

**U. S. DEPARTMENT OF LABOR
OFFICE OF INSPECTOR GENERAL
OFFICE OF AUDIT**

Audit of OSHA
Policies and Procedures
Applicable to the
Home Workplace Letter

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Acronyms/Abbreviations

LI	Letter of Interpretation
DIR	Directive
DCP	Directorate of Compliance Programs
OASAM	Office of the Assistant Secretary for Administration and Management
OSH Act	Occupational Safety and Health Act of 1970
OSHA	Occupational Safety and Health Administration
SOL	Office of the Solicitor

Executive Summary

Background

On November 15, 1999, the Occupational Safety and Health Administration (OSHA) issued a Letter of Interpretation (LI) to respond to an employer's inquiry of August 21, 1997. The employer had asked for guidance on applying OSHA standards to employees working at home.

This LI, posted on OSHA's website, drew reaction from the public and the Congress because it was perceived to sanction Government intrusion into private homes. As a result of these concerns, the interpretation was withdrawn. On February 2, 2000, the Office of Inspector General was requested by the Committee on Small Business and the Permanent Subcommittee on Investigations to provide analysis and evaluation of the circumstances that led to the issuance of the Home Workplace Letter.

Findings

Utilizing its delegated authority, OSHA obtains information and guidance from its staff of specialists and follows two methods when responding to requests from employers and other outside interests. A Directive is required when issuing new policy. A Letter of Interpretation (LI) may be used when clarifying existing policy from a regulation, standard or directive. The Home Workplace Letter was not designed to set new policy, therefore, OSHA deemed the LI as the appropriate method of communicating its response.

The Office of the Secretary of Labor did not provide clearance or prior approval of the LI, because OSHA's procedures do not require the Agency to notify, clear or obtain prior approval from the Office of the Secretary of Labor before issuing LIs.

Since issuing the Home Workplace Letter, OSHA has recognized the need to develop processes to ensure appropriate executive level awareness of potentially sensitive issuances. At the time of our field work, OSHA was in the process of revising its internal policies and procedures to strengthen processing requirements for those LIs which provide interpretations of the OSH Act or significantly expand on existing policies.

Our audit of OSHA's process for issuing LIs disclosed stronger processing controls are necessary to ensure such letters would not infer or communicate new policy to recipients or to the public. Therefore, we recommend controls for inclusion in OSHA's current effort to revise its procedures.

G4 **Recommendations**

We recommend that our findings regarding needed processing controls for LIs be incorporated in OSHA's current effort to revise policies, procedures and practices to ensure proper elevation of policy issues to the DOL executive level for consideration. Specifically, we recommend that OSHA:

- Develop **written** procedures that specifically govern preparation and processing of LIs.
- Clarify language in OSHA Directives that cloud the policy role of LIs.
- Establish common rules to guide all staff on how to recognize and process responses on interpretations of the OSH Act, standards and significant expansions of existing policies.
- In consultation with the Office of the Solicitor, eliminate inordinate clearance delays, and ensure all documents and comments germane to the LI response be shared among all those responsible for clearing the document.
- Ensure that key staff in the clearance process is sensitive to the policy implications of interpretations made in LIs and that executive-level management is consulted as appropriate.

Agency Response and Audit Conclusions

In responding to our draft report, OSHA agreed in principle with our findings. Furthermore, the Agency stated that in conjunction with its ongoing efforts and in compliance with our audit recommendations, it intends to improve internal procedures with respect to policy pronouncements and interpretations as a result of the experience with the Home Workplace Letter. (See complete Agency response in Appendix.)

OSHA's response adequately addresses and resolves our audit recommendations. To properly close these recommendations, we will monitor and review the Agency's planned and implemented corrective actions to revise its procedures for developing and issuing interpretations and policy.

Background

Letter of Interpretation

On November 15, 1999, the Occupational Safety and Health Administration (OSHA) issued a Letter of Interpretation (LI) to respond to an employer's inquiry dated August 21, 1997. The inquiry posed a number of different circumstances related to employees working at home and asked for guidance from OSHA concerning employers' responsibilities for workplace safety and health for those employees who are working in home office environments.

This LI – the “Home Workplace Letter” – was posted on OSHA's website. The letter came to broad public attention in January 2000, when news media disclosed it. In response to public concerns and congressional reaction, OSHA withdrew the LI because, in the words of the Secretary of Labor, it “caused widespread confusion and unintended consequences.” On February 25, 2000, OSHA issued a Directive to provide guidance to OSHA's compliance personnel about inspection policies and procedures concerning worksites in an employee's home.

Congressional Request

On February 2, 2000, the Office of Inspector General was requested by the Committee on Small Business and the Permanent Subcommittee on Investigations to provide analysis and evaluation of the circumstances that led to the issuance of the Home Workplace Letter. The request summarized the Chairmen's concern about the impact the Home Workplace Letter would have on small businesses, if ever implemented. They stated that their concern was heightened by the apparent lack of communication among the various agencies within the Department of Labor, as indicated in the Secretary's withdrawal of OSHA's letter.

The congressional request asked the OIG to examine three issues, which became the audit objectives for this project.

Objectives/Scope/Methodology

Objectives

The objectives of the audit were to examine the following issues:

- how OSHA obtains information and guidance as well as clearance from the DOL with regard to the issuance and release of policy-making decisions;
- the sequence of events that led to the drafting and issuance of the Home Workplace Letter; and
- why the Home Workplace Letter was issued without the approval of the DOL Office of the Secretary.

