

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

NATIONAL CHIMNEY
SWEEP GUILD, et al.,

Docket No. 17-1087

Petitioner,

v.

OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION and
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

NCSG PETITIONER'S CONSENT MOTION TO DISMISS

The National Chimney Sweep Guild (“NCSG”) hereby moves to dismiss its pending petition before the Court in Docket No. 17-1087, with prejudice and with each party bearing its own costs, fees, and expenses. Respondents, the Occupational Safety and Health Administration and the United States Department of Labor (collectively “DOL/OSHA”), consented to this motion per Paragraphs 2 and 9 of the Stipulation in the attached Stipulation and Settlement Agreement incorporated herein by this reference. The grounds for this motion are as follows.

1. On September 12, 2017, at the request of the parties, and the Ned Stevens Petitioners whose petitions¹ were consolidated with NCSG's and earlier resolved (See Docket No. 17-1087, ECF No. 72), the Court entered an order suspending the briefing in this matter pending further order of the Court to allow time for the parties to negotiate a settlement. In that and subsequent orders, the Court directed that counsel for NCSG file regular status reports updating the Court on the progress of settlement negotiations. Pursuant to those orders, Petitioner filed regular status reports updating the Court on the progress of settlement negotiations between NCSG and DOL/OSHA.
2. The last status report (See Docket No. 17-1087, ECF No. 97) of NCSG, filed on November 17, 2023, advised the Court that the parties had negotiated a comprehensive settlement addressing all issues before the Court in this matter and requested an additional thirty days to execute the formal settlement agreement and file a dispositive motion.
3. On November 20, 2023, the Court issued an order directing that counsel for NCSG file either a further status report or a motion to dismiss NCSG's appeal in this matter by December 20, 2023. NCSG greatly appreciates the patience of the Court in this matter.
4. On December 1, 2023, NCSG and DOL/OSHA executed a Stipulation and Settlement Agreement to resolve the petition for review pending before this Court. In accordance

¹ The Ned Stevens Petitioners filed the petitions in consolidated dockets 17-1096, 17-1184, 17-1201, 17-1216, 17-1321, 17-1329, and 17-1555.

with Paragraphs 2 and 9 of the Stipulation in that Stipulation and Settlement Agreement, NCSG respectfully requests that the Court enter an order dismissing its petition for review with prejudice and with each party bearing its own costs, fees, and expenses.

Dated: December 5, 2023

Respectfully submitted,
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Attachment:

*Stipulation and Settlement Agreement Between the National Chimney Sweep Guild and the
U.S. Department of Labor*

CERTIFICATE OF SERVICE

I hereby certify that, on December 5, 2023, a copy of the foregoing Motion to Dismiss was filed electronically via the Court's CM/ECF Electronic Filing System. All registered counsel will be served via operation of the Court's CM/ECF Electronic Filing System.

Respectfully submitted,

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STIPULATION AND SETTLEMENT AGREEMENT
Between the National Chimney Sweep Guild
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Following extensive negotiations, the Secretary of Labor ("Secretary") and the National Chimney Sweep Guild ("NCSG") have reached a full and binding settlement of the Petition for Review filed in this Court. This matter involves a challenge to a final rule promulgated on November 18, 2016, by the Occupational Safety and Health Administration ("OSHA"), entitled Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) ("Walking-Working Surfaces Rule"). *See* 81 Fed. Reg. 82494.

The Secretary and NCSG stipulate and agree as follows:

1. This Stipulation and Settlement Agreement, incorporating by this reference the

attached Settlement Agreement, shall be effective upon execution by both parties, which occurred on December 1, 2023.

2. Within fifteen days of execution of this Stipulation and Settlement Agreement, NCSG shall file a motion with the United States Court of Appeals for the Seventh Circuit for voluntary dismissal, with prejudice, of its petition for review in this matter.
3. Within fifteen days of execution of this Stipulation and Settlement Agreement, NCSG shall also withdraw from the Secretary's consideration the Petition for a Partial Administrative Stay or Variance, Re-Opening of the Rulemaking Record and Reconsideration, which NCSG and the Ned Stevens Petitioners filed with the Secretary on June 8, 2017. This withdrawal shall be accomplished by letter to the Secretary of Labor.
4. Within fifteen days of execution of this Stipulation and Settlement Agreement, NCSG shall inform its members of the settlement and post a copy of the Stipulation and the Settlement Agreement on its website.
5. OSHA shall distribute this Stipulation and Settlement Agreement to all OSHA Regional and Area Offices, including its compliance safety and health officers ("CSHOs"). OSHA shall also instruct its Regional Offices, Area Offices, and CSHOs to implement this Stipulation and Settlement Agreement during any inspection of a Chimney Service Industry employer (as defined in the attached Settlement Agreement) worksite that involves potential non-compliance with 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), or 1910.140¹. Such inspections must be performed pursuant to this Stipulation and Settlement Agreement if they occur after

¹ The reference to 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), and 1910.140 includes the current versions and any future renumbered versions of 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), and 1910.140. However, this stipulation and Settlement Agreement will cease to be effective to the extent it is superseded by any substantive changes to any of these standards.

the effective date of this Stipulation and Settlement Agreement and the employer, when asked, informs OSHA that the employer's fall protection practices include the options outlined in the attached Settlement Agreement at the worksite that is the subject of the inspection.

6. NCSG will conduct outreach to the Chimney Service Industry and encourage them to adopt the fall protection practices described in this Settlement Agreement, document those practices, and communicate these practices to all of their employees who perform Covered Tasks. The objective of having and communicating the documented fall protection practices is to enable the employee(s) at the site being inspected, even if not owners or supervisors, to advise CSHOs of their fall protection practices so the appropriate inspection can be conducted without delay.
7. OSHA shall provide Chimney Service Industry employers until December 1, 2024 (twelve months from the date of execution) to implement this Settlement Agreement. Employers who are in the process of implementing this Settlement Agreement must comply with the requirements of 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), and 1910.140 to the extent such compliance is feasible, and does not pose a greater hazard, pursuant to Occupational Safety and Health Review Commission precedent.
8. OSHA shall distribute this Stipulation and Settlement Agreement to all the responsible agencies operating state plans pursuant to Section 18 of the OSH Act, and encourage those agencies to adhere to the terms of this Stipulation and Settlement Agreement as if it referenced the relevant provisions of any applicable standards, whether or not identical to 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), and 1910.140.
9. Each party agrees to bear its own attorney fees, costs, and expenses which arise or

have arisen out of and are incidental to the instant matter before this Court.

