STATE OF HAWAII

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

OCCUPATIONAL SAFETY AND HEALTH DIVISION

August 14, 2009

To: All OSHCOs & EHSs

From: Darwin L.D. Ching, Director
Department of Labor and Industrial Relations

Subject: Enhanced Enforcement Program (EEP)

The attached is an OSHA directive on its Enhanced Enforcement Program that we will use to focus on agriculture, construction, and general industry employers who are subject to enforcement actions that result in enhanced enforcement cases.

Please note that this Directive mentions Section 11(b) of the OSH Act. HIOSH does not have a word for word equivalent of Section 11(b) in Chapter 396, Hawaii Revised Statutes (HRS). Chapter 396, HRS, does not contain any provision to obtain summary court orders. However, Chapter 396, HRS, incorporates provisions of Section 11(b) in substance and/or in principal allowing HIOSH to enforce final orders.

HIOSH equivalents to the federal are as follows:

Area Director → Branch Manager
Area Office → HIOSH Honolulu Office
Office of the Solicitor → Office of the Attorney General
Regional Administrator → Administrator
Regional EEP Coordinator → Administrator

Please insert CPL 02-00-145, Enhanced Enforcement Program (EEP) into your Part I GOSH and annotate the index accordingly.

This GOSH is effective upon receipt.

Source: OSHA Instruction CPL 02-00-145, January 1, 2008

# OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR — Occupational Safety and Health Administration

**DIRECTIVE NUMBER:** CPL 02-00-145 | **EFFECTIVE DATE:** January 1, 2008

**SUBJECT:** Enhanced Enforcement Program (EEP)

## ABSTRACT


**Purpose:** This Instruction revises OSHA's Enhanced Enforcement Program (EEP) to focus on agriculture, construction, maritime, and general industry employers who are subject to enforcement actions that result in enhanced enforcement cases. This Instruction also replaces implementing memoranda dated September 30, 2003, and October 16, 2003.

**Scope:** OSHA-wide

**References:** OSHA Instruction CPL 02-00-103 (CPL 2.103), Field Inspection Reference Manual (FIRM), September 26, 1994; OSHA Instruction CPL 02-00-137, Fatality Inspection Procedures, April 1, 2005; OSHA Notice 06-01 (CPL 02), Site-Specific Targeting 2006 (SST-06), June 12, 2006; and OSHA Instruction CSP 01-00-002 (STP 2-0.22B), State Plan Policies and Procedures Manual, March 21, 2001.

**Cancellations:** Memorandum to Regional Administrators from John L. Henshaw, March 12, 2003, Subject: Enhanced Enforcement Policy for Employers Who Are Indifferent to Their Obligations Under the OSH Act; Memorandum to Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, September 30, 2003, Subject: Interim Implementation of OSHA's Enhanced Enforcement Program (EEP); and Memorandum to Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, October 16, 2003, Subject: Enhanced Enforcement Program (EEP) IMIS Coding.

**State Impact:** Notice of Intent Required. See section VI.

**Action Offices:** National, Regional, and Area Offices

**Originating Office:** Directorate of Enforcement Programs

**Contact:** Directorate of Enforcement Programs
Office of General Industry Enforcement
200 Constitution Avenue, NW, N-3119
Washington, DC 20210

By and Under the Authority of

Edwin G. Foulke, Jr.
Assistant Secretary

## Executive Summary

This Instruction revises OSHA's Enhanced Enforcement Program (EEP) to focus on agriculture, construction, maritime, and general industry employers who are subject to enforcement actions that result in enhanced enforcement cases that include follow-up inspections, inspections of other sites, increased company/corporate awareness of OSHA enforcement, enhanced settlement provisions, and federal court enforcement under Section 11(b) of the OSH Act. This Instruction also replaces the March 12, 2003, September 30, 2003 and October 16, 2003 memoranda.

## Significant Changes

1. Clarifies that Federal Agencies are included in the program.
2. Drops the "Priority Enforcement Case (PEC)" terminology.
3. Modifies the EEP criteria.
4. Clarifies what constitutes OSHA history.
5. Provides for the lining-out of establishments on the EEP2 Log.

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I. Purpose.

This Instruction revises OSHA's Enhanced Enforcement Program (EEP) to focus on agriculture, construction, maritime, and general industry employers who are subject to enforcement actions that result in enhanced enforcement cases. This Instruction also replaces implementing memoranda dated September 30, 2003 and October 16, 2003.

II. Scope.

This Instruction applies OSHA-wide.

III. References.

A. OSHA Instruction CPL 02-00-103, Field Inspection Reference Manual (FIRM), September 26, 1994.

B. OSHA Instruction CPL 02-00-137, Fatality/Catastrophe Inspection Procedures, April 14, 2005.

C. OSHA Notice 06-01 (CPL 02), Site-Specific Targeting 2006 (SST-06), June 12, 2006.

D. OSHA Instruction CSP 01-00-002, State Plan Policies and Procedures Manual, March 21, 2001.

IV. Cancellations.

A. Memorandum to Regional Administrators from John L. Henshaw, March 12, 2003, Subject: Enhanced Enforcement Policy for Employers Who Are Indifferent to Their Obligations Under the OSH Act.

B. Memorandum to Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, September 30, 2003, Subject: Interim Implementation of OSHA's Enhanced Enforcement Program (EEP).

