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SUBMITTED VIA www.regulations.gov

Attn: Ms. Tiffany Jones
U.S. Department of Labor
200 Constitution Ave. NW, Room S-2312
Washington, DC 20210

Attn: Ms. Flowers
General Services Administration
Regulatory Secretariat (MVCB)
1800 F. Street NW, 2nd Floor
Washington, DC 20405

Re: FAR Case 2014-025: Federal Acquisition Regulation: ZRIN 1290-ZA02
Fair Pay and Safe Workplaces DOL Proposed Guidance: RIN 900-AM81

Dear Ms. Flowers and Ms. Jones:

On behalf of Change to Win, I hereby submit the attached comments of the proposed FAR regulation and the DOL Proposed Guidance.

Sincerely,

/s/ Eric Frumin

Eric Frumin
Health and Safety Director

CHANGE TO WIN

Comments on Federal Standards and Guidance for the Evaluation of Employer Labor Law Violations in Federal Contracting

1. CtW strongly supports the Executive Order, the proposed Guidance and the proposed FAR regulation
2. The definition of “Serious” violations is appropriate for violations under the OSHAct but should be expanded to all violations, not just violations of specific standards.
3. The threshold level for penalties under the OSHAct is appropriate, but not for back wages in discrimination cases under the OSHAct.
4. The definition of “substantially similar” violations under the OSHAct is appropriate for determining whether the violations are “repeated”.
5. CtW strongly supports the proposals’ principle of reliance on initial agency findings (“administrative merits determinations”) as the basis for inquiry into bidders’ responsibility status – without awaiting the outcome of potentially extended and often frivolous employer challenges to such findings and orders. OSHA’s experience with its Severe Violators Enforcement Program (SVEP) demonstrates that the overwhelming majority of violations are either accepted or imposed by the appeals process, even where an unusually large number are appealed. Furthermore, many of these employers had agreed to “Enhanced Settlement Agreements” by the time the review process was completed.
6. CtW strongly supports the creation of the Agency LCA role, including the Office of LC in DOL to assist the Agency LCA’s in the contracting agencies in their role advising the CO’s. It is essential that specific offices within the contracting agencies develop credible expertise in the enforcement of labor laws, and be able to provide that expertise to the agency CO’s promptly within the procurement review process.
7. CtW supports the use of company-wide experience in the definition of “repeat” violations. Under the OSHAct, state OSHA agencies (whose findings will be treated as equivalent to those of US DOL OSHA) are not allowed to cite an employer for a “repeat” violation if the predicate violation occurred outside the state’s jurisdiction. However, the definition of “repeat” violation as occurring anywhere within the same company will assure that individual employers with the same or substantially similar violations are properly designated as Repeat violators anywhere within the jurisdiction of the Occupational Safety and Health Act, irrespective of the coincidence of state plan jurisdiction.
8. The proposed arrangement for Agency LCA advice to the relevant enforcement agency Contracting Officer is inappropriate. The arrangement proposed under the Guidance and the FAR is too short. Three days is simply insufficient for LCA’s to gather the relevant facts based on the documents provided by the Contractor and DOL. This is particularly true for the critical step of evaluating the Contractor’s compliance or non-compliance with any labor compliance agreements.

- A. In cases of Severe Violators, additional time is required to fully assess the status of employer's compliance.
- B. Responsibility Determinations must also consider the potential of on-going investigations to identify continuing non-compliance.
- C. The lack of adequate pre-award consultation by the bidder also justifies a longer evaluation period, to allow adequate time for agency LCA, CO and DOL consultation and information collection.
- D. Additional time is needed for adequate public participation and advice to the agency LCA and CO regarding compliance with remediation agreement commitments.
- E. The enforcement agencies have only a limited capacity to monitor compliance with remediation agreements in selected cases.

9. Pre-Award and Post-Award Reporting Should Include Copies Of Any Outstanding "Remediation Agreements" Known To The Bidders

Current OSHA practices regarding disclosure of remediation agreements are inadequate to provide the contracting agencies, agency LCA's and workers with the information necessary to quickly evaluate the compliance performance of employers bidding on federal contracts. To avoid any gaps in the responsibility determinations by either the Agency LCA's or the Contracting Officers, the bidders must be required to affirmatively include the full text of any remediation agreements for the full three years after those agreements take effect.

- A. There is a broad range of OSHA settlement agreements, including "Severe Violators" and Corporatewide agreements.
- B. Comparison of recent settlement agreements for "Severe Violators" of OSHA standards.
- C. "Corporatewide Settlement Agreements" (CSA's) are an important but incomplete factor in determining employer compliance, and once disclosed deserve careful scrutiny.
- D. Since current settlement agreements are only rarely available outside of the responsible OSHA enforcement office, Bidders should be obligated to provide public disclosure of settlement agreements during the disclosure process.
- E. Feasible access to OSHA settlement agreements: OSHA's "Severe Violators Enforcement Program" agreements and CSA's
- F. Settlements in OSHA "Whistleblower" investigations are not publicly available or even catalogued consistently in state plan investigations.

10. Settlement agreements with current contractors must provide explicit provisions for informing workers about the terms of the settlements, opportunities for reporting any employer non-compliance with those terms, and specific anti-retaliation protections.

DETAILED COMMENTS

1. CTW STRONGLY SUPPORTS THE EXECUTIVE ORDER, THE DRAFT GUIDANCE AND THE PROPOSED FAR REGULATION

There is a long and unfortunate history of federal agencies granting contracts to unscrupulous employers who flout federal labor law. This history has been well-documented by both the Government Accountability Office and the Senate HELP Committee, as well as the CAP Action Fund, in their various reports referenced in the DOL guidance and FAR proposals

In this regard, we certainly agree with the proposals' conclusion that the efficiency and effectiveness of the procurement process is enhanced by more affirmatively promoting employer compliance with labor law requirements. CtW is familiar with employers whose disdain for "following the rules" in labor law extends to other areas of misconduct including improper business ethics and contracting practices. The reports by the GAO, Senate HELP Committee and CAP Action Fund were certainly no surprise.

On the other hand, we are also familiar with the large number of employers who typically make affirmative efforts to comply with federal and state labor law. With regard to employer compliance with the OSHAct in particular, there is presently no systematic, reliable estimate for the degree of employer compliance with OSHA standards. OSHA's own statistics on the extent of compliance only apply to those employers who are covered by OSHA's own "targeting" efforts, including employers in industries with known high rate of non-compliance. But we have observed that after over 40 years of OSHA's existence, compliance has generally been incorporated into the business models of most employers. Thus it is not surprising that OSHA usually finds only a small number of "serious" violations in its typical inspections.

But that relatively low level of non-compliance provides support for the overall feasibility of the Executive Order and the DOL/FAR proposals. The number of violations/inspection are typically quite low, and would be addressed by the provisions of the EO and DOL/FAR proposals that address employers with few violations.

But even when employers have more than a few violations, the process and criteria established by the EO and the DOL/FAR proposals appear quite workable, as they rely on the good-faith efforts of cited employers to comply with OSHA's standards. This expectation is more than reasonable – it is in fact borne out by OSHA's own experience. First, OSHA inspectors provide employers ample opportunities to learn about the nature of the violations. These include the ritual "Closing conference" before OSHA even makes final decisions about penalties or deadlines for "abatement", as well as the "Informal Conference" immediately after OSHA issues the citations. These continuous discussions account in part for the low rate of employer appeals in the first place – typically fewer than one out of 10 cited employers.¹

In addition to those procedures during the inspection and post-inspection process, OSHA has extremely detailed procedures to assure that employers, once cited, comply with the required standards by abating the cited violations. Nearly 20 years ago, OSHA adopted a specific set of rules (29 CFR 1903.19) to assure that OSHA and employers can cooperate in verifying that any cited violations are corrected. These rules include very simple versions of the abatement verification process – such as inspectors

¹ In addition to OSHA's own direct discussions with employers, OSHA-funded consultants are available for small businesses to further assist them in identifying hazards and violations, including fixing those problems whether before or after OSHA has cited an employer for the violations.

themselves confirming during the inspection that the violations were corrected (1903.19.c.2). They also include specific templates for employers to notify the respective OSHA office, tailored to the specific OSHA citations and violations. Thus, it is no surprise that most employers who are eventually cited by OSHA for violations willingly comply when violations are found. Indeed, of the nearly 200,000 violations found by OSHA inspectors around the nation in 2014, less than 100 were due to an employer's "failure to abate" a previously-cited violation.²

These various procedures for assuring abatement of violations are at the core of OSHA's operating procedures, and gets more diligent treatment than any other function besides the determination of violations themselves. For instance, OSHA's Field Operations Manual (FOM), the operating "bible" for OSHA's enforcement staff, has numerous requirements for inspectors and supervisors to assure that they review abatement issues with employers at every stage of the enforcement process, and implement the specific steps described above to assure abatement, as well as in OSHA's penalty policy incentives for prompt abatement.³

Finally, as discussed further below, in more complicated cases, OSHA has long-standing procedures to enter into remediation agreements (known as "Settlement Agreements") with cited employers – especially those who have objected to the penalties or other aspects of the violations – to assure that the employers are committed to compliance. While these agreements have their understandable limitations, the results are still instructive: where employers cooperate with OSHA's inspectors, they have ample opportunity to benefit from OSHA's expertise and assure that their compliance is timely and complete. Furthermore, they have ready access to discussions and written communications with OSHA at all stages of the enforcement/remediation process to assure that OSHA's front-line inspectors are familiar with the company's abatement/"remediation" activities.

In sum, it is apparent that the vast majority of OSHA enforcement actions result in appropriate remediation actions by employers, in active consultation and communication with OSHA itself. These experiences should give both the Department of Labor as well as the FAR Council the confidence that Contracting Officers, as advised by the Agency LCA's, will have relatively little difficulty in making appropriate responsibility determinations for those bidders who report the occurrence of OSHA violations during the bidding process.

With that background, it is equally important that DOL's Guidance and the FAR Regulation also anticipate that some employers will not behave responsibly. It is precisely those employers whose records of OSHA non-compliance demonstrate disdain for federal labor law who will require the requisite scrutiny. The comments below, therefore, are directed to the appropriate means for assuring

² OSHA enforcement statistics, <http://ogesdw.dol.gov/views/searchExplorer.php>, retrieved 8/19/15.

³ OSHA Field Operations Manual, April 22, 2011; see especially Chapters 3, 4 and 7; https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf; see for example, chapt. 7. IV: "For each inspection..., OSHA shall open an employer-specific case file. The case file remains open throughout the inspection process and is not closed until the Agency is satisfied that abatement has occurred." and Chapt. 7.V: "Abatement certification is the minimum level of abatement verification and is required for all violations once they become Review Commission final orders."

that such negligent employers are properly reviewed for responsibility and business ethics, and that the enforcement agencies, the contracting agencies and the public can cooperate effectively in that review.

2. THE DEFINITION OF "SERIOUS" VIOLATIONS SHOULD BE EXPANDED TO ALL VIOLATIONS, NOT JUST VIOLATIONS OF SPECIFIC STANDARDS.

The definitions of "Serious" (as well as Willful and Repeat) violations encompass those violations of OSHA standards, where penalties are imposed through citations or Imminent Danger notices under Sect. 17k of the OSHAct (as discussed in FR 30583). This definition, however, is underinclusive because additional violations of the OSHAct are not covered by citations and penalties in Section 17k of the OSHAct. Indeed, in its enumeration of the criteria for "Serious" violation on pp. 30582-83, the draft Guidance specifies two examples of such conduct which is prohibited under the OSHAct: retaliation/discrimination against employees for exercise of their rights, and "interfere[nce] with an enforcement agency's investigation." These would evidently include the actions under Section 11.c, as well as the advance notice of an OSHA inspection which is also prohibited Under Section 17 of the OSHAct.

However, none of these definitions include the other activity prohibited under the OSHAct, and penalized under Section 17: "knowingly mak[ing] any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act." It is essential that prospective bidders who would deliberately mislead OSHA's investigators be considered for a responsibility determination in the same way that they would be considered had they been cited for violating a safety or health standard in the first place, or interfering in an investigation.

Since it is only available now as a criminal sanction, this provision is rarely invoked by the Secretary. But any knowing provision of false information to OSHA investigators is an extremely serious indication of employer disdain for both employees' safety and health as well as for the proper enforcement of OSHA's standards. It would certainly be appropriate for employers who had engaged in such rare but unacceptable practices to be subject to a detailed responsibility determination.

3. THE THRESHOLD LEVEL FOR PENALTIES UNDER THE OSHACT IS NOT APPROPRIATE FOR BACK WAGES IN DISCRIMINATION CASES.

The detailed list of "Serious" violations includes "an adverse employment action ... for exercising any right protected by any of the Labor Laws," without reference to any specific penalties, fines or back wages. If this is intended to assure that any such adverse actions are by definition "Serious" violations, the Guidance should say so. We certainly agree that adverse actions in response to workers exercising their legal rights must be viewed as potential evidence of inadequate business ethics, and trigger a responsibility determination.

However, a back-wages threshold of \$10,000 is far too high. Low-wage/minimum wage workers are likely to work weeks or months before accumulating that level of losses. But those losses are devastating to the individuals involved.

4. THE DEFINITION OF "SUBSTANTIALLY SIMILAR" VIOLATIONS UNDER THE OSHACT IS APPROPRIATE FOR DETERMINING WHETHER THE VIOLATIONS ARE "REPEATED".

The term "substantially similar" is appropriate for determining "Repeated" violations. This concept has been a foundation of the violation criteria in the OSHAct since adopted in 1979, and has been widely accepted since with little challenge by employers or change by reviewing courts. Given the considerable detail and specificity attached to many OSHA standards applied to the same set of circumstances, it is vital that this concept apply not only to OSHA's own decision-making but also to the responsibility determination process by CO's and Agency LCA's. Otherwise, abusive patterns of highly similar violations

might escape the necessary scrutiny simply because they do not involve violations of the identical subsections of the same multi-part standard. For instance, one overall OSHA standard can have multiple important sections dealing with the same basic purpose – protecting workers from a well-recognized standard. One section will require employers to perform a detailed assessment of the hazard; another the provision of the protective equipment or procedures; and another to train workers about both the assessment as well as the need for the provided precautions. Any one failure can be hazardous or even catastrophic for the employers and workers involved – which is why OSHA adopts programmatic, multi-part standards in the first place. An employer’s repeated failure to effectively implement the entire protective program needs to be viewed comprehensively by the CO and the Agency LCA.

5. CTW STRONGLY SUPPORTS THE PROPOSALS’ PRINCIPLE OF RELIANCE ON INITIAL AGENCY FINDINGS (“ADMINISTRATIVE MERITS DETERMINATIONS”) AS THE BASIS FOR INQUIRY INTO BIDDERS’ RESPONSIBILITY STATUS – WITHOUT AWAITING THE OUTCOME OF POTENTIALLY AND OFTEN FRIVOLOUS EMPLOYER CHALLENGES TO SUCH FINDINGS AND ORDERS.

In contrast to many other worker and public safety laws (notably the Mine Safety and Health Act), the OSHAct allows employers to delay the protective mandates of the Act by challenging the finding of violations. As discussed above, the ability to challenge violations does not usually appear to encourage employers to take advantage of the process to delay enforcement.. On the contrary, roughly 90% of cited employers accept the violations and pay the same or reduced penalty without formally challenging either the violations or penalties.

The EO directs that the contracting process generally and the responsibility determination process in particular take into account that bidders may well have accumulated Serious violations, but that these employers may well be responsible employers for the purpose of consideration in the contracting process. This is certainly appropriate and will assure that incidental violations, while Serious to the enforcement agencies, employers and workers involved, do not interfere in an efficient contracting process. In the case of the OSHAct, OSHA’s ability to assure abatement/remediation in the overwhelming number of cases provides additional assurance that once found, Serious violations will be promptly abated and need not be of overriding concern to CO’s and Agency LCA’s.

However, in the case of negligent employers who are disdainful of the law’s requirements, it is vital that initial agency determinations receive appropriate attention. In 2014, Federal OSHA issued 733 Willful violations, and 5,598 Repeat violations (in a few cases, even to the same employers, obviously). An employer who has committed Willful or Repeat violations should not be allowed the luxury of deferred scrutiny simply because it is able to exercise its right to challenge the violations on review.

For a small subset of those employers, OSHA has categorized them as “Severe Violators” and included them in OSHA’s Severe Violators Enforcement Program (SVEP). This is based on the occurrence of multiple Willful or Repeat violations, and/or a worker fatality, involving a select few types of very well-recognized hazards for which OSHA already has established standards (such as guarding machines to protect workers from amputations, shoring trenches to prevent collapses, or preventing falls on construction sites). Continuing violations of these standards in the face of these well-recognized hazards and required protections bespeak a gross failure by the employer to comply with core labor standards.

OSHA maintains a public Log of all employers who are put into its SVEP category.⁴ The SVEP Log for July 2, 2015 shows that of a total of 460 SVEP cases still active, 240 were appealed (i.e., “contested”) by the

⁴ <https://www.osha.gov/dep/index.html>

employers, of which 147 had resulted in Final Orders” by July, 2015. In other words, of those employers contesting the underlying violations, over 60% were resolved with some of the underlying Willful or Repeat violations still in effect. Another indeterminate proportion of the remaining 30% are still in the review process.

It would be unconscionable to allow these negligent employers - the unrestricted opportunity to receive government contracts after such abysmal disdain for the labor compliance responsibilities simply because those employers have challenged OSHA’s finding of Willful or Repeat violations. But that would be the necessary outcome of any reliance on “final” merit determinations rather than “administrative merit determinations.”