FOR THE SECRETARY OF LABOR:

FOR NATIONAL CHIMNEY SWEEP GUILD:

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Executed on ~~November~~, 2023
December 1, 2023

Executed on November 21, 2023

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**Between the National Chimney Sweep Guild
and the U.S. Department of Labor**

SETTLEMENT AGREEMENT

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SETTLEMENT AGREEMENT

I. GENERAL

- A.** This Settlement Agreement, executed December 1, 2023, between the U.S. Department of Labor, Occupational Safety and Health Administration (“DOL/OSHA”), and the National Chimney Sweep Guild (“NCSG”), which includes Appendices A, B, C, and D, will be referred to herein as the "Agreement." It contains procedures and requirements (“Fall Protection Options”) agreed to by DOL/OSHA and NCSG under which employers in the Chimney Service Industry may satisfy the fall protection requirements of 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), and 1910.140, whenever applicable, which were promulgated as part of OSHA's Walking-Working Surfaces Rule for General Industry, 81 Fed. Reg. 82494 (November 18, 2016). This agreement does not address compliance with any other OSHA requirements. The Fall Protection Options provided for under this Agreement apply only to "Covered Tasks," as defined in Section II.C below, when performed by employers in the Chimney Service Industry. They do not apply to, and may not be used for, any work performed by an employer outside the Chimney Service Industry. They do not apply to, and may not be used for, construction activities, except as specifically permitted herein.
- B.** This Agreement identifies Fall Protection Options that will be deemed compliant with 29 CFR §§ 1910.28(b)(1), 1910.29(j), and 1910.140 when used pursuant to the conditions specified in this Agreement. Where the Fall Protection Options under this Agreement do not apply or are not being utilized, the employers in the Chimney Service Industry shall be subject to the fall protection requirements of 29 C.F.R. § 1910.28, § 1910.29(j) and 1910.140, as written.
1. The anchorages identified in Appendices A and B, selected and used by or under the supervision of a Competent Person per the specific criteria set

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out in the relevant Appendix, will be deemed to satisfy

1910.140(c)(13)(ii).¹

2. The anchorages identified in Appendices A and B, selected by or under the supervision of a Qualified Person in accordance with the relevant Appendix, and used by or under the supervision of a Qualified Person or Competent Person in accordance with the relevant Appendix, which, as part of a complete fall protection system, maintain a safety factor of at least two, will be deemed to satisfy 1910.140(c)(13)(ii).²

C. OSHA shall ensure that no citation for failure to comply with the fall protection requirements of 29 C.F.R. §§ 1910.28(b)(1), 1910.29(j), or 1910.140 shall be issued if and when a Chimney Service Industry employer is in compliance with the terms of this Agreement applicable to the activity at a worksite inspected by OSHA.

¹ For example, a worker is using a travel restraint system consisting of a harness attached by a carabiner to a rope grab with a vertical lifeline that is threaded through the rope grab, run over the peak of the roof and down the other side of the roof to a tree, and attached to the tree with an appropriate knot. Except for the tree and the knot, all individual components selected by the sweep to assemble the travel restraint system meet the technical specifications in 29 CFR § 1910.140 and are being used in accordance with any instructions and specifications provided by the manufacturer. The tree that is serving as an anchor meets all criteria in Appendix A, Section III.A.1. In that situation, a Competent Person is authorized to select the individual components, assemble, and install this travel restraint system, and to use or supervise its use to perform the Covered Task. Rope grab means a deceleration device which travels on a lifeline and automatically, by friction, engages the lifeline and locks so as to arrest the fall of an employee. A rope grab usually employs the principle of inertial locking, cam/level locking, or both.

² For example, a worker is using a travel restraint system consisting of a harness attached by a carabiner to a rope grab with a vertical lifeline that is threaded through the rope grab, run over the peak of the roof and down the other side of the roof to a tree, and attached to the tree with an appropriate knot. Except for the tree and the knot, all individual components selected by the sweep to assemble the travel restraint system meet the technical specifications in 29 CFR § 1910.140 and are being used in accordance with any instructions and specifications provided by the manufacturer. The tree that is serving as an anchor meets all criteria in Appendix A, Section III.A.1 subject to modification as provided by Appendix A, Section I.C, General Conditions of Use. In that situation, a Qualified Person is authorized to specify or select the anchor; and either a Qualified Person or a Competent Person is authorized to select the other individual components, assemble, and install this travel restraint system, and to use or supervise its use to perform the Covered Task.

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II. DEFINITIONS

- A. “Chimney Service Industry” means businesses engaged in the maintenance, repair, and installation of chimney and venting systems serving fireplaces and heating appliances.
- B. “Competent Person” means a person who is capable of identifying existing and predictable hazards in any personal fall protection system or any component of it used under this Agreement, as well as in their application and uses with related equipment, and who has authorization to take prompt, corrective action to eliminate the identified hazards;
- C. “Covered Tasks” refers to the group of tasks covered by this agreement. Covered tasks are limited to tasks performed by Chimney Service Industry employers on residential roofs or roofs on residential-type structures that have been converted to commercial use (e.g., a dentist's office). Covered Tasks are limited to general industry tasks, and do not extend to construction tasks.³ They include but are not limited to the Covered Tasks listed in Appendix C.
- D. “Qualified Person” means a person who, by possession of a recognized degree, certificate, or professional standing, **OR** who by extensive knowledge, training, and experience has successfully demonstrated the ability to solve or resolve problems relating to the subject matter, the work, or the project within the scope of this Agreement.⁴

³ The initial installation of a chimney cap, which OSHA views as a construction activity, is deemed to fall within the definition of Covered Tasks for purposes of this Agreement only. The removal and replacement of an existing chimney cap may be part of either a Section 1910.28(a)(2)(ii) Assessment or a Covered Task, depending on the circumstances.