C. Memorandum to Regional Administrators from R. Davis Layne, Deputy Assistant Secretary, October 16, 2003, Subject: Enhanced Enforcement Program (EEP) IMIS Coding.

V. Action Information.

A. Responsible Office.

Directorate of Enforcement Programs (DEP).

B. Action Offices.

National, Regional, and Area Offices.

C. Information Offices.

State Plan States, OSHA Training Institute, Consultation Project Managers, VPP Managers and Coordinators, OSHA Strategic Partnership Coordinators, Compliance Assistance Coordinators, and Compliance Assistance Specialists.

VI. State Impact/Notice of Intent.

This Instruction describes a Federal program change which revises OSHA's Enhanced Enforcement Program for cases in which there is reason to believe that the employer may be indifferent to its occupational safety and health obligations. States should consider establishing programs comparable to the Federal Enhanced Enforcement Program to focus appropriate attention on these employers.

Because of the significant nature of this program, notice of intent is required concerning: (1) whether the State will adopt an Enhanced Enforcement Program, as revised by this instruction; (2) if so, whether the State's program will be identical to or different from the Federal EEP; and, whether or not the State adopts its own EEP program, (3) how the State will identify and notify its Regional Administrator of multi-state employers that would qualify for action under the Federal EEP; and (4) how the State will respond to Federal referrals of EEP worksites. When an employer is identified for national attention through the issuance of an EEP-Alert Memorandum, States are asked to follow the procedures in this directive for inspecting worksites within their jurisdiction and recording their activity.

If the State adopts a program comparable to the Federal EEP, its implementing policies and procedures are expected to be at least as effective as those in this instruction and must be available for review. If the State's program differs from the Federal one, the State may either post its different procedures on its State plan web site and provide the link to OSHA or provide a copy to OSHA with information on how the public may obtain a copy. If the State adopts identical policies and procedures, it must provide the date of adoption to OSHA. OSHA will provide summary information on the State responses to this instruction on its web site.

VII. Background.

A. Purpose.

This program was first announced in former Assistant Secretary John L. Henshaw's memorandum of March 12, 2003, entitled "Enhanced Enforcement Program for Employers Who Are Indifferent to Their Obligations Under the OSH

Act." It was initially implemented in a memorandum to Regional Administrators from former Deputy Assistant Secretary R. Davis Layne on September 30, 2003.

After four years of implementation, OSHA is revising the program. The purpose of the program remains the same, to target those employers who are indifferent to their obligations under the OSH Act. However, the revised program will focus greater enforcement emphasis on those employers that have a history of violations with OSHA (including history with the State Plans).

OSHA views a case meeting the enhanced enforcement criteria as stated in section XI as one in which there is reason to believe that the employer may be indifferent to its OSH Act obligations. The EEP actions described in this Instruction in section XII are intended to increase attention on the correction of the hazards found in these workplaces and, where appropriate, in other worksites of the same employer where similar hazards are deemed likely to be present.

Under the original EEP program, a large percentage of inspections involved small employers (with 25 or fewer employees) who had only one serious violation related to a fatality, but who had no significant OSHA history within the previous three years. The revised program removes such employers from the EEP program. Although this group of cases is no longer included in the revised EEP, such cases remain subject to OSHA's policies for inspection, abatement verification and follow-up procedures, as stated in OSHA's directive on fatality cases, OSHA Instruction CPL 02-00-137.

B. EEP Log.

OSHA maintains an EEP Log in which inspections that meet the EEP criteria, or are EEP-related inspections (i.e., EEP follow-ups, SST-related, or inspections at other worksites of the same employer) are logged as they are reported to the National Office by the Regional EEP Coordinators.

The effect of an employer's inclusion on an EEP inspection list does not continue indefinitely as some employers may believe. When the Regions submit their EEP inspections to the National Office for inclusion on the EEP Log, the Office of Statistical Analysis (OSA) checks to see if the EEP inspection establishment or related establishments are on the current SST primary and secondary lists. Any such establishments found are moved to the Area Office's current SST cycle. The SST, however, calls for only one inspection of the establishment (or at most two, if separate safety and health inspections are conducted). See paragraph XIII.E. of OSHA Notice 06-01 (CPL 02) (SST-06).

A provision has been added to this Instruction to provide for lining-out of establishments on the EEP2 Log when certain violations are withdrawn or vacated. See section XIV.

VIII. Transition Between Original EEP and the Revised EEP.

Because there are significant differences between the original Enhanced Enforcement Program as implemented in the September 30, 2003 memorandum, and the revised EEP program described in this Instruction, the data from the two programs will not be comparable and so will be kept separately.

The National Office will start a new EEP Log, which will be referred to as the EEP2 Log, for enhanced enforcement cases, follow-up inspections, and related establishment inspections under the revised program.

The revised EEP protocol of this Instruction will be followed for any new inspection opened on or after the effective date of this Instruction.

IX. Significant Changes.

A. Federal Agencies are explicitly covered by this program. See paragraph X.D. The original EEP protocol was silent on Federal Agency coverage although Regional Offices were notified later that the program did apply to Federal Agencies.

B. The term "Priority Enforcement Case (PEC)" is no longer used. Instead, an inspection that meets the EEP criteria will be referred to as an enhanced enforcement case. See section XI.

C. The criteria for enhanced enforcement case status have been modified to place more emphasis on an employer's history of violations with OSHA, especially previous willful, repeat, and failure-to-abate violations. See section XI.