(It is worth noting that out of the 460 SVEP employers listed in July 2015, 220 employers did not contest the violations. Furthermore, over 100 of the 460 employers had signed “Enhanced Settlement Agreements” with OSHA to further promote worker safety and health above and beyond mere compliance with OSHA’s mandatory standards. This provides further evidence of the importance of assuring that employers receive both the strict approach to enforcement and as the balanced encouragement of remediation, as envisioned by the Executive Order.)

Inclusion of employee retaliation and other violations under the OSHAct

However, there is one important failure in the Draft Guidance approach to “Administrative Merit Determinations”: it fails to delineate any violations of the OSHA within the scope of “Administrative Merit Determinations” other than violations for failure to comply with standards. Unfortunately, this omits any of the other equally “Serious” violations that employers can commit under the OSHAct, including the all-important violations of OSHA’s anti-retaliation provisions. According to OSHA’s public data on its “Whistleblower” program,⁵ OSHA received roughly 1700 worker complaints about retaliation and other forms of employers’ discrimination against workers for protected activities under the OSHAct. In the last year, OSHA made over 1400 determinations in those cases which were not withdrawn themselves by the complainants. In over 1/3 of the cases, OSHA found that the complaints had merit.

The fact that hundreds of complaints are found to have merit annually shows that DOL and the contracting agencies should include these Serious examples of employer misconduct in the exclusive and otherwise “exhaustive” list of qualifying merit determinations in Section II.B.1 of the Guidance.

As discussed in the section above on the definition of Serious violation, the same should be true for other violations of the OSHAct which are punishable under Section 17 of the Act, including knowing provision of false information.

It is vital that these additional determinations be disclosed by bidders if the CO’s and Agency LCA’s are to grasp the full picture of compliance, especially at employers with a questionable record of other violations of OSHA standards themselves.

6. CTW STRONGLY SUPPORTS THE CREATION OF THE LCA ROLE, INCLUDING THE OFFICE OF LC IN DOL TO ASSIST THE LCA’S IN THE CONTRACTING AGENCIES IN THEIR ROLE ADVISING THE CO’S.

As discussed further below, it is essential that specific offices within the contracting agencies develop credible expertise in the enforcement of labor laws, and be able to provide that expertise to the agency CO’s promptly within the procurement review process. The Contracting Officers and their supervisors in

⁵ [OSHA Whistleblower Program Investigation Data, 2005-2015](#)

the procurement process cannot simply take this expertise for granted. There are literally decades of daily administrative practice, agency policy-making and regulatory experience that serve as the foundation for many of the day-to-day enforcement and compliance determinations made by labor enforcement agencies. While the availability of the determinations themselves is essential for triggering disclosures and potential responsibility reviews, they are far from sufficient. In the cases of highly negligent employers with repeated records of disdain for labor law compliance, it is essential that the a broader view of agencies' interactions with these employers be available to CO's. In the absence of such a nuanced approach, it is highly likely that only a one-sided, self-serving version of employer compliance will be articulated by the negligent employers themselves. CO's are ill-equipped to respond appropriately to such distortions, through no fault of their own. The entire contracting process will be well-served by the active involvement of Agency LCA's whose mission is likewise to facilitate procurement decision, but whose assignment is to assure that the facts about labor law compliance are fairly and quickly judged in the process.

7. CTW STRONGLY SUPPORTS THE USE OF COMPANY-WIDE EXPERIENCE IN THE DEFINITION OF "REPEAT" VIOLATIONS.

Under the OSHAct, state OSHA agencies (whose findings will be treated as equivalent to those of US DOL OSHA) are not allowed to cite an employer for a "repeat" violation if the predicate violation occurred outside the state's jurisdiction. Without needing to address that particular inequity in the OSHAct's enforcement scheme, the definition of "repeat" violation as occurring anywhere within the same company will assure that individual employers with the same or substantially similar violations are properly designated as Repeat violators anywhere within the jurisdiction of the Occupational Safety and Health Act, irrespective of the coincidence of state plan jurisdiction.

This is particularly important for states which, for whatever reason, have failed to properly classify repeated violations as "Repeat" in the first place. Prominently among these is California's state OSHA program (CalOSHA), the largest in the nation. For reasons it has never explained, California does not even classify as "repeat" a violation occurring at the same employer but at a different location within the state. This is an unacceptable violation of CalOSHA's obligation to be "at least as effective" as the national OSHA program mandated by the OSHAct.

Federal OSHA recognized this severe defect in CalOSHA's definition of Repeat violations in 2009, and CalOSHA promised to correct it by January 2012. Until only weeks ago, CalOSHA had failed to even formally issue a proposed revision to conform its criteria to those of Federal OSHA, much less adopt a final rule.⁶ In 2013, CalOSHA proposed to amend the underlying rules in the California Code of Regulations, and held a formal Advisory Committee meeting on Feb. 19, 2014, to take public testimony on this subject. Attached as Appendix 1 is the testimony provided by Change to Win and the Warehouse Workers Resource Center at that meeting, which includes two case studies demonstrating the severe repercussions emanating from CalOSHA's failure to correct this defective policy: the enforcement failure at a major global trucking/warehouse/logistics contractor, and a list of all the potential "Repeat" violations at the Safeway grocery chain. In the Safeway example, nearly one third of the violations cited in the period 2007-2012 should have been classified as Repeat but were not because of the defective CalOSHA policy.

⁶ That new proposed revision, however, would still be inadequate. It only allows its inspectors to consider violations within the previous 3 years, rather than the previous 5-year period which Federal OSHA has used for issuing Repeat violations since 2010. See: <http://www.dir.ca.gov/dosh/doshreg/Definition-of-Repeat-Violation/>

This is exactly the kind of technical loophole which – in unusual but nonetheless important situations -- gives employers with repeated violations the incentive to continue to violate the law and renders important aspects of an enforcement program virtually meaningless.

8. THE PROPOSED TIME FRAME FOR AGENCY LCA ADVICE TO THE RELEVANT ENFORCEMENT AGENCY CONTRACTING OFFICER IS TOO SHORT.

The time frame proposed under the Guidance and the FAR is too short. Three days may be fully adequate for the large number of bidders who will have only incidental numbers of Serious, Willful or Repeat violations, and have fully abated the violations with the appropriate documentation according to the existing procedures for such documentation.

However, it is apparent that the intent of the Executive Order is to assure that CO's and Agency LCA's have the ability to focus attention on those relatively few number of employers who recklessly violate labor laws and accumulate larger records of violations – particularly when those violations continue. In such cases, three days is simply insufficient for LCA's to gather the relevant facts based on the documents provided by the Contractor and DOL. This is particularly true for the critical step of evaluating the Bidder's or Contractor's compliance or non-compliance with any labor compliance agreements – especially in cases of Bidders with multiple Willful or Repeat violations, such as those covered by OSHA's Severe Violators Enforcement Program, detailed Labor Compliance Agreements, or on-going investigations.

As the DOL Draft Guidance states in Appendix E (FR 30603-04):

Each contractor or subcontractor's disclosed violations will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. The extent to which a contractor or subcontractor has remediated violations of Labor Laws, including agreements entered into by contractors or subcontractors with enforcement agencies, will be given particular weight in this regard.

Remediation of the violation(s), including Labor Compliance Agreements: *Typically the most important factor that can mitigate the existence of a violation*, remediation is an indication that a contractor or subcontractor has assumed responsibility for a violation and has taken steps to bring itself into compliance with the law going forward. In most cases, for remediation to be considered mitigating, it should involve two components:

- Correction of the violation: The remediation should correct the violation itself, including by making any affected workers whole. For example, this could involve abating a dangerous hazard, paying workers their back wages owed, or reinstating a wrongfully discharged employee.
- Efforts to prevent similar violations in the future: For example, if a contractor or subcontractor improperly misclassified workers as exempt from the FLSA and pays any back wages due to the workers without reviewing its classifications of the workers going forward, it will likely commit similar violations in the future. Particular consideration will be given where the contractor or subcontractor has implemented remediation on an enterprise-wide level or has entered into an enhanced settlement agreement with the relevant enforcement agency or agencies that goes beyond what is minimally required under the law to address appropriate remedial or compliance measures.

[Emphasis added]

One specific type of remediation is a Labor Compliance Agreement, which is an agreement entered into between an enforcement agency and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other

related matters. A Labor Compliance Agreement is an important mitigating factor because it indicates that the contractor or subcontractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.

* * *

Safety and health programs or grievance procedures: Implementation of a safety and health management program, ... grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of an enhanced settlement agreement, or other compliance programs foster a corporate culture in which *workers are encouraged to raise legitimate concerns about Labor Laws violations without the fear of repercussions. Such programs and procedures may prompt workers to report violations that would, under other circumstances, go unreported.* Therefore, the implementation of such programs or procedures will be considered a mitigating factor, particularly as to violations that might otherwise be deemed repeated or pervasive.

[Emphasis added]

- A. Labor compliance documents provide important, but limited, information about the extent of compliance for “Severe Violators”. In cases of Severe Violators, additional time is required to fully assess the status of employer’s compliance.

As discussed above, OSHA maintains an extensive system of documenting employer compliance, including detailed remediation agreements, much of which should be readily available to OSHA staff and Agency LCA’s relatively quickly. Some – though by no means all -- of these documents or the information contained therein are also easily available to the public. For these reasons, this information should suffice for most responsibility determinations after a bidder has disclosed its record of violations.

However, in situations where the Bidder or Contractor is continuing to fail to comply, non-compliance is unlikely to be fully reflected in the documents either provided by the Contractor or maintained by the enforcement agency. (See also discussion in Section 6 below about the need for public access to Settlement Agreements.) This is especially so 1) for employers with a large number of facilities, 2) where the agencies’ agreement contains novel provisions specifically suited to the unique circumstances of the employer in question, or 3) where the provisions deal with enforcement issues that fall outside the agencies’ core enforcement mission (e.g. retaliation for reporting of violations, rather than compliance with the underlying economic, health or safety standards themselves).

For instance, as indicated in the attached case study of the Cintas Corp., the company’s 2008 corporatewide settlement/remediation agreement (“CSA”) took effect in April, 2009, with a term of 2 years. In the summer and fall of 2011, the company’s compliance record may well have looked adequate to a Contracting Officer considering any bids for or renewals of contracts for 2012. During the 2009 -2011 period, Federal OSHA had issued a variety of citations for Serious violations – most arising from worker complaints. But all but two were subsequently “deleted” by OSHA (primarily during formal appeals), and the remaining two were unrelated to the prior violations. From the standpoint of federal enforcement agencies and Contracting Officers, Cintas might have looked like a “responsible bidder” on the criteria of worker safety. The terms of the 2008 remediation agreement might even have provided assurance that the employer had “learned the lessons” of the horrific series of incidents, inspections, investigations and violations in 2007-08, and had implemented a comprehensive compliance program to keep its employees out of harm’s way.

However, if the Contracting Officer had enjoyed the benefit of an agency LCA, as well as ready access to the records of state OSHA enforcement agencies, s/he would see a very different picture. Of the seven “Serious” violations issued through 2011, 4 were never deleted. One arose from a worker complaint in a Kentucky plant, as did another two in Washington State (and one more from an inspection in Michigan).

Of the five Serious violations that were later “deleted,” all but one were from the same KY and WA plants where the company accepted the other violations as part of local settlements. One of the plants with the recent violations was not covered by the CSA. And one of the deleted violations – at the plant covered by the CSA – was for the same standard as was cited in the 2007-08 series of violations. These should have been warning signs of problems, requiring further investigation about the effectiveness of the CSA remediation agreement, the limitations of its scope, and reliability of any assurances about bidder responsibility.

Warning signs would have helped. Because just a few months later, in October, 2012, another Kentucky plant (also omitted from the CSA) was the site of yet another fatality involving conditions similar to the notorious string of violations in 2007. That incident prompted yet more “serious” violations, with maximum penalties, by the KY state OSHA program.⁷

Sadly, even those warning signs were not enough: the following year, the same Kentucky plant incurred yet another incident, in which another worker was entangled in the plant’s unguarded dryer, then hospitalized with a broken arm.⁸ The verdict: yet another “Serious” violation, with a maximum penalty, for the same standard as was cited by Federal and State OSHA agencies in a total of 8 facilities in 2004-2008, for 4 Repeat violations, 4 Serious violations and total initial penalties of \$105,024.

Thus, it is evident that settlement agreements alone are not sufficient evidence of renewed compliance efforts worthy of consideration as “mitigating factors.” The real evidence of compliance with applicable laws and standards involves a more complex picture, requiring a deeper understanding of the facts at hand. Worker complainants have valuable information about the status of companies’ efforts to remediate violations. Labor enforcement compliance officers have important insights about the parent corporation’s oversight – or lack of oversight – of local managers’ diligence. And Counsel for both federal and state agencies have important perspectives on the meaning of remediation agreements, beyond the simplistic interpretations of the documents themselves. Those views are accessible to Agency LCA’s and CO’s – but not necessarily within a three-day window.

Of course, if the bidder provides fuller information as part of its mandated pre-award disclosures, that will greatly simplify the burden on Agency LCA (as well as the labor enforcement agencies themselves) to identify the relevant information. See Section 9.C below regarding the expansion of pre-award disclosures by Bidders.

B. Responsibility Determinations must also consider the potential of on-going investigations to identify continuing non-compliance

In addition to a fuller evaluation of the violations that were previously identified, in the most serious cases agency LCA’s and CO’s will need to consider the possibility that an active investigation will result in new findings, concurrently with the responsibility determination. In the context of the OSHAct, this could include an OSHA inspection responding to a workers’ complaint, a worker fatality. Ongoing investigations could also target a particularly severe injury or incident which reveals continued systemic management failures – such as those at Cintas and other employers who OSHA has added to its Severe Violator Enforcement Program. OSHA and its state plan partners perform thousands of those inspections

⁷ Kentucky Labor Cabinet, OSHA citation 314601394, April 20, 2012.

⁸ Kentucky Labor Cabinet, OSHA citation 316916436, Sept. 12, 2013

annually. Some of those employers are later categorized as “Severe Violators” when the investigations are concluded and the violations issued.⁹

Furthermore, with regard to broad remediation agreements (such as “CSA’s”), under current agency practices the agencies’ themselves perform essential but limited monitoring of employers’ compliance with settlement agreements. At Cintas, for example, Federal OSHA committed to do followup inspections at 10% of the company’s 65 facilities covered by the CSA. However, OSHA had no plans to initiate inspections at the other dozens of plants omitted from the CSA. The initiation of new “unplanned” inspections (i.e., Complaint or Monitoring inspections, among others) can be critical windows into the continuing problems masked by limited affirmative agency monitoring and oversight.

Those new findings could certainly include such warning signs as Repeat, Willful or Pervasive violations – some even in direct violation of the remediation agreement itself. Such new findings of violations would ordinarily trigger a CO’s determination that the proposed contractor displays a “lack of integrity or business ethics,” and the more urgent actions that those findings would require under the FAR regulations.

Dissemination of the necessary information about newly-opened investigations among the various agencies involved is certainly feasible, and in some cases is already routine. However, the depth of the readily-available information may well be insufficient to satisfy the needs of a proper responsibility determination. As mentioned above, further consultation with Compliance Officers or Agency Counsel may be needed, especially in cases of remediation agreements involving bidders with prior Repeated, Willful or Pervasive violations.

If an agency LCA – much less a CO – is to acquire that knowledge and perspective, it will take time, a coordinated effort with the enforcement agencies, and an affirmative effort to listen to sources other than those of the bidder. For routine cases, this could be sufficient: there are no on-going investigations, or the scope of the investigation is limited to a worker complaint completely unrelated to prior violations. However, for “Severe Violators,” with multiple on-going investigations, it is inconceivable that such an examination could be adequately performed in 3 days in all cases. Complicated cases like Cintas will certainly require additional time.

(The time required could certainly be shortened by various efficiencies. But however efficiently the information is disclosed, reviewed and discussed, it will be more efficient if the bidders themselves provide all the available and discloseable enforcement-related information to the contracting agencies and to the public at the outset. See discussion of expanded disclosure requirements in Section # 11, below).

⁹ OSHA has recently instructed its Compliance Officers to routinely collect the additional employer ownership information to facilitate the implementation of the FAR regulation: “To meet the intent of and implement this Order, Compliance Safety and Health Officers (CSHOs) must attempt to collect new information during inspection activity for OSHA Information System (OIS) input and complete several new OIS data fields. The new information is necessary to provide a unified means of identifying companies on a government-wide database. For the first time, DOL and other federal agencies will have access to the labor law compliance record of employers bidding on government contracts.” Memorandum to Regional Administrators and State Plan Designees: Executive Order 13673: Fair Pay and Safe Workplaces, April 23, 2015.

In sum, it is completely unrealistic to expect OSHA, within one or two days, to properly assess the full range of their various enforcement activities at large employers and compile a succinct evaluation of the contractor's compliance/non-compliance.

- C. The lack of adequate pre-award consultation by the bidder also justifies a longer evaluation period, to allow adequate time for agency LCA, CO and DOL consultation and information collection.

The proposed FAR regulation presumes that Contractors who are continuing to violate their obligations will have already been in contact with the enforcement agencies and the LCA's prior to the submission of a bid (FR 30550):

As explained in DOL's Guidance, contractors and subcontractors will be able to engage with DOL and enforcement agencies early in the process when contractors or subcontractors know that they have violations that may require remediation, so that the results of those engagements can be used by contracting officers to help determine responsibility, and used by contractors to help determine responsibility of subcontractors, without having these steps unnecessarily disrupt the procurement process.

