above provision as requiring mandatory State adoption of NEPs "when a pattern of serious injuries or incidents emerges that demonstrates a widespread hazard demanding attention by the nation's employers." You further mandate that "A State may adopt the Federal program, or it may adopt an equivalent State program, if it can document how the State program is 'at least as effective,' 29 CFR §1954.3(b)(4). In the latter case, it is essential that the States address all key components of the NEP in an "at least as effective" manner" (e.g., conduct a specified number of enforcement inspections within a set time frame).

OSHSPA's first comment on OSHA's position with regard to NEPs is that it seriously questions how any State's program could be "adversely effected" if it chooses not to adopt an NEP which only requires a State plan or a federal Area Office to conduct five or fewer inspections in a given industry per year – a frequent occurrence in NEPs. In a State Plan that conducts 3,000 inspections per year, your argument suggests that if the State fails to conduct 5 inspections, or 16/100ths percent of the total, the State Plan will somehow not be "as effective as" the federal program. In practical terms, OSHSPA finds OSHA's position unsupportable. In legal terms, OSHSPA finds OSHA's position contrary to the OSH Act.

The OSH Act of 1970 provides in §2(b)(11):

> "(b) The Congress declares it to be its purpose and policy...to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and preserve our human resources -
>
> > (11) by encouraging States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in **identifying their needs and responsibilities in the area of occupational safety and health**, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, **and to conduct experimental and demonstration projects in connection therewith**...." (Emphasis added).

As the OSH Act indicates, State Plans are charged by Congress to identify "their needs and responsibilities in the area of occupational safety and health." OSHA's position that a State Plan must conduct five inspections in a given industry per year constitutes federal micro-management of State resources and runs directly contrary to Congress's stated intent for the States to identity their own needs and responsibilities for assuring "safe and healthful working conditions" in their State.

OSHSPA's second comment with regard to OSHA's position that "States address all key components of the NEP in an "at least as effective" manner" is that OSHA's position is not supported by its own stated basis for the development of NEPs. For instance, if OSHA uses national data on injuries and incidents to support the development of the NEP, as your letter suggests, but a State has a level of injuries and illnesses in the industry that demonstrates there is no widespread hazard in the State, your position would still suggest that the State would have to conduct the NEP inspections anyway or risk being found to be not "as effective as" the federal program. OSHSPA finds OSHA's position that a State Plan should use its limited resources to address a hazard that may be a problem elsewhere in the nation, but is not one in a particular State, to be unsupportable.

OSHA would also presumably take the position that if a State Plan chose to approach the particular hazard addressed by the NEP through Cooperative Programs first, the State Plan would still have to conduct enforcement inspections, even if the cooperative approach proved successful in the State. OSHSPA finds OSHA's position in this scenario to be unsupportable as well, and contrary to Congress's stated intent that State Plans "conduct experimental and demonstration projects" to address workplace hazards that impact the safe and healthful working conditions of employees and employers.

OSHSPA's third comment is that OSHA's current position on NEPs runs contrary to and is inconsistent with its own position on determinations of "as effective as" with regard to State Plans. As part of quarterly and annual monitoring of State Plans, OSHA regularly evaluates the "effectiveness" of State Plan inspection targeting systems by reviewing: in-compliance rates, not-in-compliance rates, percent serious rates, percent of programmed inspections with serious/willful/repeat violations and violations per inspection. State Plans that have inspections statistics that significantly differ from federal OSHA in any of these areas are currently subject to receiving recommendations and corrective action plans. This has been highlighted in the two most recent Federal Annual Monitoring and Evaluation (FAME) reports issued by OSHA. OSHSPA can provide countless examples of State Plan annual evaluation reports where OSHA monitoring personnel have used such indicators as high in-compliance rates and low percent serious violation rates in planned inspections to conclude that a State's targeting system was inadequate or not "as effective as" OSHA's targeting system.

NEP inspections are one part of a State Program's planned inspection targeting scheduling system and by making all NEPs mandatory, OSHA would be requiring every State Plan to focus enforcement activities in the areas covered by the NEPs. Based on your letter, OSHA would presumably take the position that a State Plan would still have to conduct planned enforcement inspections under the NEP, even if the State could demonstrate that previous enforcement and consultation inspections in the particular industry or emphasis area in their State resulted in high in-compliance rates and/or a low percent serious rate. Additionally, OSHA's current position on NEPs would not take into consideration state injury and illness rates pertaining to a particular industry or operation even if they were below the national average. OSHSPA finds OSHA's position that a State Plan should use its limited resources to address a hazard that may admittedly be a problem elsewhere in the nation, but is not one in each State Plan, to be unsupportable.

OSHSPA's final comment is that OSHA's current position on NEPs could constitute an unfunded mandate to State Plans. OSHA's recent implementation of the NEP on Recordkeeping was the latest example of a resource impact for State Plans resulting from participation in an OSHA enforcement initiative that OSHA had determined was of such widespread significance and importance that all federal and State Plan Programs should be strongly encouraged to participate. That particular NEP was developed by OSHA without any State Plan participation early enough in the development process to identify any negative resource impacts on State Plan programs in time to address them up front. Additionally, OSHA received an appropriation of approximately one million dollars in FY2009 and FY2010 from Congress to implement its Recordkeeping initiative, but provided no such funding to the 27 State Plans. As you know, inspections under the Recordkeeping NEP can last hundreds or even thousands of hours, which takes away from other planned enforcement inspection activities. When such funding is not provided to State Plans, the initiative becomes an unfunded mandate for States, which are already significantly underfunded as it is.