D. For purposes of this Instruction, the delineation of OSHA history is clarified at XI.G.

E. A provision has been added to this Instruction to provide for lining-out of establishments on the EEP2 Log when certain violations are withdrawn or vacated. See section XIV.

X. Handling Enhanced Enforcement Cases.

A. Compliance Officers (CSHOs) are to become familiar with the material in Appendix B in order to be able to evaluate the employer during an inspection likely to result in an enhanced enforcement case.

B. The Area Director will identify enhanced enforcement cases at the time the citations are issued, in accordance with criteria set forth in this directive.

C. The Area Director, in addition to EEP actions described in section XII, will consider for criminal referral under Section 17(e) of the Act any fatality inspection

involving a willful violation of a standard that caused the death of an employee. See CPL 02-00-137, section XIII.

D. Federal Agency cases that meet the enhanced enforcement case criteria will also be classified as enhanced enforcement cases, and where the term "employer-wide" or "company-wide" is used, it will apply agency-wide or department-wide, as appropriate. Appropriate EEP actions for such cases will be determined by the Area Director in consultation with the Regional Administrator.

E. When the Area Director determines that a case meets the enhanced enforcement case criteria, the Area Director will notify the Regional Administrator, who in turn must notify the Directorate of Enforcement Programs (DEP) and the Directorate of Construction (DOC).

F. Regional Administrator notification to DEP and DOC must be by e-mail using the EEP-group e-mail address on OSHA's Global Address list. The notification must be at least monthly and include the information requested in Appendix A. If history is an element in the criterion used, it is necessary to give the inspection number of the inspection that the history is based upon. Regions are encouraged to use the Excel spreadsheet format that will be sent to the EEP Regional Coordinators shortly after this Instruction becomes effective.

XI. Criteria for an Enhanced Enforcement Case.

Any inspection that meets one or more of the following criteria at the time that the citations are issued will be considered an enhanced enforcement case. The serious violations can be of low, medium or high gravity.

A. Fatality Criterion.

- A fatality inspection in which OSHA finds one or more willful or repeated (serious any gravity) violations related to the death, **OR**
- A fatality inspection in which OSHA finds one or more serious (any gravity) violations related to the death, **and** the employer has either
  - an OSHA **history of violations similar in kind to the violation that led to the current fatality** consisting of at least one serious, or willful, or repeat violation within the last three years, **or**
  - the occurrence of another fatality within the last three years regardless of whether any citation was issued**.**

B. Non-Fatality Criterion.

An inspection that results in the citation of three or more serious (any gravity) violations that **are also** classified as willful or repeat (or any combination of such willfuls and repeats totaling three or more), **and** the employer has an OSHA **history of violations similar in kind to one or more of the violations found in the current inspection** consisting of at least one serious (any gravity), or willful, or repeat violation within the last three years.

C. Failure-to-Abate Criterion.

An inspection that results in one or more failure-to-abate notices where the underlying violations were classified as serious (any gravity)**.**

D. Additional Enforcement Inspections

Any egregious case will be considered an enhanced enforcement case, and will be coded with the IMIS "EEP2" code.

E. Significant Cases.

A Significant Case (significant enforcement action) consists of one or more inspections in which the proposed penalties total more than $100,000. (In general industry, a significant case often consists of a safety and a health inspection of the same employer; in construction, there may be several inspections of different companies comprising one significant enforcement action.)

For classification under the Enhanced Enforcement Program, each individual inspection must be evaluated separately to determine if it meets one of the criteria in XI.A., B., or C. If any of the inspections meet one of the enhanced enforcement criteria, it will be considered an enhanced enforcement case, and will be coded with the IMIS "EEP2" code.

F. Grouped and Combined Violations.

Grouped and combined violations will be counted as one violation for purposes of the enhanced enforcement case criteria.

G. Unclassified Violation.

An Unclassified violation will qualify for EEP designation, depending upon what the citation classification was, or would have been, if the Unclassified designation was not used. See chapter IV, paragraph D.4.a.(2) of OSHA Instruction CPL 02-00-103 (FIRM).

Note: Where the original citation classification (willful or repeat) was an error, Unclassified is not appropriate. Instead, the citation is to be amended to the appropriate classification.

H. OSHA History.

For purposes of the revised Enhanced Enforcement Program, OSHA history is based on the employer's nationwide inspection history, which includes State Plans as well as Federal OSHA jurisdictions.

Prior history must be based on a final order; it is important to know how the case was finally resolved (citations deleted/vacated), and not just what citations were issued.

The following examples show a violation history that is "similar in kind" to the current violation for the purposes of this Instruction. This would also apply to any violations of the General Duty Clause.

- Example 1. Violations of OSHA's fall protection standards. A prior fall from a scaffold is considered similar in kind to a current fall through a floor opening, or a fall from a roof.

- Example 2. Violations of standards calling for personal protective equipment (PPE). A prior failure to provide hard hats is considered similar in kind to a current failure to ensure respirator use, or a failure to train regarding PPE.

- Example 3. Violations of OSHA's standards concerning exposure to toxic and hazardous substances. A prior exposure to lead is considered similar in kind to a current exposure to chemicals of a dipping/coating operation, or a failure to train on the hazards of the chemicals.

Note: For purposes of this Instruction, "similar in kind" is broader than the "substantial" similarity that is required for a repeat citation.