Unfortunately, neither the proposed FAR regulation nor the DOL Guidance requires the Contractor to "engage" with DOL and the enforcement agencies, disclose its interest in submission of a bid, and discuss the facts related to compliance/non-compliance with a Labor Compliance Agreement. Nor does the DOL Guidance provide any explicit advice to Contractors to undertake the "engagement" referred to in the proposed FAR Regulation, prior to submission of any bids and notification of violations to the Contracting Officers. The only explicit requirement about such consultation or engagement is in the Executive Order itself, and it merely requires the agencies to be available for such consultation at the request of the Contractor in regard to any questions about the adequacy of subcontractors' compliance/non-compliance.¹⁰

On the other hand, the Proposed FAR regulation also explicitly invites the bidder to provide a one-sided version of its non-compliance, to reframe or otherwise excuse its continuing non-compliance:

(iv) To the Contracting Officer such additional information as the Offeror deems necessary to demonstrate its responsibility, *e.g.*, mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with labor laws. (Proposed FAR regulation 52.222-AA.d.1.iv; FR 30569)

The DOL Guidance also invites Contractors to provide the facts underlying any challenges to the agencies' non-compliance findings, even if that evidence has not been considered by the enforcement agency or other review body (FR 30580):

... contractors and subcontractors may raise good-faith disputes regarding administrative merits determinations that have been issued to them. As set forth below, when contractors and subcontractors report administrative merits determinations, *they may also submit any additional information that they believe may be helpful* in assessing the violations at issue (including the fact that the determination has been challenged). [Emphasis added]

¹⁰ EO 13673, Sect. 2.a.iv: A contracting officer, Labor Compliance Advisor, and the Department of Labor (or other relevant enforcement agency) shall be available, as appropriate, for consultation with a contractor to assist in evaluating the information on labor compliance submitted by a subcontractor pursuant to paragraph (v) of this subsection.

Indeed, the same one-sided reliance on Contractor-provided information is anticipated in the companion FAR regulation 52.222-BB.b.3, FR 30570, for post-award “Prime Contractor Updates”:

(3) The Contracting Officer will afford the Contractor an opportunity to provide any additional information, *e.g.*, mitigating circumstances, remedial measures (to include labor compliance agreements), other steps taken to achieve compliance with labor laws, and explanations for delays in entering into or for not meeting the terms of an existing labor compliance agreement before the Contracting Officer decides on any needed action.

This unbalanced process virtually assures that LCA’s will be unable to properly determine the adequacy of the Contractor’s compliance within the available time, and advise the Contracting Officer accordingly.

D. Additional time is needed for adequate public participation and advice to the agency LCA and CO regarding compliance with remediation agreement commitments

The proposed process for agency LCA’s to advise CO’s fails to give members of the public – including the workers directly affected by the violations – an adequate opportunity to learn about the contracting agencies’ consideration of the violations history – especially in companies with the worst records. The short period also denies the public the opportunity to inform the LCA’s and CO’s of important relevant information which may never have come to the attention of the enforcement agencies themselves – and thereby make a meaningful contribution to the advisory process. For instance, the remediation agreements are vital parts of the overall scheme. Yet these are not yet part of the required public disclosure process, nor are they typically distributed to workers by the employers in question. In order to assure that workers are both aware of the violations and remediation agreements relevant to the bidding process, and can provide important factual information to the LCA’s and CO’s involved in the responsibility determination, the process must allow a reasonable period for workers to learn of the posted information, receive the remediation agreement, and communicate the factual information to the agency LCA.

E. The enforcement agencies have only a limited capacity to monitor compliance with remediation agreements in selected cases.

As indicated in more detail in the next section, OSHA has only a very limited ability to conduct effective monitoring of employers covered by remediation agreements. As the Cintas example shows, the SVEP program does not always trigger the continuing state plan enforcement monitoring activities which would deter future violations either. The violations of Monro Muffler’s remediation agreement provide additional vivid examples of the severe limits of OSHA’s employer compliance monitoring in uncovering – much less actually deterring – ongoing violations, even in the presence of what otherwise appear to be effective remediation measures.

OSHA’s “Severe Violator Enforcement Program” provides for a specific followup protocol by OSHA, and those followup inspections are a matter of public record in OSHA’s “SVEP Log”. As the July 2015 Log indicates, of the 146 followup inspections done of employers already designated as SVEP cases, seven of those employers were found in the followup inspections to again qualify as SVEP cases. (One of those also had signed an “enhanced settlement agreement” with OSHA as well.)

More importantly,, the predictable followup inspections within the SVEP program are the exception rather than the rule. In 2014, Federal and State OSHA agencies did a total of 92,300 inspections, of which 56,400 found violations (the rate of inspections with Serious/Repeat/Willful violations varies but

accounts for the majority of Federal inspections). In the same year, these agencies only did 3,400 “followup” inspections.

This is not to criticize OSHA for failing to allocate its scarce enforcement personnel any differently. As OSHA’s Field Operations Manual (Chapt. 3, Sect. IX) states:

The primary purpose of a follow-up inspection is to determine if the previously cited violations have been corrected. Monitoring inspections are conducted to ensure that hazards are being abated and employees protected, whenever a long period of time is needed for an establishment to come into compliance (or to verify compliance with the terms of granted variances). Issuance of willful, repeated and high gravity serious violations, failure to abate notifications, and/or citations related to imminent danger situations are examples of prime candidates for follow-up or monitoring inspections. These type of inspections will not normally be conducted when evidence of abatement is provided by the employer or employee representatives.

If the Manual’s protocols result in too few inspections to catch even the Severe Violators or the systemic problems in CSA’s, that is the result of the underfunding of the agency, rather than necessarily bad choices in enforcement priorities. (By comparison, MSHA by statute is obligated to inspect underground mines every quarter!)

The limitations in followup/monitoring inspection policy and practice, as well as the examples cited here, reveal the need to assure that any responsibility determination allows others—especially the affected workers—to provide the agency LCA’s and CO’s with relevant information about the company’s compliance. In order for the workers to have an adequate opportunity to provide this information, they must be informed of the terms of the settlements and relevant information regarding the implementation of compliance/remediation policies and practices. Such awareness on their part of the terms of the agreement, as well as instances of non-compliance, will allow them to bring relevant, current evidence of both compliance and non-compliance to the LCA’s, given their intense familiarity with the conditions of interest. But the truncated schedule for consideration of such information renders that opportunity virtually impossible.

For these reasons, we believe that a longer period of notice to employees regarding the pending bid consideration is more likely to yield effective, evidence-based decision-making by LCA’s and CO’s, free of corporate misinterpretation and distortion about potentially troubling violation histories.

9. PRE-AWARD AND POST-AWARD REPORTING SHOULD INCLUDE COPIES OF ANY OUTSTANDING “REMEDIATION AGREEMENTS” KNOWN TO THE BIDDERS

Public and worker access to accurate information about employer remediation agreements is of vital importance if the gaps in agencies’ own information can be filled before the completion of the responsibility review. Both the Guidance and the FAR regulation should be modified to assure agency LCA’s and CO’s are not hindered in that review by the well-established limits of the agencies’ own capacity for maintaining, analyzing and providing remediation agreements on short notice – nor by the inherent limits on OSHA’s knowledge of the conditions within these companies in the first place.

Current OSHA practices regarding disclosure of remediation agreements are inadequate to provide the contracting agencies, agency LCA’s and workers with the information necessary to quickly evaluate the compliance performance of employers bidding on federal contracts. To avoid any gaps in the responsibility determinations by either the Agency LCA’s or the Contracting Officers, the bidders should

be required to affirmatively include the full text of any remediation agreements for the full three years after those agreements take effect.

There is a wide range of enforcement practices under the OSHAct involving settlement agreements which would qualify as “remediation agreements” in the DOL Draft Guidance and the FAR regulations. But OSHA’s current disclosure practices are insufficient, as discussed below. Only a specific requirement on bidders to disclose their own settlement agreements will assure that the necessary interested parties – including the affected workers – have access to the agreements and can provide meaningful information to agency LCA’s and CO’s about continued employer non-compliance.

The attached “case study” from the Cintas Corp. – a significant federal contractor – illustrates vividly the need for full reporting by bidders. Cintas was also one of the most heavily-penalized violators of OSHA standards in the history of the OSHA program. Its notorious record was repeatedly the focus of national media attention, and the subject of a House subcommittee hearing in 2008. The problems at Cintas were specifically cited by the Senate HELP Committee report in 2013. Cintas has signed multiple remediation agreements with OSHA, including a corporatwide settlement agreement in 2008. But none of those agreements are readily available to the public or others on OSHA’s website. Had they been known to Cintas’ employees or to agency compliance officer, they may well have helped raise questions about the company’s non-compliance in order to prevent further non-compliance. But notwithstanding this exceptional oversight and scrutiny, as well as those many remediation agreements, Cintas employees continued to suffer loss of life and limb years after Cintas’ problems were well known to either the labor enforcement agencies, the contracting agencies on whose contracts Cintas continued to bid, or the public. During the same period, the Defense Department was forced to cancel a contract because of non-performance.

A. There is a broad range of OSHA settlement agreements, including “Severe Violators” and Corporatwide agreements

OSHA has many types of settlements, involving both routine enforcement of safety and health standards and enforcement of OSHA’s anti-retaliation protections for worker-complainants.

Regarding OSHA’s routine compliance enforcement, OSHA and employers arrive at such agreements at various stages in the enforcement appeals process. In almost all cases, OSHA only makes such agreements after it has made a formal finding of one or more violations. As such, virtually all of OSHA’s agreements will be relevant to the types of violations envisioned by the Executive Order and proposed FAR regulation: “Serious”, “Repeat” and “Willful” violations.

In many cases, they occur after OSHA issues its citations, but before the employer files any formal appeal (i.e., “contests” a citation). Such “Informal Settlement Agreements” are routinely achieved for a wide range of purposes, but there is only limited consistency in the provisions of such agreements other than the assurance that the employer will not formally seek to challenge OSHA’s merit determination (i.e., citations).

In the small proportion of cases involving formal employer appeals before the Occupational Safety and Health Review Commission (generally less than 10% of all citations), OSHA and the employers usually arrive at “formal” settlement agreements. These are approved and filed by a Commission ALJ. Once again, there is a wide range of provisions in such agreements, with only limited consistency in the substantive provisions other than the acceptance of the violations and penalties, and the obligation to “abate” the violations and hazards.

However, in cases involving employers with the kinds of violations envisioned in the EO as triggering a responsibility determination, there can be a wide range of provisions. OSHA has no “template” mandating such provisions, and the provisions are usually tailored to the specific facts of the employer and the violations in question.

The best examples of OSHA’s policy regarding settlement provisions are found in OSHA’s directives to its enforcement field staff under two high-profile enforcement initiatives: the **Severe Violators Enforcement Program** (SVEP; OSHA Directive CPL 02-00-149, June 1, 2010), and OSHA’s enforcement/settlement policy on **“Corporatewide Settlement Agreements”** (“CSA’s”; OSHA Directive CPL 02-00-152; June 22, 2011).

These two policy Directives offer a range of provisions to assist both employers and OSHA in achieving their common goal of achieving compliance with the standards violated. But while there is certainly much overlap and even some consistency among these many different agreements, there is no formal consistency. OSHA apparently has no formal policy or practice of comparing these many essential elements in OSHA’s enforcement armamentarium, much less routine public disclosure of either of the underlying the provisions or any internal agency comparison.

Thus, in the absence of any formal or other available comparisons among the multitude of remediation agreements that could apply to individual companies or across comparable companies, agency LCA’s as well as affected workers will be relegated to making their own comparisons among remediation agreements. Such comparisons are important filters for identifying agreements that are indeed substantive compared to those that are merely superficial statements of intent with little real ability to assure an end to the violator’s non-compliance.

There are many examples of choices that enforcement agencies and employers can make when negotiating such agreements. These include a few of obvious relevance to the value of the agreement as a mitigating factor in a responsibility determination:

- How much training do supervisors or managers (or even workers) receive in the detection, prevention and reporting of any future violations?
- What kind of on-going reporting is required by the bidder to the enforcement agency?
- What provisions does the agreement have for worker access to such reports?
- What kind of training does the employer provide to the affected workers about the importance of reporting on-going violations to both the employer and to OSHA?
- What kind of anti-retaliation program has the employer adopted to assure that workers are free to participate in any system promoting the reporting of violations?

At the outset of the implementation of the FAR regulation and DOL Guidance, it is essential that both agency LCA’s and CO’s have the ability to answer these questions. Only an affirmative reporting requirement on the bidders will assure that the LCA’s and CO’s will actually receive the outstanding agreements as part of the responsibility determination process.

B. Comparison of recent settlement agreements for “Severe Violators” of OSHA standards

The criteria listed above are not incidental to the responsibility determination, nor to the employer’s actual likelihood of compliance. As described further below, OSHA routinely provides a public “Log” of hundreds of employers with multiple “Willful” or “Repeat” violations of high-profile standards, often

involving worker fatalities – OSHA’s Severe Violators Enforcement Program. The latest Log shows that for those cases in which the employer has accepted the violations and reached a settlement with OSHA, fully 25% signed agreements that were “enhanced” beyond the minimum requirements (i.e., acceptance of the violation and agreement to pay penalty).

An analysis by CtW two years ago of the comparable group found 75 SVEP cases with “enhanced” settlements. The 75 employers ranged in size from 5 or less to 16,000, with an average employer size of 427 employees. A majority were construction employers – 44 (59%).

Details of 50 such settlements were available from the applicable Federal OSHA Area Office. The agreements demonstrate the wide range of important provisions to which these employers and OSHA have agreed to prevent future “severe” violations.

- | | |
|---|----------|
| - additional employer training (supervisors, etc.): | 12 (24%) |
| - additional worker training | 16 (32%) |
| - detailed evaluation of the potential hazards (e.g., audits, etc.) | 23 (46%) |
| - specific measures to correct the conditions underlying the cited violations | 14 (28%) |
| - hiring a consultant to assist with compliance | 24 (48%) |
| - implement a “Safety and Health Program” | 16 (32%) |

In sum, while there is obviously consistency among these agreements, there was apparently no comprehensive practice of requiring either the “Safety and Health Program” or the violation reporting procedures specified in the draft DOL Guidance as elements of an adequate Remediation Agreement for the purpose of serving as a “mitigating factor”.

Indeed, only 2 of these 50 agreements had specific provisions to encourage worker reporting of violations:

P. Gioioso & Sons:

- *Reporting Form:* Gioioso will develop and encourage the use of a reporting form by which employees can report a safety or health problem and a suggestion form for making safety and health suggestions.”
- “4) Provision for employee involvement in safety and health matters to take advantage of their knowledge of their jobs and work environment, and to assure adequate and full communication in regard to safety and health issues and their resolutions; 5) A system for investigating all accidents and reported near misses to identify all contributing causes and implement protection; 6) A procedure to encourage employees to report hazards to management as soon as possible and to require management to address such hazards promptly;”
- *Training:* Gioioso will ensure that all employees are trained to recognize hazards at the worksite and directed to report any hazard so that it be corrected as soon as possible.”)

Keystone Stucco: *“Notification to Employees of Right to Report:* Respondent shall provide notification to all employees upon hire and monthly thereafter of their right to report perceived unsafe work conditions and their right to refuse to work under such unsafe conditions until corrected.”

(Unfortunately, in a few cases, the settlements had provisions that could even inadvertently discourage worker reporting of violations – particularly in the absence of any explicit anti-retaliation or confidentiality protections. For example the agreement at North Central Power stated: *“Training:* respondent shall provide training to all linemen and foremen regarding disciplinary steps that will be taken in the event of violations of company safety policies by employees.” The related debate over the application of discipline against workers who report injuries also continues, as OSHA has already acknowledged in multiple recent actions. See discussion below regarding “Whistleblower Investigations.”)

This review of OSHA's current practices is not intended to fault those practices – nor should it be used (or abused) for that purpose by the opponents of strict enforcement. On the contrary, with the exception of admittedly intractable problems with small employers in the construction industry, the SVEP program has produced successful results in stopping highly negligent employers from continuing such conduct.

However, SVEP has not necessarily yielded the kinds of settlement agreements that would on their surface appear to serve as “mitigating factors” in responsibility determinations. Only an adequate review of both the remediation agreement in particular, within the proper context of such agreements generally, can determine if the agreement is a realistic effort by OSHA and the employer to put the employer on a straight- and-narrow path to cessation of current violations as well as prevention of future recurrences. Absent such comparisons and evaluations, many such agreements could be a strong statement of intentions, but with only a limited ability to force a negligent employer to actually detect, fix, and deter ongoing violations.

C. “Corporatewide Settlement Agreements” (CSA’s) are an important but incomplete factor in determining employer compliance, and once disclosed deserve careful scrutiny.

OSHA's CSA's have been an important step in the efficient administration of OSHA's enforcement program, in conjunction with employers' affirmative efforts to voluntarily comply beyond the scope of specific violations. They have led to essential reforms at cooperative corporations, and provided much greater protection to workers than would otherwise be available through traditional site-by-site enforcement – even with the potential sanctions of Repeat and Willful violations. Notable examples include the settlement at Beverly Enterprises in 2002, and Delta Airlines in 2012 – both of which set new benchmarks for industry practices that were later adopted by many more employers than OSHA could have ever reached otherwise.¹¹

However, CSA's are not a universal solution by any means. OSHA's Directive has criteria limiting the discretion of its compliance staff in the adoption of such agreements. Worse, if an employer fails to make the necessary internal reforms embodied by the agreement, violations will continue. While there are relatively few cases of such corporate failures, the risks of non-compliance associated with them are much higher than with agreements of a smaller scope due to the large size of the employers in question. And those risks are compounded due to OSHA's limited capacity to monitor compliance at all of a large company's locations.

