

FY 2012 Abridged Federal Annual Monitoring and Evaluation (FAME) Report

California Division of Occupational Safety and Health (Cal/OSHA)



Evaluation Period: October 1, 2011 – September 30, 2012

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I. Executive Summary

The Department of Industrial Relations (DIR) administers the California Occupational Safety and Health Plan. Within DIR, the Division of Occupational Safety and Health (DOSH), which is commonly referred to as Cal/OSHA, is the principal executor of the plan. The Director of DIR and State Designee for this fiscal year was Ms. Christine Baker. Ms. Ellen Widess, Chief of Cal/OSHA, was supported by Ms. Cora Gherga, Acting Deputy Chief of Enforcement, and Ms. Vicky Heza, Program Manager for Consultation Services.

DIR has an independent Occupational Safety and Health Standards Board (OSHSB) which promulgates occupational safety and health standards for the State of California. Seven board members are appointed by the Governor. DIR also has an independent Occupational Safety and Health Appeals Board (OSHAB) that adjudicates contested cases. Under the Labor Commissioner, the Division of Labor Standards Enforcement (DLSE) investigates allegations of discrimination.

Federal Occupational Safety and Health Administration (OSHA) funds this plan under grants authorized by Section 23(g) and 21(d) of the Occupational Safety and Health Act, 23(g) covers enforcement of private and public sector employees and consultation of public sector employers and 21(d) covers consultation of private sector employers. In Fiscal Year (FY) 2012, the total budget for Cal/OSHA's 23(g) grant was \$71,871,800. The Federal share was \$27,418,800 which the state matched and provided additional funds of \$17,034,200. Federal OSHA also provided an additional funding of \$300,000 which was matched by the state.

Cal/OSHA's current benchmarks for safety and health compliance officers are 334 safety and 471 health inspectors. At the end of FY 2012, Cal/OSHA had approximately 186 compliance staff that spent their time in direct program activities conducting inspections which is a substantial difference from the benchmark. There are 26 enforcement offices located throughout the state. These offices are separated into six regions. Each region has a Regional Manager.

A total of 7,604 inspections were conducted in FY 2012 of which 7,080 and 524 inspections were done in the private and public sector, respectively. The projected FY 2012 inspection goal was 7,000 and 185 inspections in the private and public sector, respectively.

Of the 42 findings and recommendations identified in the FY 2011 FAME: nine remain open, five are closed, five are corrective action completed- awaiting verification, two are observations, and twenty-one have been completed. The open recommendations include: a significantly lower percentage of programmed inspections with serious, willful or repeat violations, the incorporation of the new definition of "serious" violation into the Policies and Procedures (P&P) Manual, the removal of a sentence in P&P C-6 regarding Personal Protective Equipment, untimely response to Federal Program Changes, a state initiated standard on Bakery Ovens that is not as effective as Federal OSHA, a repeat policy that is less effective than Federal OSHA, whistleblower related findings that address case file documentation, training of the investigators, and the need to update the State whistleblower manual. The recommendations which have corrected action completed - awaiting verification include: untimely response to investigations, final letters not being mailed to next of kin in the case of fatalities, union involvement and documentation of that involvement, and two items related to Integrated Management Information

System (IMIS).

This was the fifth and final year of Cal/OSHA's five-year Strategic Management Plan. Cal/OSHA successfully achieved all three parts of the first Strategic Goal "to improve workplace safety and health for all workers through direct intervention methods that result in fewer hazards, reduced exposures, and fewer injuries, illnesses, and fatalities." Industries targeted were construction, agriculture, and high hazard. Cal/OSHA met or made progress toward meeting all three parts of the second Strategic Goal "to promote workplace cultures that increase employee and employer awareness of, commitment to, and involvement in safety and health." Cal/OSHA conducted 3,137 inspections in agriculture and construction, provided over 60 seminars emphasizing heat illness, participated in 180 outreach events, and distributed over 15,000 publications flyers in Spanish, Hmong, and Punjabi languages. One Voluntary Protection Program (VPP) in general industry and two Cal/VPP Construction sites were added to the program. Part 3.2 of Cal/OSHA's third Strategic Goal, "to secure public confidence and maximize Cal/OSHA's capabilities by improving the effectiveness and efficiency of Cal/OSHA's programs and services," was met. Part 3.1 was not met in that the Division's citation lapse time is still above the National average. This issue will be explored further in FY 2013.

Information and data referenced in this report were derived from computerized State Activity Mandated Measures (SAMMs), FY 2012 State OSHA Annual Report (SOAR), FY 2012 23(g) Grant, Complaints About State Program Administration (CASPA), Integrated Management Information System (IMIS) reports and discussion with state staff.

II. Major New Issues

On August 6, 2012, the Chevron Refinery in Richmond caught on fire. Cal/OSHA and the Chemical Safety Board investigated the incident. As a result of the investigation, Cal/OSHA issued 25 citations with a penalty of \$963,200.

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 and erroneously marked as complete. 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.

Assembly bill (AB) 1136, the Hospital Patient and Public Health Care Worker Injury Protection Act, incorporated into the California Labor Code as Section 6403.5 on January 1, 2012, requires general acute care hospitals to adopt a safe patient handling policy as part of the Injury and Illness Prevention Program. The law does not apply to hospitals operated by the Department of Corrections and Rehabilitation or the California Department of Developmental Services.

In FY 2013, the OSHSB will consider the following proposed standards: Globally Harmonized System Update to Hazard Communication; Securing of Poles during Removal Operations; Federal OSHA Direct Final Rule-Head Protection; Strap On-Foot Protectors; Horizontal Pull Saw (Radial Arm Saw) Guarding; Hoisting, Use of Cribbing, American Society of Mechanical Engineers (ASME) Reference Correction; Airborne Contaminants-Ethylbenzene; and Aerosol Transmissible Diseases Respirator Exception.

On November 14, 2013 a letter was sent to the California Occupational Safety and Health Standards Board noting concerns with the proposed changes to the Hazard Communication Standard. Cal/OSHA is working with the Standards Board on updating their standard to include the Globally Harmonized System (GHS). The GHS Standard was heard by the Standards Board on November 15, 2012 and the Standards Board returned the proposed regulation to Cal/OSHA after receiving comments from the public.