Based on the above, it is OSHSPA's position that OSHA does not have the legal authority nor is correct from a policymaking standpoint to require State Plans to adopt NEPs.

On behalf of OSHSPA, I respectfully request that OSHA withdraw its requirement for mandatory State Plan adoptions of NEPs.

Sincerely,

Kevin Beauregard
Chair, Occupational Safety and Health State Plan Association

cc: Greg Baxter, Acting Director Cooperative and State Plan Programs
OSHSPA Board

Occupational Safety & Health State Plan Association

Chair

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July 6, 2010

David Michaels, PhD, MPH
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

Re: Legal Basis of Requirement for Mandatory State Plan Adoption of NEPs

Dear Assistant Secretary Michaels:

At the June 22, 2010, Occupational Safety and Health State Plan Association (OSHSPA) Spring meeting Deputy Assistant Secretary Jordan Barab informed State Plans that OSHA would be requiring mandatory adoption of all future National Emphasis Programs (NEPs) developed by OSHA. The reasoning provided to OSHSPA by Mr. Barab was that OSHA could not truly have a national emphasis program without requiring participation from all states.

OSHSPA members have serious concerns about this directive. NEPs developed by OSHA in the past have generally addressed legitimate safety and health issues of national importance. However, failure to include affected State Plans in NEP development and requiring subsequent adoption of the NEPs in all State Plans potentially places employees within some State Plans at greater risk for injury, illness or death. As you know, State Plans already provide well over 50% of the funding for our programs and are facing unprecedented demands on State resources through budget cuts, furloughs, reductions in force and other austere measures. State Plans have to be very careful in how they allocate inspection resources to address the hazards that impact their own State's employees and employers. To that end, each State has developed specific strategic plans for maximizing their resources in efforts to reduce statewide fatality, injury and illness levels. A State strategic plan often includes statewide emphasis programs specific to prevalent industries or activities within an individual state that are accounting for the highest rates of fatal and non-fatal serious accidents. Requiring State Plans to adopt NEPs developed solely by OSHA could divert limited State resources from these critical areas to other areas associated with a NEP which may or may not constitute a significant problem in an individual state. This is particularly worrisome to State Plans that have small programs and very limited resources.

On behalf of OSHSPA, I am requesting that you provide our members with clarification of the legal basis and authority for OSHA's recent decision to require State Plans to mandatorily adopt OSHA- developed NEPs and/or their equivalent policies. Should you have any questions please feel free to contact me @ 919-807-2863.

Sincerely,

Kevin Beauregard

Kevin Beauregard, CSP, CPM
Chair, Occupational Safety and Health State Plan Association

cc: Steven Witt, Director, Cooperative and State Plan Programs

Occupational Safety & Health State Plan Association

August 6, 2010

David Michaels, PhD, MPH
Assistant Secretary for Occupational Safety and Health
United States Department of Labor
200 Constitution Ave, NW #2315, Suite 800
Washington, DC 20210- 0001

Re: Legal Basis of Requirement for Mandatory State Plan Adoption of OSHA's New Penalty Procedures

Dear Assistant Secretary Michaels:

At the June 22, 2010, Occupational Safety and Health State Plan Association (OSHSPA) Spring meeting, Deputy Assistant Secretary Jordan Barab informed State Plan States that federal OSHA would require mandatory adoption of recently proposed changes to its penalty calculation procedures. The reasons prompting these changes that were provided to OSHSPA by Mr. Barab and other OSHA officials over the last year include:

- Current penalty levels do not provide a sufficient deterrent to employers to encourage them to proactively identify and correct serious hazards that could severely injure or kill employees prior to an OSHA inspection.
- "Bad actor" employers whose employees are severely injured or killed on the job are not sufficiently penalized either before or after the fact of an accident or death.
- It does not make sense to the average observer that federal OSHA and State Plan penalty calculation procedures could result in significantly different penalties for the same violation.

The overwhelming majority of OSHSPA members have very serious concerns about this unilateral decision to impose an enforcement procedure absent any statutory change to the OSH Act by Congress. Federal OSHA's decision to revise its penalty calculation procedures may be one of the most significant and important policy changes that OSHA has undertaken in the last 20 years. Over the past two decades, State Plans and previous OSHA administrations have made concerted efforts to work more closely together in a true partnership relationship. In keeping with this history, both you and Deputy Assistant Secretary Barab have indicated on multiple occasions that State Plans States would be more involved in OSHA's decision making processes on major policies, but recent actions do not affirm this commitment. The recent decision to require State Plan adoption of all future National Emphasis Programs (NEP) without any prior consultation regarding the selection, relevance or impact on OSHSPA State Plan

members, and your insistence on attempting to make the new penalty calculation procedures mandatory, again without any input from OSHSPA, further belies this commitment.