We address each of these issues in Chapters 1 through 3.

Scope

Our audit scope included a review of OSHA and DOL activities associated with the issuance of the Home Workplace Letter. These activities occurred while the letter was being drafted, August 27, 1997, through November 15, 1999. Our audit also included subsequent events and activities through March 2000.

The audit was performed in accordance with Government Auditing Standards, issued by the Comptroller General of the United States.

Methodology

To accomplish our objectives, we interviewed DOL officials in OSHA and the Office of the Solicitor. We also reviewed operating procedures, instructions and documents provided by the interviewees. We examined the OSHA Instructions which cover the issuance of Directives and Letters of Interpretation. We also obtained and reviewed recent testimony of OSHA officials before various congressional committees.

Chapter 1

How OSHA Obtains Information and Guidance as Well as Clearance from the DOL with Regard to the Issuance and Release of Policy-Making Decisions

Utilizing its delegated authority,¹ OSHA obtains information and guidance from its staff of specialists and follows two methods when responding to requests from employers and other outside interests. A **Directive** is required when issuing new policy. A **Letter of Interpretation** (LI) may be used when clarifying existing policy from a regulation, standard or directive. The Home Workplace Letter was not designed to set new policy, therefore, OSHA deemed the Letter of Interpretation as the appropriate method of communicating its response.

OSHA maintains historical documents on various subject matters and relies on these, as well as the institutional knowledge of OSHA personnel, when responding to questions regarding jurisdiction and applicability of standards. OSHA personnel are also expected to discern responses that need only to clarify existing policies from those which constitute a new policy statement or a significant expansion of existing policy.

The distinction is critical because OSHA requires that new policies cannot be established by informal means such as responses providing requested clarifications. New policies are established by issuing Directives. To issue a Directive, OSHA follows a prescribed methodology to ensure the accuracy and legal sufficiency, as well as concurrence by the Assistant Secretary for Occupational Safety and Health or his designee.

Directives

OSHA policy or procedure must be issued through the directives system.²

The OSHA Instruction provides guidelines for signing, initiating and clearing directives. The Assistant Secretary approves and signs all national directives except those dealing with administrative matters, which are signed by the Director of Administrative Programs. Program Directors are responsible for initiating proposed directives covering matters within

¹Secretary's Order 06-96, subparagraph 4.a.(1) - See Criteria References, page 15.

²OSHA Instruction, Directive No. ADM 8-0.1C, entitled OSHA Electronic Directives System, Chapter 1, Paragraph X - See Criteria References, page 16.

the scope of authority of his/her office.³ The requirements for the clearance of directives vary depending on the initiating office, type of directive and content.⁴

Letters of Interpretation

An LI may be used only to provide supplementary guidance that clarifies how an existing OSHA standard or directive applies to a specific workplace situation.⁵ Further, policies and procedures relating to OSHA and its programs may not be issued outside of the Code of Federal Regulations or OSHA Directives System.⁶

We requested from OSHA specific procedures for processing LIs. We were referred to OSHA Instruction, Directive No. ADM 8-0.1C. These references defined the **use** of LIs, but provided limited instructions for **processing** LIs. However, offices issuing LIs are required to develop and implement procedures for ensuring they meet established office standards.⁷ Based on our interviews, neither the Directorate of Compliance Programs (DCP), nor its suboffice, the Office of General Industry Compliance Assistance (GICA), had established specific written processing procedures for LIs.

We observed that the process for issuing Letters of Interpretation generally follows the Directives methodology to ensure accuracy and legal sufficiency, but does not require the Assistant Secretary concurrence before being issued.

The Home Workplace Letter

On November 15, 1999, the Home Workplace Letter responded to an employer's inquiry (see Exhibit 1) which asked for information on OSHA's policies concerning employees working at home. OSHA responded with an LI to address the employer's general and specific questions.

This employer's inquiry was one of hundreds of inquiries received by the DCP each quarter. The letter was forwarded to the Directorate's GICA for response. The missions of DCP and GICA require them to develop and execute a comprehensive occupational safety compliance

³OSHA Instruction, Chapter 1, Paragraph XV - See Criteria References, pages 16 - 17.

⁴OSHA Instruction, Chapter 3 - See Criteria References, pages 18 - 24.

⁵OSHA Instruction, Chapter 1, Paragraph XII - See Criteria References, page 16.

⁶OSHA Instruction, Chapter 1, Paragraph XVII.A - See Criteria References, pages 17-18.

⁷OSHA Instruction, Chapter 1, Paragraph XVII.B. - See Criteria References, page 18.

guidance and assistance program for general industries. As such, one of GICA's functions is to develop replies to technical inquiries.

OSHA's historical practices have demonstrated its policy not to inspect homes. OSHA has not targeted home workplaces for inspection and only three instances of home inspections (all involving employees exposed to lead hazards) were noted since the creation of the Agency. Further, GICA files included three letters issued between 1993 and 1995 on the subject of OSHA's working at home policy.

OSHA and SOL staff we interviewed stated they believed that the Home Workplace Letter was not setting new policy, but was a further clarification of existing policy. OSHA is prohibited from using an LI to establish new policy.

In Chapter 2, we will discuss more events associated with the Home Workplace Letter, and in Chapter 4 we will present some of its shortcomings.