The Cintas example

The attached case study of the Cintas Corp. is a revealing example of the problems with otherwise useful CSA's. For otherwise legitimate reasons, the agreement failed to cover many plants within the company, including one in which a worker severe and fatal injuries shortly after the agreement expired.

Failures at Munro Muffler after the CSA: The implications of OSHA's limited monitoring capacity

The Munro Muffler Co. settlement offers a lesson about the limits of both the CSA's. As OSHA describes (see quoted press release below), OSHA's South Boston Office initially investigated a near-fatality at a

¹¹ For a partial list of such agreements, see :

https://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=CWSA&p_toc_level=0

company store in 2011, and cited the company for serious violations with penalties of \$19,000. The same office had also done an earlier inspection finding Willful and multiple Repeat violations and an initial penalty of \$260,000 at a different store.) The violations were sufficient to trigger classifying Munro as a "Severe Violator". A year later, the company and OSHA reached an agreement to fix the same problems throughout the 800 stores nationally:

"August 24, 2012: *Monro Muffler Brake Inc.*, which operates a chain of more than 800 stores that provide automotive repair and tire services throughout the eastern United States, has reached an enterprisewide settlement agreement with the U.S. Department of Labor in which it will institute procedures to protect its workers against being crushed or struck by automotive hydraulic lifts.

In September 2011, the department's Occupational Safety and Health Administration cited the company's Stoughton location for improperly inspecting and maintaining hydraulic lifts, as well as other hazards, following an April 2011 incident in which a lift failure caused a car to fall to the ground. Deficiencies exposed service center employees to being struck or crushed if the lifts failed. *Monro* initially contested these citations carrying proposed fines of \$19,000 but now has agreed to address the issue – and not just at the Stoughton location but companywide.

"What's important about this agreement is its multiplier effect," said Marthe Kent, OSHA's regional administrator in Boston. "It will enhance safety for *Monro* employees at service centers in multiple states. That means safer working conditions for thousands of workers at hundreds of workplaces."

Under the agreement,... *Monro* will develop and implement an inspection and maintenance program for all automotive lifts at all of its federal OSHA-covered work sites. The program will comply with industry standards and include periodic inspections by qualified inspectors, procedures to remedy any potentially unsafe conditions, mandatory training for lift operators and the submission of written compliance reports to OSHA. *Monro* also will pay a fine of \$12,500 for the violations identified at the Stoughton location.

"This settlement agreement replaces potentially lengthy and contentious litigation with a mutual respect for and commitment to worker safety," said Michael Felsen, the department's regional solicitor for New England. "We encourage other employers to take similar steps to eliminate hazards and safeguard their workers in a broad, systemic and effective manner."

Sadly, OSHA's expectations were not uniformly fulfilled. Less than a year later, following a complaint from a *Monro* worker in New Hampshire, OSHA was compelled to take strong action in response to yet another finding of Willful and multiple Repeat violations. As OSHA then described its actions:

May 20, 2013: *Monro Muffler Brake Inc.* cited by US Labor Department's OSHA for alleged willful, repeat and serious workplace safety violations in Portsmouth, NH.

Automotive repair and tire chain faces more than \$221,000 in fines

CONCORD, N.H. – A *Monro Muffler Brake Inc.* facility in Portsmouth has been cited by the U.S. Department of Labor's Occupational Safety and Health Administration for alleged willful, repeat and serious violations of workplace safety standards. The automotive repair, maintenance and tire company faces proposed fines of \$221,100 following an inspection by OSHA's Concord Office, begun in November 2012, as the result of a complaint.

"Willful and recurring violations suggest a disturbing pattern of noncompliance with safety standards that exist to protect the lives and well-being of a company's employees," said Rosemarie Ohar, OSHA's area director for New Hampshire. "*Monro Muffler Brake* must correct these hazards and take effective steps to address recurring hazards at all its workplaces."

The willful citation stems from workers who were exposed to potential electric shock from exposed, energized wires in a restroom. OSHA found that the company did not correct the hazard after knowing of its existence from in-house safety inspections... The proposed penalty for the willful violation is \$60,500.

Five repeat citations were issued for defective work ladders, unsecured oxygen and acetylene cylinders, and inadequate eyewashing facilities for workers... Similar hazards have been cited since 2009 at facility locations in Newington, Conn.; Canton, Rochester and Victor, N.Y.; and Middleburg Heights, Ohio. The proposed penalties for the repeat violations are \$143,000.

The Munro Settlement had multiple provisions to assure worker protections. One provision, which was aimed at improving the reporting of potential violations, “require[d] its Automotive Lift Operators to report all conditions perceived to be Maintenance/Repair Problems to facility management; and evaluate and remedy, as soon as practicable, all actual Maintenance/Repair Problems so identified by its Automotive Lift Operators.” The settlement also included a specific notice to workers signed by senior managers regarding the management’s commitment to continuation and expansion of the company’s existing safety program, including annual inspections of the hazardous lift equipment involved in the initial 2011 fatality. It likewise included a provision to promote the reporting of violations: “Under this program, we ensure that we will ... continue to have all automotive lift operators report maintenance problems to management.”

However, it is apparent that the agreement failed to establish the kind of accountability within the company that would truly assure compliance with well-known standards or remediate well-defined hazards. Nor did the procedures established for reporting of violations do so effectively. It was only when workers filed a confidential complaint to OSHA did OSHA uncover the multiple Willful and Repeat violations in 2012.

The 2012 inspection also underscored the importance of worker training about the reporting of violations, including realistic anti-retaliation assurances and protections. While the company’s compliance inspection program proceeded, OSHA continued with its own limited monitoring of the company’s over 800 facilities. In the 2 years after the agreement took effect, Federal OSHA did 12 “Monitoring” inspections on its own initiative. However, there were another 10 inspections prompted by complaints from Munro workers. Of these worker-driven Complaint inspections, OSHA inspectors found 19 Serious violations in 6 of those inspections (of which only 6 violations were eventually changed). One of these inspections, which occurred in Wisconsin based on a worker complaint, began on June 5, 2013, only weeks after the announcement of multiple Willful and Repeat violations for the very same life-and-death hazard that prompted the CSA in the first place; failure to protect workers from unguarded automobile lifts, based on the failure of the company’s own internal inspection program established by the CSA:

“... Employees were required to work near and beneath vehicles supported by a defective, hydraulic automotive lift that was known to be in need of repair during an inspection on December 19, 2012 and was not removed from service until June 5, 2013.

Thus, it is evident that however well-intentioned and well-crafted the Munro CSA was when negotiated, it was only able to force the company to achieve the compliance/remediation challenge at some, but not all, of its stores. Considerable additional OSHA enforcement was still necessary to detect and deter

further Serious, Repeat and Willful violations. And that external enforcement effort by OSHA was reliant in major part on active worker involvement.¹²

Hence, full disclosure of Settlement Agreements, including relevant documentation, can assist workers in informing supervisors and managers, as well as enforcement agencies, about potential violations of remediation agreements.

- D. Since current settlement agreements are only rarely available outside of the responsible OSHA enforcement office, Bidders should be obligated to provide public disclosure of settlement agreements during the disclosure process.

Under current agency practice, only a limited amount of information about the employer's non-compliance is readily available to persons outside of the OSHA office directly responsible for the initial enforcement decisions. While OSHA's "OIS" data system has uniform records of inspections and violations across the nation (including state OSHA agencies), it fails to provide any information on any "enhanced" provisions of remediation ("settlement") agreements.

In other words, absent a cumbersome effort to retrieve the underlying documents and provisions, neither OSHA's National Office nor other responsible federal agency staff can readily learn of the obligations which these agreements impose on the employers. And members of the public can only obtain them through the cumbersome, time-consuming and potentially expensive procedures available under the Freedom of Information Act (FOIA). It is typical in busy OSHA offices for FOIA requests to require waits of weeks or longer before the requester receives a substantive response, and (in the event of large files) additional time for payment.

the US Occupational Safety and Health Review Commission, the agency with direct supervision of the settlement process in the most urgent cases — has discussed the creation of an electronic system for establishing and maintaining public access to the dockets of its many cases, including those resolved by settlements. But it has not been able to do so as of yet (see: http://www.oshrc.gov/foia/foia_reading_room.html).

Notwithstanding the availability of other types of enforcement information, remediation agreements are not readily available to the public or to OSHA's national office. In view of the central importance of remediation agreements as a critical component for responsibility determinations in procurement award decisions, the existing information system is simply not efficient. OSHA inspectors will be forced to rely on the manual retrieval and transmission of settlement agreements from other OSHA offices. LCA's will be required to await the same laborious process. Workers covered by these agreements, as well as members of the public affected by the agreements' provisions) will simply never receive such information within a reasonable time frame to inform either OSHA's or the LCA's evaluation of the bidder's performance under the terms of the agreement.

¹² It is worth noting that the auto repair industry does not meet any of OSHA's own longstanding inspection targeting criteria. Thus, absent an incident, referral from another agency or a worker complaint, OSHA inspectors do not do inspections at companies like Monro Muffler. In the two years prior to the two Massachusetts inspections which then triggered the SVEP designation and CSA negotiations, Federal OSHA had done only 7 inspections at Monro stores nationally, and five of those resulted from worker complaints. Four of these Complaint inspections each found multiple Serious violations – none of which were ever dropped or revised.

This stands in sharp contrast to the Federal courts and several federal civil enforcement agencies, which make most settlements publicly accessible on their websites. For instance, the CFPB frequently achieves settlements in its enforcement actions without requiring formal hearings. According to the Office of Administrative Adjudication, all of those settlements (as consent decrees and/or stipulations) are posted on the CFPB public website: <http://www.consumerfinance.gov/administrativeadjudication/>. That now includes 50 such settlements involving both huge banking corporations as well as small lending/consumer credit businesses, dating to CFPB's creation in 2012. These dockets themselves are readily available, and the publicly-available documents are easily retrievable by agency officials, responsible officials in other agencies, and members of the public.

The Federal Trade Commission posts on its website, on a webpage entitled "[Cases and Proceedings](#)," the settlements and consent orders for enforcement actions. At present, the Commission posts documents including settlements involving 2,545 cases.

Likewise, the Securities and Exchange Commission maintains a webpage entitled "[Distributions in Commission Administrative Proceedings: Notices and Orders Pertaining to Disgorgement and Fair Funds](#)." This resource contains settlement orders regarding the payment of civil penalties and the disgorgement of profits in illegal schemes and also the creation of a "fair fund" for the benefit of investors who were harmed by the violation.

The Office of the Comptroller of the Currency also maintains a [public website with a searchable database of consent orders](#) in its enforcement cases and also releases a monthly list of such actions on its main [webpage of news releases](#). For instance, the June 2015 list of enforcement actions includes 8 Cease and Desist Orders and 4 Civil Money Penalty Orders.

Unfortunately, given the time frames for implementation of the Executive Order and the implementing FAR regulations and DOL Guidance, it not possible to await to see the outcome of the Review Commission's creation of a public docket system to facilitate public access to remediation agreements. Likewise, OSHA's own records of its inspections – including critical information on employer compliance/non-compliance practices – will forever be subject to the often interminable delays of the internal retrieval/ FOIA request processes.

In sum, whether to assure that the enforcement agencies and LCA's themselves have ready access to the terms of remediation agreements, or to make worker and public comment a meaningful part of the CO's determination, it is vital that the essential publicly-releasable documents are readily available to both the LCA's and the public.

E. Feasible access to OSHA settlement agreements: OSHA's "Severe Violators Enforcement Program" agreements and CSA's

The feasibility of ready public access is clear, and the benefits of easier public availability are manifold. For instance, in the case of OSHA's premier enforcement targeting initiative – the "Severe Violators Enforcement Program" – OSHA already provides an updated "Log" on its website of all such cases (see OSHA's website for the latest SVEP case log). That Log includes a listing of 491 current cases, of which 240 were formally challenged by employers before the OSH Review Commission. Of these, the Log reports that there are currently 149 which were fully resolved (the others, presumably, are still pending). Of these 149 resolved cases, 33 involved "Enhanced Settlement Agreements." Likewise, of the 179 cases which the Log indicates were not the subject of formal appeals, there were another 50 involving "Enhanced Settlement Agreements." (There were an additional 170 cases listed

which involved followup inspections to the prior cases that triggered the SVEP status for the employer in the first place.)

But the SVEP Log provides little information about the various terms of these important Agreements.

In other words, in OSHA's premier targeted enforcement program, dealing employers whose violations had involved either an employee's death or multiple "Repeat" or "Willful" violations, OSHA itself is aware of 328 cases that were resolved, and fully 83 (25%) involved "Enhanced Settlement Agreements." However, those agreements are not readily available for public access, nor necessarily easily available to OSHA officials or LCA's outside the OSHA offices immediately responsible for maintenance of the case file records.

Despite the current inaccessibility of such documents to the public,, it is certainly feasible for OSHA to identify which employers have such agreements. OSHA should therefore alert agency LCA's and CO's about the existence of these agreements prior to any responsibility determination. Such a notification scheme would certainly create incentives for bidders to provide copies of the agreements and relevant related documents (i.e. required internal or external monitoring reports; worker reports of violations and actions taken in response; etc.) during their pre-award reporting as well as during the semi-annual updates.

The other major OSHA program yielding significant settlement agreements is the adoption of "Corporatewide Settlement Agreements" (CSA's). This effort has been a fixture of OSHA's major enforcement cases for nearly 30 years, but has taken on much greater importance in the last 5 years as the Administration has promoted "Enterprisewide" enforcement.

Fortunately, since 2009, new CSA's have been easily available on OSHA's website to both the affected workers and to the public. It represents a model for the active dissemination of settlement agreements in other significant cases. However, given the scope of corporate structures in the context of the procurement process and the Executive Order, it is unreasonable to expect the Labor Department to bear the full burden of coordinating the public dissemination of all settlement agreements that could affect potential federal contractors. The potential contractors submitting these bids should be responsible for providing copies of such remediation agreements, no later than the required disclosure for other law violation information

F. Settlements in OSHA "Whistleblower" investigations are not publicly available or even catalogued consistently in state plan investigations.

The DOL draft Guidance proposes to include adverse findings in retaliation complaints as examples of actionable "Serious" violations under the EO and FAR regulations.¹³ OSHA has considerable experience with such investigations – as the primary investigative agency under not only the OSHAct but also 21 other labor, environmental, transportation safety and financial regulation statutes. In FY 2014, OSHA completed a total of 3,271 such investigations, of which the retaliation investigations under the OSHAct itself were the largest single source of worker complaints (1,865, or 57%).¹⁴

¹³ In an apparent oversight, the Guidance has failed to explicitly include 11.c violations, and other violations of Sect. 17 of the OSHAct, as within the scope of "administrative merits determinations" (FR 30579) The Guidance should be revised according.

¹⁴ [OSHA Whistleblower Program Investigation Data, 2005-2015](#)

Of these 1,865 completed investigations, OSHA reports that a total of 483 had “merit”, including 470 which were settled either directly by OSHA (309), or privately between the parties (161). (The backpay and other employer payments amounted to over \$3.5 million).

However, OSHA does not make these settlements publicly available absent a FOIA request. Indeed, when OSHA fails to reach a settlement in a “merit” case and is forced to take action in Federal District Court to remedy the retaliation, even in those cases for which it issues press releases, it does not release documents, even though the documents including the DOL Complaint are available through PACER.

Likewise, there is a wide range of provisions in settlements under the OSHAct Sect. 11.c.¹⁵ This range of provisions may well be acceptable within the context of individual cases. It is likely even wider in those cases, which in FY 2014 accounted for 34% of all settlements in “merit” cases under OSHA Sect. 11.c, where OSHA was not party to the settlement (even if OSHA approved the terms of the settlement).

However, the fact that such settlements have such a broad range of provisions simply underlines the urgency of their public dissemination. Absent public disclosure, workers who suffered further retaliation by employers who have already agreed to halt retaliation are unable to inform either DOL or the agency LCA’s about the inadequacy of the prior remediation agreements in light of the employer’s continuing abusive practices.

Some would argue that OSHA itself should be fully aware of the gaps in such settlements that would allow continuing abuses – and itself assist agency LCA’s in determining the potential problems with remediation agreements that would limit the legitimacy of such agreements as mitigating factors in the responsibility review. This is a completely unrealistic expectation.

First, once retaliation complaints are resolved by settlements, OSHA has no mechanism to learn about the risk of further potential violations absent further retaliation complaints. Currently, OSHA has no mechanism under the OSHAct for investigating employer retaliation violations other than 11.c complaints.

OSHA recently expressed considerable interest in the application of its 11.c authority to stop the rampant employer practices and policies which penalize workers who report injuries.¹⁶ OSHA has had little experience with such investigations, and has no reliable system for capturing the evidence needed to evaluate the adequacy of employer compliance with Sect. 11.c at such a broad level (i.e., above the level of individual worker retaliation complaints).

OSHA is also sufficiently concerned about this problem that it recently proposed to expand its regulations on employer recordkeeping practices (29 CFR 1904) to limit such policies by regulation.¹⁷ However, the outcome of that rulemaking is far from certain.

¹⁵ See *OSHA Whistleblower Investigations Manual*, Chapt. 6.

¹⁶ See: [“Employer Safety Incentive and Disincentive Policies and Practices,”](#) Memorandum for Regional Administrators, Whistleblower Program Managers, by Richard E. Fairfax, Deputy Assistant Secretary, March 12, 2012.