Of perhaps as great a concern to State Plan States' is the fact that, when asked for an explanation of what factors would be taken into account and what criteria would be used by OSHA to evaluate each State Plan States penalty calculation procedures, federal officials responded that answers to those questions have yet to be developed.

OSHSPA members believe that before such a major policy change is initiated, a significant level of research, analysis, and consultation with appropriate stakeholders – including State Plans – should occur. This is particularly pertinent to the area of revised penalty calculation procedures considering that collectively State Plan States annually conduct more inspections and issue more violations than federal OSHA. Instead, State Plan States were not consulted on this proposed change, nor were State Plan States provided by OSHA with any empirical studies which support OSHA's rationale for adoption of these new penalty procedures (e.g., that a 300-400% increase in average penalty per serious violation would deter employers from violating OSHA regulations, over and above other considerations which could result in increased employer compliance, such as loss of government contracts from receipt of an OSHA citation, or increases in workers' compensation costs following an accident). Furthermore, as discussed below, OSHSPA members have not been provided any information by federal officials to indicate that research or analysis was conducted to assess the potential negative effects that a penalty increase could have on employers, employees and the effectiveness of both the federal and State Programs.

Specifically, State Plan States have the following substantive concerns about federal OSHA's proposed new penalty calculation procedures:

- OSHSPA is greatly concerned that implementation of the new penalty calculation procedures during a recession, with no phase-in strategy, could result in the same sort of backlash from employers that occurred in the mining industry when the Mine Safety and Health Administration (MSHA) raised their penalty levels in 2006. The mining community responded by significantly increasing their rate of contest of violations and penalties to the point where most parties would agree that MSHA's legal system has been overwhelmed and is in gridlock. Neither federal OSHA nor the State Plan States have the legal resources to handle a potential doubling, tripling or quadrupling of the current contest rate. If contested cases and the numbers of hearings increase substantially, Compliance Safety and Health Officers (CSHOs) will be required to appear in court on a more regular basis, which means they will be spending increasing amounts of their time in depositions and in court providing testimony instead of conducting inspections, and identifying and ensuring correction of serious hazards. In FY 2009, the Federal appeals rate was 6.8% and the collective State Plan States appeals rate was 14.3%. It seems reasonable to ask whether OSHA has conducted a comprehensive study on the potential impact of the new procedures on the productivity of CSHOs, appeals rates in federal/state jurisdictions and the rate of correction of violations in contested cases. **If such research and analysis has been conducted, OSHA should provide the results to OSHSPA for review and comment.**

- Changing the maximum penalty reduction factor for employer size from 60% to 40%, as proposed, will place an undue and disproportionate financial burden on small employers at a time when our national unemployment rate hovers close to 10%. As you know, small employers in the United States are responsible for creating the majority of jobs in our national economy. While neither OSHA's current penalty policy nor the proposed new penalty policy is likely to present a significant deterrent to Fortune 500 companies, the current policy does provide a deterrent to small employers. Under the new policy, while raising penalty levels on small employers is not likely to significantly increase the deterrent effect on larger employers, such action could force some small employers to forgo hiring additional employees or could possibly result in layoffs to existing employees. OSHSPA believes there is a strong disconnect between OSHA's stated rationale for implementing new penalty procedures and the employers/employees likely to be impacted the most by this change. State Plan States' experience has shown that an effective method to achieve greater compliance among small employers is by focusing on education and training while increasing the likelihood of an onsite inspection. As has been shown in a number of different studies over the years, employers in many State Plan States have a much higher likelihood of being inspected than similarly situated employers in federal OSHA States. This strategy has proven effective, and is supported by the existence of fewer serious violations of occupational safety and health rules and regulations in those establishments inspected by State Plan States. OSHSPA recommends OSHA consider pursuing a strategy of making a more concerted effort to increase

federal enforcement staffing and CSHO inspection productivity, if the primary objective is to improve employer compliance.

- OSHSPA evaluated the new penalty calculation procedures as presented at our recent Springfield, Illinois, meeting, and we have determined the proposed new procedures are unlikely to have any additional deterrent effect for large companies even though large companies are almost exclusively the ones cited by federal OSHA officials as typifying "bad actor" employers. Again, OSHSPA believes there is a decided disconnect between the publicly stated rationale for implementing the new procedures and the actual results which can reasonably be expected when the new procedures are applied. Large companies today are usually much more concerned about having violations classified as "serious" than they are about penalty levels. Even if the current maximum initial penalty levels for the largest employers were to be significantly increased through a policy change and become closer to the statutory cap of $7000, the concerns of these large employers would likely remain primarily with classification of the violations. OSHSPA believes a better deterrence approach for large (or even small) companies deemed "bad actors" is through the use of egregious penalties, criminal prosecution and/or increasing the statutory maximums for both civil and criminal penalties. The first two options exist under current OSHA penalty procedures, and the third can only be achieved through legislative action.