Chapter 2

The Sequence of Events That Led to the Drafting and Issuance of the Home Workplace Letter

As discussed in Chapter 1, the response to the employer's inquiry was communicated through an LI. We also noted there were no written procedures that specifically govern preparation and processing of LIs.

Nevertheless, our interviews with OSHA staff and the review of related documents reveal that many individuals provided input into the letter and participated in the clearance process before it was issued. Despite this effort, not all documents and comments were shared at the appropriate levels with others responsible for clearing and issuing the Home Workplace Letter.

The employer's inquiry, dated August 21, 1997, was received by OSHA August 27, 1997. The letter was preceded by a telephone conversation between the employer and a staff person in the Office of General Industry Compliance Assistance (GICA). In that conversation, the employer posed a number of questions bearing on employers' safety and health obligations to workers who are performing work in their homes. Due to the volume and complexity of the questions the employer asked, he was invited to pose the questions in writing.

The employer's inquiry was received in the Directorate of Compliance Programs (DCP) and forwarded to its suboffice, GICA, for response. There, the letter was assigned to staff who determined that the response should be communicated as a Letter of Interpretation (as discussed in Chapter 1). The letter was prepared in a format which repeated the question posed and then provided the answer. The draft was first circulated within OSHA to obtain input to address technical questions and for concurrence on the accuracy of the other responses.

Shortly after circulating the first draft, the staff person coordinating the clearance of the letter was temporarily reassigned to other duties for 5 months. When the staff person returned, the responses to the first draft were collected and used to prepare another draft. This version was forwarded to various OSHA divisions in late March 1998. It was forwarded to the Directorate for Policy on April 28, 1998, and reviewed in a single day.

The Office of the Solicitor (SOL) was provided the draft on May 1, 1998, to obtain clearance for legal sufficiency. The letter was in SOL for 7 months. SOL told us they placed a low priority on the letter and were working on other more important issues. Shortly after the SOL clearance was received, the GICA staff member processing the letter went on a 2-month leave of absence.

Another draft was prepared in March 1999 and circulated again because some of the individuals in positions who had cleared the letter earlier had changed. The clearances at this time were recorded on a sign-off grid that was attached to the file copy of the issued version of the letter. This grid evidenced that the letter was provided to staff in the following locations between March and November 1999:

In OSHA:

- Office of General Industry Compliance Assistance
- Office of Health Compliance Assistance
- Office of Statistics
- Directorate of Federal-State Operations

Office of the Solicitor

The SOL clearance of this version took 6 months. Various changes were made to the letter after March 1999. Because of the wide expanse in the clearance dates, there is no evidence that those identified on the grid cleared the final version of the letter. The letter was finally issued on November 15, 1999.

During our audit, we learned from interviews and various documents that four individuals who were asked to provide input or clearance on the letter, submitted comments or expressed concern with the contents or presentation of the letter. These comments were not shared with others responsible for clearing the LI. In addition, the SOL had two previous internal memoranda on the subject, one of which was familiar to the head of DCP, but neither was available to other OSHA staff, although this staff was responsible for developing and processing the letter.

Chapter 3

Why the Home Workplace Letter Was Issued Without the Approval of the DOL Office of the Secretary

OSHA LIs do not require the approval of the Office of the Secretary. Agency Instructions⁸ state that LIs do not require elevation above the Directorate level.

During Calendar Year 1999, OSHA posted 161 LIs on its Internet Website, excluding the withdrawn Home Workplace Letter. None were signed by the Secretary of Labor. Most often (141 of the 161 cases), LIs were signed at the Directorate level. The remaining 20 LIs were elevated to the Assistant Secretary for Occupational Safety and Health. Most of these elevated LIs were in response to safety and health questions with congressional sponsorship and the remaining touched upon policy/sensitive/political issues. In none of these instances was a need found to refer a letter for the Secretary of Labor's signature.

Some LIs were raised to the executive level to ensure compliance with OSHA policies and executive sensitivities. Therefore, there was a system in place that identified appropriate letters for executive consideration. Nevertheless, none of the letters elevated to the Assistant Secretary for OSH was further elevated to the Secretary for signature.

⁸OSHA Instruction, Chapter 1, Paragraph XVII.B - See Criteria References, page 18.

Chapter 4

Findings and Recommendations

OSHA's Controls over Issuing Letters of Interpretation Need Strengthening

Our audit of OSHA's process for issuing LIs disclosed a number of instances where stronger controls are necessary to ensure such letters would not infer or communicate new policy to recipients or to the public. Among the control weaknesses we noted:

- There were no **written** procedures that specifically govern preparation and processing of LIs.
- Conflicting language in OSHA Directives clouds the policy role of LIs.
- There were no common rules to guide all staff to consistently recognize responses that provide interpretations of the Occupational Safety and Health Act (OSH Act), as distinct from interpretations on applying standards to specific work environments, as further distinct from interpretations representing a significant expansion of existing policies. As a result, OSHA staff applied the "eye of the beholder" rule, that is: I'll know it when I see it.
- Not all documents and comments were shared among all those responsible for clearing the document. As a result, observations, concerns and suggestions provided to (or not made available to) the individual principally responsible for processing the LI were not fully considered in the clearance process.
- No one involved in the clearance process for the Home Workplace Letter was specifically expected to evaluate the policy ramifications of the letter taken as a whole.