XII. Elements of the Enhanced Enforcement Program (EEP).

When the Area Director determines that a case meets one of the enhanced enforcement case criteria, the case will be treated in accordance with paragraphs XII. A. through E. Only those EEP actions that are appropriate for the particular employer should be taken; not all elements in A. through E. are appropriate for all employers.

The actions described in paragraphs B, C, and D below may be taken before a case meeting the EEP criteria results in a final order of the Review Commission.

A. Enhanced Follow-up Inspections.

For any case opened on or after the effective date of this Instruction which is identified as an enhanced enforcement case, a follow-up inspection must be conducted even if verification of abatement of the cited violations has been received. The purpose of the follow-up inspection is to assess **not only** whether the cited violation(s) were abated, **but also** whether the employer is committing similar violations. This is a modification of the follow-up procedures found in Chapter II of the FIRM at paragraph B.1.a. in that it has a broader scope.

If there is a compelling reason not to conduct a follow-up inspection, that reason must be documented in the file, and in the follow-up column of the EEP2 Log. Examples of compelling reasons not to conduct a follow-up inspection include: worksite/workplace closed, out of business, operation cited has been discontinued at the worksite/workplace, worksite/workplace moved out of Area Office jurisdiction, case no longer meets any of the EEP criteria because citation has been withdrawn/vacated, or EEP violation(s) currently under contest. See also section XIV, regarding lining-out of establishments on the EEP2 Log.

When, as will often happen, the Area Office has reason to believe that a construction worksite is no longer active (or is nearing completion), thus making a follow-up inspection impossible or impractical, the provisions of XII.B.4 will apply. When a construction follow-up is attempted but the employer is no longer at the site, the attempted inspection will not be coded with the N-8-EEP2 and will not be added to the EEP2 Log.

Note: A Corrected During Inspection (CDI) situation does not take the place of a needed follow-up inspection.

B. Inspections of Related Worksites.

OSHA views an enhanced enforcement case as an indication that the employer may be indifferent to its OSH Act obligations. Therefore, when circumstances warrant, OSHA will inspect related worksites of the same employer to determine whether the compliance problems initially cited are indicative of a company-wide problem. See Appendix B for CSHO guidance in evaluating employers.

Establishments are related when there is common ownership. Related establishments include establishments of corporations that are in the same corporate family, such as a parent corporation and all subsidiary corporations in which the parent has an ownership share of greater than 50 percent.

For assistance in identifying other related worksites of the same employer, see paragraph XII.B. 3.f., below.

1. Comprehensive Inspection of EEPs on Current SST Lists.

Establishments that have been identified as enhanced enforcement cases, which are on the current year's Site-Specific Targeting primary or secondary inspection lists, may be placed in the SST's current inspection cycle by the Office of Statistical Analysis (OSA) as they become known, and the Area Director will be notified. Since many of these cases result from limited-scope inspections, the placement of these establishments in the current SST cycle will allow for a prompt comprehensive inspection. Deletion and deferral procedures in the current SST directive will be followed for these enhanced enforcement cases.

2. Related EEP Sites on Current SST Lists.

When an inspection results in an enhanced enforcement case, all related establishments of the same employer that are on the current year's SST primary or secondary lists will be identified by the OSA, and they will be moved (except as provided below) to the current inspection cycle if the establishment is in the same 3-digit NAICS code (or 2-digit SIC code) as the initial enhanced enforcement establishment.

Related establishments on the SST primary or secondary lists that are not in the same 3-digit NAICS code (2-digit SIC code) may also be placed in the current inspection cycle if the nature of the hazards and violations found might be present at the related sites.

If, however, OSA identifies more than 10 related facilities of one company on the SST primary and secondary lists, OSA will randomly select no more than 10 to be moved into current cycles.

OSA will be notified by the Regional Administrator's monthly report (sent to the EEP e-mail address) of any enhanced enforcement cases. OSA will, in turn, notify the Regional EEP Coordinator and Area Director by e-mail of any establishments moved to an Area Office's current inspection cycle, identifying each establishment that has been moved.

An establishment that has been moved to the current inspection cycle will not be considered as having received an EEP action (i.e., SST-related inspection) until it is inspected.

3. Additional Inspections in Agriculture, Maritime, and General Industry Worksites.

Whenever an enhanced enforcement case occurs in an agriculture, maritime, or general industry establishment, other related sites of the same employer (those not on the current SST inspection lists) may be inspected if the Regional Administrator determines that there are reasonable grounds to believe problems similar to those found in the enhanced enforcement case may exist at the other site. Appendix B of this Instruction provides guidance on determining whether compliance problems found during the initial EEP inspection are localized or are likely to exist at related facilities.

a. Decision to inspect additional establishments of same employer.

The Regional Administrator is responsible for determining whether there is sufficient evidence of a company-wide problem to justify inspection of additional company worksites. Before conducting such an inspection, the Regional Administrator will consult with the Regional Solicitor, as appropriate, to decide whether OSHA has probable cause to conduct the inspection.

The information discussed in Appendix B should be gathered to the extent possible during the initial EEP inspection. Such information can also be sought by letter, telephone, or, if necessary, by subpoena.

b. Additional worksite inspections where the employer is operating within one region.