⁴ The following explanatory material is designed to further explain what is meant by a Qualified Person. It consists of direct quotes of materials extracted from the Preamble to the Walking-Working Surfaces Rule (81 Fed. Reg. 52494). The definition of “qualified” in the rule (29 C.F.R. § 1910.21(b)) allows employers to have crew chiefs, supervisors, operations personnel, or other individuals train workers, provided they have the necessary “degree” or “extensive knowledge” outlined in the definition of qualified, and specified in 29 C.F.R. § 1910.30(a). 29 C.F.R. § 1910.30(a)(2) does not require that trainers possess a degree if they have the necessary knowledge, training, and experience. 81 Fed. Reg. 82640, col. 3.

The most important aspect of a Qualified Person is that they have the “demonstrated ability” to solve or resolve problems relating to the subject matter, work, and project. When the person the employer designates as

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- E. “Fall Protection Aid” means a device designed to be hooked onto (rather than being bolted or nailed to) an appropriate component of the roof, such as the roof ridge or eave, and used by an employee to prevent a fall while traveling to or from a Covered Task, or while setting up and removing the Fall Protection Option that will be used while performing the Covered Task. A Fall Protection Aid may only be used as an anchorage for a personal fall protection system *while performing a Covered Task* if it is specifically designed for that purpose and installed and used per the manufacturer’s instructions and specifications⁵ (in which case it also would be a Non-Penetrating Roof Anchorage).
- F. “Non-Penetrating Roof Anchorage” means a multipurpose device that secures to (rather than being bolted or nailed to) an appropriate component of the roof (e.g., the roof ridge, roof eave/soffit) and may serve as an anchorage for a personal fall protection system (either a Travel Restraint System or a Personal Fall Arrest System). A Non-Penetrating Roof Anchorage may only be used as an anchorage for a personal fall protection system *while performing a Covered Task* if it is used in accordance with Section IV.B of Appendix A. A Non-Penetrating Roof Anchorage must be installed and used as part of a complete personal fall protection system that maintains a safety factor of at least two pursuant to 29 C.F.R. § 1910.140(c)(13)(ii).

a Qualified Person has demonstrated the ability to solve or resolve problems, which may include performing various complex calculations to ensure systems and components meet required criteria, the qualifications of that person are adequate. In addition, an employer may need to select different Qualified Persons for different projects, subject matter, or work to ensure the person’s professional credentials or training, experience, and knowledge are sufficient to solve or resolve the problems associated with the subject matter, work, or project. 81 Fed. Reg. 82650, col. 1.

Qualified Persons must possess the type of qualifications (*i.e.*, recognized degree, certificate, or professional standing or extensive knowledge, training, and experience) that makes them capable of designing anchorages that successfully meet the requirements of the Walking-Working Surfaces Rule. Or, the Qualified Person must have demonstrated ability to solve and resolve the issues relating to the subject matter, work, or work project. 81 Fed. Reg. 82655, col. 3, and 82656, col. 1.

⁵ Whenever used in this Settlement Agreement, the requirement to use a system or component according to/per/consistent with the manufacturer’s instructions and specifications does not include a direction from the manufacturer that the purchaser/user must obtain training from the manufacturer or its representative before using the product.

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G. “Roof Hook Ladder” means a straight ladder with attached ridge hooks designed to hook over the roof ridge and hold the ladder in position. Where the location and characteristics of the work, and the manner in which the Roof Hook Ladder is installed, will prevent the Roof Hook Ladder from being dislodged, it can be used: (1) without fall protection for tasks that are performed when working from the ladder; (2) as a Fall Protection Aid; or (3) as a Non-Penetrating Roof Anchorage, provided the criteria for use as a Fall Protection Aid or Non-Penetrating Roof Anchorage in this Agreement are met.

III. EMPLOYERS QUALIFYING TO OPERATE UNDER THIS SETTLEMENT AGREEMENT

A. Each employer electing to operate under this Settlement Agreement shall, before commencing activities under this Settlement Agreement, ensure it has:

1. Documented its Safety Program for Rooftop Work, as described in Section IV;
2. Identified, in its Safety Program for Rooftop Work, the Covered Tasks that will be performed by its employees and any restrictions on the Covered Tasks that may be performed by a particular employee;
3. Identified, in its Safety Program for Rooftop Work, the Fall Protection Options (described below) that will be installed and utilized by its employees, and any restrictions in the Fall Protection Options that may be installed or utilized by a particular employee;
4. Obtained and provided its employees with the equipment necessary to perform the Covered Tasks and to install and utilize the Fall Protection Options that the employer has chosen to include in its Safety Program for Rooftop Work, consistent with any restrictions placed on the Covered Tasks performed or Fall Protection Options installed or used by a particular employee per Paragraphs III.A.2 and 3, above; and
5. Provided its employees with the training necessary to perform the Covered Tasks and implement the Fall Protection Options that the

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employer has chosen to include in its Safety Program for Rooftop Work, consistent with any restrictions placed on the Covered Tasks performed or Fall Protection Options installed or used by a particular employee per Paragraphs III.A.2 and 3, above.

- B.** Each employer electing to operate under the Settlement Agreement shall ensure their Qualified Persons, Competent Persons, and employees implement the provisions of this agreement as applicable to each.

IV. SAFETY PROGRAM REQUIREMENTS APPLICABLE TO ALL FALL PROTECTION OPTIONS UNDER THIS AGREEMENT

A. Safety Program for Rooftop Work

1. The employer must develop and implement a written Safety Program for Rooftop Work addressing the Covered Tasks performed by its employees.
2. The Safety Program for Rooftop Work must include a comprehensive training program for training on the use of the Fall Protection Options authorized by this Agreement.

B. Comprehensive Training Program

1. General
 - a. The Comprehensive Training Program must include the training requirements listed in Paragraph IV.B.2, below, for all personnel performing or supervising work using any Fall Protection Option identified in Appendix A or Appendix B of this Agreement as well as the training requirements listed in Paragraph IV.B.2, below, for all personnel who will be a Competent Person under this Agreement (Note: Redundant training is not required to the extent the employer verifies the employee already has the required knowledge from prior training and/or experience.)
 - b. All training must comply with 29 C.F.R. § 1910.30.
 - c. All required training must also be provided to an employee before that employee performs or supervises work using any Fall Protection Option identified in Appendix A or Appendix B of this Agreement.