1. There were no written procedures that specifically govern preparation and processing of LIs.

OSHA issued the Home Workplace Letter in an attempt to comply with the requirements of the OSH Act that require the Agency to provide consultative services and advice to employers. It is one of the express missions of the Directorate of Compliance Programs to provide consultation and advice. Each quarter, the Directorate receives hundreds of inquiries, ranging from telephone inquiries to written requests for guidance, to clarify workplace safety and health requirements. The Home Workplace Letter was processed as one instance of these many requests.

We examined OSHA's written procedures and found that general guidance giving broad parameters for developing policy and processing LIs is contained in an Administrative Directive. However, the Directive places responsibility for establishing detailed procedures and control points with the office issuing the policy or LI, in this case, the Directorate of Compliance Programs (DCP). We found that neither the DCP nor its suboffice, the Office of General Industry Compliance Assistance, had established specific written processing procedures.

2. Conflicting language in OSHA Directives clouds the policy role of LIs.

The conflicting language occurs in OSHA Instruction, Directive No. ADM 8-0.1C, Chapter 1, Paragraphs XI and XII. Paragraph XI provides that Supplementary issuances, which include LIs, **may establish OSHA policy** only in the context of an existing regulation, standard or directive. Paragraph XII, in defining an LI, provides that an LI **may not establish policy** not already addressed by a directive or standard. The conflict presented by the language in these two paragraphs could risk misuse of LIs to establish policy. We believe that both of these references need revision in order to provide consistent guidance to all staff.

3. There were no rules to govern when LIs go beyond interpretation and become new or expanded policy.

There were no common rules to guide OSHA staff included in the clearance process to consistently recognize responses that provide interpretations of the OSH Act, as distinct from interpretations on applying standards to specific work environments, as further distinct from interpretations representing a significant expansion of existing policies.

During interviews, OSHA officials differed in how they characterized the contents of the Home Workplace Letter. While one official found that the letter was a significant expansion of current policy, another said that the letter provided an interpretation of the OSH Act; still another official said that the letter interpreted applicability of specific standards to the work environment of a private home.

4. Not all documents and comments were shared among all those responsible for clearing the LI.

Observations, concerns and suggestions provided to the individual principally responsible for processing LIs were not fully considered by all staff included in the clearance process. We found that comments provided to OSHA staff in response to the input/clearance process contained cautionary language but were not shared by all responsible staff, including SOL,

to consider when providing clearance. Likewise, not all SOL internal memoranda on the subject were available in OSHA files prior to the issuance of the Home Workplace Letter. We believe that full access by all concerned parties to comments, especially any cautionary language, would promote full consideration of the appropriateness of the action proposed.

5. No one involved in the clearance process was specifically expected to evaluate the policy ramifications of the letter taken as a whole.

We found that early in the clearance process OSHA’s Directorate for Policy signed off on the Home Workplace Letter. It was received and returned in a single day and there were no comments or other evidence provided to reveal the scope of the review performed. While other OSHA participants in the drafting/clearance process were primarily concerned with the accuracy of statements made in the letter, it appears no one was sensitive to the overall policy implications as the letter was developed in its final stages. Moreover, comments that had been provided earlier in the process, that should have raised concerns with the way the letter was being developed, were not referred to the Directorate level for additional review.

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OSHA has recognized the need for stronger controls, and has begun reviewing and implementing some corrective measures. For instance, OSHA is currently rewriting policies to ensure that LIs constituting a significant expansion of current policy, or interpreting the OSH Act must be cleared through the Assistant Secretary; staff is being retrained to ensure an understanding of what is a significant expansion of policy, and to be aware of the Secretary’s interests and concerns. Also, OSHA documents on the world-wide web are being reviewed to identify any that may need to be addressed in a directive, or otherwise changed or clarified. We believe additional steps can complement these ongoing efforts.

Recommendations

We recommend that our findings regarding needed processing controls for Letters of Interpretation be incorporated in OSHA’s current effort to revise policies, procedures and practices to ensure proper elevation of policy issues to DOL executive level for consideration. Specifically, we recommend that OSHA:

- Develop **written** procedures that specifically govern preparation and processing of LIs in the Directorate of Compliance Programs. These procedures should include a clear definition of what is involved in the process of providing input into LIs and what is involved in the process of clearing an LI.
- Clarify language in OSHA Directives that cloud the policy role of LIs.

- Establish common rules to guide all staff to consistently recognize responses that provide interpretations of the OSH Act, as distinct from interpretations on applying standards to specific work environments, as further distinct from interpretations representing a significant expansion of existing policies.
- In consultation with the SOL, eliminate inordinate clearance delays and ensure all documents and comments germane to the LI response be shared among all those responsible for clearing the document. This will ensure full consideration of all cautionary remarks and observations in the clearance process.
- Ensure that key staff in the clearance process is sensitive to the policy implications of interpretations made in LIs, and that executive-level management is consulted as appropriate.

Agency Response

In responding to our draft report, OSHA agreed with our findings in principle, and stated it will strive to incorporate them into revised agency procedures. Specifically, OSHA stated:

1. There were no written procedures that specifically govern preparation and processing of LIs – OSHA’s Directives System requires that offices that issue policies and procedures must have written procedures governing the issuance of policy or letters of interpretation. Although an informal recognition of the process to be followed was understood in the originating office, no formal operating procedures were in place to ensure that this particular letter received proper review within the agency. In an effort to avoid similar misunderstandings in the future, OSHA is committed to developing and implementing written procedures for all of its offices in line with this recommendation. These procedures will include a clear definition of what is involved in the process of providing input and what is required in the clearance of directives and letters of interpretation.