If the Regional Administrator determines that additional worksites should be inspected, at least one additional establishment of the cited employer within the Region will be inspected to determine whether that site has violations similar to those in the enhanced enforcement case. Additional related establishments may be inspected depending upon the results of the inspection(s) and the Region's resources. If the Regional Administrator believes that there are additional establishments located in one or more of the Region's State Plan States that should be inspected, the information will be forwarded to the State Plan Designee(s) and the National Office with a recommendation for inspection.

c. Additional worksite inspections where the employer is operating in two or more regions.

If the Regional Administrator believes that there are additional establishments in another Region or in a State Plan State in another

Region that should be inspected, the information will be forwarded to the National Office in accordance with paragraph XIII.B, below. The Regional Administrator's recommendation for inspection shall include all relevant facts.

d. Scope of the Inspection.

The scope of inspection of a related establishment will depend upon the information obtained in connection with the original EEP inspection, and will mainly focus on hazards that are the same as or similar to those found in the original case.

e. Priority of the Inspection.

Inspections under this program will be given priority over any other programmed inspection.

f. Office of Statistical Analysis.

At the request of the Regional Administrator or Regional Coordinator, OSA will identify other related worksites nationwide (including in State Plan States) of the same employer, and will e-mail all related information to DEP and the Regional Coordinator in the region where the enhanced enforcement case originated.

g. Notification of National Office.

The Regional Administrator must notify the Director of Enforcement Programs whenever the Regional Administrator determines that there is sufficient evidence of a company-wide problem to justify inspection of additional worksites within the region, or referrals to State Plan States, or to other Regions.

4. Construction Worksites.

Whenever an employer in the construction industry has an enhanced enforcement case, the Regional Administrator must determine whether further investigation of the employer's OSH Act compliance is appropriate. If so, at least one other worksite of the cited employer must be inspected to determine whether the employer is committing violations similar to those in the enhanced enforcement case. Because the worksites of construction employers are often difficult to locate, the following means may be used to identify other worksites of the cited employer.

a. If the enhanced enforcement case is resolved through a settlement, the agreement should require the employer to notify OSHA of its other current jobsites and whenever it begins work at a new construction site during the next year.

b. An administrative subpoena may be issued, as needed, to an employer for the production of existing records that identify the location of worksites where employees of that employer are presently working or are expected to be working within the next 12 months. See Field Inspection Reference Manual (FIRM), Chapter I, paragraph E.4.b.

Although subpoenas for such records will usually be issued after enhanced enforcement case citations have become final, a subpoena may be issued at any time during an inspection if it appears that the inspection is likely to result in an enhanced enforcement case and the Area Director determines (after consultation with the RA) that the hazards disclosed by the inspection and the inadequacy of the employer's response to those hazards indicate that a broader response by OSHA may be appropriate.

Whenever a subpoena is to be issued, the Regional Administrator must coordinate with the Regional Solicitor to ensure future enforceability of the subpoena.

c. Where a Regional Administrator determines that there is sufficient evidence of a company-wide problem that may cross regional lines, the procedure in paragraph XIII.B regarding notification to the National Office will be followed.

C. Increased Company Awareness of OSHA Enforcement.

For all establishments that are the subject of an enhanced enforcement case, the Area Director must mail an information copy of the Citation and Notification of Penalty to the employer's national headquarters if the employer has more than one fixed establishment. See sample letter in Appendix C. In cases where OSHA determines that the establishment's safety and health problems need to be addressed at the company headquarters level, the following actions may also be taken.

1. A meeting may be held between OSHA and company officials to discuss how the company intends to address safety and health requirements. If the

company operates in more than one region, this normally will require National Office coordination.

2. A letter may be sent from the Regional Administrator, or the appropriate National Office official, to the company President expressing OSHA's concern with the company's violations.

3. Employee representatives (e.g., unions) should be notified when OSHA determines that the establishment's safety and health problems need to be addressed at the company headquarters level.

D. Enhanced Settlement Provisions.

Most settlement agreements require the employer to abate all violations and pay a penalty. In some settlements, however, particularly those in egregious cases and other significant enforcement actions, OSHA has insisted that employers take steps to address systemic compliance problems or to provide OSHA with information that will enable it to take follow-up action.

In coordination with the Office of the Solicitor, OSHA must make use of settlement provisions designed to ensure future compliance. For all establishments that are the subject of an enhanced enforcement case and are seeking a settlement with the agency, OSHA shall include some or all of the following, or other appropriate settlement provisions, in the settlement agreement.

1. Requiring the employer to hire a qualified safety and health consultant to develop an effective and comprehensive safety and health program with management support in the establishment and assist the company in implementing such a program;

2. Applying the agreement company-wide;

3. In construction (and, where appropriate, in agriculture, maritime, and general industry), using settlement agreements to obtain from employers a list of their current jobsites, or future jobsites within a specified time period;

4. Requiring the employer to submit to OSHA its Log of Work-related Injuries and Illnesses on a quarterly basis, and to consent to OSHA's conducting an inspection based on the report;

5. Requiring the employer to notify the Area Office of any serious injury or illness requiring medical attention and to consent to an inspection; and

6. Obtaining employer consent to entry of a court enforcement order under Section 11(b) of the Act.

See also paragraph XII.E.3., below, for guidance on drafting settlement agreements that can maximize the deterrent effect of a Section 11(b) order.

E. Federal Court Enforcement under Section 11(b) of the OSH Act.

An employer's obligation to abate a cited violation arises when there is a final order of the Review Commission upholding the citation.