¹⁷ “Improve Tracking of Workplace Injuries and Illnesses, Supplemental notice of proposed rulemaking,” 79 Fed Reg 47605, Aug. 14, 2014. “... [OSHA is concerned about] workplace policies and procedures that deter or discourage employees from reporting work related injuries and illnesses. These include ... retaliating against employees who report injuries and illnesses.... If an employer disciplines or takes adverse action against an employee for reporting an injury or illness, this may discourage employees from reporting injuries and illnesses. These adverse actions could include termination, reduction in pay, reassignment to a less desirable position, or any other action that might dissuade a reasonable employee from reporting an

In other words, with regard to worker retaliation, OSHA's investigative authority and processes are designed to investigate past instances of retaliation, rather than assessing the potential for retaliation in light of settlement or remediation agreements.

Furthermore, at best, OSHA is barely equipped to report the results of individual retaliation investigations.. It is not realistically possible for OSHA to conduct a real-time analysis of its broad range of existing settlement agreements in order to determine the adequacy of any individual settlement for the purpose of a "responsibility determination" by a Contracting Officer or agency. OSHA does not even have the resources to promptly investigate and resolve the 11.c complaints that already arise from employers' abusive behavior. In FY 2014, fully 75% of 11.c complaints ended with dismissals or withdrawals.¹⁸ However, even with that reduced load of "merit" cases, OSHA is still able to complete a timely investigation in only 34% of the complaints. Section 11.c investigations already require an average of 289 days to completion, including withdrawals and dismissals. Indeed, it is common for the agency to announce a successful prosecution of an employer in which the time from the initial retaliation and complaint to the filing of the remediation action in Federal District Court is over 2 years.¹⁹

The EO, the DOL Draft Guidance and the proposed FAR regulation all agree on the importance of both remediation agreements as well as the protection of employer reporting of violations under those agreements – in the critical determination of "mitigating factors" in responsibility reviews. This is certainly appropriate.

But given the statutory, regulatory, budgetary and other limitations in OSHA's authority and practices, it is completely unrealistic to expect that vital information about violations of remediation agreements will be forthcoming if the agency LCA and the CO rely solely on OSHA as the source for that information. While this would be true even under normal conditions, it is particularly the case within the limited timeframes available for agency LCA and CO review.

The Employers, on the other hand, are fully aware of these settlements, including any problems that have arisen since the agreements were signed. They may well provide them to the CO's as evidence of the employer's good faith effort to resolve the underlying violations. And in many cases, as employers comply with these agreements, that conclusion may well be justified. But both DOL and the FAR Council invite misrepresentation or worse if they allow employers alone to decide when and how to refer to such agreements as mitigating factors. As the Cintas example shows, even carefully crafted settlement agreements, negotiated over months of painstaking deliberations, cannot remediate an employer's basic incompetence or refusal to comply with life-and-death safety and health regulations.

Given both the ease of electronic communication and the employer's keen awareness of the importance of remediation agreements in the CO's consideration of mitigating factors, it is incumbent on both DOL and the FAR Council to require that employers provide the full facts about remediation agreements in

injury.... these retaliatory actions would likely be actionable under 11(c), as well as under the provisions that OSHA is considering as amendments to 1904.35.

¹⁸ [OSHA Whistleblower Program Investigation Data, 2005-2015](#)

¹⁹ <https://www.osha.gov/newsrelease/reg5-20150709A.html>

both the pre-award responsibility determination reporting as well as the post-award disclosure updates, including publicly-available websites or databases.

10. SETTLEMENT AGREEMENTS WITH CURRENT CONTRACTORS MUST PROVIDE EXPLICIT PROVISIONS FOR INFORMING WORKERS ABOUT THE TERMS OF THE SETTLEMENTS, OPPORTUNITIES FOR REPORTING ANY EMPLOYER NON-COMPLIANCE WITH THOSE TERMS, AND SPECIFIC ANTI-RETALIATION PROTECTIONS.

Any settlements with current contractors should include explicit provisions for 1) the training of workers regarding the applicable violations covered by the settlement and 2) reporting violations to both the employer and the enforcement agency. They must also include specific provisions to deter retaliation against workers who follow those established procedures, including protections against retaliation by employer representatives or agents, as well as training for workers about the employer's policies and practices to stop and respond to retaliatory actions.

In the absence of such essential provisions, we strongly urge that incomplete settlement/remediation agreements not be allowed for consideration as mitigating factors in responsibility determinations.

OSHA's compliance enforcement program has accumulated a definite set of practices in settlement agreements, notwithstanding the variety of provisions that those agreements typically include. However, one provision is almost always missing: a plain-language posting for employees informing them of the provisions of the agreement comparable to the postings that OSHA and other agencies (such as the NLRB) use in anti-retaliation enforcement. Settlements arising from employer's formal "contests" of citations – the kinds of settlements that would most often arise in cases of "Repeat" and "Willful" violations – are often complicated legal documents. While the rules of the OSH Review Commission require that the settlements be "posted" in the workplace, there are no rules about distribution to employees.

Neither of the Directives detailing the formal policies underlying OSHA's most extensive enforcement settlement policies – SVEP and CSA's – provide for any employee notices. Recently, as in the CSA at Walmart, OSHA has begun to include such notices. However, those notices do not include any specific procedures for reporting violations to the employer or to OSHA. The small reference to any protection from retaliation, at the very end of the document, is also clearly insufficient to assure that the workers are aware of their ability to report violations or the protections that such reporting affords those workers.

On the other hand, OSHA's anti-retaliation enforcement program has a typical practice of requiring specialized postings to inform workers about the protections afforded to workers who report hazards and violations, and recent settlements have also required anti-retaliation training for managers and supervisors.²⁰ These postings are written in plainer language, on agency letterhead, and follow established practices of the NLRB and other anti-discrimination/anti-retaliation enforcement agencies.

²⁰ See OSHA's standard posting in WB cases. See also May 30, 2013 Settlement Agreement in OSHA's 11.c prosecution of the True North Hotel Group, Inc., which not only resulted in a \$22,300 backpay award for an illegally discharged worker (including compensatory damages), but also required a nationwide posting and a four-year commitment to training all current and newly-promoted supervisors and managers.

The solutions to this gap are not difficult. Plain-language postings are easy to design, and easy and inexpensive for employers to implement. Likewise, it is easy to incorporate assurances that employers will provide copies of the settlement/remediation agreements to employees, at not cost and in a convenient manner. OSHA already requires employers to provide important information to workers, including copies of citations, employer documents and policies on health and safety compliance, injury records, etc. Settlement agreements are certainly within the scope of employers existing information-sharing activities, and do not require a new set of policies and procedures for employers to meet their obligations.

Such practices are clearly envisioned by the recent recommended “Best Practices” provided to OSHA by OSHA’s Whistleblower Programs Advisory Committee (WPAC) see attached Appendix 3.. The undersigned is a member of the WPAC. But while these comments are written with the benefit of the WPAC’s deliberations, they do not represent the views of the Committee per se. In particular, they make use of the recent recommendations the Committee offered publicly to OSHA on employer “Best Practices.”²¹

The recommended Best Practices are lengthy and thoughtful, and cover several key concepts:

1. Leadership commitment, including accountability through an organization’s entire chain of command and appropriate consequences for managers when acts of retaliation are confirmed
2. Encouraging workers to report concerns, including response systems to resolve issues and protect workers who report concerns
3. “Independent, protected resolution systems for any allegations of retaliation”
4. Training for both workers and managers about their respective roles and responsibilities
5. “Monitoring and measurements that don’t contribute to suppression of reporting” to make sure that the incentive systems work to deliver the right outcomes.
6. Independent auditing to determine if the program is “actually working.”

Supported by a consensus of labor, public and management members, these recommended practices provide guidance to agency LCA’s and Contracting Officers about the viability of remediation agreements as deterrents to future retaliatory actions against workers who would report violations. However, such provisions have been rarely addressed in OSHA’s typical settlement agreements in 11.c retaliation cases, and virtually never in OSHA’s settlement agreements in compliance enforcement cases.

It is beyond the scope of this notice-and-comment proceeding to address the many considerations that would assure such provisions in both compliance enforcement and 11.c retaliation/discrimination settlements going forward. But it is urgent that the Guidance require more detailed anti-retaliation protections than is now described regarding the adequacy of “remediation agreements” to serve as “mitigating factors.” At a minimum, any such remediation agreement must include a clear and well-protected process for workers to report new or on-going violations both internally within the company as well as to OSHA. Such processes are difficult to enforce unless there is independent oversight of the process, and accountability for the managers who engage in retaliation.

²¹ <http://www.regulations.gov/#!documentDetail;D=OSHA-2014-0028-0018>

In the absence of such provisions, the Safety and Health Programs are not effective mitigating factors in evaluating past violations – especially severe violations or violations involving retaliation at the outset.

CONCLUSION

Change to Win strongly supports both the intent and most of the provisions of the Executive Order, the Draft DOL Guidance and the proposed FAR regulation.

We urge the both the FAR Council as well as DOL to finish their work on these proposals, to complete the evaluation of comparable state labor laws, and to implement the new disclosure/review system as expeditiously as possible.

RESPECTFULLY SUBMITTED,

ERIC FRUMIN, DIRECTOR
Health and Safety Director
Change to Win

APPENDICES

1. Statement of Change to Win/Warehouse Workers Resource Center to CalOSHA Advisory Committee on Repeat Violations, March 13, 2014, with list of CalOSHA inspections/violations at Safeway Corp., 2009-2013.
2. CtW Case Study in OSHA enforcement, with Federal and State OSHA plan inspections/violations, 2009-2013.
3. Recommendations of the Whistleblower Protection Advisory Committee to US Department of Labor/OSHA, April 21, 2015.



March 13, 2014

Key issues in CalOSHA Repeat Violation policy

According to Federal OSHA's Annual Enforcement Monitoring reports dating back to 2009, CalOSHA's established policy – CCR 334.d.1 -- on the classification of Repeat violations is severely deficient.

In 2011, DIR responded by promising to fix this defect and amend the defective regulation by "January, 2012."

However, that deadline passed with no significant proposal by DIR Director Baker or CalOSHA Director Ellen Widess to remedy the defect.

In August, 2013, Federal OSHA's Annual Enforcement Monitoring report (based on a review completed in early 2013) stated the following:

Cal/OSHA's repeat violation regulation, Title 8, Section 334(d)(1), states "For the purpose of considering whether a violation is repeated, a *repeat citation issued to employers having fixed establishments* (e.g., factories, terminals, stores . . .) *will be limited to the cited establishment*; for employers engaged in businesses having no fixed establishments (e.g., construction, painting, excavation . . .) a repeat violation will be based on prior violations cited within the same Region of the Division." This language is inconsistent with Federal OSHA policy since it does not allow for the increased deterrent effect of a "Repeat" classification and added penalty to be applied throughout their jurisdiction. This issue was identified in the FY 2010 FAME . . . It has been determined that Cal/OSHA can modify the regulation, but must go through a rulemaking process. This has been included in this report as finding 12-14. [Emphasis added]

A year later, DIR has still failed to propose an actual amendment to this regulation.

The consequences of this recurring failure are broad and serious. In one recent notorious case, CalOSHA responded to the pleas of Inland Empire warehouse workers suffering abject abuse at the hands of some of the largest logistics companies and staffing agencies in the nation. At the Mira Loma site, the huge logistics company NFI (aka NDC) works almost exclusively for Walmart. In January, 2012, CalOSHA cited 5 separate NDC facilities in Chino for literally dozens of violations, many of them Serious. One of the Serious violations was a "Serious – Accident Related" violation of the Injury/Illness Prevention standard, resulting from a severe heat exposure incident inside the Chino warehouse. Applying the multi-employer policy, it also cited

the staffing agency as well, and total penalties amounted to over \$250,000 among the 5 facilities.

Seven months later, workers at the company's huge Mira Loma facility filed a complaint and OSHA issued 4 Serious violations in December, 2012 – almost a year following the Chino citations. Two of the four Serious violations were the same as had been cited in Chino a year earlier: the Serious IIPP violation regarding indoor heat exposure, and the failure to provide protective footwear.

Not surprisingly, by the time CalOSHA made the final citation decisions in Mira Loma, NDC's appeal of the Chino citations was still dragging on. Miraculously, a protracted argument suddenly reached resolution with all violations sustained and the penalties severely reduced.

In other words, by simply dragging out the settlement negotiations – which is encouraged by the lax oversight from both CalOSHA and the Appeals Board over such frivolously extended negotiations – NDC was able to delay justice for the Chino workers. If CalOSHA had a federally-compliant definition of Repeat violations, the subversion of justice would have been even worse: easy avoidance of the Repeat classification.

NDC seems to have learned the logical lesson from its experience – CalOSHA does not know how to deter repeated offenders. Notwithstanding NDC's recent January 2014 settlement of the December 2012 violations in Mira Loma, NDC has still failed to comply with all the standards for which it was cited. An NDC worker recently suffered a serious foot injury due in part to the failure to provide the steel-toe boots required by the December, 2012 citation. CalOSHA is now investigating that incident. Should it find a violation of the same standard, it would finally be in a position to do what it should have done over a year ago – cite NDC for a Repeat (or even Failure to Abate) violation with the appropriately higher penalty. This pattern of violations was evidently avoidable. Had NDC simply complied with the standard in all of its locations once it had been cited in Chino in January, 2012 – over two years ago – much of the pain suffered by the workers and the resources expended by CalOSHA would have been avoided.

In the attached example involving the Safeway Company retail chain, the broader consequences of the non-compliant Repeat definition are clear. In 2007-2012, CalOSHA did at least 48 inspections at Safeway stores throughout the state which found any violations at all. An analysis of those inspections found that in 12 separate inspections, there were a total of 58 violations. Of those 58, 18 individual violations would have been classified as Repeat violations under a statewide Repeat policy (see red shaded cells in Column M "Standards"). Of those 18, only 4 were classified as Serious – and all others were either General or Regulatory.

As for the effect of the Appeals Board delays, Safeway was evidently dragging out any number of those cases before the Appeals Board. The attached snapshot of those 48 cases in CalOSHA records taken today shows that several of those cases are pending resolution before the Appeals Board; depending on the accuracy of OSHA's website, some may be going back as far

as 2009. Of the 17 cases opened since September 2010, over half appear to be still pending resolution.

Additional analysis of these cases (including examination of settlement documents) will be required to determine definitively, were CalOSHA to have a Federally-compliant Repeat definition, exactly which of these potential Repeat violations would have been delayed due to Safeway's appeals behavior. However, it is evident that Safeway's appeal policy is to routinely challenge citations, even if in most cases the citations are ultimately affirmed in settlements. Note, for instance, that for the cases opened in 2013, Safeway contested the citations in all 4 cases with violations.

This loophole is aggravated, of course, by the inherent incentive for employers to contest citations: the delay without penalty of the abatement period. That loophole would have been largely closed for important cases with Serious violations had Governor Brown not vetoed the recent legislation. But that continuing loophole can only serve as a "get-out-of-jail-card-for-free" should CalOSHA adopt a Federally-compliant Repeat definition.

Finally, CalOSHA's abysmal performance in the classification of Serious violations poses yet another challenge to the prompt handling of appeals cases and the proper implementation of a Repeat classification definition. CalOSHA is obliged to implement the provisions of AB 2774, and to close the inexplicable and inexcusable gap between the rates of Serious violations in California compared to all other states and the Federal OSHA program. As CalOSHA does so, it is likely that employers in California will finally experience the same equitable treatment that employers receive everywhere else in the nation.

Unfortunately, based on the experience thus far, we can expect employers to challenge those citations more frequently as well. All the more reason for CalOSHA and the Appeals Board to enhance their oversight of and resistance to frivolous delays in settlement negotiations, and to bring swift resolution to contested cases generally.

Conclusion

The current enforcement regime in California has extremely serious loopholes which effectively negate any real deterrent effect:

- no multi-site Repeat policy
- no sanctions for frivolous delays in Appeals Board settlement negotiations
- unending Appeals Board delays in processing important cases.

The lesson for large multi-site employers is very simple:

- Time and loopholes are on your side.
- CalOSHA is a complete paper tiger.
- Compliance need be no more than an afterthought.

This is not the policy and practiced envisioned under the OSHAct. DIR must stop the inexcusable delays, swiftly promulgate a federally-compliant definition of Repeat violations, and put a stop to frivolous settlement negotiations.

At the same time, the Appeals Board must ensure prompt docketing of contested cases, rapid action to promote swift resolution, and proper oversight over settlement negotiations to ensure that they are not abused by large multi-site employers as an “escape valve” to reduce their liability for Repeat violations under any new federally-compliant definition.