2. Conflicting language in OSHA Directives clouds the policy role of LIs – Although it is clearly intended as agency policy that letters of interpretation cannot establish new policies, the agency acknowledges that the existing language governing directives is not precise enough to avoid possible confusion. In the upcoming revision on agency directives, this language will be modified to ensure a clear understanding that letters of interpretation will provide interpretations only in the context of an existing regulation, standard, or directive.

3. There were no rules to govern when LIs go beyond interpretation and become new or expanded policy – OSHA has already recognized the need for establishing common ground rules within the agency to differentiate between interpretations of the Act and interpretations of existing policies and procedures. Although the OIG report focuses

specifically on the issuing of letters of interpretation, the recommendation is also appropriate and will be heeded for the establishment of agency policies and procedures through formal directives. A major concern of the agency in the aftermath of the Home Workplace letter, is how agency policy is established and communicated and what level and degree of clearance that requires. We fully intend to clarify this issue in the upcoming revision of the Directives System to ensure consistent application throughout the agency and to avoid improper or unintentional expansion of existing agency policy.

4. Not all documents and comments were shared among all those responsible for clearing the LI – The OIG report raises concerns that there was an incomplete sharing of information within OSHA and between the Office of the Solicitor (SOL) and OSHA. This failure is seen as undermining the ability of agency staff to properly assess and evaluate a letter of interpretation such as the Home Workplace letter. Specifically, the OIG report reflects a belief that cautionary comments raised by some staff during the development of the letter as well as the existence of an internal SOL legal opinion should have been widely shared with everyone in the clearance process. With the advantage of hindsight, OSHA acknowledges that the universal sharing of all information among those in the clearance process may have avoided this controversy. On the other hand, the agency remains concerned that the clearance process not become unwieldy. OSHA agrees with the OIG report that improvements are necessary in the agency’s clearance process. Better and more timely coordination among offices in OSHA and between OSHA and SOL is an essential component in a revised clearance process. When a substantive change is made in a letter of interpretation or policy pronouncement subsequent to a clearance sign-off, OSHA acknowledges that the document should be rerouted to that person to ensure agreement with the change. Clearly, OSHA understands that a number of changes such as these must be incorporated in its clearance processes. We look forward to working with the OIG in determining what practical steps can be instituted to improve the OSHA clearance process.

5. No one involved in the clearance process was specifically expected to evaluate the policy ramifications of the letter taken as a whole – While there may be an inherent expectation that senior level clearance involves consideration of policy ramifications, OSHA’s written procedures do not impose such a requirement. The report reflects the fact that there are inconsistent approaches among individuals in the agency with respect to the clearance and review of documents. This becomes particularly critical when it involves the establishment or interpretation of policy. We accept this finding and the accompanying recommendation that OSHA ensure that key staff in the clearance process are sensitive to the policy implications of interpretations made in LIs. We also acknowledge the need for identifying appropriate instances when executive-level management is consulted before statements reflecting agency policy are issued. Appropriate changes in the agency’s clearance process and Directives System will be formally implemented to address the concerns raised by the OIG report.

Audit Conclusions

OSHA's response adequately addresses and resolves our audit recommendations. To properly close these recommendations, we will monitor and review the Agency's planned and implemented corrective actions to revise its procedures for developing and issuing interpretations and policy.

Criteria References

Occupational Safety and Health Act of 1970:

Section 2(b) declares the purpose and policy of Congress:

. . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . .

Section 4 provides the applicability of the Act:

(a) This Act shall apply with respect to employment performed in a workplace. . . .

Section 5 defines the duties of employers and employees:

(a) Each employer -

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards . . .

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Section 21 (c) addresses consultations and advice to employers:

The Secretary . . . shall . . . (2) consult with and advise employers and employees, and organizations representing employers and employees as to effective means of preventing occupational injuries and illnesses.

Secretary's Order 06-96, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, dated December 27, 1996:

Subparagraph 4.a.(1) describes the delegation of authority and assignment of responsibility to the Assistant Secretary for Occupational Safety and Health:

The Assistant Secretary for Occupational Safety and Health is delegated authority and assigned responsibility for administering the safety and health programs and activities of the Department of Labor.

Excerpts from OSHA Instruction, Directive No. ADM 8-0.1C, OSHA Electronic Directives System, dated December 19, 1997:

Chapter 1, Paragraph X, Directives System Coverage, states:

- A. *It is mandatory that OSHA communications be issued through the directives system whenever the communication:*
 - 1. *Establishes policy or procedure. . . .*

Chapter 1, Paragraph XI discusses Supplementary Issuances:

Supplementary issuances, including Letters of Interpretation (LI), are interpretative or explanatory in nature. Although they are not part of the OSHA directives system proper, they are nonetheless subordinate to it. LI interpret or provide guidance on matters covered by directives or by OSHA regulations (CFR), including Standards. They must specifically refer to the source document they interpret. Other guidance that is provided in letter form, such as advice on the applicability of the Act to a particular workplace or workplace situation, must make reference to a specific section of the Act itself that is not the subject of an existing regulation, including standards, or directive. Supplementary issuances may establish OSHA policy only in the context of an existing regulation, Standard or directive. These issuances may also serve to clarify or more clearly articulate Agency policy.