There have been an increasing number of jurisdictional issues between Cal/OSHA and Federal OSHA that have caused concern and could have adversely affected conducting a prompt and complete investigation of accidents, fatalities and other complex inspections. Most of the issues that occurred involved military installations with various types of property use agreements and unclear boundaries. One fatality case involved a construction site where half of the building was under Federal OSHA jurisdiction and half under Cal/OSHA jurisdiction. To complicate the matter more, the incident occurred very close to the demarcation line in the building. Discussions were held to address this growing concern with Cal/OSHA resulting in an agreement to transfer jurisdiction of private employers on military installations to Federal OSHA.

The FY2012 grant application contained a funding request for 222 authorized positions for compliance staff that spend their time in direct program activities such as conducting inspections, while the FY 2013 grant application contained a funding request for 189 authorized positions. This amounts to a cut of 33 positions that provide direct compliance enforcement activity in the field and is not adequate to provide an effective OSHA program. A review of the funding breakout noted that Cal/OSHA has incorrectly allocated some positions toward program activity when they did not spend 100% of their time either conducting inspections or other program activities. For example, District Managers and Senior Technical positions that spend time in supervision and internal training and professional development positions conduct administrative activities.

III. State Progress in Addressing FY 2011 FAME Report Recommendations

Finding 12-01 (formerly 11-01): Complaint investigations were not being initiated within three working days for serious hazards or fourteen calendar days for other-than-serious complaints in 6% of case files reviewed.

Recommendation 12-01 (formerly 11-01): An opening conference shall be held within three working days for serious complaints and 14 calendar days for other-than-serious complaints.

Status: Corrective Action Completed-Awaiting Verification—During the November 2012 quarterly meeting, Cal/OSHA agreed to generate reports on an annual basis to enable them to track if complaints are being handled within the specified time periods as outlined in their P&P

C7. The success of this tracking mechanism will be assessed at the end of FY 13.

Finding 11-02: In 37 of the 268 cases reviewed, a response letter was not always sent to the complainant for complaint inspections or inquiries.

Recommendation 11-02: Response letters shall be sent to complainants who provide a complete address after complaint inspections or inquiries are completed.

Status: Observation 12-01—In FY 2012, IMIS data indicated there were 16 cases where complainants were not notified. This information was sent to Cal/OSHA for response as this is not normally a problem area. Cal/OSHA indicated that several CSHOs were out on medical leave, causing the letters to not be sent to the complainants. Cal/OSHA promptly mailed letters to the complainants. This item will be tracked over the next fiscal year to ensure that state management is properly tracking this activity in the event of staff absences.

Finding 11-03: A diary sheet, or an equivalent activity summary sheet, was not used or was not updated for complaint inquiries.

Recommendation 11-03: Diary sheets, or equivalent, shall be used for complaint inquiries and inspections.

Status: Closed—Cal/OSHA's P&P does not require diary sheets or equivalent to be used for complaint inquiries and inspections.

Finding 11-04: Data entry errors resulted in fatalities being recorded for non-work related deaths and investigations being recorded as untimely. The coding in IMIS for fatality inspections was not updated once it was determined that the fatality was not work related.

Recommendation 11-04: Ensure IMIS data is updated to reflect the correct coding for non-work related fatalities and is entered correctly to reflect timely investigations.

Status: Completed—In the past, Cal/OSHA coded non-work related heart attacks as work-related. The IMIS would show these incidents as work-related fatalities not responded to within one day. To resolve this issue, Cal/OSHA now codes non-work related fatalities as referrals.

Finding 12-02 (formerly 11-05 and 10-03): One of two case files reviewed, a final letter, indicating the results of the investigation, was not mailed to the next of kin.

Recommendation 12-02 (formerly 11-05 and 10-03): Final letters shall be sent to the next of kin after completion of the investigation.

Status: Corrective Action Completed-Awaiting Verification—Cal/OSHA's P&P C-170 indicates that family members shall be contacted early in the investigation and mailed a copy of the citations, settlement agreements, or Appeals Board decisions as they are issued. In FY 2013, fatality cases will be reviewed to ensure final letters to the next of kin are being mailed.

Finding 11-06: Twelve fatality investigations were not initiated within one day.

Recommendation 11-06: Initiate fatality inspections within one day of being notified of a work-related fatality which warrants an inspection.

Status: Completed—FY 2012 IMIS data indicates there were 12 fatalities which were not responded within one day. This information was forwarded to Cal/OSHA for a response and explanation. In their response, Cal/OSHA mentioned only one work-related fatality was not responded within one day due to unavailability of staff. The remaining fatalities were erroneously coded in IMIS and the corrections were made.

Finding 12-03 (formerly 11-07 and 10-07): The percent of programmed inspections with serious, willful or repeat violation is significantly lower than the National average.

Recommendation 12-03 (formerly 10-07): Improve targeting of programmed inspections to reach high hazard workplaces.

Status: Open—Issues contributing to this low rate are being explored. The targeting lists used by the state include incorrect data entry. In FY 2012, there were 1,960 programmed planned inspections of which 374 were not inspected because the establishments were inactive, out of business, etc. On-site inspections of tower cranes to check for health and safety operations are conducted to issue “permits” required by California statutes. These inspections are being coded as programmed inspections. Inspections done for permitting reasons are not OSHA related inspections and should not be entered into the OSHA data system. By eliminating these inspections and securing current lists for establishments, Cal/OSHA can obtain a “true” percent of programmed inspections with serious, willful or repeat violations.

Finding 12-04 (formerly 11-08 and 10-08): Cal/OSHA’s policy on classifying violations does not ensure violations that would be considered “Serious” under the Federal Field Operations Manual (FOM) are classified as Serious.

Recommendation 12-04 (formerly 11-08 and 10-08): Cal/OSHA needs to incorporate the new definition of a serious violation into their policy and procedures manual.

Status: Open—Cal/OSHA has not updated their P&P C-1B and has not incorporated the new definition of “serious” into their manual.