Respectfully submitted,

/s/ Eric Frumin
Eric Frumin
Health and Safety Director
Change to Win

Warehouse Workers Resource Center

Activity	Opened	Type	Sc	NAICS	Vio	Establishment Name	ID	Type	Standard	Issuance	Abate	Curr\$	Init\$	Contest	LastEvent
313229684	9/2/2009	Accident	Partial	445110	1	Safeway, Inc.	1001	Other	3704	1/5/2010	1/25/2010	\$150	\$450	1/26/2010	F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	5001	Serious	4312	8/12/2010	8/19/2010	\$3,375	\$3,375		
312759277	12/30/2008	Complaint	Partial	445110	5	Safeway, Inc.	1005	Other	23400013 A	4/8/2009	5/1/2009	\$0	\$420	4/30/2009	F - Formal Settlement
312759277	12/30/2008	Complaint	Partial	445110	5	Safeway, Inc.	1004	Other	23400016 A	4/8/2009	5/1/2009	\$0	\$420	4/30/2009	F - Formal Settlement
310094156	7/8/2008	Complaint	Partial	445110	2	Safeway Store #3008	1001	Other	23400016 A	7/17/2008	8/19/2008	\$200	\$200		
310097167	1/12/2010	Complaint	Partial	445110	1	Safeway, Inc.	1001	Other	23400016 B	5/10/2010	6/25/2010	\$100	\$100		
312680960	1/7/2010	Complaint	Partial	445110	4	Safeway Inc Db a The Vons Companies Inc	1003	Other	23400016 C	6/9/2010	7/12/2010	\$150	\$280	6/30/2010	F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	2001	Serious	23400017 A	8/12/2010	8/19/2010	\$3,375	\$3,375		
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	2001	Serious	23400017 A	8/12/2010	8/19/2010	\$3,375	\$3,375		
310097829	6/3/2010	Complaint	Partial	445110	1	Safeway, Inc.	1001	Other	25000010 A	9/9/2010	9/14/2010	\$300	\$300	9/20/2010	W - Empr Withdrew
125525477	7/6/2010	Complaint	Partial	445110	1	Safeway, Inc	1001	Other	3001 C	8/30/2010	10/2/2010	\$450	\$450		
312680960	1/7/2010	Complaint	Partial	445110	4	Safeway Inc Db a The Vons Companies Inc	1004	Other	3203 A	6/9/2010	7/12/2010	\$50	\$420	6/30/2010	F - Formal Settlement
312680713	12/3/2009	Accident	Partial	445110	3	Safeway Inc, Db a The Vons Companies, Inc	1002	Other	3203 A	4/14/2010	5/17/2010	\$150	\$420	5/3/2010	F - Formal Settlement
310487913	6/14/2007	Accident	Partial	445110	1	Vons Grocery Store #2152 (Safeway Inc)	1001	Other	3203 A	7/5/2007	8/7/2007	\$0	\$560	7/25/2007	F - Formal Settlement
310552534	7/15/2008	Accident	Partial	493110	2	Safeway, Inc.	2001	Serious	3203 A04 C	12/4/2008	12/22/2008	\$10,125	\$10,125	12/12/2008	F - Formal Settlement
310552351	7/9/2008	Complaint	Partial	493110	1	Safeway, Inc.	1001	Other	3203 A06	12/4/2008	1/6/2009	\$750	\$750	12/15/2008	F - Formal Settlement
310549605	1/23/2008	Complaint	Partial	424410	1	Safeway, Inc.	1001	Other	3203 A07	2/25/2008	4/10/2008	\$280	\$280	3/14/2008	F - Formal Settlement
310552534	7/15/2008	Accident	Partial	493110	2	Safeway, Inc.	3001	Serious	3203 A07 E	12/4/2008	12/22/2008	\$10,125	\$10,125	12/12/2008	F - Formal Settlement
300870094	3/30/2009	Accident	Complete	493110	2	Safeway Self Storage Co Inc	2001	Serious	3212 D01	5/22/2009	6/18/2009	\$1,800	\$3,150	6/8/2009	F - Formal Settlement
310094156	7/8/2008	Complaint	Partial	445110	2	Safeway Store #3008	1002	Other	3225 A 1	7/17/2008	8/19/2008	\$200	\$200		
315319251	9/5/2012	Complaint	Partial	445110	1	Safeway, Inc.	1001	Other	3241 A	11/28/2012	12/11/2012	\$225	\$375		I - Informal Settlement
311655831	5/21/2008	Complaint	Complete	445110	2	Safeway #300-12	1001	Other	3272 B	8/4/2008	8/7/2008	\$150	\$150		F - Formal Settlement
312759277	12/30/2008	Complaint	Partial	445110	5	Safeway, Inc.	1001	Other	3273 A	4/8/2009	5/1/2009	\$150	\$420	4/30/2009	F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	1001	Other	3279 D07	8/12/2010	9/11/2010	\$280	\$280		
314324757	9/22/2010	Complaint	Partial	311211	1	Safeway, Inc., Richmond Bread Plant	1001	Other	3314 C	1/26/2011	1/31/2011	\$150	\$1,125	1/31/2011	F - Formal Settlement
311068464	12/3/2007	Accident	Partial	424410	4	Safeway, Inc., Richmond Bread Plant	2001	Serious	3314 C	1/17/2008	1/29/2008	\$675	\$6,750	1/24/2008	F - Formal Settlement
311068464	12/3/2007	Accident	Partial	424410	4	Safeway, Inc., Richmond Bread Plant	1001	Other	3314 G	1/17/2008	2/20/2008	\$0	\$750	1/24/2008	F - Formal Settlement
312759277	12/30/2008	Complaint	Partial	445110	5	Safeway, Inc.	1002	Other	3364 B	4/8/2009	5/1/2009	\$0	\$420	4/30/2009	F - Formal Settlement
310551239	5/9/2008	Accident	Partial	493110	1	Safeway, Inc.	1001	Other	3385 A	7/9/2008	8/11/2008	\$375	\$375	7/22/2008	F - Formal Settlement

314147869	7/27/2010	Accident	Partial	445110	1	Safeway, Inc.	1001 Other	342 A	9/29/2010	10/4/2010	\$5,000	\$5,000	
300870094	3/30/2009	Accident	Complete	493110	2	Safeway Self Storage Co Inc	1001 Other	342 A	5/22/2009	5/28/2009	\$1,000	\$5,000	6/8/2009 F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	3001 Serious	3577 E	8/12/2010	8/19/2010	\$3,375	\$3,375	
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	3001 Serious	3577 E	5/14/2009	6/8/2009	\$3,375	\$3,375	5/21/2009 F - Formal Settlement
311069058	3/13/2008	Planned	Partial	311511	1	Safeway, Inc. Db a San Leandro Milk Plant	1001 Other	3577 E	4/9/2008	4/14/2008	\$0	\$0	-
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	4001 Serious	3578 G	8/12/2010	8/19/2010	\$335	\$335	
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	1002 Other	3578 G	5/14/2009	6/30/2009	\$185	\$185	5/21/2009 F - Formal Settle
311068464	12/3/2007	Accident	Partial	424410	4	Safeway, Inc., Richmond Bread Plant	3001 Other	4002 A	1/17/2008	1/29/2008	\$450	\$6,750	1/24/2008 F - Formal Settlement
311068464	12/3/2007	Accident	Partial	424410	4	Safeway, Inc., Richmond Bread Plant	4001 Other	4070 A	1/17/2008	1/29/2008	\$450	\$6,750	1/24/2008 F - Formal Settlement
313481020	10/29/2009	Complaint	Partial	445110	1	Safeway Inc.	2001 Other	4353 A01 A	3/30/2010	4/2/2010	\$800	\$3,600	4/21/2010 F - Formal Settlement
312361124	8/17/2010	Complaint	Partial	445110	1	Safeway, Inc. Store #951	1001 Other	4543 B02	8/19/2010	8/29/2010	\$0	\$0	-
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	1003 Other	4650 E	5/14/2009	6/30/2009	\$185	\$185	5/21/2009 F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	1002 Other	5144 C	8/12/2010	9/11/2010	\$185	\$185	
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	1001 Other	5144 C01 E	3/2/2009	4/16/2009	\$0	\$0	
312680960	1/7/2010	Complaint	Partial	445110	4	Safeway Inc Db a The Vons Companies Inc	2001 Serious	5162 A	6/9/2010	7/12/2010	\$2,700	\$5,060	6/30/2010 F - Formal Settlement
312680713	12/3/2009	Accident	Partial	445110	3	Safeway Inc, Db a The Vons Companies, Inc	2001 Serious	5162 A	4/14/2010	4/27/2010	\$4,050	\$5,060	5/3/2010 F - Formal Settlement
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	2001 Other	5162 A	5/14/2009	6/8/2009	\$375	\$3,375	5/21/2009 F - Formal Settlement
312317365	6/9/2010	Accident	Partial	311511	7	Safeway Inc Div. Vons Milk Plant	1003 Other	5162 D	8/12/2010	9/11/2010	\$280	\$280	-
314991621	5/18/2011	Complaint	Partial	445110	1	Safeway Inc	1001 Other	5162 E	5/18/2011	5/18/2011	\$0	\$0	
311655831	5/21/2008	Complaint	Complete	445110	2	Safeway #300-12	1002 Other	5162 E	8/4/2008	8/7/2008	\$0	\$150	8/15/2008 F - Formal Settlement
309912251	1/21/2009	Planned	Partial	311511	6	Safeway Incorporated Los Angeles Milk Plant	5001 Serious	5189 J02 C	5/14/2009	6/8/2009	\$3,375	\$3,375	5/21/2009 F - Formal Settlement
311155998	12/13/2007	Complaint	Partial	446110	2	Safeway, Inc.	1001 Serious	5193 D03 A	3/28/2008	5/14/2008	\$2,700	\$2,700	F - Formal Settlement
311155998	12/13/2007	Complaint	Partial	446110	2	Safeway, Inc.	2001 Other	5193 F03	3/28/2008	5/14/2009	\$0	\$2,700	4/14/2008 F - Formal Settlement
312680713	12/3/2009	Accident	Partial	445110	3	Safeway Inc, Db a The Vons Companies, Inc	1003 Other	5194 E01	4/14/2010	7/17/2010	\$0	\$185	5/3/2010 F - Formal Settleme
312680960	1/7/2010	Complaint	Partial	445110	4	Safeway Inc Db a The Vons Companies Inc	1007 Other	5194 H02	6/9/2010	7/12/2010	\$150	\$420	6/30/2010 F - Formal Settlement
310549308	12/17/2007	Accident	Partial	493110	1	Safeway, Inc.	1001 Other	5194 I01	12/17/2007	12/17/2007	\$0	\$0	
315319350	9/11/2012	Complaint	Partial	445110	1	Safeway, Inc. Db a Pak'N Save Foods	1001 Other	6151 C01	11/29/2012	12/12/2012	\$0	\$420	I - Informal Settlement
310546817	6/28/2007	Accident	Partial	445110	1	Safeway, Inc.	1001 Other	6151 C01	6/28/2007	6/28/2007	\$0	\$0	
310412119	4/27/2007	Complaint	Partial	445110	1	Safeway, Inc. Store #1899	1001 Other	6151 C01	6/21/2007	7/9/2007	\$0	\$700	7/17/2007 J - ALJ Decision

CHANGE TO WIN

Proposed Federal Standards and Guidance for the Evaluation of Employer Labor Law Violations Case Study: The Cintas Corporation

The Cintas Corp. provides a useful case study in the limits of existing enforcement approaches in cases of significant federal contractors whose violations should have raised questions about the company's compliance record. As the Senate HELP Committee's December 2013 report stated:

... officials responsible for determining if a prospective contractor is a responsible entity prior to awarding a contract lack access to information on labor violations and lack the tools to evaluate the severity or repeated nature of these types of violations. This is true even though the Clean Contracting Act of 2008 specifically required that a database be established to help agencies evaluate violations of federal law in making a responsibility determination. Some of the many incidents of misconduct that are not currently available to contracting officers in this database include ... The death of a 46-year-old father of four, who was working as a washroom operator at a Cintas Corporation facility in Tulsa, Oklahoma. He was killed after being swept into an industrial dryer when he attempted to dislodge a clothes jam. The dryer continued to spin with him inside for 20 minutes at over 300 degrees. Cintas received \$3.4 million in federal contracts in fiscal year 2012.

* * *

In the case of clothing manufacturer Cintas, Eleazar Torres Gomez, a 46-year-old father of four, was working as a washroom operator at a facility in Tulsa, Oklahoma, when he noticed a clothes jam on the conveyor that feeds clothing into the dryer. Attempting to dislodge the jam, he climbed onto the conveyor belt and jumped on top of the clothes. He was then swept into the dryer, which continued to spin for 20 minutes at over 300 degrees before a supervisor heard a noise and opened the dryer to investigate. Emergency responders pronounced him dead at the location.

OSHA found 46 violations at the plant, among them, failure to protect employees from being pinned by the conveyor belt, failure to have a proper procedure to shut down equipment when clearing jammed clothing, and failure to train workers on how to clear jams. Edwin G. Foulke Jr., the Assistant Secretary of Labor in charge of OSHA at the time of the settlement stated, "Plant management at the Cintas Tulsa laundry facility ignored safety and health rules that could have prevented the death of this employee."

As disappointing as the facts in the Senate report already show, the reality at Cintas was indeed worse.

Cintas is the nation's largest supplier of industrial uniforms. The violations at Cintas' Tulsa plant were committed in early 2007. Following the death of Mr. Torres Gomez, OSHA investigated the workplace and cited Cintas in August 2007 for the following violations involving hazardous work on industrial dryers:

- 41 willful violations of one critical safety standard ("Lockout"), including one directly related to the employee's death, with most violations carrying the maximum penalty of \$70,000.
- An additional "Repeat" violation of another critical safety standard ("Guarding")
- Two additional "Serious" violations, with a maximum penalty

At the same time, OSHA announced the results of an inspection it started at a similar facility in Columbus, OH, following the Tulsa fatality: 5 "Repeat" violations with penalties totaling \$115,000 for the

same hazards as found in Tulsa on industrial dryers (as well as two “Serious” violations of the same standards).

Shortly before OSHA announced these findings in August, 2007, it also started an inspection in response to a complaint from workers at a third Cintas plant in Mobile, AL about hazards on industrial dryers. In October, OSHA cited Cintas for a total of 15 violations, with penalties totaling \$196,000:

- One “Willful” violations of one of the same standards cited in Tulsa, with a near-maximum penalty of \$55,000
- Four “Repeat” violations of the same standards cited in Tulsa, again with a near-maximum penalty of \$50,000.
- Eight “Serious” violations, several for similar hazards as previously cited, with penalties totaling \$27,500.

In sum, by October 2007, OSHA had found a total of 65 violations, including 53 “Willful” and “Repeat” violations, with a total of \$3.1 million, involving hazards of industrial dryers. It was the largest penalty ever issued by OSHA in the services industry.

Shortly before Federal OSHA announced these severe violations, the Washington State OSHA program issued its own citations for some of the same standards in connection with a severe injury to a washroom employee in an incident operating a large unguarded washer that severely injured an employee’s arm -- merely three weeks before Mr. Torres Gomez’ death in Tulsa.¹

The accumulated violations and penalties received widespread, national news coverage, and were the subject of an oversight hearing by the House Workforce Protections Subcommittee in April, 2008.²

Following the issuance of these citations, OSHA and the company consolidated the company’s appeals of these violations (as well as others found later at two other locations in response to additional worker complaints), and negotiated for over a year to resolve the violations. The company’s settlement agreement was proposed in December 2008, finalized in the spring of 2009, and included payment of \$2.8 million. It covered 65 separate company facilities with the same or substantially similar machine hazards in all states covered by Federal OSHA enforcement, and 41 such facilities in other states with state OSHA agency enforcement (including KY). It provided a two-year window – until April 2011 -- for the company to fully implement remediation in all these facilities.

The Settlement Agreement did not however cover all the company’s laundry facilities, as it only included the company facilities with automated/semi-automated machine operations, rather than covering equipment at dozens of very similar laundry facilities (i.e., large industrial facilities with heavy washing and drying equipment) but which rely more on manual handling of the laundry. Those other uncovered facilities include the company’s plant in Louisville, KY.

The Settlement Agreement also “encouraged” the company to offer similar terms to the states – like KY – which operate an OSHA “state plan” to enforce OSHA standards, but did not require either the states

¹ Washington State Dept. of Labor and Industries, OSHA Citation 310702873: “The employer did not ensure that employees were safeguarded from rotating or revolving parts ... Wash alley operators are exposed to this hazard when manually loading a washer with product as it continues to tumble while the door is open. Employees are exposed to serious injuries that could result in twisting of body parts, broken bones, amputations, or even death.”

² House Subcommittee on Workforce Protections, “Improving Workplace Safety: Strengthening OSHA Enforcement Of Multi-Site Employers,” Washington, DC, April 23, 2008.

or the company to implement such plans. Few if any states (other than California) with such identical plants adopted such agreements, even if they had already done inspections and found similar violations at one of the several such plants in the state's jurisdiction (e.g., Indiana).

The Settlement Agreement had several of the provisions identified in the proposed DOL Guidance for appropriate remediation of the violations – provisions which under other circumstances might have allowed the CO and the LCA to consider the agreement to be a “mitigating factor” offsetting the severity of the violations. It included provisions to inform workers of the violations, provide for in-house monitoring of compliance, and reports to OSHA. In addition, OSHA added Cintas to its then “Enhanced Enforcement Program” (predecessor to OSHA's current Severe Violators Enforcement Program) and proposed to send inspectors to 10% of the company's facilities within Federal OSHA jurisdiction to verify compliance. One would have hoped that with such a broad and detailed settlement agreement in hand, Cintas would have taken full measures to assure that it would stop “Serious” violations of important safety standards.

However, these extensive provisions and extraordinary penalties failed to deter Cintas from continuing to violate critical OSHA safety standards in its industrial laundry operations. On Oct. 28, 2011, only 6 months after the termination of the 2-year Federal Settlement Agreement, Cintas' laundry in Louisville, KY reported that a mechanic named Kevin Burgess died inside an industrial dryer. Two months later, the Kentucky state OSHA agency again cited Cintas for 6 “Serious” violations of critical safety standards, and again imposed maximum penalties.³

The violations found in Louisville were for a different standard dealing with the servicing of hazardous equipment, but the same facts applied in both incidents: an employee trapped inside an industrial dryer because the dryer was not properly managed when the employee was working inside or next to the dryer.