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- d. The Comprehensive Training Program must be developed and conducted by a Qualified Person and the Program must include a written certification by a Qualified Person that the Program conforms with this Agreement.
2. Fall Hazards and Fall Protection
 - a. Overview

The training program, per 29 C.F.R. § 1910.30, shall enable each employee to recognize the hazards of falling as well as the fall hazards at the worksite, and shall train each employee in the procedures to be followed to minimize these hazards.
 - b. Minimum Training for all Employees Performing Work Under this Agreement

The employer must ensure that each employee performing work under this Agreement is trained by a Qualified Person in at least the following topics:

 - (1) The nature of the fall hazards in the work area and how to recognize them;
 - (2) The proper procedures to be followed to minimize those hazards;
 - (3) The proper procedures for installing, inspecting, operating, maintaining, and disassembling the personal fall protection systems and other equipment that the employee uses to address fall hazards;
 - (4) The proper use of personal fall protection systems and other equipment that the employee uses to address fall hazards, including, but not limited to, identification and evaluation of proper anchor points, proper hook-up, anchoring, and tie-off techniques, and methods of equipment inspection and storage, as specified by the manufacturer;
 - (5) The proper care and storage of the personal fall protection systems and other equipment that the employee uses to address fall protection hazards; and
 - (6) Fall/slip recovery procedures and techniques.

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c. Additional Training for Competent Persons

- (1) The employer must ensure that each employee who will be a Competent Person under this Agreement is trained by a Qualified Person to:
 - (i) conduct and document the hazard assessment;
 - (ii) select and use the appropriate Fall Protection Options; and
 - (iii) complete the job-specific Fall Prevention Plan, using Appendix D or equivalent.⁶
- (2) The employer must ensure that each employee who will be a Competent Person under this Agreement demonstrates the ability to identify existing and predictable hazards in the personal fall protection systems or components used under this Agreement, as well as in the application or uses of related equipment.

d. Training Format

An appropriate portion of the required training in the use of personal fall protection systems must be a hands-on demonstration, which can be in a classroom setting or through properly supervised on-the-job training, to ensure the training is effective and understood. 29 C.F.R. § 1910.30 does not otherwise require or prohibit a specific format for delivering training to workers. Employers may use video-based, web-based or computer-based training, provided that:

- A Qualified Person developed or prepared the training;
- A Qualified Person is available to answer any questions workers may have;
- The training content complies with the requirements in 29 C.F.R. § 1910.30; and
- The employer provides the training in a manner each worker understands (29 C.F.R. § 1910.30(d)).

⁶ The term "Fall Prevention Plan" is used here to distinguish it from the term "Fall Protection Plan" as used in 29 C.F.R. 1910.28(b)(1)(ii) and 1926.502(k).

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C. Requirements With Respect to the Covered Tasks

1. Overview

The Safety Program for Rooftop Work must include the following requirements with respect to the Covered Tasks. The employer will conduct a hazard assessment and then develop and implement a written Fall Prevention Plan, based on that hazard assessment, for each job where this Agreement is implemented. The employer will also ensure its employees meet the requirements applicable for their roles as trained employees, Competent Persons, and/or Qualified Persons.

2. Hazard Assessment

A Competent Person will conduct a hazard assessment based on the Covered Task and conditions at each individual worksite, taking into account factors such as weather conditions (e.g., wind, rain, snow, moss, moisture, temperature), condition of the roof, access to the roof and to the location where the Covered Task will be performed, roof pitch, type of surface, nature of Covered Task, presence of skylights or utility lines, required equipment and materials, time to perform the Covered Task, and number of employees assigned to the job and on the roof. The hazard assessment will be documented in the written Fall Prevention Plan created for each job where this Agreement is implemented.

3. Fall Prevention Plan

The Fall Prevention Plan must be completed by a Competent Person or a Qualified Person. The Plan must be specific to the Covered Tasks being performed and the jobsite conditions. A flexible, generic template may be used for this purpose if it adequately addresses the tasks and conditions at the jobsite. The template in Appendix D is an example of an acceptable template for this purpose. The Fall Prevention Plan will establish acceptable roof working conditions, work practices, and fall protection measures to be implemented for particular Covered Tasks under the particular worksite conditions, including:

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- a. Selection of the appropriate method and location of access to the roof and work area(s) (e.g., placing the ground ladder at the location that will provide the highest overall level of safety for the Covered Task);
 - b. Selection of the appropriate fall protection measures;
 - c. Selection of the appropriate PPE (e.g., selecting shoes that achieve adequate traction with the surface of the roof).
4. At least one of the workers installing or supervising the installation of the fall protection system must be a Competent Person. At least one of the workers using or supervising the use of the fall protection system must be a Competent Person.
 5. A Qualified Person must design any fall protection system used under this Agreement that is not: 1) installed and used per the specifications in this Agreement; or 2) installed and used in a manner for which the system was designed, and consistent with the manufacturer's instructions and specifications for the use of the system or its components.⁷
 6. The same individual may be both a Competent Person and a Qualified Person. Where the circumstances require the participation of both a Competent Person and a Qualified Person, that requirement is satisfied by one individual who meets the requirements of both definitions.
 7. All workers performing work under this Agreement must have had at least the training required under Section IV.B.2.a-b.
 8. Work on the Covered Tasks
 - a. Employers will ensure that their employees implement the applicable requirements of the Fall Prevention Plan for the Covered Task, including

⁷ For example, a worker is using a travel restraint system consisting of a harness attached by a carabiner to a rope grab with a vertical lifeline that is threaded through the rope grab, run over the peak of the roof and down the other side of the roof to a tree, and attached to the tree with an appropriate knot. Except for the tree and the knot, all individual components selected by the sweep to assemble the travel restraint system meet the technical specifications in 29 CFR § 1910.140 and are being used in accordance with any instructions and specifications provided by the manufacturer. The tree that is serving as an anchor meets all criteria in Appendix A, Section III.A.1. In that situation, a competent person is authorized to select the individual components, assemble, and install this travel restraint system, and to use or supervise its use to perform the Covered Task.

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location and method of roof access, proper use of appropriate fall protection measures, and proper use of appropriate PPE.