Finding 11-09 (formerly 10-34): The rules of evidence used by Cal/OSHA prevent many serious hazards from being appropriately classified without the use of “Expert” testimony and relevant medical training on specific injuries. Federally, expert testimony is not always required to establish whether a hazard is serious. In some cases, expert testimony may be needed, but Cal/OSHA appears to be applying a test that far exceeds well-settled law in both the Occupational Safety and Health Review Commission (OSHRC) and Federal courts. Cases have been identified showing an extreme standard of evidence to prove classification of violations where the compliance officer’s ability to identify, evaluate, and document conditions in the workplace are not considered. A medically qualified person is necessary to sustain violations based on exposure to an exposure and “work-relatedness” under the current Appeals process.

Recommendation 11-09 (formerly 10-34): Cal/OSHA must take the appropriate action—administrative, judicial, or legislative—to ensure that OSHAB’s test for acceptance of compliance officers’ testimony is at least as effective as the test at the federal level and results in a similar classification of violations as serious.

Status: Completed—AB 2774 was codified into Labor Code 6432 on January 1, 2011. Labor Code 6432 addressed the issue of having Industrial Hygienist or Safety Engineer be deemed competent to offer testimony to establish a serious violation, and offer evidence on the custom and practice of injury and illness prevention in the workplace. Cal/OSHA can also call upon “expert” testimony from other people depending upon the case. There have been no Administrative Law Judge (ALJ) decisions that have resulted in a reduction of the classification based on a perceived lack of qualification of the Division Investigator witness since the implementation of the legislation.

Finding 11-10 (formerly 10-14): Cal/OSHA did not verify that all Serious, Willful, or Repeat violations were abated.

Recommendation 11-10 (formerly 10-14): Verify all Serious, Willful, or Repeat violations are abated.

Status: Completed—In FY 2012, there were 37 violations not verified. Cal/OSHA has reviewed the violations and has provided an excel spreadsheet indicating the date and reason for having these violations not verified on a timely basis such as the employer is out of business or the date verified was not entered into the IMIS database. Use of these new tracking sheets will ensure that abatement is being verified.

Finding 12-06 (formerly 11-11 and 10-10): In three of the case files reviewed, the Union was present at the work site but was not involved in the opening conference and in three cases, union involvement was not properly documented.

Recommendation 12-06 (formerly 11-11 and 10-10): An opening conference shall be held with the Union either jointly with the employer or separately, and properly documented.

Status: Corrective Action Completed-Awaiting Verification—Cal/OSHA will continue to verify records to ensure an opening conference is held with the Union if one is present. In FY 2013, a records review will take place to ensure Union participation or notification has taken place during an inspection.

Finding 11-12: Informal Conference policy allows conferences to be held beyond 15 days and lacks guidance on obtaining counsel and does not require conference information to be posted properly and consistently throughout the state.

Recommendation 11-12 (formerly 10-15): Cal/OSHA needs to revise P&P C-20 to allow informal conferences to be held within 15 working days of the issuance of citations and penalties and not to exceed this time frame.

Status: Closed—If an appeal is filed, Cal/OSHA settles the case up to the day of the appeal hearing. This policy allows greater flexibility and conserves resources for those cases that need to be heard in front of the Occupational Safety and Health Appeals Board.

Finding 11-13: DOSH's (Cal/OSHA) interpretation is that they don't have the authority to adjust the penalty at the informal conference according to Section 342(a). On the other hand OSHA believes that the Appeals Board does have the authority to adjust the proposed penalty and does so routinely when these violations are appealed.

Recommendation 11-13: Cal/OSHA using all available appeal resources must strongly select sufficiently strong cases for appeal that would set precedent regarding retention of penalties overall and a minimum penalty for violations of 342(a).

Status: Closed—OSHAB has issued three Decisions after Reconsiderations (DARs). A \$5,000 penalty was upheld when the employer failed to report an injury as required under Section 342(a). In another case, when employers are late in reporting an injury under Section 342(a), OSHAB has allowed the standard reduction to the penalty for size, good faith and history.

Finding 11-14: Cal/OSHA field staff does not have sufficient legal training or background to present cases at hearings. Pre-hearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the DAR process and furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.

Recommendation 11-14: Cal/OSHA must take appropriate action to ensure that their enforcement actions are appropriately defended at contest, either through attorney representation or, if necessary, through a system where Cal/OSHA field staff are trained and provided with adequate access to technical and legal resources to ensure at least as effective presentation of cases to OSHA. Cal/OSHA must determine whether the problems associated with the current system of having compliance officers' defend their own cases during contest can be corrected. If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements as is done in the Federal Program and most other OSHA-approved State Plans.

Status: Closed—Cal/OSHA provides five days of training to CSHOs who must defend their cases in court. There is no requirement for an attorney to present a case. Cal/OSHA P&P C-23 outlines the criteria for when an attorney is required (mandatory), and when the District Office can request legal representation (discretionary). For cases not meeting either the mandatory or discretionary criteria, the District Manager, Senior Safety Engineer or Industrial Hygienist will present the case. In the SIR Report (September 2012), the percent violations vacated and reclassified after a contest has been filed, for the State, were 13.8 and 7.9, respectively, which was lower than the federal data. According to OSHAB, the ALJ applies the same rules to both attorney and non-attorney representation. OSHAB has not discerned great settlements with attorneys and poor ones with Cal/OSHA field staff.

Finding 12-07 (formerly 11-15): The Employer Payment for Personal Protection Equipment issue has not been resolved.

Recommendation 12-07 (formerly 11-15): OSHSB needs to resolve the issue regarding Employer Payment for Personal Protective Equipment.

Status: Open—Cal/OSHA's Personal Protective Equipment Regulation, Title 8, Article 10 requires employers to pay for required personal protective equipment. This regulation has been in place, but there may have been a misunderstanding. Cal/OSHA can cite employers for not paying for required PPE. OSHAB has upheld Cal/OSHA's citation for failing to pay for required personal protective equipment. The CAP indicates Cal/OSHA needs to amend P&P C-6 to remove the sentence "To require the employer to pay for safety devices which are required for employees pursuant to applicable Safety Order." The main issue of Employer Payment for PPE has been resolved. The outstanding issue is amending the P&P C-6 to come in line with the standard.