- Although OSHA intends the new penalty calculation procedures to primarily deter "bad actor" employers and prevent serious accidents and occupational deaths, our members believe the new procedures will actually have their most significant impact on calculated penalty levels for low and moderate gravity serious violations, which OSHA itself defines as less likely to result in death or serious injury. Additionally, with the current maximum penalty set statutorily at $7000, there does not appear to be enough room on the "upside" of current penalty levels to significantly increase the average high gravity serious penalty for large employers. In fact, the proposed changes will most significantly impact small and medium sized employers and will result in little change to those penalties currently being assessed to large employers. Likewise, small employers will be more significantly impacted with the proposed increase in minimum penalties assessed for serious violations. We believe that OSHA's approach in developing the new penalty calculation procedures was misdirected from the beginning because it started with the premise that raising the **average** serious penalty significantly would provide a deterrent effect, instead of focusing on what changes to the penalty calculation procedures for serious violations would most likely result in the elimination or reduction of serious injuries, illnesses and fatalities. For instance, new procedures could have been developed that would result in the highest penalties being assessed for those serious violations that relate to the four main causes of fatal accidents in the construction industry; or the new procedures could have provided for the maximum penalty being assessed whenever a violation is found to have directly contributed to or caused a fatal accident or serious injury or illness. Instead, the new procedures place an increased emphasis on low and medium severity violations, which could be reasonably interpreted by employers and stakeholders as OSHA wanting to punish **all** employers instead of just the bad actors or the employers that most seriously endanger their employees. OSHSPA members believe that the majority of employers we contact on a daily basis care about their employees and about providing a safe and healthful workplace, but sometimes they need help to achieve compliance, either in terms of education, resources, or motivation in the form of an inspection. Absent any consideration and discussion about these concerns, OSHSPA questions the design of the new procedures in light of their stated rationale and purpose.

- OSHA's decision to "serially" apply penalty reduction factors represents ill-conceived policy that presents the appearance of sleight of hand. By way of illustration, under current procedures a 60% penalty reduction (e.g. 10% for history, 10% for good faith and 40% for size), would result in a gravity based penalty of $7000 being reduced to $2800. Under the new procedures, even though OSHA would describe the same reductions as totaling 60%, when applied serially would result in a penalty of $3402, which is a true reduction of only 51.4%. The new procedure is unnecessarily complicated for field personnel and reducing penalties "serially" is misleading and deceptive to the public we serve. In addition, because employers who receive a reduction due to size are the primary beneficiaries of the current approach, this change will – like others in the policy – have its largest impact on the smallest employers. Again, OSHSPA questions the design of the new penalty procedures in light of the stated rationale.

In closing, all State Plan members of OSHSPA have chosen to administer their own occupational safety and health programs, as set forth in the OSH Act, to best ensure workplace safety and health in their respective States. For the past decade, States have taken on a disproportionate cost of administering these programs as part of their commitment to better ensure their citizens are afforded occupational safety and health protections. This letter is intended to serve as an indication of the importance States place on the penalty issue and overall federal strategy of unilaterally developing procedures which affect State Plan States without any effort to involve the States in the policy development and decision making process. State Plan States are justifiably disturbed by OSHA's recent attempts to impose a "one size fits all" approach to State Plan administration. We are seriously concerned about OSHA's failure to seek input from State Plans; our concern is exacerbated by the lack of follow-through on repeated promises we have heard from OSHA to include State Plans in significant policy discussions. In addition, we are concerned with OSHA's failure, thus far, to identify or share empirical research supporting significant policy decisions; the lack of information on whether OSHA has considered the possible negative impact of the procedures on employees, employers and the federal and State Programs; and the failure of OSHA to develop criteria for assessing the effectiveness of different State penalty calculation procedures.

On behalf of OSHSPA, we request that you provide OSHSPA members with the legal basis and authority for OSHA's decision to make adoption of OSHA's new penalty calculation procedures mandatory for State Plan States. Additionally, we request OSHA reverse its decision to provide formal notification to State Plan States of a mandatory requirement for State Plan States to adopt OSHA's revised penalty procedures. Finally, we request OSHA adequately address the concerns we have raised. Should you have any questions regarding issues outlined in this letter, please feel free to contact the Chair of OSHSPA.

Sincerely,

The OSHSPA Board:

Kevin Beauregard | **Butch Tongate** | **Mischelle Vanreusel**

Stephen Cant | **Jay Withrow** | **Doug Kalinowski**

Occupational Safety & Health State Plan Association

November 10, 2009

The Honorable George Miller
Chairman, Committee on Education and Labor
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable John Kline
Ranking Member, Committee on Education and Labor
2101 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Miller and Congressman Kline:

The Occupational Safety and Health State Plan Association (OSHSPA) hereby submits written testimony pertaining to the U.S. House of Representatives' Education and Labor Committee hearing of October 29, 2009 held to examine the federal Occupational Safety and Health Administration's (OSHA) review of Nevada's workplace health and safety State Plan Program. We respectfully request that you "offer-up" this cover letter and our testimony to be entered into the hearing record.

OSHSPA represents the 27 states and territories that have chosen to enforce occupational health and safety laws within their jurisdictions. Our organization and our individual member States have historically worked very closely with federal OSHA to address common issues and common goals related to the safety and health of America's workers. We view our relationship with OSHA as a cooperative effort and believe that we provide unique contributions toward the attainment of our common goals.