Chapter 1, Paragraph XII defines a Letter of Interpretation:

A Letter of Interpretation (LI) provides supplementary guidance that clarifies how to apply to a specific workplace situation the policy or procedure disseminated by an OSHA standard or directive. An LI may not establish policy not already addressed by a directive or standard.

Chapter 1, Paragraph XV addresses Responsibilities for issuing Directives:

- A. Assistant Secretary.
 - 1. *Provides general oversight of program.*
 - 2. *Approves and signs all national directives except those dealing with administrative matters.*

B. Director, Administrative Programs.

1. Oversees administration of the program.
2. Signs all national directives dealing with administrative matters.

C. Directives Officer, OMSO.

1. Administers the OSHA directives program.
2. Assures compliance with this and related instructions.
3. Provides advice, assistance and training to Directives Liaison Officers in directives management, including the special requirements of this revised system.
4. Periodically, notifies the Directives Web Supervisor when in-force directives have been reviewed for currency and approved as still fully in effect.

D. Program Directors.

1. Responsible for implementation of OSHA national directives within her/his organization.
2. Initiates proposed directives covering matters within the scope of authority or significantly affecting the operations of his/her office.
3. Obtains clearance by other OSHA components of proposed directives; promptly responds to requests by other offices for clearance of proposed directives initiated from them.
4. Provides for supervision of the activities of the Directives Liaison Officer for her/his organization.
5. Responsible for reviewing in-force directives at least every three years for currency and revising, or notifying the Directives Officer that no revisions are needed.

Chapter 1, Paragraph XVII discusses the Exclusive Policy and Procedure Dissemination Medium:

- A. Policy and procedure relating to OSHA and OSHA programs may not be issued outside of the Code of Federal Regulations (CFR) or the OSHA Directives

System. Policy may not be issued by memorandum, letter, report or any other non-directives format regardless of media (such as paper or electronic). Interpretations of policy and procedure may be issued as provided in paragraph XI of this chapter, Supplementary Issuances , and detailed below.

- B. The establishment of the directives system as the exclusive medium for communication of OSHA policy and procedure does not preclude the issuance of interpretive guidance as formal “Letters of Interpretation” (LI) issued by and under the authority of an official heading an OSHA Directorate. Such LI are often in response to a request for clarification or direction from an OSHA field office, a State Plan program, or a regulated entity. Issuing officials must implement procedures governing the issuance of LI to assure that they are:*
- 1. Interpretations or explanations of policy or procedure that has been issued through the formal directives system or by Federal Register Notice and publication in the CFR, and not issued as other supplementary documents when a relevant regulation or directive exists to be referenced.*
 - 2. Necessary to the effective implementation of the broader policy or procedure in the directive or regulation.*
 - 3. Explicitly associated with the broader policy or procedure, at a minimum through reference to the CFR or directive number and effective date.*
 - 4. Incorporated, by reference, into the OSHA Directives System, as an official LI. Selected LI will be made available on-line and accessible from the directives pages according to protocols and procedures of the OSHA Computerized Information System (OCIS).*
 - 5. Consistent with all other LI governing directives.*

Chapter 3 outlines the requirements of the Coordination and Clearance of Directives:

- I. Purpose. This chapter prescribes responsibilities, guidelines and procedures for coordinating and clearing OSHA directives.*
- II. Responsibilities:*
 - A. Assistant Secretary or Deputy Assistant Secretary. The Assistant Secretary or Deputy Assistant Secretary will:*
 - 1. Sign national directives or delegate signatory authority to subordinate managers.*

2. *Approve (or delegate approval authority for) the issuance of Interim Directives superseding normal coordination and clearance procedures (see paragraph VI.)*

B. Director, Administrative Programs. Sign national directives dealing with administrative subjects.

C. Regional Administrators. Sign regional directives for their respective regions.

D. Originator. The originator of a directive will:

1. *Prepare OSHA 83, OSHA Draft Clearance Request or regional equivalent.*
2. *Distribute the Draft Directive to internal and/or external offices for review and comment. (See paragraphs IV, B and C.)*
3. *Collect, review, and integrate comments in a final draft directive.*
4. *Submit the final directive for signature, all copies of OSHA 83 or regional equivalent, all comments received from internal and/or external offices, and any other background materials to the Directives Officer for national directives or the Directives Liaison Officer for regional directives.*
5. *Submit to the Directives Office minor changes in the format or content of existing directives which do not alter the directive's policy or procedure, or interpretation thereof for exemption from the clearance process.*

E. Clearance Officers. Clearance Officers will respond to requests for comments on draft directives within specified time periods.

F. Directives Officer. The Directives Officer will ensure that national directives are properly coordinated and cleared. The Directives Officer also authorizes minor changes to be made outside of the clearance process in the format or content of existing directives. These changes may not alter the directive's policy or procedure, or interpretations thereof.

- G. Directives Liaison Officers. Each Directives Liaison Officer will ensure that directives are properly coordinated and cleared.

III. Mandatory Clearance Offices for Instructions and Notices.

A. All Directives must be cleared by:

1. Labor-Management Relations Officer, Office of Personnel Programs, or regional equivalent.
2. Directives Officer, Office of Management Systems and Organization.