Finding 12-08 (formerly 11-16): Cal/OSHA has been late in responding to 6 out of 13 Federal Program Changes and did not respond to 3 out of 13 Federal Program Changes.

Recommendation 12-08 (formerly 11-16 and 10-22): Cal/OSHA needs to respond by the due date to all Federal Program Changes.

Status: Open—Cal/OSHA continues to be late, but has responded to six Federal Program Changes.

Finding 12-09 (formerly 11-17): State-initiated rulemaking that promulgated a standard on Bakery Ovens was deemed not to be at least as effective as Federal OSHA standards.

Recommendation 12-09 (formerly 11-17 and 10-23): Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.

Status: Open—Discussion between Federal OSHA and the Standards Board is ongoing. Both parties are working together to resolve this issue.

Finding 11-18: DLSE was not properly screening all newly filed discrimination complaints.

Recommendation 11-18: As soon as possible upon receipt of the discrimination complaint, the available information shall be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a prima facie allegation.

Status: Completed—DLSE Investigators have a documented process for screening complaints. Once a complaint is received, DLSE will review the complaint for jurisdiction, and record the received date. If there is no protected activity, DLSE will send a letter either asking for additional information or will send a negative reply to the complainant.

Finding 11-19: DLSE was not properly notifying all whistleblower complainants of their right to dually file with Federal OSHA.

Recommendation 11-19: Because employers in state plan states do not use the federal OSHA poster, the states must advise whistleblower complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent federal protection.

Status: Completed—DLSE has a pamphlet that indicates an employee who is alleging retaliation because of a workplace safety and health issue has the right to concurrently file a complaint with Federal OSHA. DLSE has indicated this pamphlet is mailed to the complainant and is on their website.

Finding 11-20: DLSE was not interviewing whistleblower complainants in all cases.

Recommendation 11-20 (formerly 10-26): The investigator shall arrange to meet with the whistleblower complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations.

Status: Completed—To insure interviews are conducted during all investigations, investigators have been reminded to take detailed notes when speaking with witnesses. The Assistant Chief issued an email to the staff reminding them to document information from witnesses. Attorneys for DLSE developed a template for witnesses to sign.

Finding 11-21: DLSE was not interviewing company officials in all whistleblower cases who have known direct involvement in the case to test assertions made by the company.

Recommendation 11-21 (formerly 10-26): The investigator shall interview all company officials who have known direct involvement in the whistleblower discrimination case and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation.

Status: Completed—DLSE Investigators interview all relevant witnesses. Investigators have been reminded to take detailed notes when speaking with witnesses. The Assistant Chief issued an email to the staff reminding them to document information from witnesses. Attorneys for DLSE developed a template for witnesses to sign.

Finding 11-22: DLSE was not conducting further interviews with relevant witnesses in all discrimination cases.

Recommendation 11-22 (formerly 10-26): The investigator shall fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the whistleblower complainant's and respondent's positions and contact made with all relevant witnesses with every attempt made to gather all pertinent data and materials from all available sources.

Status: Completed—DLSE Investigators have recorders, but they are only used only if the

person being interviewed agrees to the recording. If the person does not agree to be recorded, investigators have been instructed to document the interview in writing.

Finding 11-23: DLSE was not conducting closing conferences with Whistleblower complainants.

Recommendation 11-23 (formerly 10-26): Upon completion of the field investigation, and after discussion of the case with the Senior Deputy Labor Commissioner and legal department as necessary, the investigator shall conduct a closing conference with the whistleblower complainant.

Status: Completed—Since October 2011, DLSE has been conducting closing conferences and writing final investigation reports which are placed in the file.

Finding 12-10 (formerly 11-24 and 10-26): DLSE was not documenting their discrimination case files to support their findings in all cases, including failing to include notes of interviews and closing conferences conducted.

Recommendation 12-10 (formerly 11-24 and 10-26): Investigators shall document the discrimination case file to support their findings, including, but not limited to, notes of interviews and closing conferences.

Status: Open—DLSE has indicated one person is not documenting notes or updating the file in their case management system (CMS). All other investigators are updating the file in CMS and documenting notes.

Finding 11-25: DLSE was not preparing the equivalent of a final investigation report at the end of their investigations of Discrimination complaints.

Recommendation 11-25: Investigators shall prepare the equivalent of the final investigation report at the end of all their investigations to include at a minimum the sections proscribed in DIS 0.09 Chapter (IV)(B), and keep such report in the discrimination case file.

Status: Completed—Since October 2011, DLSE has been conducting closing conferences and writing Final Investigation Reports which are placed in the file.

Finding 11-26: DLSE was not organizing its discrimination case files in a consistent manner for all cases.

Recommendation 11-26: Investigators shall organize all discrimination case files consistently in a manner that satisfies at a minimum the case file organization required in DIS 0.09 Chapter 5 (III), including the separation of transmittal and other administrative materials from evidentiary material, the use of exhibit tabs separating evidentiary materials, and a table of contents identifying all evidentiary material by exhibit.

Status: Completed—Materials in the files are consistently separated by tabs. For example, one tab may have records of adverse actions, another tab may contain information on the parties, etc. but there is no specific order.

Finding 11-27: For all discrimination cases deemed settled, DLSE was not requiring that the settlement be in writing.

Recommendation 11-27: For all discrimination cases deemed settled, DLSE shall follow the procedures required in DIS 0.09 Chapter 6 (IV), including requiring that the settlement be in writing.

Status: Completed—Settlements written by DLSE are in the file. However, if the parties agree

to settle outside of DLSE, between attorneys, DLSE will request a copy of the settlement from the parties. DLSE may or may not receive these settlements. If DLSE cannot get a copy of the settlement, they dismiss the case and record this in IMIS.

Finding 11-28: DLSE did not gather all relevant evidence available in the discrimination cases. As a result, the investigator could not evaluate the evidence and draw conclusions based on the evidence and the law.

