

OSHA Response to Draft Report

U.S. Department of Labor


Occupational Safety and Health Administration
Washington, D.C. 20210



Reply to the attention of:

MAR 30 2009

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

FROM: DONALD G. SHALHOUB 
Deputy Assistant Secretary

SUBJECT: Response to OIG's Draft Audit Report
No. 02-09-203-10-105
"Employers With Fatalities Were Not Always Properly
Identified and Inspected Under OSHA's Enhanced
Enforcement Program"

This memorandum is in response to your March 13, 2009, transmittal of the Office of Inspector General (OIG) Draft Audit Report No. 02-09-203-10-105, "Employers With Fatalities Were Not Always Properly Identified and Inspected Under OSHA's Enhanced Enforcement Program." OSHA appreciates the time, thought, and effort expended by the OIG in conducting the audit of the Enhanced Enforcement Program (EEP). Additionally, the Agency appreciates the opportunity to respond to the findings and recommendations of the audit report. While we agree with many of the recommendations and believe they will allow the Agency to make important improvements to the program, we also want to convey some reservations and concerns we have related to several of the audit findings and the implications of those findings.

As recognized by the OIG, the OSHA EEP is a relatively new program. The Agency is aware of its value and also understands that the program has shortcomings that we have continued to address. After three years of EEP implementation, OSHA acknowledged that the program may not have been consistently accomplishing its purpose and intent to focus on "recalcitrant employers." In an effort to address this situation, the Agency adjusted the program in January 2008 and issued a new EEP directive that modified the policies for its administration. Shortly after the policy revision, the Agency realized that even more program modifications were needed to better direct resources and to add a more stringent follow-up inspection criteria to the program. The Agency planned to create a task group to evaluate and work on EEP improvements. Before that group could be constituted, OSHA received notification from the OIG that this current audit would be conducted. After discussions with the

OIG, the Agency postponed its plans until after the completion of the OIG audit. We now look forward to using the insights from this audit and our own experience to address and correct recognized issues with the EEP.

EEP was developed by the Agency to supplement enforcement activity to focus on “recalcitrant employers.” It is important to note that the EEP works in concert with several other Agency enforcement programs designed to target and direct resources as efficiently as possible to make the greatest impact on the reduction of workplace injuries, illness, and fatalities. This fact is acknowledged in the audit with the recognition that EEP inspections constitute approximately 1 percent of all programmed inspections conducted by OSHA. This is also indicative of the fact that EEP is not designed as a major enforcement program of OSHA nor meant to be a stand-alone Agency program or strategy in dealing with these types of employers. Rather, it was specifically designed to focus on the recalcitrant employer and to supplement the major enforcement initiatives of the Agency. The report concludes that the Agency did not place the “appropriate management emphasis and resources on this program to ensure indifferent employers were properly designated for this program and subject to EEP actions.” Based on the size and purpose of this program, we do not fully accept the implication of that conclusion since we believe that our resource allocation was consistent and balanced with the many other Agency targeting programs and strategies we employ.

The draft audit report findings subtly imply that inadequacies in the EEP have resulted in additional workplace fatalities. While we appreciate the OIG’s attempt to carefully word the report to avoid a direct cause and effect relationship, the pairing of Findings #1-4 with subsequent fatalities is a matter of deep concern. We fear this may lead to an inference that the lack of a workplace inspection resulted in a fatality, an inference that we find to be both misleading and unfair. We also believe it to be an inappropriate and unsupported assumption to suggest that a fatality did or did not occur because a given workplace did not receive an inspection. The Occupational Safety and Health Act recognizes workplace safety and health as the responsibility of employers. OSHA’s mission is to assure safe and healthful working conditions for working men and women which we accomplish through a variety of mechanisms including enforcement, regulation, and training. It has never been within the reach of the Agency’s resources to provide absolute safety and health protection for all workplaces.

Before responding specifically to the recommendations made by the OIG, we would also like to draw your attention to the information cited from the Bureau of Labor Statistics (BLS) that on average 5,680 workplace fatalities were recorded over each of the last five years. It should be noted that most of those fatalities occurred in workplaces not covered under Federal OSHA jurisdiction and thus not subject to protections afforded under the EEP. In fact, in each of the last four years, less than 20 percent of those workplace fatalities identified by BLS were subject to Federal OSHA coverage.