(It is worth noting, of course, that even the 2007 fatal dryer incident in Tulsa was not the first time the company was aware of the severe hazards from dryers. In 2004, the company safety director had previously warned the company's senior leadership of dangers of worker entry into industrial dryers, following a near-fatal incident, very similar to the one in Tulsa three years later.⁴)

In other words, by the end of 2011, the company's failure to implement effective protections for workers exposed to well-recognized hazards was crystal clear to both Federal and state OSHA agencies – with fatal consequences to the employees. Nonetheless, in 2012, as the Senate Report explained, Cintas was nonetheless awarded \$3.4 million in federal contracts.

It should not have surprised the Defense Department, therefore, that on Jan. 16, 2013, it had to terminate an \$80,000 contract with Cintas, “for Cause due to the non-performance of the contractor, and their inability to perform as documented in the company's email of 7 Jan 2013.”⁵

And incredibly, even after this inexcusable pattern of violations, Cintas continued to violate important safety standards in the very same plant where Burgess died. On May 29, 2013, yet another Cintas

³ Kentucky Labor Cabinet, OSHA citation 316916436, Sept. 12, 2013

⁴ House Subcommittee on Workforce Protections, “Improving Workplace Safety: Strengthening OSHA Enforcement Of Multi-Site Employers,” Washington, DC, April 23, 2008, p. 16.

⁵ NAVSUP FLC JACKSONVILLE, SIMPLIFIED ACQUISITIONS DIV, “AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT, P00001, N6020113RC003X6, Jan. 16, 2013.

employee suffered a severe arm injury when his arm was caught by a floor mat during the emptying of the dryer, due to the lack of adequate guarding of the dryer.⁶ This was very similar to the incident in Washington State in early 2007. Three months later, Kentucky OSHA issued another maximum penalty for another “Serious” violation of the same “Guarding” standard for which Cintas had been cited in 2007 by Federal OSHA in Tulsa, OK following that fatality, as well as in Columbus, OH and Mobile, AL, as well as by Washington State in 2007.

In the face of such clearly recidivist conduct by a prominent federal contractor, it is evident that the existing system for determining responsible conduct by federal contractors does fails to adequately deter either repeated and willful violations of labor laws, or the non-performance of the contracts themselves. Only a carefully-crafted system for identifying repeat and willful violators, as well as an effective system for sharing that information among the appropriate federal agencies, will allow both the contracting agencies as well as the labor enforcement agencies to assure themselves that responsible contractors receive federal contracts – and that irresponsible ones do not.⁷

Attachment: Federal and State OSHA violations, Cintas Corp, 2009 – 2013.

⁶ Kentucky Labor Cabinet, OSHA citation 316916436, Sept. 12, 2013. “Cintas Corporation did not properly guard the point of operation on the Braun 500PT Dryer # 2.... This condition resulted in ... “his hand [being] caught by the draw string in the tumbler, twisting his left arm up and around the tumbler rotation injuring the employee. This broke the employee's arm.”

⁷ Note that this case study only discusses Cintas’ record of violating health and safety standards. During the same period, Cintas also violated wage laws, such as the Living Wage Ordinance from Hayward, CA, in which case Cintas was subsequently ordered to pay \$790,000 in back wages, \$14,000 in unpaid vacation benefits and \$259,000 in penalties. Calif. Ct. of Appeals, *Amaral v Cintas*, June 11, 2008, p. 6.

s Insp. Activi	Name	Address	City	State	Zip	NAICS	Inspection Type	Establish	Open Date	Case Closed	Citation Id	Deleted	Standard	Violation Type	Issuance Date
311137509	CINTAS	12 HARBOR	PORT	NY	11050	812332	Complaint	112	2009-05-08	2009-10-09	1001	Deleted	19100037 A04	Serious	2009-09-03
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	1001	Deleted	19101025 G01	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	1002	Deleted	19101027 M04	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	01003A	Deleted	19100132 D01	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	01003B	Deleted	19100132 D01	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	01004A	Deleted	19100022 D01	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	01004B	Deleted	19100022 D02	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	1005		19100132 D01	Serious	2011-08-05
314592502	CINTAS	2250	LANCASTER	OH	43130	812332	Complaint	58	2011-04-05	2013-05-01	1006		19100132 D01	Serious	2011-08-05
314790387	CINTAS	333 WEST MAIN	ROCHESTER	NY	14608	812332	Planned	96	2010-08-27	2011-05-16	1001	Deleted	19100184 C04	Serious	2010-09-13
314790387	CINTAS	333 WEST MAIN	ROCHESTER	NY	14608	812332	Planned	96	2010-08-27	2011-05-16	1002	Deleted	19100333 A01	Serious	2010-09-13
316180330	CINTAS	5679	MOBILE	AL	36619	812332	Complaint	100	2012-01-11	2012-04-18	1001	Deleted	19100212 A02	Serious	2012-03-21
314605957	CINTAS INC	12601	NORTH	OH	44451	812331	Monitoring	128	2011-03-22	2012-04-30	1001	Deleted	19100219 C04	Serious	2011-04-05

Abate Date	Abate Complete	Current Penalty	Initial Penalty	Contest Date	Final Order Date	Instances	Exposed	REC	Gravity	Emphasis	Hazard Category	FTA Inspection N
2009-09-16		1500.00	1500.00			1	4		1			
2011-09-07		3240.00	3240.00	2011-08-26	2012-06-29	1	6		5			
2011-09-07		3240.00	3240.00	2011-08-26	2012-06-29	1	6		5			
2011-09-07			3825.00	2011-08-26	2012-06-29	1	6		5			
2011-09-07				2011-08-26	2012-06-29	1	6		5			
2011-09-07		2754.00	2754.00	2011-08-26	2012-06-29	1	6		5			
2011-09-07				2011-08-26	2012-06-29	1	6		5			
2012-07-29	Abatement	3825.00		2011-08-26	2012-06-29	1	6		5			
2012-07-29	Abatement	3240.00		2011-08-26	2012-06-29	1	6		5			
2010-09-16	Corrected	1700.00	1700.00	2010-10-06	2011-03-17	1	1		2			
2010-10-01		1700.00	1700.00	2010-10-06	2011-03-17	1	1		2			
2012-01-11	Quick Fix	2103.00	2103.00			1	2		1			
2011-04-08	Corrected	4000.00	4000.00	2011-04-28	2011-10-21	1	3		5			

insps state.Activ	Name	Address	City	State	Zip	NAICS	Inspection Type	Establish	Open Date	Case Closed	Citation Id	Deleted	Standard	Violation Type	Issuance Date
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2002		19100303 F02	Other	2009-05-01
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2003		19100303 G01	Other	2009-05-01
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	1003		19100305 B01	Other	2009-05-01
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2005		19101200 E01 I	Other	2009-05-01
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2006		19101200 E01 II	Other	2009-05-01
312004690	CINTAS CORP	51518	MACOMB	MI	48042	812332	Planned	137	2009-07-13	2010-10-12	2001		3254720103	Other	2009-07-23
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	2001		80028022	Other	2010-10-11
314480369	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-07	2011-07-05	1002		8001601501	Other	2010-08-16
315115584	CINTAS CORP	3375 MIKE	EAGAN	MN	55121	812332	Complaint	103	2010-12-02	2011-06-15	1001		5205120004 A	Other	2010-12-16
316074459	CINTAS	3951	FREDERICK	MD	21703	812332	Planned	48	2012-01-12	2012-06-13	2001		50406 A01	Other	2012-02-16
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	1001		2031002	Serious	2009-05-01
311992192	CINTAS CORP	39145 WEBB DR	WESTLAND	MI	48185	812332	Planned	160	2009-10-13	2010-08-09	1001		4081145002	Serious	2009-11-06
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	01004A		8002802501	Serious	2011-06-30
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	01004B		8002803503	Serious	2011-06-30
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001A		19100146 C04	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001B		19100146 D03	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001C		19100146 D03	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	1002		19100146 E01	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	1003		19100146 G01	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001G		19100146 L01	Serious	2012-04-20
316916436	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Referral	135	2013-06-14	2014-01-02	1001		19100212 A03II	Serious	2013-09-12
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2001	Deleted	19100022 A02	Other	2009-05-01
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	2004	Deleted	19100303 G01	Other	2009-05-01
311992192	CINTAS CORP	39145 WEBB DR	WESTLAND	MI	48185	812332	Planned	160	2009-10-13	2010-08-09	2001	Deleted	4081121101 D	Other	2009-11-06
314480369	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-07	2011-07-05	1001	Deleted	80016005	Other	2010-08-16
311299481	CINTAS	4125	ASHLAND	KY	41101	812332	Complaint	130	2009-01-26	2011-01-31	1002	Deleted	19100212 A01	Serious	2009-05-01
312004690	CINTAS CORP	51518	MACOMB	MI	48042	812332	Planned	137	2009-07-13	2010-10-12	1001	Deleted	4081142104	Serious	2009-07-23
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	1001	Deleted	80014025	Serious	2010-10-11
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	1002	Deleted	8002802501	Serious	2010-10-11
314480310	CINTAS LOC	1306 W	PASCO	WA	99301	812332	Complaint	7	2010-07-08	2011-07-07	1003	Deleted	8002803503	Serious	2010-10-11
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001D	Deleted	19100146 D05I	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001E	Deleted	19100146 D05II	Serious	2012-04-20
314601394	CINTAS	3916 OAKLAWN	LOUISVILLE	KY	40219	812332	Accident	134	2011-10-28	2013-12-23	01001F	Deleted	19100146 D06	Serious	2012-04-20
316074459	CINTAS	3951	FREDERICK	MD	21703	812332	Planned	48	2012-01-12	2012-06-13	1001	Deleted	19100303 B01	Serious	2012-02-16

Abate Date	Abate Complete	Current Penalty	Initial Penalty	Contest Date	Final Order Date	Instances	Exposed	REC	Gravity	Emphasis	Hazard Category	FTA Inspection NR
2009-05-11	Abatement			2009-05-27	2010-08-30	1	2					
2009-05-11	Abatement			2009-05-27	2010-08-30	1	2					
2009-05-11	Abatement		1625.00	2009-05-27	2010-08-03	1	4					
2009-05-11	Abatement			2009-05-27	2010-08-03	1	1					
2009-05-11	Abatement			2009-05-27	2010-08-03	1	113					
2009-07-23	Abatement			2009-09-17	2010-10-12	1	1					
2010-07-08	Abatement			2010-11-01	2011-06-30	2	7	Complaint				
2010-07-07	Abatement			2010-09-02	2011-06-16	1	5	Complaint				
2011-01-09	Abatement	250.00	350.00	2011-01-05	2011-06-11	1	1	Complaint				
2012-03-13	Abatement			2012-03-02	2012-05-15	1	48					
2009-05-20	Abatement	1300.00	1300.00	2009-05-27	2010-08-03	1	1					
2009-11-06	Abatement		600.00	2009-12-30	2010-08-09	2	2					
2011-06-30	Abatement	1750.00	1750.00		2011-06-30	1	7					
2011-06-30	Abatement				2011-06-30	1	7					
2012-04-30	Abatement	4000.00	7000.00	2012-05-07	2013-09-03	4	3		1			
2012-04-30	Abatement			2012-05-07	2013-09-03	4	3					
2012-04-30	Abatement			2012-05-07	2013-09-03	4	2					
2012-04-30	Abatement	4000.00	7000.00	2012-05-07	2013-09-03	4	3		1			
2012-04-30	Abatement	4000.00	7000.00	2012-05-07	2013-09-03	4	3		1			
2012-04-30	Abatement			2012-05-07	2013-09-03	4	3					
2013-09-20	Abatement	4000.00	7000.00			1	2	Referral	10			
2009-05-13	Abatement			2009-05-27	2010-08-03	1	4					
2009-05-11	Abatement			2009-05-27	2010-08-03	1	2					
2009-11-06	Abatement			2009-12-30	2010-08-09	1	2					
2010-07-07	Abatement			2010-09-02	2011-06-16	1	5	Referral				
2009-05-20	Abatement		1300.00	2009-05-27	2010-08-03	1	4					
2009-07-23	Abatement	600.00	600.00	2009-09-17	2010-10-12	1	1					
2010-07-08	Abatement		1750.00	2010-11-01	2011-06-30	1	7	Complaint				
2010-07-08	Abatement	1750.00	1750.00	2010-11-01	2011-06-30	1	7	Complaint				
2010-07-08	Abatement	1750.00	1750.00	2010-11-01	2011-06-30	1	7	Complaint				
2012-04-30	Abatement			2012-05-07	2013-09-03	4	3					
2012-04-30	Abatement			2012-05-07	2013-09-03	4	3					
2012-04-30	Abatement			2012-05-07	2013-09-03	4	3					
2012-02-21	Corrected		1300.00	2012-03-02	2012-05-15	3	48		8			

April 21, 2015

Recommendations from Work Group as amended by WPAC and transmitted to OSHA

Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation

Introduction

Retaliation against employees who report issues is all too common. The program structure and elements recommended below can provide practical and current guidance for organizations—public, private and non-profit—that wish to provide protections for whistleblower rights. These recommendations may be of assistance to provide a refresher to large employers or others already working at whistleblower protections. For others, especially small and medium-sized organizations that have not had access to the requisite guidance or expertise, these guidelines can help them construct and carry out a program.

Factors beyond the scope of these recommendations, some structural and intentional, some not, may affect an organization's willingness or ability to assure that employees have a right to be heard. These guidelines do not attempt to address those factors. Used fully and in combination, these programs and practices can make a specific and positive difference in organizations that are ready and able to improve communication with employees and eliminate the occurrence of retaliation in the workplace. By doing so, an organization can better ensure the exercise of whistleblower rights and thereby gain the benefits that ensuring these rights can bring to the work place and the success of the organization.

These suggestions are drawn from practices found and lessons learned in a range of industries. They are presented in a generic form, adaptable to most workplaces, but must be adjusted to variables like size, history, and applicable law.

An effective whistleblower protection and anti-retaliation system requires senior leadership commitment and accountability, and making anti-retaliation and prevention a proactive rather than a defensive aspect of the organization. Most needed elements are not intuitive, but require specific policies, accountabilities and programs. Key elements, as summarized in the following sections, include:

1. Leadership commitment
2. A true "speak up" organizational culture that is the basis of a prevention-oriented program that encourages raising and fair resolution of issues
3. Independent, protected resolution systems for allegations of retaliation
4. Specific training to teach workers their rights and about available internal and external protection programs, and for managers to learn these along with related skills, behaviors and obligations to act
5. Monitoring and measurements that don't contribute to suppression of reporting and which measure the effort and effectiveness of inputs to a speak-up and non-retaliation culture
6. Independent auditing to determine if the program is actually working

This summary of best practices for whistleblower protections was developed at the invitation of the Assistant Secretary for OSHA by a group consisting of union representatives, legal experts from labor and management perspectives, corporate safety and compliance directors, public policy professionals, academics and present and former regulators.

1. The Role of Leadership

The best way to avoid retaliation and external airing of employee concerns about safety or organizational integrity is to address the concerns internally in a timely and effective manner and to have a strong program to prevent and correct any retaliatory actions. Chief executives and boards of directors must take the lead in implementing a whistleblower-protection and anti-retaliation system that includes training in how to identify retaliation, carry out independent and thorough investigations, and, as necessary, undertake corrective actions. Creating a non-retaliatory environment avoids external legal and public relations risks, and improves employee satisfaction and involvement. There are business leaders whose experience shows that organizational effectiveness and profitability improve when these whistleblower protection actions are put in place. To gain these benefits, organizations need to move from defense and reaction to proactive programs to hear and resolve issues and to otherwise prevent retaliation.

- ✓ The chief executive and management* at all levels should be held accountable for the quality of response to issues, to reports of retaliation, and for supporting policies that ensure whistleblower rights.
- ✓ Top leaders and the board should understand the statutory definition of retaliation, legal obligations and what it takes programmatically to prevent it, and know employees' real willingness to report issues and the organization's present actual record in preventing retaliation and fear thereof.
- ✓ Board members should understand their risks, responsibilities under Sarbanes-Oxley, other statutes.
- ✓ Organizations should have a chief compliance officer whose job is to enact, enforce, and evaluate anti-retaliation policies and programs. This person should report to the chief executive and have a separate reporting responsibility to the board (or an appropriate board subcommittee).
- ✓ Performance reviews for leaders and managers should support anti-retaliation behavior (including attending training, championing compliance initiatives, and constructively addressing concerns).
- ✓ With represented employees, bargaining unit leaders can also play a valuable role in creating management awareness and strengthening the willingness of employees to come forward.
- ✓ Companies should enact strong codes of conduct and ethics programs to support fair treatment of employees who report issues internally, to agencies, and in response to government inquiries.
- ✓ Appropriate consequences (i.e., discipline, penalties, etc.) should be imposed when acts of retaliation are confirmed, and be sufficient to serve as a deterrent.
- ✓ Employers need a mechanism to track changes in public policies and laws and to update internal training, auditing and other internal policies and practices.

****These leadership terms refer to the highest ranking corporate and agency officials and governing boards in the organization. This, therefore, encompasses public, private and non-profit entities.***

DO	DON'T
Give the board training, case studies, and monitoring data (including industry-specific data)	...provide the board with only general policies or cursory summaries
Give the board regular updates—at least annually—on reported issues, retaliation incidents, and program results	...shield the board or senior leaders from employee concerns or issues of retaliation. Don't ignore unaddressed issues or retaliation claims
Assure that employees have adequate channels for reporting and resolving issues or retaliation.	...assume policies and statements are enough.

Small business considerations: The board or owner may serve as the locus for employee reporting and for investigating allegations of retaliation. The chief compliance functions may unknowingly reside with the owner or manager, though that person may not realize it, may feel ill-equipped to handle the responsibility, or may not believe that the role is essential to the business.