Recommendation 11-28: DLSE shall gather all relevant evidence in order to evaluate the evidence and draw conclusions based on the evidence and the law, including interviewing whistleblower complainants, respondent witnesses who have known direct involvement in the case, and third party witnesses with relevant information.

Status: Completed—DLSE Investigators completed training on December 12, 2012. Training included how to conduct an effective investigation and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.

Finding 11-29: DLSE did not properly investigate and analyze protected activity, employer knowledge, adverse action, and nexus (including disparate treatment, pretext, animus, and dual motive).

Recommendation 11-29: During all phases of the discrimination investigation, the investigator shall bear in mind and look for evidence dealing with protected activity, employer knowledge, adverse action, and nexus (including disparate treatment, pretext, animus, and dual motive).

Status: Completed—DLSE Investigators completed training on December 12, 2012. Training included how to conduct an effective investigation, and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.

Finding 11-30: DLSE did not adequately test the respondent's reason for taking adverse action.

Recommendation 11-30: DLSE shall fairly pursue all appropriate investigative leads which develop during the course of the discrimination investigation, with respect to both the complainant's and the respondent's positions. After completing the respondent's side of the investigation, the investigator should again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.

Status: Completed—DLSE Investigators completed training on December 12, 2012. Training included how to conduct an effective investigation and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.

Finding 11-31: DLSE did not promptly notify the parties that it had opened an investigation in many discrimination cases until several months after the complaint had been filed.

Recommendation 11-31: DLSE shall promptly notify whistleblower complainants that it has opened an investigation upon receiving the complaint. DLSE shall promptly notify respondents that it has opened an investigation upon receiving the complaint, unless an inspection is pending.

Status: Completed—The state now uses the following process for whistleblower complaints: Clerks docket the case in IMIS. In order to docket a case, the date of the opening letter is needed. This action prompts the mailing of the opening letter to the complainant. The case is assigned to an investigator who sends the final letters to the complainant and respondent. Opening letters are immediately sent once the case has gone through the screening process.

Finding 11-32: DLSE did not provide the parties with appeal rights in all dismissed discrimination cases.

Recommendation 11-32: DLSE shall provide the parties with appeal rights in all dismissed discrimination cases, including those where the complaint was dismissed due to the complainant's lack of cooperation.

Status: Completed—DLSE mails a form 9.2 case closed investigation letter. The letter contains language telling the complainant he/she has the right to file a CASPA.

Finding 11-33: DLSE is not always sending an opening letter to the parties in discrimination cases.

Recommendation 11-33 (formerly 10-25): DLSE shall send an opening letter to the parties in discrimination cases.

Status: Completed—DLSE sends form RCI 4.1 and RCI 4.2 opening letters to the employee and employer respectively.

Finding 11-34: DLSE is not always sending a closing letter to the parties in discrimination cases.

Recommendation 11-34 (formerly 10-25): DLSE shall send a closing letter to the parties in discrimination cases. Letters to all parties must be sent certified, return receipt.

Status: Completed—DLSE sends form 9.2 case closed investigation letter to all parties.

Finding 12-11 (formerly 11-35): The RCI Manual discourages DLSE from accepting orally filed, faxed, and emailed 6310 and 6311 discrimination complaints.

Recommendation 12-11 (formerly 11-35): DLSE shall amend the RCI Manual to allow Whistleblower complainants to file 6310 and 6311 complaints orally, by fax, and by email.

Status: Open—The RCI Manual has not been amended.

Finding 12-12 (formerly 11-36): DLSE is not closing all cases in IMIS that have closed. As a result, IMIS does not reflect the number of discrimination cases DLSE actually closed in FY 2011 and hundreds of likely closed cases have remained open in IMIS for years. DLSE also improperly coded some discrimination cases that DLSE did close in IMIS, recorded the wrong filing date in several cases, and did not accurately indicate the complainant's remedies in merit cases.

Recommendation 12-12 (formerly 11-36): DLSE shall properly close all closed discrimination cases, record the filing date as the date the complainant contacts DLSE, and indicate the complainant's remedies in merit cases. It is also recommended that (1) DLSE review all currently pending cases and close them out in IMIS as appropriate, (2) establish a procedure to appropriately close out all discrimination cases in IMIS once DLSE issues findings or a closing letter, and (3) ensure Senior Deputy Labor Commissioners and staff are trained in IMIS entry and closure to allow Senior Deputy Labor Commissioners the ability to review DLSE's IMIS data entry for accuracy and completeness.

Status: Corrective Action Completed-Awaiting Verification—Additional training is required to address properly closing out cases in IMIS. Federal OSHA has scheduled training for DLSE in March 2013.

Finding 11-37: DLSE is not opening all new cases in IMIS. As a result, IMIS does not reflect the number of discrimination cases DLSE actually opened in FY 2011.

Recommendation 11-37: DLSE shall open all new discrimination cases filed in IMIS.

Status: **Completed**—DLSE is opening cases in IMIS.

Finding 12-13 (formerly 11-38): DLSE does not input, track, or document administratively closed discrimination cases in IMIS.

Recommendation 12-13 (formerly 11-38): DLSE shall input, track, and document administratively closed discrimination cases in IMIS.

Status: **Corrective Action Completed-Awaiting Verification**—DLSE is having issues with closing cases in IMIS. Some cases can be closed in IMIS, but not always. Training is scheduled for March 14, 2013.

Finding 11-39: Of the 128 whistleblower (WB) investigations, 96% were not completed within the 90-day period as required.

Recommendation 11-39: Ensure whistleblower investigations are completed within 90 days.

Status: **Closed**-Per Policy Decision.

Finding 12-14 (formerly 11-40): DLSE investigators and Senior Deputy Labor Commissioners need formal basic training for investigating 6310 and 6311 whistleblower retaliation complaints.

Recommendation 12-14 (formerly 11-40): DLSE investigators and Senior Deputy Labor Commissioners shall attend Federal OSHA's 1420 Basic Whistleblower Investigations course.

Status: **Open**—DLSE Investigators cannot travel out of state and therefore have not attended the OSHA 1420 course. DLSE will either put on an equivalent course or bring the OSHA 1420 Basic Whistleblower Investigation course to the State.