Over the years, there has been a steady decline in the number of workplace fatalities which serves as a good indicator that the Agency's programs and strategies are achieving some notable success. Still, even a single fatality is one too many. Agency programs are designed with that in mind as we continue to make improvements in our programs to provide greater protections for worker safety and health.

The insights of this current audit report and the importance of ongoing improvements in OSHA programs such as the EEP enable the Agency to better address workplace safety and health. OSHA will evaluate and implement the OIG recommendations as follows:

Recommendation 1: Form an EEP Task Force to make recommendations to improve program efficiency and effectiveness in the following areas.

- a. Targeting indifferent employers most likely to have unabated hazards and/or company-wide safety and health issues at multiple worksites.
- b. Ensuring appropriate actions (i.e. follow up and related worksite inspections) are taken on indifferent employers and related companies.
- c. Centralizing data analysis to identify employers with multiple EEP qualifying and/or fatality cases that occur across regions.
- d. Making use of different enhanced enforcement approaches, as appropriate, based on employer industry or the type of worksite.
- e. Identifying and sharing Regional and Area Offices' "best practices" to improve compliance with EEP requirements.

OSHA Response: The Agency agrees with this recommendation. As previously indicated, OSHA had always intended to constitute an Agency Task Force to review and strengthen the EEP. The findings and recommendations contained in this audit will serve as a basis for the work of the Task Force. The Agency agrees that recommendations a. through e. above provide a well-considered starting blueprint for the evaluation of the EEP.

Recommendation 2: Revise the EEP directive to address issues with prior qualifying history and designation, and to provide specific criteria when National Office EEP-Alert Memoranda are to be issued.

OSHA Response: The Agency agrees with the OIG that once constituted, OSHA's EEP Task Force should evaluate the issue of prior qualifying history and designation and the need for specific criteria when National Office EEP-Alert Memorandum are to be issued.

Recommendation 3: Provide formal training on the EEP requirements including designation, consideration of related worksite inspections, enhanced enforcement

follow-up, and enhanced settlement provisions to ensure consistent application of EEP requirements.

OSHA Response: The Agency agrees with this recommendation. When the revised EEP directive is completed, the Agency is committed to providing formal training on its provisions. At this time, we expect that OSHA would provide Webinar training for all OSHA field personnel to assure understanding of the directive, including the elements specifically raised in Recommendation #3.

Recommendation 4: Incorporate enhanced settlement provisions in OSHA's informal settlement template.

OSHA Response: The Agency agrees with this recommendation to the extent that we will raise the issue of incorporating enhanced settlement provisions in our informal settlement template. However, since the Agency works in conjunction with the Office of the Solicitor and settlement provisions are subject to their input on the matter, we cannot definitively commit that such provisions will be incorporated.

Recommendation 5: Establish controls for periodic reconciliation of the EEP log to OSHA's data system (currently IMIS).

OSHA Response: The Agency believes that it has already complied with this recommendation. OSHA previously established a separate data base with biweekly reporting by the Regional Offices. We are convinced that any concerns raised by the OIG about periodic reconciliation of the EEP log will be resolved with the roll-out of the new OSHA Information System (OIS). In addition, the EEP Task Group will be charged with reviewing the subject of data reconciliation and making any recommendations for interim remedial action that might be reasonable and appropriate to address any concerns prior to the implementation of the OIS.

Recommendation 6: Develop and distribute a crosswalk to Federal OSHA citations for state standards that have different coding than Federal OSHA Standards.

OSHA Response: Although the Agency agrees with this recommendation in principle, this would be a very resource intensive project that would require the expenditure of funds for which the Agency has neither budgeted nor requested. However, OSHA does commit to undertake an effort, in conjunction with the States, to have the States provide crosswalk information for the Agency's data system that will link different State citable standards to its Federal equivalent. The availability of IT resources and competing priorities for those funds will determine the Agency's ability and timetable in completing this task.