- b. Employers will ensure their employees use caution while walking on a roof and maintain a low center of gravity.
 - c. Unless it is infeasible or poses a greater hazard pursuant to Occupational Safety and Health Review Commission precedent, employers will ensure employees use a Fall Protection Aid, a Roof Hook Ladder, a Non-Penetrating Roof Anchorage, or a Travel Restraint System described in Appendices A and B to access (travel to or from) the Covered Tasks, or while setting up and removing the Fall Protection Option that will be used while performing the Covered Tasks.
9. **Weather Hazards:** When adverse weather (such as high winds, rain, snow, or sleet) creates a hazardous condition (such as a slippery roof) that is not eliminated or adequately controlled, Covered Tasks will be suspended until the hazardous condition no longer exists or is adequately controlled.
 10. **Prompt Rescue:** When using fall arrest systems to perform Covered Tasks under this Agreement, the equipment set-up will include self-rescue devices and employers will require employees performing Covered Tasks to carry mobile telephones to summon help. For Covered Tasks not requiring fall arrest systems, employers will encourage employees to carry mobile telephones to summon help.
 11. **Employer Enforcement, Investigations, and Retraining**
 - a. Employers shall ensure unannounced safety spot checks are performed and documented. Each worker engaged in Covered Tasks under this Agreement shall be spot checked for compliance with this Agreement a minimum of once per year.
 - b. Employers shall take immediate action to correct any observed or reported violations of this Agreement and retrain employees as required. All retraining shall be documented.

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- c. Employers shall conduct investigations into any observed or reported incidents or near misses that involve falls from height. This investigation and analysis of causal factors shall be completed within two weeks of the incident. Employers must implement appropriate changes, if necessary, to prevent similar incidents in the future, and must document such changes.

V. ASSESSMENTS UNDER 29 C.F.R. § 1910.28(a)(2)(ii) (“SECTION 1910.28(a)(2)(ii) ASSESSMENTS”)

A. General

Pursuant to 29 C.F.R. § 1910.28(a)(2)(ii), with one exception, fall protection is not required when employees are: (1) inspecting, investigating, or assessing workplace conditions or work to be performed prior to the start of rooftop work⁸ or (2) conducting a good faith inspection, investigation, or assessment of workplace conditions and the rooftop work that was performed to confirm all rooftop work has been completed. The exception is that employees must use any fall protection system or equipment meeting the requirements of 29 C.F.R. § 1910.29 that has been installed and that is available and adequate (e.g., in good condition and appropriate location) for workers to use for pre-work and post-work assessments (see 29 C.F.R. § 1910.28(a)(2)(ii)).

B. Scope

The following rooftop activities fall within the scope of a Section 1910.28(a)(2)(ii) Assessment: inspecting flashing, shingles, roof vents, and chimneys (which includes removing the chimney cap with a screwdriver or screw gun to allow inspection of the crown and inside of the chimney cap and flue with the aid of a flashlight and/or camera, and then replacing the chimney cap with a screwdriver or screw gun) while on the roof. Incidental chimney cleaning activities, such as brief removal of creosote,

⁸ This means a Section 1910.28(a)(2)(ii) Assessment may be performed before or after an employer has first performed some non-assessment tasks that do not involve accessing the rooftop.

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may also be considered part of the Section 1910.28(a)(2)(ii) Assessment for purposes of this Agreement.

VI. FALL PROTECTION OPTIONS FOR COVERED TASKS

A. Preference for Ground Level Work

To the extent practical – and permitted by the homeowner, any applicable legal requirements (e.g., pandemic restrictions), and the design of the house (e.g., chimney, damper, flue, fireplace) – employers will ensure employees perform chimney inspection and cleaning activities from inside the house.

B. Installed Fall Protection

Employees must use any existing fall protection system or equipment meeting the requirements of 29 C.F.R. § 1910.29 that has been installed and is available and adequate (e.g., in good condition and appropriate location) for workers to use to access the location where the rooftop task will be performed and/or to perform the Covered Task. The requirement to use existing fall protection anchors is contingent on a Competent Person determining, by visual inspection, that the existing roof anchors are firmly installed, in good condition (e.g., free of significant corrosion), and in an appropriate location to provide fall protection while accessing the location where the Covered Task will be performed and/or performing the Covered Task. Where there are no existing fall protection anchors installed in locations that would provide appropriate fall protection while accessing the location where the Covered Task will be performed and/or performing the Covered Task, employers may utilize one or more of the following Fall Protection Options.

C. Fall Protection Options

When fall protection is required, employees performing Covered Tasks under this Agreement shall be protected from falls by any of the Fall Protection Options described in Paragraphs 1 through 4, below, which is not infeasible and does not

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create a greater hazard (pursuant to Occupational Safety and Health Review Commission caselaw), and may use a combination of these options. A Fall Protection Aid may be used by an employee to prevent a fall while traveling to or from a Covered Task, or while setting up and removing the Fall Protection Option that will be used while performing the Covered Task.

1. A Travel Restraint System that complies with the requirements in Appendix A of this Agreement and is otherwise subject to 29 C.F.R. § 1910.140.
2. A Personal Fall Arrest System that meets the requirements in Appendix B of this Agreement and is otherwise subject to 29 C.F.R. § 1910.140.
3. Working from an aerial work platform that complies with 29 C.F.R. § 1910.67.
4. Working from portable ladders where the physical conditions at the worksite permit. The use of ladders shall be in compliance with 29 C.F.R. § 1910.23.
Note: Employers shall ensure that employees move ladders from location to location around the worksite as often as necessary to safely access the areas where work is to be performed.

Additions, modifications, and updates to the Fall Protection Options described in Paragraphs 1 through 4, above, that are designed to make them safer or more efficient while providing substantially equivalent protection may be requested by NCSG, but are permitted only after consultation with the OSHA National Office, Directorate of Enforcement Programs, and receipt of written approval from OSHA. Consent to modifications or updates may not be unreasonably withheld and all parties must negotiate any changes in good faith.