Finding 11-41: Case file workload does not appear to be managed in a manner to ensure the most expedited issuance of citations. The "first in-first out" case file management system being used seems to negatively affect this rate.

Recommendation 11-41: Monitor Cal/OSHA policies and procedures to assist in lowering the citation lapse time such as completing less complicated cases before the completion of cases requiring extensive research and development, where appropriate.

Status: **Observation 12-02**—Cal/OSHA's citation lapse time has increased over the past three years. This finding will be reviewed during an onsite visit in FY 2013.

Finding 12-05 (formerly 10-9/11-42): When determining Repeat Violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).

Recommendation 12-05 (formerly 11-42): Consider employer history statewide when citing repeat violations.

Status: **Open**—Cal/OSHA is aware of this issue and discussions have taken place.

IV. Assessment of FY 2012 State Performance of Mandated Activities

A. Enforcement

- **Complaints:**

SAMM 1 may not be a “true” reflection of Cal/OSHA’s response time since this measure does not separate response to serious and other-than-serious complaints but uses one response time for all complaints. Cal/OSHA has either 3 working days or 14 calendar days to respond to a serious or other-than-serious complaint respectively. SAMM 1 includes response time for serious and other-than-serious complaint time which may not truly reflect Cal/OSHA’s response

To determine the “true” rate of response time, Cal/OSHA will be running IMIS data at least annually to determine their “true” response time for serious and other-than-serious complaints (Table 1 and 2).

Table 1
Complaints (SAMM 1, 2, 3)

	FY 2010	FY 2011	FY 2012	Goal
Days to Initiate Inspection (SAMM 1)	23.04 days	18.65 days	14.93 days	3 days
Days to Initiate Investigation (SAMM 2)	10.59 days	6.72 days	8.27days	14 days
Complainants Notified Timely (SAMM 3)	98.84%	99.13%	99.69%	100%

Finding 12-01 (formerly 11-01)—Complaint investigations were not being initiated within three working days for serious hazards or fourteen calendar days for other-than-serious complaints in 6% of case files reviewed.

Recommendation 12-01: An opening conference shall be held within three working days for serious complaints and 14 calendar days for other-than-serious complaints.

In the previous year’s FAME, Federal OSHA conducted a records review of complaint inspections and inquiries in three District Offices. The results from that records review is described as Finding 11-02. FY 2012 IMIS data indicated 16 complainants were not notified. This information was sent to Cal/OSHA for an explanation. Cal/OSHA indicated some CSHOs were out on medical leave which resulted in the letters not being sent to the complainants. In FY 2013, this will be looked at during a records review.

Observation 12-01 (formerly 11-02): In 37 of the 268 cases reviewed, a response letter was not always sent to the complainant for complaint inspections or inquiries.

Recommendation 12-01: Response letters shall be sent to complainants who provide a complete address after complaint inspections or inquiries are completed.

• **Fatalities / Imminent Danger**

Section 342, requires every employer to report any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. Cal/OSHA receives work and non-work related fatality reports. Once notified, Cal/OSHA must respond to work-related fatalities within one day. An IMIS data for FY 2012 indicated twelve fatalities were not responded within one day. Cal/OSHA was notified of this information and provided an explanation. Cal/OSHA indicated one fatality was not responded within one day due to staff unavailability. The remaining eleven cases were due to coding errors inputted by the District Offices. These coding errors have been corrected.

**Table 2
Imminent Danger (SAMM 4)**

	FY 2010	FY 2011	FY 2012	Goal
Percent Responded to Within One Day	98.90%	100%	99.52%	100%

During CY 2011, a records review of three District Offices discovered that final letters to the next of kin were not mailed in accordance with Cal/OSHA’s P&P C-170. To verify that letters are being sent to the next of kin, a records review will be conducted in FY 2013.

Finding 12-02 (formerly 11-05 and 10-03): One of two case files reviewed, a final letter, indicating the results of the investigation, was not mailed to the next of kin.

Recommendation 12-02: Final letters shall be sent to the next of kin after completion of the investigation.

• **Targeting and Programmed Inspections**

Cal/OSHA conducted 1,960 programmed inspections. 374 inspections were coded “no inspections” due to out of business, inactive, etc. These “no inspections” are calculated into the percent programmed inspections with S/W/R violations, and could be contributing to the low rate, (Table 3).

Mining and Tunneling did 313 programmed inspections. Six inspections had serious violations. Cal/OSHA needs to review their scheduling of mining and tunneling inspections since the majority of inspections are not finding any serious hazards.

Issues contributing to this low rate are being explored. The targeting lists used by the state include incorrect data entry. In FY 2012, there were 1,960 programmed planned inspections of which 374 were not inspected because the establishments were inactive, out of business, etc. On-site inspections of tower cranes to check for health and safety operations are conducted to issue “permits” required by California statutes. These inspections are being coded as programmed inspections. Inspections done for permitting reasons are not OSHA related inspections and should not be entered into the OSHA data system. By eliminating these inspections and securing current lists for establishments, Cal/OSHA can obtain a “true” percent of programmed inspections with serious, willful or repeat violations.

**Table 3
Percent Programmed Inspections with S/W/R Violations (SAMM 8)**

	FY 2010	FY 2011	FY 2012	FY 2012 National Data (3 years)
Safety	25.15%	20.73%	20.86%	58.5%
Health	9.04%	6.21%	8.33%	53.0%

Finding 12-03 (formerly 11-07 and 10-07): The percent of programmed inspections with serious, willful or repeat violation is significantly lower than the National average.

Recommendation 12-03: Improve targeting of programmed inspections to reach high hazard workplaces.

• **Citations and Penalties**

Cal/OSHA’s citation lapse time for safety and health inspections has steadily increased and was a finding in the FY 2011 FAME. Cal/OSHA attributes the citation lapse time on AB 2774. On January 1, 2011, AB 2774 changed the definition of serious violations in Labor Code 6432. Labor Code 6432 requires Cal/OSHA to send to the employer, not less than 15 days prior to issuing a serious citation, a form containing the alleged violation which they intend to cite serious. The waiting period between notifying the employer and awaiting the employer’s response can increase the citation lapse time (Table 4). This issue will be reviewed during an onsite visit in FY 2013.