We further believe that the operational issues identified in Nevada are not indicative of the situation in other State Plan States. We believe that the majority of State Plan monitors in OSHA regional offices have done an excellent job of working with the States. We welcome the upcoming evaluations as an opportunity to improve our programs and to provide federal OSHA with insights to improving its own enforcement and monitoring programs.

The hearing on October 29th highlighted several areas which do have a significant impact on the ability of State Plan States to ensure that our programs are at least as effective as that of federal OSHA. These areas are summarized here and are discussed in more detail in the attached testimony.

- **Equitable Funding** – A process must be established to accurately and fairly address the budgetary requirements of State Plan Programs. The total OSHA budget in FY 2009 was $515 million dollars. The total amount allocated to State Plan programs was $93 million. In addition to matching those funds, State Plans had to contribute an additional $91.8 million in overmatching funds in an effort to maintain effective programs. Congress should fully fund 50% of the costs of State Plan Programs.

- **Effective Partnership** – Maximum effectiveness and efficiency of both federal OSHA and State Plan States will only be achieved if we work collaboratively to address key enforcement issues. Conversely, if federal OSHA seeks to impose a "one size fits all" approach in every jurisdiction, it invalidates one of the primary intents of allowing State Plans. States invest a great deal of time and resources to ensure their programs focus on the industries and demographics of their specific state. State Plans are not contractual services, but rather grants with required matching funds and significant overmatching state funds. Congress should encourage a true Federal/State partnership between OSHA and State Plan Programs in the areas of strategic planning, policy and standards development, and legislative initiatives.

- **Monitoring Criteria** – Congress should encourage OSHA to work cooperatively with State Plan States to review current monitoring guidelines, make improvements where needed, and establish benchmarks for both State Plan Programs and federal OSHA. The benchmarks should include staffing levels, federal/state funding levels, training, equipment, quality control, internal auditing and outcome measures.

- **State Responsibility** – In enacting the Occupational Safety and Health Act of 1970, Congress declared its purpose "… to assure every working man and woman in the Nation safe and healthful working conditions … by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws … ." States cannot assume full responsibility for their enforcement programs unless they have full authority to manage their enforcement programs. Congress and OSHA should resist reactionary requests to adopt legislation that would make it easier for OSHA to assert concurrent jurisdiction in State Plans.

We hope that you will consider our comments as an attempt to improve the safety and health environment in every American workplace. There should be no question that we are totally dedicated to achieving this goal. In that regard, we would be happy to participate in any future hearings by your committee on this topic. If you would like more information about our programs or have any questions regarding our position on these matters, please contact me at 919-807-2863 or kevin.beauregard@labor.nc.gov .

Sincerely,

Kevin Beauregard

Kevin Beauregard, CSP, CPM
Chair, Occupational Safety and Health State Plan Association

Attachment: OSHSPA Statement

TESTIMONY OF THE
OCCUPATIONAL SAFETY AND HEALTH STATE PLAN ASSOCIATION (OSHSPA)

REGARDING THE HEARING HELD BY THE

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ON OCTOBER 29, 2009

BACKGROUND

When OSHA was established, Congress specifically encouraged states to develop their own safety and health plan programs, to provide enforcement and compliance assistance activities in their states. Section 18 of the Occupational Safety and Health Act (OSH Act) authorizes states to administer a state-operated program for occupational safety and health, provided the programs are "at least as effective" as federal OSHA. Congress envisioned a comprehensive national program that would provide safety and health protection in all U.S. States and Territories. Prior to the creation of OSHA, many states had already been operating programs to protect their workers.

Today, the 27 states and territories that operate a State Plan Program for workplace safety and health work together through the Occupational Safety and Health State Plan Association (OSHSPA) to address common issues and facilitate communications between the States and federal OSHA. State programs have made major contributions in the area of occupational safety and health and have helped drive injuries, illnesses and fatalities to all time low levels. It makes sense for State Plan Programs and OSHA to work together to develop strategies for making jobsites safer and to share methods that will work on both a national and state level.

OSHSPA does not view occupational safety and health as a partisan issue. The OSH Act was established "to assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the states in their efforts to assure safe and healthful working conditions; by providing research, information, education and training in the field of occupational safety and health; and for other purposes."

In order to meet the original intent of the OSH Act, OSHSPA firmly believes that a "balanced approach" within OSHA and State Plan Programs is required. We believe the most effective approach includes strong, coordinated programs that address enforcement, education and outreach, and consultation. The lack of commitment to any of these three elements will eventually lead to an ineffective OSHA program.

State Plan Programs and OSHA share common goals regarding occupational safety and health. Over the years we have formed many positive relationships and have achieved many successes through cooperation between OSHSPA members and OSHA staff as we worked side-by-side on numerous projects and in response to nationwide catastrophic events. Those successes prove that OSHA has many positive attributes and talents to share with State Plans and, likewise that State Plans have many positive attributes and talents to share with OSHA.

One of the many benefits of State Plan Programs is the flexibility afforded states to address hazards that are unique or more prevalent in particular states, or are not already being addressed by OSHA. In many instances, State Plans have passed more stringent standards or additional standards that do not exist on the federal level, while OSHA labors through the standard adoption process that frequently takes not only

years but decades. These include State regulations such as, but not limited to: cranes and derricks , communication towers, confined space in construction, ergonomics, heat stress, reverse signal operations, residential fall protection, tree trimming, workplace violence, comprehensive safety and health programs, safety and health committees and lower chemical permissible exposure limits (PELS).