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D. Exception to Fall Protection Requirement

For chimney sweeping and chimney cap installation only: If all means of performing chimney sweeping or installing chimney caps under Sections VI.A, B, and C, above, are infeasible and/or create a greater hazard (pursuant to Occupational Safety and Health Review Commission caselaw), the employer may allow employees to enter onto a roof to perform those tasks without fall protection when the following conditions are met:

1. A Competent Person has determined, by visual inspection, that the work surface is in good condition and capable of supporting the employee;
2. Employees shall not enter onto any portion of a roof where the roof pitch is greater than 4 in 12;
3. Employees shall keep their centers of gravity low whenever walking on or working from the roof; and
4. Employees shall take an access path that minimizes the time spent within 6 feet of the edge of the roof.

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APPENDICES

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APPENDIX A

TRAVEL RESTRAINT SYSTEMS

I. Use of Travel Restraint Systems

A. Purpose

A Travel Restraint System is designed and used to prevent an employee from going over the edge of a walking-working surface rather than arresting a fall after going over the edge. A Travel Restraint System shall not be relied upon to arrest a fall because it is not designed to handle the potential forces generated in free fall.

B. Equipment

A Travel Restraint System generally consists of an assembly of components – anchorage, anchorage connector, lanyard (or other means of connection), ascent/descent device, lifeline, and body support (harness or belt) – that an employer uses to eliminate the possibility of an employee going over the edge of a walking-working surface.

C. General Conditions for Use

Except as provided in this Agreement, use of a Travel Restraint System shall be subject to all applicable provisions in 29 C.F.R. § 1910.140. The Travel Restraint Systems described in this Appendix A may be used for Covered Tasks. These descriptions are requirements when the systems are being installed by a Competent Person, and safe harbor guidance if the person designing the Travel Restraint System is a Qualified Person. A Qualified Person may, in the exercise of his/her knowledge, training and/or experience, determine that some of the criteria listed below may be modified.

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II. Chimney-Based Travel Restraint Systems

A. Description

While it may be set up in a variety of ways, a Chimney-Based Travel Restraint System generally means a combination of a line tightly wrapped around a chimney to which a lanyard and body support (belt or harness) are attached.

B. Conditions for Use

1. A Competent Person must determine that the chimney is suitable for this purpose and that the Travel Restraint System can be safely attached to the chimney. A non-enclosed chimney or vent (a/k/a a manufactured chimney or vent with no chase) is not suitable for this purpose.
2. A brick or stone chimney shall be in good condition and solid, with no loose, missing, or damaged grout or cement mortar and no loose brickwork.
3. The chimney may not be within six feet of the gable edge of the roof.
4. The restraint lines shall be padded where they touch angled, sharp, or rough surfaces.

III. Ground-Based Anchorage Travel Restraint Systems

A. Approved Ground-Based Anchorages

The following objects may be used as a single anchorage for a Travel Restraint System when the listed requirements are met.

1. **A mature tree** that, based upon visual inspection prior to use, meets the following requirements:
 - a. The tree has a trunk that appears to be at least 6.5 inches in diameter.
 - b. The tree shall be inspected prior to use by striking the trunk with a rubber mallet in at least three locations to determine if the inside of the tree is solid.

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- c. The tree is substantially in line with and on the opposite side of the roof from the work being performed.
- d. The rope and/or webbing between the tree and the eaves is at as shallow an angle as possible to minimize the risk of anchor sling slippage and to maintain lateral load on the trunk.
- e. The anchor sling is installed as low to the ground as possible, is secure and remains in place (does not slide up the trunk). If nails or screws are used to secure the slings, they shall be placed above the sling (not through) and a minimum of three shall be used, spaced around the area where the sling contacts the trunk.
- f. If necessary, the rope/webbing shall be protected from any visible contact with tree sap.
- g. The tree trunk shall be substantially free of visible fungus, rot, cracks, splits, or decay.
- h. The tree trunk shall be close to vertical (i.e., not leaning significantly).
- i. The bark of the tree shall be healthy, primarily intact, and not loose.
- j. The tree shall not lean or give when pushed or pulled.
- k. The tree roots shall be substantially free of visible fungus or rot.
- l. The tree roots shall not be bound between structures.
- m. The tree roots shall not be shallow.
- n. The tree crown shall have no or very few dead branches.
- o. The ground around the tree shall be free of large cracks or fissures.
- p. The ground around the tree shall show no evidence of upheaval.

Note: Workers shall tie off to the largest-diameter tree available that meets the above requirements.

- 2. **A structural member** (such as a wooden structure or a metal structure) that, based upon visual inspection prior to use, meets the following requirements:
 - a. A wooden structure that is:
 - (1) Made from 4x4 lumber (which is actually 3½ inches by 3½ inches) or

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equivalent (e.g., two 2"x4" lumber joined to form 4 x 4 lumber), or larger lumber.

(2) Free of rot, cracks, and decay.

(3) Substantially in line with and on the opposite side of the roof from the work being performed.

b. A metal structure that is:

(1) Solidly connected to the building structure.

(2) Free of rust and corrosion.

(3) Substantially in line with and on the opposite side of the roof from the work being performed.

c. The following shall not be used as anchorage points:

(1) Handrails;

(2) Pipes;

(3) Utility conduits;

(4) Vents; and

(5) Any other structure not intended or designed to be load bearing.

3. A **vehicle** that, based upon visual inspection prior to use, meets the following requirements:

a. Has a gross vehicle weight of at least 4,000 pounds.

b. The vehicle shall be parked on a clean, dry, stable surface.

c. The vehicle shall be in line with and on the opposite side of the roof from the work being performed, with the restraint line in line with the length of the vehicle.

d. The restraint line shall not cross the vehicle travel ways.

e. The vehicle shall be parked with the ignition off.

f. A vehicle with an automatic transmission shall be in "park." A vehicle with a manual transmission shall be in gear.

g. The vehicle shall have the parking brake set, wheels chocked to restrain movement of the vehicle in both directions, and doors locked.

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- h. The keys to the vehicle shall remain with the worker performing the roof work.
- i. A tag shall be placed near the ignition warning that the vehicle is not to be moved.
- j. The restraint lines shall be connected to approved connection points on the vehicle, and shall be padded where they touch angled, sharp, or rough surfaces. The only approved connection points are the following:
 - (1) Around wheels;
 - (2) Through openings in rims;
 - (3) B pillar;
 - (4) Frame; and
 - (5) Axles.