1. Section 11(b) Summary Enforcement Orders.

Section 11(b) of the OSH Act authorizes OSHA to obtain a summary enforcement order from the appropriate Circuit Court of Appeals enforcing final Review Commission orders. An employer who violates such a court order can be found in contempt of court. Potential sanctions for contempt include daily penalties and other fines, recovery of the Secretary's costs of bringing the action, incarceration of an individual company officer who flouts the Court's order, and any other sanction which the court deems necessary to secure compliance. Employers who ignore ordinary enforcement actions may be induced to comply by the severity of these potential contempt sanctions.

Section 11(b) orders can be an effective and speedier alternative to failure-to-abate notices that are typically issued when an employer does not abate a violation within the allowed time. They can be requested from the Court whether the final order results from a Review Commission or ALJ decision, a settlement agreement, or an uncontested citation.

2. Selection of Cases for Sec. 11(b) Action.

All final orders issued in enhanced enforcement cases must be considered for 11(b) enforcement. In addition, a petition for 11(b) enforcement is to be considered in cases where final orders do not meet the enhanced enforcement case criteria but where the following factors suggest that an 11(b) petition should be filed:

- Employer’s citation history and/or other indications suggest serious compliance problems, such as widespread violations of the same or similar standards at multiple establishments or construction worksites. The OSHA IMIS database should be searched for the employer's history of violations;

- Employer statements or actions indicating reluctance or refusal to abate significant hazards, or behavior that demonstrates indifference to employee safety;

- Repeated violations of the Act, particularly of the same standard, which continue undeterred by the traditional remedies of civil monetary penalties and Review Commission orders to abate;

- Repeated refusal to pay penalties;

- Filing false or inadequate abatement verification reports;

- Disregard of a previous settlement agreement, particularly one that includes a specific or company-wide abatement plan.

3. Drafting of Citations and Settlements to Facilitate Sec. 11(b) Enforcement.

Proper drafting of citations and settlement agreements can facilitate obtaining an 11(b) order and maximize its deterrent effect.

Where possible, OSHA should attempt to identify cases that may warrant 11(b) enforcement at least a month before issuing the citation. When OSHA identifies such a case, it will contact the Regional Solicitor to discuss citation language that is in accord with 11(b) enforcement. If a case identified for potential 11(b) action is being resolved through a settlement agreement, whether formal or informal, language should be sought in the agreement that commits the employer to specific ongoing abatement duties.

Language in a settlement agreement that imposes a specific duty on the employer, such as a requirement that the employer hire a consultant to develop a safety program or provide OSHA with a list of other worksites, can be enforced under Section 11(b).

4. Follow-up Inspections.

The OSH Division of the Solicitor's Office will notify the Regional Solicitor (RSOL) and the Directorate of Enforcement Programs (and, where the order pertains to a construction employer, the Directorate of Construction), when a court has entered an 11(b) order. OSHA will then promptly schedule an inspection or investigation to determine whether the employer is complying with the court order. The Regional Administrator, in consultation with the RSOL, will determine the nature and extent of the inspection or investigation. The RSOL will advise on the kind of "clear

and convincing" evidence that would be needed to support a contempt petition in the event of the employer's noncompliance with the order of the court.

5. Conduct of Verification Inspections.

Whenever an enforcement order is issued by a Court of Appeals, an inspection shall be scheduled within six months to determine whether the company is complying with the court order. If serious violations of the standard(s) subject to the enforcement order are found, the Regional Solicitor shall be contacted immediately for guidance on what evidence will be needed for submission to the court.

XIII. Coordination.

The Directorate of Enforcement programs (DEP) will be the National Office point of contact for all initial coordination of the EEP. Any questions should be addressed to the Director or Deputy Director in DEP at (202) 693-2100, or for construction-related cases, the Director or Deputy Director in the Directorate of Construction (DOC) at (202) 693-2020. All Regional Administrators will name an Enhanced Enforcement Program (EEP) Coordinator.

A. If Employer Operating within One Region.

The Regional Administrator will make the determination to inspect or not to inspect related sites if the employer’s additional sites are operating within one region.

B. If Employer Operating in Two or More Regions.

The determination to inspect or not to inspect related sites must be coordinated at the National Offices level with DEP or DOC.

C. EEP-Alert Memorandum.

DEP (or in the case of a construction employer, DEP and DOC jointly) will issue an EEP-Alert memorandum when it is deemed necessary to notify Regional Administrators and State Designees regarding activity of a particular employer with many worksites/workplaces across more than one region and/or State Plan States.

Any inspection conducted under an EEP Alert memorandum is to be coded as an unprogrammed-referral. The EEP Alert memorandum is to be considered a

referral from the National Office. An OSHA-90 is to be generated when a site is discovered where an EEP Alert employer is working.

XIV. Lining-Out Establishments from the EEP2 Log.

If an establishment has entered into a settlement agreement (informal or formal) in which a violation that qualified the establishment for an EEP designation is deleted, or if there has been an Administrative Law Judge, Review Commission, or court decision that has vacated such violation, then the entry on the EEP2 Log will be lined-out and the IMIS "EEP2" code will be removed from that establishment's Internet Inspection Detail summary. The Area Director must notify the Regional EEP Coordinator of these changes, who in turn must notify DEP to line out the inspection from the EEP2 Log.

Note: An inspection will not be removed from the EEP2 Log on account of the reclassification of a citation to "Unclassified." See paragraph XI.F.