Observation 12-02 (Formerly 11-41): Case file workload does not appear to be managed in a manner to ensure the most expedited issuance of citations. The “first in-first out” case file management system being used seems to negatively affect this rate.

Recommendation 11-41: Monitor Cal/OSHA policies and procedures to assist in lowering the citation lapse time such as completing less complicated cases before the completion of cases requiring extensive research and development, where appropriate.

**Table 4
Citation Lapse Time (SAMM 7)**

	FY 2010	FY 2011	FY 2012	FY 2012 National Data
Safety	70.60 days	76.15 days	85.77 days	55.9 days
Health	79.09 days	80.77 days	97.35 days	67.9 days

The average number of S/W/R violations per inspection was 0.59. In FY 2012, Cal/OSHA conducted 2,958 complaint inspections which may or may not involve serious hazards. Further data analysis will be done to determine if complaint inspections are lowering the average number of S/W/R per inspection, (Table 5).

Cal/OSHA contributes their low serious rate to their high penalty structure, but there is no data to support this conclusion. Cal/OSHA can assess \$ 7,000, \$ 25,000, and \$70,000 for a General, Serious, and Repeat violations, respectively. Federal OSHA can assess \$7,000 for both an Other than Serious and Serious violations. \$70,000 can be assessed for a Repeat violation by Federal OSHA. Another issue involving the low serious rate is employers tend to contest serious citations to either reduce the classification, lower the penalty, or both.

**Table 5
Average Violations per Inspection with Violations (SAMM 9)**

	FY 2010	FY 2011	FY 2012	FY 2012 National Data (3 years)
S/W/R	0.68	0.55	0.59	2.1
Other	2.61	2.71	2.67	1.2

In FY 2012, the average initial penalty for California was \$7,074.59 which exceeds the National

average of \$1,990.50 (Table 6). Despite the difference in classification, California does a very good job of maintaining their penalties through settlements.

Table 6
Average Initial Penalty per Serious Violations (SAMM 10)

	FY 2010	FY 2011	FY 2012	FY 2012 National Data (3 years)
	\$5712.43	\$6390.04	\$7074.59	\$1990.5

AB 2774 changed the definition of a serious violation. In accordance with their action plan, Cal/OSHA was to change the definition of a serious violation in P&PC-1B, but has not.

Finding 12-04 (formerly 11-08 and 10-08): Cal/OSHA’s policy on classifying violations does not ensure violations that would be considered “Serious” under the Federal Field Operations Manual (FOM) are classified as Serious.

Recommendation 12-04: Cal/OSHA needs to incorporate the new definition of a serious violation into their policy and procedures manual.

Cal/OSHA’s repeat violation policy does not consider the employer’s enforcement history statewide, except for the Field Sanitation Standard. Cal/OSHA recognizes the difference between Federal OSHA’s repeat policy and the State’s policy. Federal OSHA will work with Cal/OSHA to amend the State’s repeat policy.

Finding 12-05 (formerly 10-9/11-42): When determining Repeat Violations, Cal/OSHA does not consider the employer’s enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA’s policies and procedures C-1B, page 14).

Recommendation 12-05: Consider employer history statewide when citing repeat violations.

• Abatement

The SAMM report indicated that Cal/OSHA failed to verify 41 violations as abated within the abatement date plus 30 calendar days. Verification of hazards in the private sector has steadily improved from FY 2010 – FY 2012. There is a steady decline in verifying hazards in the public sector (Table 8). An IMIS data scan was run after the SAMM report and found 37 violations which were not abated within the specified time period. Cal/OSHA has provided data indicating these 37 violations were abated.

Table 8
S/W/R Violations Verified (SAMM 6)

	FY 2010	FY 2011	FY 2012	Goal
Private Sector	84.38%	92.93%	94.90%	100%
Public Sector	100%	93.33%	81.25%	100%

• Employee and Union Involvement

When conducting inspections, if a Union is present, the Compliance Officer must notify the Union of the inspection. The Compliance Officer will hold opening and closing conferences with the Union, either jointly with management or separately. Employees also have the right to

be involved in the inspection. Issues with Union involvement were discovered in three case file during a records review. Cal/OSHA has re-emphasized the requirement to document efforts and completed training of their Managers and Compliance Officers on this issue.

In CY 2011 a records review of three District Offices was conducted. The records review discovered the Union was not always involved in the opening conference during an inspection or their involvement was not properly documented. In FY 2013, a records review will be conducted to verify if Compliance Officers are notifying and involving the Union, when one is present, during their inspections.

Finding 12-06 (formerly 11-11 and 10-10): In three of the case files reviewed, the Union was present at the work site but was not involved in the opening conference and in three cases, union involvement was not properly documented.

Recommendation 12-06: An opening conference shall be held with the Union either jointly with the employer or separately, and properly documented.

B. Review Procedures

• **Informal Conferences**

If the employer does not file an appeal with the Occupational Safety and Health Board (OSHAB), Cal/OSHA will try to conduct an informal conference within 10 working days following the issuance of the citation. If the informal conference cannot be held within 10 working days, the reasons for this shall be documented in the case file, and an informal conference will be held at Cal/OSHA’s and the employer’s earliest opportunity. If an appeal is filed with OSHAB, Cal/OSHA can conduct an informal conference up to the day of the appeal hearing.

The days between contest date and the first level decision were 353.97 days almost twice as long as the National average of 187 days. This could be attributed to Cal/OSHA’s informal conference proceedings, which allows the employer to continue with the conference up until the hearing date. The contested lapse time could also reflect the employer’s unwillingness to settle the case at an informal conference (Table 7).

**Table 7
Contested Case Lapse Time (SAMM 12)**

	FY 2010	FY 2011	FY 2012	FY 2012 National Data (3 years)
	315.31 days	321.92 days	353.97 days	187 days

As indicated by the State Indicator Report (SIR), Cal/OSHA had fewer violations vacated (1.2% versus Federal OSHA’s 7.1%) and fewer violations reclassified (0.5% versus Federal OSHA’s 4.9%).