B. Directives originating in the National Office must be cleared by:

1. Director, Information Technology (pending).
2. Director, Policy.
3. Director, Administrative Programs.

C. Directives affecting field operations also must be cleared by:

1. Director, Compliance.
2. Director, Construction.
3. Regional Administrators.

D. Directives affecting State plans and/or consultation programs also must be cleared by the Director, Federal/State Operations. Federal/State Operations will approve appropriate language for all Federal Program changes.

E. Directives affecting only administrative functions must be cleared by the Director, Administrative Programs.

F. Directives affecting only the offices within a specific Region must be cleared by the Regional Administrator and the affected National Office organizations.

IV. Clearance and Coordination Guidelines for Instructions and Notices.

A. General. Clearance is mandatory if the subject area relates to any of the offices listed in Figure 3-1, Mandatory Clearance Offices. Originator must also clear with certain offices based on the directive content and purpose, as outlined above or as needed. Originator should be selective in clearing draft directives outside the originating office. Include organizations that are:

1. Responsible for programs, standards, or procedures affected by the draft directive.
2. Administratively or legally responsible for reviewing the draft directive.
3. Required to take or modify action as a result of the draft directive.

B. Internal Clearance (within DOL).

1. OSHA.

National Directives. Clear national directives which affect the activities or functions of another OSHA national office or field office with that office.

Regional Directives. Clear regional directives which affect the activities or functions of other organizations or individuals with those organizations and individuals.

2. Office of the Solicitor. Clear the following regulatory materials with the Office of the Solicitor:

- Any construction or interpretation of laws or regulations.
- Any citation of laws or regulations as the authority for a legal position.
- Any other statement expressing an opinion on a matter of law, legal rights, or liabilities.

C. External Clearance.

1. Office of Management and Budget (OMB). Clear national directives which implement OMB Circulars with the appropriate offices of the OMB.

2. Other Federal Agencies. Clear with other Federal agencies those directives which affect those agencies' programs.

3. State and Local Governments. Chief executives of State and local governments may comment on major proposed directives which directly affect any of the following:

- Interstate and intergovernmental relationships (e.g., State-State, State-local, and interlocal).

- Designations of agencies with State or local governments.

- Organization, planning, personnel, or fiscal activities of State or local governments.

- Roles and functions of heads of State or local governments.

V. Coordination Procedures. Originators are permitted to make use of electronic media to facilitate both the informal and formal clearance processes provided proper records are kept.

A. Informal Clearance.

1. Preliminary Agreements. Originators should communicate frequently with agency stakeholders to agree on policies, procedures, and required actions wherever possible during the initial drafting process and before circulating drafts.

2. Informal Coordination. Originators should circulate drafts, reports, and other materials relating to directive drafting informally before conducting the formal clearance process detailed in paragraph B below.

3. Federal Program Change. Originators should consult with the Directorate of Federal/State Operations for Federal Program change language during the informal clearance to ensure that the appropriate language is circulated for review during the formal clearance process.

B. Formal Clearance. Figure 3-2, National Directives Clearance Process, shows the steps involved in formally coordinating and clearing draft national directives using the OSHA 83. OMSO will make the OSHA 83 available in electronic format. Regional Offices will establish their own clearance

procedures for clearing regional directives consistent with mandatory clearance offices designated above and in Figure 3-1.

1. Originator.

- *Completes items 1 through 6 on the OSHA 83.*
- *Determines whether field coordination is necessary.*
- *Allows a minimum of 10 working days if directive only requires clearance within the National Office. If field coordination is necessary, allows field offices a minimum of 15 working days for clearance.*
- *Prepares enough copies of OSHA 83 and draft directive to circulate concurrently to all clearance officers. Two versions of the OSHA 83, one for the National Office and one for the field, may be prepared at the discretion of the originator.*
- *Marks the name of the clearance office to which the copy goes and sends the copy to the clearance office.*

2. Labor-Management Relations Officer.

- *Determines whether consultation with Local 12 of the NCFLL is required.*
- *Indicates whether consultation is required in item 7 and completes items 8, 9 and 10 on the OSHA 83.*
- *If consultation with Local 12 or the NCFLL is required, coordinates with appropriate directorates.*

3. Clearance Officers in the National Office and the Field.

- *Review the draft directive.*
- *Complete items 7, 8, 9 and 10 on the OSHA 83.*
- *Return the OSHA 83 with comments to the originator.*

4. Originator.

- *Reviews and reconciles any comments noted in item 7 of the OSHA 83 by clearance officers in the National Office and in the field. Consults with clearance officers regarding comments and proposed policy and procedures including language.*
- *Revises draft directive as necessary. Makes final determination of material to include in final version.*
- *Prepares directive in final form, in consultation with the Directives Liaison Officer.*
- *If external clearance is necessary (except union), initiates required clearances.*
- *Sends directive package consisting of paper and diskette copies of final directive including abstract, table of contents, and index; and paper copies of transmittal memo to clearance official, OSHA 83's, comments, other materials received from clearing offices, and other background materials, to the Directives Liaison Officer. . . .*

Exhibits

1. August 1997 Letter Requesting OSHA Policy Guidance
2. November 1999 Letter of Interpretation
3. Withdrawn Letter of Interpretation
4. OSHA Directive CPL 2-0.125 - Home-Based Worksites

U.S. Department of Labor

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

APR 25 2000

MEMORANDUM FOR: JOIN J. GETEK
Assistant Inspector General for Audit

FROM: CHARLES N. JEFFRESS *Charles N. Jeffress*
Assistant Secretary

SUBJECT: Response to OIG's Draft Audit Report No. 05-00-005-10-001 --
"OSHA Policies and Procedures Applicable to the Home
Workplace Letter"

This is in response to your April 14 memorandum transmitting the Office of the Inspector General's (OIG) Draft Audit Report No. 05-00-005-10-001, "OSHA Policies and Procedures Applicable to the Home Workplace Letter." We appreciate the professional manner in which this audit was conducted and intend to improve our internal procedures with respect to policy pronouncements and interpretations as a result of this experience and your recommendations.