XV. Relationship to Other Programs.

A. Unprogrammed Inspections.

If the occasion for an unprogrammed inspection arises with respect to an establishment that is to receive an EEP-related inspection (in accordance with paragraph XII.A. or B.), the two inspections may be conducted either separately or concurrently. This Instruction does not affect in any way OSHA's ability to conduct unprogrammed inspections.

B. Programmed Inspections.

Some establishments may be selected for inspection under this Instruction which may also fall under one or more other OSHA initiatives such as Site-Specific Targeting (SST), National Emphasis (NEP), or Local Emphasis (LEP). Inspections from these programs may be conducted either separately or concurrently with inspections under this Instruction.

XVI. Recording and Tracking of Inspections.

This applies to all enhanced enforcement cases opened on or after January 1, 2008. Once a case is identified as an enhanced enforcement case, modify the OSHA-1 by entering the code "**EEP2**" in Item 42, Optional Information, for the inspection.

EXAMPLE: N 08 EEP2

Note: Any enhanced enforcement cases opened from October 1, 2003 though December 31, 2007 will follow the enforcement procedures described in the September 30, 2003

memorandum and be coded "**EEP**."

If the case also receives an enhanced settlement agreement, modify the existing record to add the enhanced enforcement settlement agreement code "ENHSA."

| | | | |
|---|---|---|---|
| EXAMPLE: | N | 08 | EEP2,ENHSA |

If the case is also determined to be a significant case, modify the existing record to add the significant case code "SIGCASE."

| | | | |
|---|---|---|---|
| EXAMPLE: | N | 08 | EEP2,SIGCASE |

Remember, if the inspection is a Non-Primary Inspection in a Multiple Inspection Significant Case, the (S + Activity Number of Primary Inspection) code is to be used.

| | | | |
|---|---|---|---|
| EXAMPLE: | N | 08 | EEP2,S######### |

If the case also receives an enhanced settlement agreement, modify the existing record to add the enhanced enforcement settlement agreement code "ENHSA."

| | | | |
|---|---|---|---|
| EXAMPLE: | N | 08 | EEP2,SIGCASE,ENHSA |
| | N | 08 | EEP2,S#########,ENHSA |

In addition, all enhanced enforcement follow-up inspections, SST-related inspections, related general industry inspections, or related construction inspections are to be coded "EEP2." This is regardless of whether violations are found or the inspections are in compliance.

Remember to enter all applicable SST, NEP, LEP program codes in Item(s) 25c and 25d when an inspection is conducted and the inspection also meets the protocol for other program(s). Also, enter all applicable Strategic Management Plan hazard/industry codes in Item 25f.

XVII. Dun & Bradstreet Number.

If it is available, the Data Universal Numbering System (DUNS) number is to be entered in the appropriate field on the Establishment Detail Screen. In establishments where ownership has changed, enter the DUNS number for the new owner. If the new owner does not have a new DUNS number, enter the old DUNS number, if known. Since the DUNS number is site-sensitive, the old number will give some useful data. The field on the Establishment Detail Screen can be accessed by pressing F5 in Item 8 to access establishment processing. Once establishment processing is completed, the DUNS number will appear in Item 9b.

XVIII. End of the Fiscal Year Report.

The Directorate of Enforcement Programs (DEP) will compile an End of the Year report of each Region's EEP activity. This report will cover the period from October 1st, through September 30th. The report will include the following information:

A. Number of EEP cases;

B. Number of follow-up inspections conducted;

C. Number of EEP-related SST establishments inspected;

D. Number of additional establishments of the same employer (construction-related or general industry-related) inspected;

E. Number of notifications sent to company headquarters or "NA" for not applicable if there is only one workplace;

F. Number of signed Settlement Agreements (Informal and Formal) with enhanced provisions;

G. Number of Section 11(b) court actions initiated by sending required documentation to the Regional Solicitor;

H. Number of Section 11(b) court actions approved by the OSH Division of the Office of the Solicitor;

I. Number of Section 11(b) court actions filed with a court;

J. Number of verification inspections conducted for purposes of determining compliance with an 11(b) order;

K. Number of cases found where the employer was not in compliance with the 11(b) court order;

L. Number of cases referred to the Court of Appeals for enforcement action together with their current status and/or outcome;

M. Information concerning any EEP-Alert memoranda issued;

N. Number of EEP referrals received from State Plan States; and

O. Suggestions and recommendations from the Regions.

Appendix A

**Information Needed on Each EEP Inspection for Monthly Report to the National Office**

| | | | |
|---|---|---|---|
| Employer Name | Inspection Number | Regional Office | Area Office |
| Opening Date | SIC & NAICS codes | # of Employees | # of Employees Controlled |

Indicate if inspection is an EEP, a Follow-up (FU), a Construction-Related (C-R), a General Industry-Related (GI-R), or an SST-Related (SST-R). If inspection is done based on an EEP Alert Memo the inspection will either be a C-R or a GI-R.

If the inspection is other than an EEP, give the name and inspection number of the EEP case to which it is a follow-up or related.

Remember: any FU, C-R, GI-R, or SST-R inspections can also be an EEP.

