

DEPARTMENT OF INDUSTRIAL RELATIONS

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October 28, 2010

Ken Nishiyama Atha
Regional Administrator
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90 – 7th Street, Suite 18100
San Francisco, CA 94103

Dear Mr. Atha:

Thank you for the opportunity to comment on the OSHA report titled, FY 09 Baseline Special Evaluation Report (Enhanced Federal Annual Monitoring and Evaluation Report-EFAME). Attached is a table containing responses to all of the findings contained in both the body of the EFAME and Appendix G, which reports on the OSHA special study of the California Occupational Safety and Health Appeals Board (OSHAB).

For over 35 years Cal/OSHA has been a national leader in occupational safety and health regulation. Cal/OSHA pioneered the partnership excellence process now called the Voluntary Protection Program by OSHA, adopted the first laws guaranteeing workers the right to know about the hazards associated with chemicals they work with, established the nation's first Injury and Illness Prevention Program (IIPP) laws in the early 1990s, and more recently has led the nation in spearheading several new initiatives, including requiring the use of anti-stick needles to protect workers from bloodborne pathogens, as well as adopting and enforcing the nation's first comprehensive heat illness prevention standard for outdoor workers, and the nation's only aerosol transmissible disease standard.

As a national leader in regulating workplace safety and health, we fully recognize and accept the need for competent monitoring and auditing to ensure program effectiveness. Our management team has invested tremendous time and energy in reviewing the findings and recommendations set forth in the EFAME and has developed considered responses and corrective action plans where appropriate for each finding and recommendation.

One thing that has increasingly stood out as we have reviewed the EFAME is that a number of findings reflect less than optimal communication between the auditors and Cal/OSHA staff, which appears to have contributed to the auditors' misunderstanding of how parts of the Cal/OSHA Program differ from OSHA. Accordingly, we are requesting a follow-up meeting with you and your staff so we can finish the discussions begun by the EFAME process and determine the most productive route to resolving any outstanding unresolved issues.

Our hope is that this process will serve as a stepping stone to a national dialog 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 to be at least as effective as OSHA, and how we can move cooperatively forward to improve workplace safety and health.

As I have said before, and I believe you agree, it is important to recognize that the federal requirement for state plans to be “at least as effective as” OSHA does not mean that states must always mimic what OSHA does. In fact, I believe an essential part of the wisdom behind the use of this phrase was recognition that states can serve as laboratories for different approaches to be tested and emulated by other states or nationally, as appropriate.

In the end, the gold standard for success is the reduction of workplace fatalities, injuries and illnesses, as well as bringing about 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. Since neither OSHA nor any of the state plans have yet progressed to the point of having metrics like these in place, we should not only be allowing different approaches, we should be welcoming and encouraging them. We and many stakeholders nationwide believe it is long overdue that OSHA confront head on the issue of defining what effectiveness means in this context, and we are still hopeful OSHA will begin to do so.

The fundamental purpose of the OSH Act of 1970 is to ensure safe and healthful working conditions for all who work within our borders. A national dialogue should be initiated to explore how best to measure improvement in worker safety and health on the job, as opposed to just measuring the output of enforcement measures like citations, penalties, etc. In looking toward true performance measures of success and effectiveness, it is critical to examine all aspects of a plan that demonstrate leadership and expertise even if these areas are not a part of the federal OSHA program.

DIR’s response to the EFAME are contained in the attached table. The following are highlights of some of the most important issues it addresses:

Issue: Cal/OSHA Program classification of serious violations

The EFAME and the Special Study both point to differences between the way OSHA handles serious violation classification and the way the Cal/OSHA Program handles this issue. Finding 8 in the EFAME says that Cal/OSHA’s policy on classifying violations does not ensure violations that would be considered “Serious” under the Federal FOM are classified as Serious. The first finding of the Appeals Board Special Study criticizes the Appeals Board for adhering to a definition of serious violation that is not consistent with the intent of the OSH Act because it results in findings in California that violations are not serious when the same violations would be upheld as serious at the federal level.

This has been an active issue of discussion in meetings between stakeholders and Cal/OSHA, many of which have included the Appeals Board as a participant, for over two years. These discussions ultimately resulted in the passage and signing into law of AB 2774 in September of this year, which redefines the elements of serious violations in Labor Code section 6432 and adds several provisions that will provide clear direction to the Appeals Board and Cal/OSHA on the proper standard for a serious violation. AB 2774 was supported by all stakeholders who directly participated in developing the bill and was virtually unopposed by stakeholders statewide.