State Plan Programs have also developed innovative inspection targeting systems directly linked to Workers' Compensation databases, and special emphasis inspection programs covering such hazards as residential construction, logging, food processing, construction work zone safety, waste water treatment plants, and overhead high voltage lines. Many states sponsor annual State Safety and Health Conferences which bring training, networking and outreach to thousands of employees and employers, and spread the word about the positive benefits of providing safe and healthful workplaces. OSHSPA publishes annually the Grassroots Workplace Protection report which highlights many of these unique and innovative state initiatives (see: http://www.osha.gov/dcsp/osp/oshspa/annualreport.html)

OSHSPA RESPONSE TO ORAL AND WRITTEN TESTIMONY AT OCTOBER 29TH HEARING

We would like to expand on some of the comments that Acting Assistant Secretary Barab made at the October 29th hearing.

OSHSPA applauds the joint efforts of OSHA and the Nevada State Plan to work together to identify and address legitimate issues and concerns raised in the special evaluation of the Nevada program. OSHSPA also very much welcomes the testimony of Acting Assistant Secretary Barab in support of Congressional and Administration efforts to address the current inadequate levels of funding for State Plan Programs (see below discussion). We appreciate Mr. Barab's recognition of the value and benefits that State Plan Programs provide to working men and women around the country. OSHSPA looks forward to working closely with Mr. Barab and the eventual permanent Assistant Secretary to work through the many challenges that confront OSHA nationally and State Plan Programs locally.

Funding of State Plans

Employers and employees in all states should be provided with comparable levels of occupational safety and health protections. While Congress envisioned that the partnership between federal OSHA and the State Plans would include federal funding of 50 percent of the costs, the federal portion for State Programs has diminished significantly over the years. Although State Plans operate in 27 States and Territories and account for approximately 60 percent of all enforcement activity, State Plans received only 18 percent of the total OSHA Budget in FY2009.

State Plans cover approximately 40 percent of private sector workers nationwide and more than 10 million public sector workers. The total OSHA budget in FY 2009 was $515 million. The total amount allocated to State Plan enforcement programs was $93 million. In addition to matching those funds, states contributed an additional $91.8 million in overmatching funds in an effort to maintain effective programs. However, due to the current nationwide economic situation, many states will likely have to decrease their overmatch contributions in the coming year. The overall current funding level of State Plan Programs is approximately 66.5% state funding and 33.5% federal funding.

OSHA has announced that it will be adding 130 new inspectors in FY 2010 in addition to those positions added in FY2009. Meanwhile, many states have been eliminating positions, holding positions vacant and furloughing employees due to the lack of federal funding. In addition, some states have been unable to

send compliance officers to training at the OSHA Training Institute (OTI) due to budget constraints and OTI has often been unable to provide training for states that request it due to insufficient space in, and frequency of, classes. The retention of trained personnel in some states is undoubtedly affected in many cases by insufficient budgets. Data presented by federal OSHA as recently as last summer show that Nevada OSHA's base grant for enforcement is "underfunded" by almost $1.1 million. Additionally, the same data indicated that eleven other State Plans are collectively "underfunded" by more than $13 million.

There may be a time in the not so distant future when some states may opt out of having a state-administered program, simply due to the ever increasing burden of providing well beyond 50% of the program funding. If this comes to pass, the federal government will need to allocate 100% of the funding to provide equivalent enforcement. To prevent this from occurring and based on the original intent of Congress, the long term goal should be to fully fund 50% of State Plan Programs.

Although the number of employers and employees covered by State Plan Programs continues to increase in most states, the net resources to address workplace hazards in the State Plan Programs have declined due to inflation and lack of funding from Congress. The potential impacts, if this trend continues, are reduced enforcement and outreach capabilities and smaller reductions in injuries, illnesses and fatalities. A process must be established to accurately and fairly address the budgetary requirements of State Plan Programs. Insufficient federal funding poses the most serious threat to the overall effectiveness of both State Plans and federal OSHA. If the intent of Congress is to ensure OSHA program effectiveness, this issue must be adequately addressed. OSHSPA urges Congress to establish a process to accurately and fairly address the budgetary requirements of State Plan Programs.

Congress Should Encourage a True Federal/State Partnership in Occupational Safety and Health

Past and current OSHA administrations have all espoused the benefits of State Plan Programs and OSHA being "partners." OSHSPA is fully supportive of a credible and meaningful partnership with federal OSHA and we encourage Congress to support such partnership to make it a reality. Our State Plan Programs are not merely an extension of federal OSHA; we represent distinct and separate government entities operating under duly elected governors or other officials and in addition to the protocols provided by Congress and federal OSHA, also operate under state constitutions and legislative process. State Plans are not just more "OSHA offices" and are not intended to be identical to federal OSHA, but rather to operate in such a manner as to provide worker protection at least as effectively as OSHA. Words such as "transparency," "partnership," "one-OSHA" and "one-voice" have been circulating for years, in regard to the desired relationship between State Plans and OSHA. Since we all share the common goal of improving nationwide occupational safety and health conditions, this would appear to make perfect sense. However, in reality there has often been an unequal "partnership" between OSHA and State Plans, especially when it comes to policy development, funding, and program implementation.

