

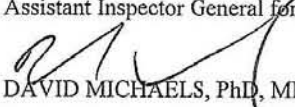
OSHA Response to Draft Report

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