This legislation makes it clear that California’s approach will not be the same as OSHA’s on this issue. However, the approach of this bill is consistent with the basic rationale behind the federal

approach, and we believe it is not only at least as effective as the federal approach, but the most effective and appropriate approach for California. OSHA may well want to consider taking a similar approach. Cal/OSHA's enforcement instructions will be amended to conform to this new law before it takes effect this January, 2011.

Issue: Targeting of high-hazard places of employment

EFAME Finding 7 states that "Cal/OSHA's targeting system is not identifying industries where serious hazards are more likely to exist," the recommendation being that Cal/OSHA should "re-evaluate the targeting system and the focus of enforcement resources to ensure that programmed inspections are being conducted at establishments where serious hazards are most likely to exist." This finding is simply incorrect, and reflects a misunderstanding of how our high-hazarding targeting system works.

What the auditors have done here is to lump all of Cal/OSHA's "programmed inspections" into the category of high hazard targeting. This means, for example, that all of the heat inspection sweeps we have conducted to evaluate the effectiveness of our campaign and bring the agricultural and other outdoor work industries into compliance with the heat-illness prevention standard have been erroneously characterized as the result of high-hazard targeting.

The vast majority of our programmed inspections for the last two years has been these heat inspection sweeps. As this special emphasis program has matured, we are seeing a dramatically increased rate of in-compliance inspections, which are a significant indicator that we have changed behavior and brought the industries we have targeted into compliance with the heat standard. We do *not* want to see a high rate of serious violations in these inspections at this stage that would be an indicator of failure.

We believe our targeting system is among the best in the nation. Our High Hazard Unit, which is the part of Cal/OSHA that selects high-hazard places of employment based on a predicted likelihood of having a high rate of serious violations, shows, for FY 2009, a rate of 5.7 violations per inspection, with 2.25 of them classified as serious, willful, or repeat (SWR), versus a national average of 3.3 violations per inspection, with 2.1 classified as SWR.

Issue: Confirming abatement of serious, willful, and repeat (SWR) violations.

EFAME Finding 16 claims there were 209 Serious / Willful / Repeat (S/W/R) violations, as identified in OSHA's data system, that were listed as not abated in a timely fashion. Cal/OSHA prioritizes confirmation of abatement even before citations are issued, and has done so for the past two years. We have also collaborated with the Appeals Board to implement a system where unabated serious violations on appeal are prioritized for early adjudication so that the abatement issue can be resolved as early as possible.

While it may be possible in some cases that abatement has not been confirmed as soon as it could have been, we have no evidence from the EFAME this has actually occurred. We have requested specifics from OSHA and when we receive a response we will act appropriately to correct whatever errors that exist. We have begun a review of files on our own to determine whether this has occurred, but so far this review has not identified any of the cases OSHA is referring to. It appears the OSHA information may have resulted from data entry errors.

Cal/OSHA will address data entry issues through training and quality assurance inspections.

Issue: Training of Cal/OSHA inspectors and other staff

EFAME Findings 45 and 46 note several deficiencies in Cal/OSHA’s provisions for training of its compliance officers. These criticisms are legitimate though dated, as there is no recognition of the substantial changes that have been in place since the beginning of 2010 to address these issues, including seeking more permanent funding from OSHA to support an expanded training unit.

Cal/OSHA completely reorganized its Professional Development and Training Unit in January 2010, and has a standing committee whose purpose is to plan and implement a three year plan for training managers, field staff and administrative personnel. New funding has been granted by OSHA to support an increase in training staff.

Cal/OSHA has implemented an “initial compliance” and other core courses requirements for all compliance officers, and has training schedules planned in three-year cycles, the first to be completed in 2013. Recognition of this new training program has been built into AB 2774 at new Labor Code section 6432, which now provides

“A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.”

Conclusion

Again, we affirm our commitment to correct every true deficiency we reasonably can, but we differ substantially with the EFAME on many of its most critical conclusions. We continue to urge OSHA to revisit its practice of omitting unique state plan achievements out of its analysis, and we look forward to resolving these differences in direct discussions.

Sincerely,

John C. Duncan
Director

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