Statute-or industry-specific considerations: Boards have accountability under Sarbanes-Oxley and other statutes. In addition to OSHA responsibilities, multinational companies should be aware of relevant differences in cultures and requirements, as well as obligations under the Foreign Corrupt Practices Act.

2. Prevention: Fostering a “Speak Up” Culture

The best way to preclude retaliation is to take a preventive approach, starting with a real program to assure employees can raise issues of concern. The seeds of retaliation are planted when employee issues are unwelcome or go unaddressed. Therefore, employers should foster a “speak up” culture that encourages reporting, provides for fair evaluation, and for just and effective resolution of concerns.

- ✓ Encouraging employees to raise concerns in a non-retaliatory environment fosters cost-effective remedies, avoids external legal and public relations risks, and improves employee involvement and ability to contribute to organizational success.
- ✓ Employees usually report first to the supervisor. Be sure they know how to constructively respond.
- ✓ Ensure all issues can be reported, evaluated and get an honest, timely response in a structured, known and transparent system, free of conflict of interest or bias; ensure that the employee is protected for reporting.
- ✓ Multiple avenues should be available for reporting issues. Everyone should see a channel they trust.
- ✓ The earlier an issue is raised, the easier it usually will be to resolve. Have early, non-emergency options.
- ✓ To assure issues are not missed, anonymous reporting should be available.
- ✓ Employers should eliminate all workplace incentives, whether formal or informal, that discourage reporting of concerns. The most important encouragement is to follow through and fairly address the issue without being defensive or retaliatory.
- ✓ Employers should have a policy of no punishment, explicit or implied, for reporting concerns or incidents. Be alert also to punishments for unrelated reasons, including retaliatory changes in employee status (e.g., changes in hours, duties, assignments, vacations, etc.) or other retaliatory actions soon after a reported incident or injury.
- ✓ Employer should have a procedure to ensure that any employment status changes are undertaken for legitimate non-retaliatory, non-discriminatory business reasons.
- ✓ Organizations should provide ways for employees to get unbiased, confidential advice about exercising whistleblower rights and how to cope with the stress of reporting concerns.
- ✓ To help gain a real “speak up” culture, seek the input and involvement of workers and union leaders in design and operation of reporting channels and anti-retaliation programs.
- ✓ Employee rights must be protected even if the person is incorrect or unpleasant in raising the issue. Negative or false narratives to discredit the employee and thereby justify retaliation can mask facts and create legal and business risks, in addition to unfairly treating employees and demonstrating risks in reporting.

DO	DON'T
Have a program with safe and structured channels for reporting	...simply rely on having told people to speak up
Make it easy for employees to report in low key ways or ask questions at an early stage	...force reporting to be unduly public or subject the employee to ridicule, stigma or pressures
Be prepared to provide protection and confidentiality to those who report	...leave an employee exposed to resentful peers and supervisors
Examine issues employees raise even if delivered in an unwelcome way	...assume or assess motives for raising the issue, making the issue easy to miss or dismiss
When investigating incidents, evaluate how more open reporting channels could have prevented. Look at possible system failures. Learn from it.	...focus first on the employee who reported the incident before investigating other possibilities. Employee should be the last factor.
Root out formal and informal incentives and value systems that encourage or allow retaliation or discourage reporting	...assume that retaliation is rare, obvious, or just personal or that it won't chill other reporting
Provide training on what constitutes retaliation and why employers are obligated to address it	...assume that everyone will "know it when they see it"
Respect confidentiality and anonymity pledges.	...discount anonymous reports—they are often the most serious.
Start with a blank page and understand that false narratives to discredit the employee and cover-ups are common	...assume that past internal, lower-level opinions or assessments of the employee or issue are correct
Investigate reports of issues promptly, thoroughly and with transparency, including responding to the employee who brought forward the initial concern(s).	
Ensure that any employment agreement or policy which requires confidentiality or non-disclosure of information contains an express "carve-out" which makes clear that nothing precludes the individual from reporting or communicating with any government agency	...require employees to disclose that they have reported or communicated with a government agency.

Small business considerations: These principles are readily applicable to most small businesses, except in the range of reporting channels in some cases.

Statute- or industry-specific considerations: Most recommendations are simply good business practice. SOX and other statutory requirements create significant responsibilities for boards and top leadership.

3. Implementing a Retaliation Response System

Retaliation against whistleblowers usually stems from prior management failures to address issues that employees believe are important or that they otherwise believe they have an obligation to report. An effective retaliation response system should include an independent complaint review process and an independent reporting line that can reach the employer's board or oversight body, if necessary. The system must include clearly defined roles, responsibilities, and expectations for top leaders, board members, managers at all levels, employees, compliance and legal staff, and HR and labor relations staffs. The procedures should be known and accessible to all.

- ✓ Like issue reporting, the retaliation response system should include multiple avenues for reporting, including opportunities outside chain of command and a hotline, including anonymous reporting.
- ✓ When the issues are especially polarizing or high-stakes, a separate, more independent channel or customized methods may be needed.
- ✓ Organizations should be transparent about how investigations are conducted, including roles and procedures, timing, quality standards, conflict-of-interest protections, training of investigative personnel, and confidentiality and anti-retaliation protections.
- ✓ Reports should derive from *de novo*, independent investigations and resolution, and employers should ensure respectful and proper closure of the issue with the reporting party.
- ✓ Investigations should focus on the facts and the underlying concern rather than on defending against the allegation. Consider whether the incident could have been avoided through more open reporting channels and greater trust—and the needed reforms made.
- ✓ Discipline, though not the only form of retaliation, should not be imposed in response to any employee action to report an issue. To protect against retaliatory discipline, an independent review with a pre-established process should review any proposed discipline and apply “just culture” principles and ask questions like:
 - Does the disciplinary action involve any retaliation or the appearance of it (e.g., given the past reporting history of the employee)?
 - Has the disciplinary action been independently assessed, and has true, justifiable and appropriate progressive discipline been applied up to this point?
- ✓ If a formal complaint has been filed, the employer should not simply default to a defensive posture. An objective, independent assessment aimed at solving the initial problem and preventing retaliation should normally be invoked. Rights of all parties in the filing should be preserved while this occurs.
- ✓ The system must have conflict of interest protections in investigations and should include in investigations senior managers and others who recognize the organizational impact, benefits, risks, and policy ramifications of the complaint. These cannot be left to functions with defensive missions.
- ✓ The reporting employee and others should have unrestricted ability to elevate the matter to higher levels. The procedures for doing so must be widely known and readily available.
- ✓ Confidentiality protections and rumor control are essential to encouraging reporting, enabling objective evaluation, finding a fair resolution and protecting the employee from further retaliation.
- ✓ Employers must ensure whistleblowers are protected even many years after the alleged incident.

DO	DON'T
Take all reports of retaliation seriously	...ignore issues because they seem minor or the source or employee motivation is questionable
Try to solve the underlying problem, even in filed cases	...address the complaint only from a defensive position,
Maintain contact with and protect the employee who reported the concern, both during and after	...isolate the employee or allow later retaliation
Recognize that failure to address retaliation can discourage future reporting and lead employees to report incidents externally	...assume that no reports of incidents or retaliation means that none are happening
Ensure confidentiality and make it standard	...allow "lobbying" about a case
Use third-party, fully independent investigators if needed	...promise anonymity if can't be guaranteed; confidentiality is usually sufficient
Respond quickly and transparently to reported incidents of retaliation	...assume that individuals who report retaliation have questionable motivations
Recognize the chilling effect of retaliation and of lack of response to retaliation	...rely solely on a strong chance of prevailing in court or that issues go away with a court "win"
Seek an independent review of proposed disciplinary actions	...punish or threaten punishment for reporting issues or retaliation

Small business considerations: Smaller companies may have simpler processes and fewer reporting channels and options for investigations, but the key principles still apply. Use the board or an outside party when confidentiality or independence is needed. The board may need to become involved earlier than in a larger employer.

Statute- or industry-specific considerations: The retaliation response system should take into account industry-specific statutory requirements.

4. Anti-Retaliation Training

Anti-retaliation skills are not intuitive. All leaders, managers, supervisors, and employees must receive training in what constitutes retaliation, legal protections available to employees, and how to prevent and address it, and management held accountable for implementing anti-retaliation policies. Anti-retaliation training should be considered equal to other required training. In developing the training, work with union leadership or, if not a represented work place, with other employee leaders.

Training should cover at least these topics:

- ✓ What constitutes retaliation—including common but less overt behaviors such as peer pressure, ostracizing, mocking, and exclusion from meetings
- ✓ How to respond to a report of an issue without engaging in or appearing to engage in retaliation
- ✓ Skills for defusing, problem solving and stopping retaliation in a work group.
- ✓ The elements of the anti-retaliation system, including roles and responsibilities, how to report concerns, how to escalate when supervisors or others do not respond, and whistleblower protections
- ✓ Relevant laws, rights of employees, risks and consequences of not responding appropriately, and the importance to organizational culture and results.
- ✓ What constitutes “notice,” when organizations are required to act, and the legal exposure and penalties they face for inaction, the inadequacy and negative consequences of using discipline and litigating a complaint as an organization’s main tool.
- ✓ How to separate, if present, annoying or inappropriate behavior from the report itself and how to deal appropriately with both while not failing to address the issue the person is reporting—and not retaliating. Often the issue is ignored if the behavior delivering the message or the motive for reporting is suspected.
- ✓ Assuming the employee’s motive in raising an issue is rarely useful and can interfere with addressing issues and responding to retaliation.
- ✓ Training should address external changes in legal, regulatory and policy requirements as well as staff turnover and need for refreshers. Training must therefore be continuous.

DO	DON'T
Recognize that some retaliatory behaviors are widely seen as acceptable and seem justifiable to the person carrying it out and to many higher up.	...assume that people intuitively know what constitutes retaliation and how to recognize, prevent and stop retaliatory behaviors

Small business considerations: Training can be brief and simple. Definitions and templates are available from OSHA and from online and other sources (links).

Statute- or industry-specific considerations: The training should be appropriate for the literacy level and language competency of employees, supervisors, and managers in the organization. Training should include the specific requirements and rights pertaining to the organization and its industry.

5. Monitoring Progress

Tracking of progress and trends is crucial to preventing retaliation. Many common measurement and incentive systems used in organizations can actually encourage or mask retaliation. By encouraging low reported numbers of things like safety or financial fault incidents, low numbers for filed concerns or reports of retaliation, retaliation is at least implicitly encouraged in order to meet the numbers or gain rewards associated with low numbers. From this, the seeds of suppression of reporting and then retaliation may be sown. Though these measurement and incentive plans have become common practices, they are now regarded as counterproductive to reporting issues and to preventing retaliation. Newer methods are being developed and adopted, and many companies have simply stopped incentives based on low volume of reporting issues, retaliation, and other problems.

- ✓ Accountability systems that reward management or employees for low reported numbers prevent issues from being addressed that could help organizational integrity, performance, or safety.
- ✓ Incentives should instead reward management and employee behavior that supports the right to come forward with concerns. Behaviors and results that support this can be observed, tracked, and audited.
- ✓ In one emerging and promising trend, accountability and incentives should focus on “leading indicators” of problem solving, encouraging compliance with safety, financial and other safeguards, and of creating a “speak up” and “no retaliation” culture, instead of on “trailing indicators” such as OSHA recordables and reported incidents of other kinds of importance to the organizations.
- ✓ The number of issues recorded often goes up when a new program is implemented. Management should understand that the higher numbers may be due to people feeling more comfortable coming forward. Higher numbers also mean that the organization has an opportunity to address the issues and learn where retaliation is taking place.
- ✓ Top leaders and the board should receive “dashboard” reports on issue reporting, retaliation allegations, and issue resolution, along with in-depth results of independent audits.
- ✓ Bargaining unit leaders should be involved in the development and review of measures. (In non-represented workplaces, consult other employee leaders, workers centers, advocates.)

DO	DON'T
Consider incentives for preventive activities, such as the “leading indicators” noted above	...tie compensation or group incentives to low reporting numbers
Track emerging issues and incidents (including “near-misses”)	...view reports of problems as negative information
Pay attention to the types of issues reported, which can help identify trends and problems	...close investigations too quickly, without resolving the issues, sharing results, and ensuring the fairness of the handling and outcome

Small business considerations: Large-scale data collection and complex incentive programs are out of reach for small businesses, but they can still ensure that incentives don’t discourage reporting or encourage retaliation. OSHA and other online guidance can provide useful templates and adjustments.

Statute- or industry-specific considerations: Some statutes include specific record-keeping requirements.

6. Independent Audits and Program Improvement

Even well-conceived, well-intentioned anti-retaliation programs can founder in implementation, either in certain facilities, functions or organization-wide. Problems can also stay hidden from management and not be apparent in normal data collection. To ensure that their program is working effectively, employers should consider engaging independent evaluators or auditors whose assessments go beyond safety or financial systems audits, but which add depth or are complimentary to those. Specific audits for employees' willingness to report issues and about fears for retaliation are needed to really gauge whether or not there are lingering issues or fears of retaliation.

- ✓ Perform independent assessment audit to ensure workers are coming forward, unafraid of retaliation
 - Direct audits of program data such as training, response time, other--done from outside immediate "business" unit.
 - Independently administered, anonymous employee surveys and confidential interviews that take in a robust sample to check behavior and perception.
 - In-depth surveys and structured individual interviews are crucial and can "ground truth" perceptions about whether policies work, whether employees are willing to report issues, whether they are actually experiencing or are fearful of retaliation; therefore not reporting.
 - Audits, surveys and interviews will be most meaningful if they reflect organization and facility structure and organization, across levels and functions, and thereby sample and focus accordingly.
 - Team with bargaining unit leaders in preparation and review of audit, including and especially the construction and implementation of surveys. (Do other outreach in unrepresented work places.)
- ✓ Cross check other sources: Issues not reported through compliance and ethics channels may be reported to workers comp, grievances, outside agencies, or revealed in exit interviews. Such differences often signal blockages or "chilling" of reporting within the firm, and represent risk, liability, non-compliance. Also analyze layoffs, terminations for reporting employee may have done in their past.
- ✓ Produce and track monitored "Get well plans" for delinquent facilities, work groups, managers.
- ✓ Report assessment results to top management and board. Track trends, problems, "get well" plan.
- ✓ Incident investigations provide a key cross-check to see if policies and systems work under pressure.
- ✓ Mandatory examination of changes in other personnel practices: Does a new or changed program, business process, new leadership, etc., impact freedom to report issues or possibilities for retaliation?
- ✓ Board should receive a thorough briefing on audit/assessment results. Board role should include seeking accountability and answers; hear directly from auditors.

DO's	DON'Ts
Independently evaluate the effectiveness of the anti-retaliation program	... assume that good intentions in a program are enough or that low numbers mean no issues
Confidential, independent written surveys. Use a broad sample of workers for surveys, interviews	...assume from a simple survey that workers are willing raise issues.
Use exit interviews, grievance information and incident investigations, etc. as ways to also test program efficacy	... restrict board to cursory information.
Ensure that proper safeguards exist to avoid conflicts of interest for independent auditors	
Institute and enforce provisions in third party and supplier contracts and codes of conduct that are consistent with these principles	
Consider publishing any results of third party audits	

Small business adaptations: Use outside resources employees will trust to: do confidential surveys interviews; check willingness to come forward, unaddressed issues, pressures and if programs work.

Statute or industry-specific considerations: Recognize applicable requirements when designing audit so that program will meet regulatory requirements.

**General Comments from WPAC to OSHA with transmittal of the above
recommendations on
“Best Practice for Protecting Whistleblowers and Preventing and Addressing
Retaliation”**

The following are general comments discussed during the WPAC meeting on April 21, 2015. These comments are intended to provide additional guidance to OSHA as the agency develops a final document to guide employers:

1. This is a generic document. We also encourage OSHA to develop additional materials that are more specific to individual statutes, sectors or industries, issues (e.g. safety and financial), or work relationships (e.g., temp workers)
2. We acknowledge the complexity of reaching out to obtain employee voice in private sector employment where there is no union bargaining agent, in view of the existing labor laws. We urge OSHA to think creatively and cautiously about this problem in developing the final best practices guidance. Solicitation of one-way input from unorganized workers into the development of policies and practices is important. It is also possible for employers to seek input from organized groups of employees within the workplace (e.g., identity groups), or from external worker advocates, in developing policies.
3. We also acknowledge the complexity of addressing these reporting and retaliation issues in complex employment relationships, particularly those that involve subcontracting and staffing agencies. We urge OSHA to be aware of these problems and to address them appropriately in final documents, with regard to appropriate policies and practices as well as training.
4. The purpose of this document, as drafted, is to forestall the necessity for an employee to seek official governmental action. It is directed to employers who want to establish internal programs and policies that will encourage employees to bring forward issues within the organization and discourage all forms of retaliation against employees who do so.
5. These recommendations were designed for “willing” employers, and were not intended to take into account the broad experiences of various employers with CSR and other audit programs for labor-related compliance.
 - a. OSHA itself has had experience with audits and monitoring in its compliance settlements, including corporate-wide settlements (CSA’s). The WPAC has not considered whether these recommendations are appropriate for inclusion in such settlements.
 - b. OSHA should proceed cautiously with the development and inclusion of audit functions in settlements in whistleblower cases, especially in cases involving large employers.
6. Although set out as six separate principles, the subcommittee and WPAC view these six elements as deeply intertwined. The recommendations interrelate.
7. Among the interrelationships, the WPAC would like OSHA to keep in mind the intertwined nature of reports of issues and retaliation.