Indicate if construction or non-construction [This distinction is requested by OSA]

What EEP2 criteria apply (more than one can apply):

1) Fatality – One/more W/R viols related to death

2) Fatality – One/more S viols related to death **and** employer **history is similar in kind**

3) Non-Fatality – Three/more S viols also classified as W/R **and** employer **history is similar in kind**

4) FTA – One/more based on a serious citation

5) Egregious Case

If history is an element, give inspection # of inspection that history is based upon.

What EEP actions have been taken (<u>do not report</u> any planned activities):

1) Follow-up inspection conducted; or compelling reason not to conduct

2) Establishment inspected that had been moved from primary/secondary SST list to current cycle

3) Additional agriculture workplace inspected

4) Additional construction worksite inspected

5) Additional maritime worksite inspected

6) Additional general industry worksite inspected

7) Citation sent to company headquarters

8) Letter sent to company headquarters by Region or National Office Official

9) Meeting with company officials (separate from informal conference)

10) Enhanced settlement provisions used in informal/formal settlements

11) Court enforcement under Sec. 11(b)

- Case submitted to RSOL
- Case submitted to N.O. SOL
- Petition filed with court [State which court & date]
- Petition granted by court [State which court & date]
- Other actions [State & give date]

Appendix B

## CSHO Guidance: Considerations in Determining Company Structure and Safety and Health Organization

When determining whether to inspect other worksites of a company that has been designated an enhanced enforcement case, it must first be determined whether compliance problems and issues found during the initial EEP inspection are localized or are likely to exist at other, similar facilities owned and operated by that employer. If the problem at the local workplace appears to be symptomatic of a broader company neglect of employee safety and health, the company structure must be investigated so that if the decision is made to inspect other facilities or worksites, there will be a basis for finding them and looking for specific conditions similar to those found in the initial inspection.

Extent of Compliance Problems. Are violative conditions a result of a company decision or interpretation concerning a standard or hazardous condition? Ask the following types of questions of the plant manager, safety and health personnel and line employees.

- Who made the decision concerning the violative operation, local management or company headquarters? If the decision was from company headquarters, what is their explanation?

- Is there a written company-wide safety program? If so, does it address this issue? If so, how is the issue addressed?

- Is there a company-wide safety department? If so, who are they and where are they located? How does company headquarters communicate with facilities/worksites? Are establishment/worksite management and safety and health personnel trained by the company?

- Do personnel from company headquarters visit facilities/worksites? Are visits on a regular or irregular basis? What subjects are covered during visits? Are there audits of safety and health conditions? Were the types of violative conditions being cited discussed during corporate visits?

- Does the company have facilities or worksites other than the one being inspected, that do similar or substantially similar work or produce like products? If so, where are they?

- What is the overall company attitude concerning safety and health? Does the establishment or worksite receive good support from company headquarters on safety and health matters?

- Ask whether the establishment's/worksite's overall condition is better or worse at present compared to past years? If it is worse, ask why? Has new management or ownership stressed production over safety and health? Is the equipment outdated or in very poor condition?

- Is there an active and funded maintenance department? Have they identified these problems and tried to fix them?

- Has the management person being interviewed worked at or visited other similar facilities or worksites owned by the company? How was this issue being treated there?

Identifying Company Structure. Where are other facilities or worksites located and how are they linked to the one being inspected? Sometimes establishment/worksite management will not have a clear understanding of the company structure, just an awareness of facts concerning control and influence from the corporate office.

- Is the establishment/worksite, or the company that owns the establishment or uses the worksite, owned by another legal entity (parent company)? If so, what is the name and location? Try to find out whether the inspected establishment/worksite is a "division" or a "subsidiary" of the parent company. (Note: A "division" is a wholly owned part of the same company that may be differently named, e.g., Pontiac is a division of GM. A "subsidiary" is a company controlled or owned by another company which owns all or a majority of its shares.) Try to determine if the parent company has divisions or subsidiaries other than the one that owns or uses the establishment or worksite being inspected. If so, try to get the names and the type of business they are involved in. Sometimes this type of information can be found on a website or in Dun and Bradstreet. Another good source of information is the office of the Secretary of State within the state government.

- Are there other facilities or worksites controlled by these entities that do the same type of work and might have the same kinds of safety and health concerns?

- Are the company entities publicly held (have publicly traded shares) or are they closely held (owned by one or more individuals)?

- What are the names, positions and business addresses of relevant company personnel of whom interviewees are aware? For which entities do the company safety and health personnel work?

- On what kind of safety and health-related issues or subjects do personnel from company headquarters give instructions?

Appendix C

**Sample Letter to Company Headquarters**

Area Office Header

Date

Name of Employer's National Headquarters
Address of Headquarters

Dear _____:

Enclosed you will find a copy of a Citation and Notification of Penalties for violations of the Occupational Safety and Health Act of 1970, which were issued to [establishment name, located in city, state]. This case has been identified as an enhanced enforcement case under the Occupational Safety and Health Administration's (OSHA) Enhanced Enforcement Program.

The violations referred to in this Citation must be abated by the dates listed and the penalties paid, unless they are contested. This Citation and Notification of Penalties is being provided to you for informational purposes so that you are aware of the violations; the original was mailed to [establishment name] on [date]. We encourage you to work with all of your sites to ensure that these violations are corrected.

OSHA is dedicated to saving lives, preventing injuries and illnesses and protecting America's employees. Safety and health add value to business, the workplace, and life. For more information about OSHA programs, please visit our website at www.osha.gov.

Sincerely,

Area Director

Enclosure

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