Similar to OSHA, each State Plan Program is staffed with dedicated occupational safety and health professionals with years of combined experience. Although OSHSPA members' contributions could be an integral part of the OSHA strategic planning process, our members are quite often excluded from providing critical input. Often State Plans are not brought into the discussion of important policies and plans to implement those policies that directly affect our programs until all the critical decisions have been made. The same can be said for OSHA's development of its regulatory agenda and legislative initiatives. For example, if, as noted in Mr. Barab's testimony, States are to be mandated to implement new or continuing National Emphasis Programs, States need to be genuinely involved in identifying what kind of programs are needed and how they will be implemented. State Plan Programs are not looking for preferential or special treatment, but feel strongly that OSHA should work harder at establishing a true

"partnership" with State Plan Programs and be more cognizant of the effect that policy decisions have on State Plan Programs.

State Plan Monitoring Background

All members of OSHSPA are subject to regular federal OSHA monitoring activities as a condition of maintaining a State Plan Program and all States acknowledge responsibility for maintaining programs at least as effective as OSHA. There are different sized State Plan Programs throughout the United States with varying capabilities. Likewise, there are different sized federal area offices with varying capabilities in federal OSHA jurisdictions. Properly conducted, audits and program monitoring can be helpful for all federal and State programs in identifying both program strengths and weaknesses.

In addition to regular monitoring activities on a local, regional and national level, there is also a rigorous State Plan approval process in place for any State or Territory that desires to have a state-run OSHA program. The approval process includes many minimum requirements and obligations that must be met to ensure that the eventual program is "at least as effective as OSHA." Prior to achieving final State Plan approval, States must also meet mandatory benchmark staffing levels for safety and health enforcement officers. Interestingly, although States are held to minimum staffing levels, there are no such staffing benchmarks applied to federal jurisdictions. As a result, many federal jurisdiction OSHA states have far fewer enforcement officers and enforcement activities than those found in a comparably sized State Plan jurisdiction. Although the State Plans expect and accept that OSHA will conduct oversight and monitoring activities, the criteria and expectations applied need to be universal for both state and federal operations.

State Plan Monitoring Concerns

The members of OSHSPA have concerns regarding some of the testimony at the October 29th hearing pertaining to OSHA's stated intent to increase monitoring of State Plan Programs. Acting Assistant Secretary of OSHA Jordan Barab indicated in a recent OSHA press statement and again during the hearing that "as a result of the deficiencies identified in Nevada OSHA's program and this administration's goal to move from reaction to prevention, we will strengthen the oversight, monitoring and evaluation of all state programs." As noted above, State Plan Programs are not opposed to OSHA monitoring their programs, and even welcome constructive review and analysis of state operations. However, the statement itself appears contradictory in that the announced increased oversight, monitoring and evaluation activity all appear to be "reactionary" in response to the Nevada findings, as opposed to preventative in nature and design.

We feel that this statement and other similar statements indicate that some within OSHA and perhaps elsewhere have a preconceived notion that there are significant deficiencies in all State Plan Programs. OSHA appears to be drawing from one State Plan Program's difficulties the broad generalization that there must be problems in all State Plan Programs and therefore a need for intensive on-site monitoring activities.

Regular auditing and monitoring based on understood and well-defined criteria and measures of all Occupational Safety and Health Programs, including federal OSHA, would be helpful to better ensure overall quality of our national program. As OSHA has announced that they will be conducting additional monitoring activities of all State Plan Programs for quality control, it would seem prudent that they would also be planning to conduct similar monitoring activities of their own offices. All federal Area Offices should be given the same in-depth evaluation that is planned for all State Plan Programs over the next six to nine months. Acting Assistant Secretary Barab indicated in his testimony that OSHA would make the results of their increased State Plan Program monitoring publicly available. Likewise, OSHA should

make all audits of their national, regional and area offices publicly available. If the goal of OSHA and Congress is to better ensure equivalent workplace safety and health protection for all employers and employees nationwide, then should not OSHA be held to the same quality, performance and staffing levels to which State Plan Programs are being held?

Prior to conducting more comprehensive State Plan monitoring activities, OSHA and the States should establish well-defined performance measures and goals for both States and OSHA. Among other items, these benchmarks should include staffing levels, federal/state funding levels, training, equipment, quality control, internal auditing and outcome measure performance for both State Plans and federal OSHA. Following the establishment of those benchmarks, there should be regular audits of both State Plan Programs and OSHA national, regional and area offices against those benchmarks. As Acting Assistant Secretary Jordan Barab indicated in his testimony, State Plans should be included and involved in the establishment of these benchmarks and the monitoring process.