Under authority delegated from the Secretary of Labor, the Assistant Secretary for OSHA is generally responsible for administering the safety and health programs and activities of the Department of Labor. The OIG report clearly recognizes that OSHA requires and has established a formal process for issuing agency policy and procedures -- the OSHA Directives System. The Home Workplace Letter in question was drafted and sent out as a Letter of Interpretation (LI) within the parameters of that Directive. Such letters are designed to clarify, but not set, agency policy. OSHA had already initiated a review of its procedures for issuing agency policy as a result of this letter. However, the agency also specifically delayed any formal revisions to these procedures so that it could incorporate the insights and recommendations of the OIG findings. The OIG report calls for stronger controls over the LI process to ensure that such interpretation letters are fully considered within the agency and do not communicate new policy to recipients or the public. We agree with these findings in principle and will strive to incorporate them into revised agency procedures.

The OIG report makes five distinct findings and corresponding recommendations.

1. There were no written procedures that specifically govern preparation and processing of LIs - OSHA's Directives System requires that offices that issue policies and procedures must have written procedures governing the issuance of policy or letters of interpretation. Although an informal recognition of the process to be followed was understood in the originating office, no

formal operating procedures were in place to ensure that this particular letter received proper review within the agency. In an effort to avoid similar misunderstandings in the future, OSHA is committed to developing and implementing written procedures for all of its offices in line with this recommendation. These procedures will include a clear definition of what is involved in the process of providing input and what is required in the clearance of directives and letters of interpretation.

2. Conflicting language in OSHA Directives clouds the policy role of LIs - Although it is clearly intended as agency policy that letters of interpretation cannot establish new policies, the agency acknowledges that the existing language governing directives is not precise enough to avoid possible confusion. In the upcoming revision on agency directives, this language will be modified to ensure a clear understanding that letters of interpretation will provide interpretations only in the context of an existing regulation, standard, or directive.

3. There were no rules to govern when LIs go beyond interpretation and become new or expanded policy - OSHA has already recognized the need for establishing common ground rules within the agency to differentiate between interpretations of the Act and interpretations of existing policies and procedures. Although the OIG report focuses specifically on the issuing of letters of interpretation, the recommendation is also appropriate and will be heeded for the establishment of agency policies and procedures through formal directives. A major concern of the agency in the aftermath of the Home Workplace letter, is how agency policy is established and communicated and what level and degree of clearance that requires. We fully intend to clarify this issue in the upcoming revision of the Directives System to ensure consistent application throughout the agency and to avoid improper or unintentional expansion of existing agency policy.

4. Not all documents and comments were shared among all those responsible for clearing the LI - The OIG report raises concerns that there was an incomplete sharing of information within OSHA and between the Office of the Solicitor (SOL) and OSHA. This failure is seen as undermining the ability of agency staff to properly assess and evaluate a letter of interpretation such as the Home Workplace letter. Specifically, the OIG report reflects a belief that cautionary comments raised by some staff during the development of the letter as well as the existence of an internal SOL legal opinion should have been widely shared with everyone in the clearance process. With the advantage of hindsight, OSHA acknowledges that the universal sharing of all information among those in the clearance process may have avoided this controversy. On the other hand, the agency remains concerned that the clearance process not become unwieldy. OSHA agrees with the OIG report that improvements are necessary in the agency's clearance process. Better and more timely coordination among offices in OSHA and between OSHA and SOL is an essential component in a revised clearance process. When a substantive change is made in a letter of interpretation or policy pronouncement subsequent to a clearance sign-off, OSHA acknowledges that the document should be rerouted to that person to ensure agreement with the change. Clearly, OSHA understands that a number of changes such as these must be incorporated in its clearance processes. We look forward to working with the OIG in determining what practical steps can be instituted to improve the OSHA clearance process.

5. No one involved in the clearance process was specifically expected to evaluate the policy ramifications of the letter taken as a whole - While there may be an inherent expectation that senior level clearance involves consideration of policy ramifications, OSHA's written procedures do not impose such a requirement. The report reflects the fact that there are inconsistent approaches among individuals in the agency with respect to the clearance and review of documents. This becomes particularly critical when it involves the establishment or interpretation of policy. We accept this finding and the accompanying recommendation that OSHA ensure that key staff in the clearance process are sensitive to the policy implications of interpretations made in LIs. We also acknowledge the need for identifying appropriate instances when executive-level management is consulted before statements reflecting agency policy are issued. Appropriate changes in the agency's clearance process and Directives System will be formally implemented, to address the concerns raised by the OIG report.

In conclusion, I assure you of my personal commitment to address the concerns and weaknesses raised in this audit. As has been discussed with your staff, we will continue to work with them in this effort as well as to share our revisions to written procedures as we develop and implement them.