IV. Roof Top Travel Restraint Systems Using Non-Penetrating Roof Anchorages

A. Description

A Non-Penetrating Roof Anchorage is one that secures onto a suitable component of the roof but is not nailed, screwed, or bolted to the roof component.

B. Conditions of Use

- 1. In cases where a system or its components are assembled, installed, and used in a manner consistent with the manufacturer's instructions and specifications for their use, and in accordance with their intended use, a Competent Person may assemble, install, or use it, or supervise the system's assembly, installation, or use. Otherwise, the determination that this system is safe and appropriate to use for fall protection under the circumstances at the site must be made by a Qualified Person.
- 2. This system may only be relied upon to provide fall protection while performing the work where the location and characteristics of the work, and the way the

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Non-Penetrating Roof Anchorage is installed, will not dislodge the Non-Penetrating Roof Anchorage.

3. The roof slope is not more than the slope for which the system or its components are rated by the manufacturer.

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APPENDIX B

PERSONAL FALL ARREST SYSTEMS

I. Use of Personal Fall Arrest Systems

A. Description

A personal fall arrest system means a system used to arrest an employee in a fall from a walking-working surface. A personal fall arrest system consists of a body harness, anchorage, and connector. The means of connection may include a lanyard, deceleration device, lifeline, or a suitable combination of these.

B. General Conditions for Use

Except as provided in this Agreement, use of a Personal Fall Arrest System shall be subject to all applicable provisions in 29 C.F.R. § 1910.140. The Personal Fall Arrest Systems described in this Appendix B may be used for Covered Tasks. These descriptions are requirements when the systems are being installed by a Competent Person, and safe harbor guidance if the person designing the Personal Fall Arrest System is a Qualified Person. A Qualified Person may, in the exercise of his/her knowledge, training and/or experience, determine that some of the criteria listed below may be modified.

II. Roof Top Personal Fall Arrest Systems Using Non-Penetrating Roof Anchorages

A. Description

A Non-Penetrating Roof Anchorage is one that secures onto a suitable component of the roof but is not nailed, screwed, or bolted to the component.

B. Conditions of Use

1. In cases where a system or its components are assembled, installed, and used in accordance with the manufacturer's instructions and specifications for their use,

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and in accordance with their intended use, a Competent Person may assemble, install, or use the system, or supervise the system's installation or use.

Otherwise, the determination that this system is safe and appropriate to use as a personal fall arrest system under the circumstances at the site must be made by a Qualified Person.

2. This system may only be relied upon to provide fall protection while performing the work where the location and characteristics of the work, and the way the Non-Penetrating Roof Anchorage is installed, will not dislodge the Non-Penetrating Roof Anchorage.
3. The roof slope is not more than the slope for which the system or its components are rated by the manufacturer.

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APPENDIX C

NON-EXCLUSIVE LIST OF COVERED TASKS

The following is a non-exclusive list of Covered Tasks. These tasks are only covered by this Agreement to the extent they fall within the scope of General Industry activities rather than Construction activities.

1. Chimney sweeping
2. Install, remove and replace chimney covers or caps
3. Waterproof or paint chimney
4. Repair chimney crowns or chase covers
5. Repair chimney chase
6. Repair grouted/mortared joints
7. Replace metal chimney liners.
8. Replace broken/missing clay chimney liner tiles.
9. Replace broken/missing masonry units.
10. Repair flashing
11. Repair roof flue or mechanical exhaust vents
12. Replace shingles

The term “Covered Tasks” includes any other similar chimney maintenance or repair tasks that do not constitute construction.

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SPECIAL ACCESS TASKS

In some situations, the only practical means of accessing the top of the chimney to perform a Covered Task is by placing the feet of a portable ladder on the surface of the roof and leaning it against the chimney. In those situations, two types of ladders may be used and fall protection must be carefully planned. Use of a portable ladder for this purpose must comply with 29 C.F.R. 1910.23(c)(4).

Ladder Options:

1. Use a straight portable ladder lashed tightly against the chimney at two different heights with both legs sitting firmly on the surface of the roof to provide firm support and prevent movement of the ladder. An appropriate rigid spacer may be used at the bottom between the ladder and the chimney to provide a slight incline that makes it easier to climb and descend the ladder.
2. Use a folding portable ladder with the back legs lashed tightly against the chimney at two different heights and both front legs sitting firmly on the surface of the roof, or a level platform designed for this purpose, in order to provide firm support and prevent movement of the ladder.

Fall Protection:

A Competent Person must determine whether a Chimney-Based Travel Restraint System is required in addition to any other fall protection systems that have been set up to perform the Covered Tasks.

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APPENDIX D

MODEL TEMPLATE FOR

FALL PREVENTION PLAN FOR COVERED TASKS

(for purposes of illustration)

This written plan must be completed, and the fall protection measures required under the December 1, 2023, NCSG-OSHA Settlement Agreement must be in place before performing Covered Tasks under the Settlement Agreement. If, after the rooftop work begins, the nature or scope of the tasks to be performed is modified or there is a change in conditions, the Competent Person must review this plan and either determine that it continues to be effective or make any necessary changes before continuing work. This plan must be provided to OSHA upon request.

Customer:

Date:

Time:

Address:

Names of employees assigned to job:

Task(s) to be performed:

DIRECTIONS FOR USE OF THIS FORM		
		<ol style="list-style-type: none"> 1. For each Covered Task to be performed, identify: (1) the Covered Task; (2) the location on the roof where it will be performed; (3) the method and location of roof access; (4) whether the Covered Task requires a portable ladder on the roof to reach the top of a chimney; and (5) the fall protection option(s) that will be employed. 2. Multiple tasks should be grouped and covered by one set of entries if the Hazard Assessment and Implementation Plan (e.g., same fall protection plan) for the grouped tasks is the same. Tasks performed with different fall protection set-ups must not be grouped.
HAZARD ASSESSMENT & IMPLEMENTATION PLAN		
Covered Task (or Grouped Tasks) 1		
Item #	Yes /No	Item
1		Location of Covered Task (or grouped Covered Tasks) on roof, including estimated distance to edge of roof:

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2		Location of Roof Access, including estimated distance from access to Covered Task: Method of Roof Access:
3		Slope(s) of Roof: Composition of Roof Surface(s):
4		Does the roof have the structural integrity to support the workers and work to be performed without supplemental equipment? If “no,” specify the Special Measures that will be required in Item 14.
5		Does the roof provide an adequate walking/working surface for the job (e.g., good traction, even surface)? If “no,” specify the Special Measures that will be required in Item 14.
6		Are there any obstacles to accessing the roof or performing the Covered Tasks that need to be addressed? If “yes,” identify the obstacles and specify the Special Measures that will be required in Item 14.
7		Does the Task Require a Portable Ladder on the Roof to Reach the Top of a Chimney? If “yes,” enter “X” in applicable blank to identify ladder.) _____ Use a straight portable ladder lashed tightly against the chimney at two different heights with both legs sitting firmly on the surface of the roof to provide firm support and prevent movement of the ladder. _____ Use a folding portable ladder with the back legs lashed tightly against the chimney at two different heights and both front legs sitting firmly on the surface of the roof to provide firm support and prevent movement of the ladder.
8		Was a fall hazard assessment performed and was it based on the Covered Task(s) to be performed and conditions at the worksite, taking into account factors such as weather conditions (e.g., wind, rain, snow, moss, moisture, temperature), condition of the roof, access to the roof and to the location where the Covered Task will be performed, roof pitch, type of surface, presence of skylights or utility lines, required equipment and materials, time to perform the Covered Task, and number of employees assigned to the job and on the roof?
9		Does the roof have guardrails or anchors for a personal fall protection system that would provide complete fall protection when accessing and performing the Covered Task? If “yes”: use them and skip to Item 11. If “no”: proceed to Item 10 to develop and implement a Fall Prevention Plan before work is allowed to proceed.

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10.A	<p style="text-align: center;">Fall Protection Options</p> <p>___ Is fall protection required during access to and from the Covered Task(s)? Y or N If “No,” explain why by checking applicable box below and skip to Question 10.B. Fall protection is Not required because task will be:</p> <p>___ Performed from Roof Hook Ladder that can be set up without using fall protection.</p> <p>___ Performed from portable ground ladder.</p> <p>___ Performed from Aerial Work Platform.</p> <p>___ Other. Explain: _____</p> <p>If “Yes,” place an “X” in the box next to each measure that will be used.</p> <p>___ Use Existing Fall Protection Anchorages located at: _____</p> <p>_____</p> <p>___ Use a Fall Protection Aid. Specify aid: _____</p> <p>___ Use a Travel Restraint System with a Ground-Based Anchorage Specify Anchorage: _____</p> <p>___ Use a Roof Top Travel Restraint System with a Non-Penetrating Roof Anchorage Specify Anchorage: _____</p> <p>___ Use a Roof Top Personal Fall Arrest System with a Non-Penetrating Roof Anchorage Specify Anchorage: _____</p> <p>___ Use a Personal Fall Arrest System with a Ground-Based Anchorage* Specify Anchorage: _____</p> <p>*This approach is not authorized by the Settlement Agreement with OSHA. It may be used, in compliance with relevant OSHA standards, if fall protection is required and the fall protection options in the Agreement are infeasible or pose a greater hazard, pursuant to Occupational Safety and Health Review Commission precedent. Such use must be documented.</p>
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10.B	<p><input type="checkbox"/> Is interim fall protection required while setting up or removing the fall protection that will be used while performing the Covered Task(s)? Y or N.</p> <p>If “No,” explain why by checking applicable box below and skip to Question 10.C. Fall protection is Not required because task will be:</p> <p><input type="checkbox"/> Performed from Roof Hook Ladder that can be set up without using fall protection.</p> <p><input type="checkbox"/> Performed from portable ground ladder.</p> <p><input type="checkbox"/> Performed from Aerial Work Platform.</p> <p><input type="checkbox"/> Other. Explain: _____</p> <p>If “Yes,” place an “X” in the box next to each measure that will be used.</p> <p><input type="checkbox"/> Use Existing Fall Protection Anchorages located at: _____</p> <p>_____</p> <p><input type="checkbox"/> Use a Fall Protection Aid. Specify aid: _____</p> <p><input type="checkbox"/> Use a Travel Restraint System with a Ground-Based Anchorage Specify Anchorage: _____</p> <p><input type="checkbox"/> Use a Roof Top Travel Restraint System with a Non-Penetrating Roof Anchorage Specify Anchorage: _____</p> <p><input type="checkbox"/> Use a Chimney-Based Travel Restraint System</p> <p><input type="checkbox"/> Use a Roof Top Personal Fall Arrest System with a Non-Penetrating Roof Anchorage Specify Anchorage: _____</p> <p><input type="checkbox"/> Use a Personal Fall Arrest System with a Ground-Based Anchorage* Specify Anchorage: _____</p> <p>*This approach is not authorized by the Settlement Agreement with OSHA. It may be used, in compliance with relevant OSHA standards, if fall protection is required and the fall protection options in the Agreement are infeasible or pose a greater hazard pursuant to Occupational Safety and Health Review Commission precedent. Such use must be documented.</p>
10.C	<p><input type="checkbox"/> Is fall protection is required while performing the Covered Task(s)? Y or N</p> <p>If “No,” explain why by checking applicable box below and skip to Question 11. Fall protection is Not required because task will be:</p> <p><input type="checkbox"/> Performed from Roof Hook Ladder that can be set up without using fall protection.</p> <p><input type="checkbox"/> Performed from portable ground ladder.</p> <p><input type="checkbox"/> Performed from Aerial Work Platform.</p> <p><input type="checkbox"/> Other. Explain: _____</p> <p>If “Yes,” place an “X” in the box next to each measure that will be used.</p> <p><input type="checkbox"/> Use Existing Fall Protection Anchorages located at: _____</p> <p>_____</p> <p><input type="checkbox"/> Use a Fall Protection Aid. Specify aid: _____</p> <p><input type="checkbox"/> Use a Travel Restraint System with a Ground-Based Anchorage Specify Anchorage: _____</p> <p><input type="checkbox"/> Use a Roof Top Travel Restraint System with a Non-Penetrating Roof Anchorage Specify Anchorage: _____</p>