Acting Assistant Secretary Barab also stated during his testimony that, although the current OSHA administration has not taken a position on potential legislative changes regarding measures against State Plans, he has heard of suggestions that would make it easier for OSHA to assert concurrent jurisdiction in State Plans. According to Acting Assistant Secretary Barab, this measure could be utilized whenever OSHA believed a State had not addressed OSHA's concerns satisfactorily in regards to the "at least as effective" requirement. This could allow OSHA to proceed with assuming concurrent jurisdiction without having to go through the established process of notification via federal register, hearings and the appeal process currently afforded State Plan Programs that have been granted final approval status. The mere fact that OSHA, and perhaps Congress, are entertaining these suggestions is very disconcerting, as it would appear to disallow a State Plan Program the opportunity to sufficiently respond to perceived deficiencies. We believe it is far too premature to even consider such an approach.

For instance, the "at least as effective as OSHA" status is a constantly moving target which compares mandated activity trends and policies within federal OSHA with each State Plan. Currently, the monitoring activities center on mandated activities and indicators such as, but not limited to: percent serious rate of violations cited, contestment rates, penalties assessed and penalties retained. Some of these items individually interpreted can lead to conclusions that are not factually based. For instance, OSHA's own policy decisions can affect the percent serious rate, but not anyone's program effectiveness. For example, OSHA has adopted a focused construction inspection policy that excludes issuing non-serious violations for items abated during the inspection. Individual State Plans may be more effective than OSHA by not adopting this policy and by continuing to cite all hazardous conditions noted. As a result, those inspections that qualify for focused inspections on a federal level could have a 100% serious rate, when in reality the percentage of serious hazards identified is much lower (as OSHA does not issue citations for those non-serious hazards abated during their focused inspection, it would affect the rate).

Likewise, grouping or combining violations noted on an inspection can have a significant impact on the percent serious rate, even when all items are cited. While each of these mandated measures may be worth reviewing, the overall effectiveness of a program should be focused on activities associated with quality of staff, program performance and outcome measures associated with the impact of the program on overall occupational safety and health.

CLOSING REMARKS

Together State Plan Programs and OSHA can successfully improve workplace conditions and continue to drive down occurrences of injuries, illnesses and fatalities. We should always be working toward program improvement with the single goal of having a positive impact on nationwide occupational safety and health. However, establishing an "us" and "them" relationship between OSHA and State Plan

Programs, which appears to be the direction we are moving, will do little to enhance nationwide workplace safety and health.

OSHA, State Plan Programs and Congress need to join forces to best ensure workplace injuries, illnesses and fatalities continue to decline nationwide. There should be a true partnership between OSHA and State Plan Programs to ensure all employers and employees are afforded equivalent workplace protections nationwide. Efforts should be made to ensure State Plan partners are included in the OSHA strategic planning and policy development process. OSHA should work to complete national regulations in a timely manner. OSHA and State Plan Programs should be held equally accountable regarding performance, and matching federal funding should be provided to State Plans as Congress originally intended. These measures together will do more to enhance nationwide occupational safety and health than any other measures being considered at this time. Thank you for the opportunity to provide written testimony.

James L. Zane Safety Professional Private Citizen

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March 28, 2017

TO: HONORABLE JILL TOKUDA, CHAIR, HONORABLE DONOVAN DELA CRUZ, VICE CHAIR, COMMITTEE ON WAYS AND MEANS

SUBJECT: **OPPOSITION TO H.B. 1114, HD1, SD1,** RELATING TO OCCUPATIONAL SAFETY AND HEALTH PENALTIES. Amends fines for Hawaii Occupational Safety and Health violations and requires the Director of Labor and Industrial Relations to adjust the penalties each year pursuant to federal law. Requires the Director of Labor and Industrial Relations to report to the Legislature each year. Takes effect on 7/1/2050. (SD1)

HEARING

DATE: Tuesday, March 28, 2017
TIME: 1:30 p.m.
PLACE: Capitol Room 211

Dear Chair Tokuda, Vice Chair Dela Cruz and Members of the Committee,

James L. Zane opposes H.B. 1114, HD1, SD1 which proposes to amend fines and penalties for Hawaii Occupational Safety and Health violations to mirror federal penalties put into place by Congress late last year, increasing fines approximately 75% from current levels. While fines and penalties are important to deter unsafe workplaces and ensure safety programs are in place that will protect all workers on a worksite, particularly construction, the proposed fine increases are exorbitant and reflect a onetime 75% increase in penalty structure which would be regularly increased based on inflation, if the bill as drafted passes.

The current bill as written proposes to increase the top penalty for serious violations from $7,000 to $12,471 per violation; and the top penalty for willful or repeated violation rising from $70,000 to $124,709. A single violation alone could significantly impact a small business' ability to not only contest the allegation, but also pay such fine if found to be in violation. While the Department of Labor and Industrial Relations has a methodology in place that allow adjustments in penalties to be made depending on the company size, a smaller company could still be significantly impacted. Furthermore, a larger company (100 or more employees) could also be negatively impacted whereby there is only a 10% reduction in penalty applied and for companies with over 250 employees there is no reduction in penalty afforded.

James l. Zane opposes H.B. 1114, HD1, SD1 and recommends the bill be deferred to allow the state to look at other alternatives to meet the criteria of the federal government to make such State Plan penalties "as effective as" our federal counterparts. As of today four states have declined to adopt the federal fines schedule and Hawaii should consider doing the same.