• **Formal Review of Citations**

An employer has 15 working days to file an appeal with the Appeals Board. The Appeals Board may accept an appeal after the 15 working days if the employer can show good cause. Good cause means circumstances beyond one’s control which could not have been reasonably anticipated. An employer may withdraw and terminate the appeals proceedings.

At least 30 days prior to the hearing, OSHAB will send out a notice of hearing to the parties involved. The employer is responsible for notifying employees of the pending hearing by posting the notice near the site of the alleged violation, in a conspicuous place, or where the employees report or carry out their duties. The Administrative Law Judge will file a written determination within 35 days after the hearing. Any party to an appeal has the right to petition the Appeals Board to reconsider an order or decision of an Administrative Law Judge. Any party to an appeal who disagrees with a decision after reconsideration or the denial of a petition for reconsideration may apply to the California Superior Court for a writ of mandate pursuant to the Code of Civil Procedure section 1094.5.

The Appeals Board consists of three members appoint by the Governor for staggered four-year terms. One member is selected from the field of management, one from the field of labor, and one from the general public. The chairman is selected by and serves the Governor. OSHAB vacated 13.8% of violations versus 22.5% (Federal). OSHAB reclassified 7.9% of violations versus 12.4% (Federal).

C. Standards and Federal Program Changes Adoption

• Standards Adoption

Table 9 lists the FY 2012 Standards on the Automated Tracking System:

Table 9

Standard:	State Response Date:	Intent to Adopt:	Adopt Identical:	Adoption Due Date:	State Adoption Date:
29 CFR 1910.102 Revising Standards Reference in the Acetylene Standard (03/08/2012)	01/31/2012	No – adopt is not required.	N/A	N/A	N/A
29 CFR 1910, 1915, 1917, 1918, 1926 Hazard Communication-Globally Harmonized System of Classification (03/26/2012)	05/01/2012	Yes	Yes	09/26/2012	Pending

Cal/OSHA is working with the Standards Board on the Globally Harmonized System (GHS). The GHS Standard was heard by the Standards Board on November 15, 2012. The Standards Board returned the proposed regulation to Cal/OSHA after receiving comments from the public.

Cal/OSHA’s Personal Protective Equipment Regulation, Title 8, Article 10 requires employers to pay for required personal protective equipment and has been upheld by OSHAB. However, Cal/OSHA needs to update their P&P C-6. In P&P C-6, there is a sentence stating “An Order to take Special Action may be issued to require the employer to pay for safety devices which are required for employees pursuant to applicable Safety Order”. Cal/OSHA needs to remove this sentence as stated in their Corrective Action Plan.

Finding 12-07 (formerly 11-15): The Employer Payment for Personal Protection Equipment

issue has not been resolved.

Recommendation 12-07: OSHSB needs to resolve the issue regarding Employer Payment for Personal Protective Equipment.

• **Federal Program/State Initiated Changes**

Table 10 lists the FY 2012 Federal Program Changes (FPCs) as well as the outstanding FPCs from previous fiscal periods on the Automated Tracking System (ATS):

Table 10

FPC Directive/Subject:	State Response Date:	Intent to Adopt:	Adopt Identical:	Adoption Due Date:	State Adoption Date:
CPL 02-00-148 Field Operations Manual (03/26/2009)	06/04/2009	Yes	No	09/26/2009	04/22/2010 – pending revised FOM per Federal OSHA’s comments to original submission.
CPL 02-00-148 Revisions to FOM November 2009 (11/09/2009)	04/22/2010	Yes	No	05/09/2010	Pending
CPL 02-00-150 Revisions to Field Operations Manual - April 2011 (04/22/2011)					
CPL 02-01-051 2011 443 Confined Spaces in Shipyards (05/20/2011)					
CPL 02-01-053 2012 482 Compliance Policy for Manufacture, Storage, Sale, Handling, Use, and Display of Pyrotechnics (10/27/2011)	03/06/2012	No	N/A	N/A	N/A
CPL 03-00-014 2012 483 National Emphasis Program-PSM Covered Chemical Facilities (11/29/2011)	03/06/2012	No	N/A	N/A	N/A
CPL 03-00-016 2012 484 Nursing Home NEP (04/05/2012)	3/28/2013	No	N/A	N/A	N/A
CPL 03-00-153 2012 504 Communicating OSHA Fatality Inspection Procedures to a Victim’s Family (04/17/2012)	3/28/2013	No	N/A	N/A	N/A
CPL 02-00-154-2012 524 Longshoring and Marine Terminals Tool Shed Directive (07/31/2012)	3/28/2013	No	N/A	N/A	N/A
CPL 02-03-004 2012 544 Section 11(c) Appeals (09/12/2012)	1/1/2013	Yes			

Federal OSHA is still awaiting the State’s response on seven FPCs. As discussed in 12-07

(formerly 11-16), this is an ongoing issue in which Cal/OSHA continues to be late in responding to FPCs.

Finding 12-08 (formerly 11-16): Cal/OSHA has been late in responding to 6 out of 13 Federal Program Changes and did not respond to 3 out of 13 Federal Program Changes.

Recommendation 12-08: Cal/OSHA needs to respond by the due date to all Federal Program Changes.

Table 11 shows there were 20 State Initiated Changes in FY 2012: These supplements were provided within 60 days from the date of adoption.

Table 11

Rulemaking	Public Hearing Date	Effective Date
Vehicle Exhaust Retrofits	February 17, 2011	March 2, 2012
Airborne Contaminants	April 21, 2011	March 17, 2012
Fixed Ladders and Steps for Telecommunication Towers & Poles	June 16, 2011	October 6, 2011
Ventilation Inside Shafts, Culverts and Pipelines	August 18, 2011	May 31, 2012
Use of Portable Step Ladders	October 20, 2011	January 28, 2012
Portable Ladders-Frequency of Inspections	October 20, 2011	Proposal Withdrawn
Definition of General Purpose Die	October 20, 2011	February 4, 2012
Diesel Engine Runaway Protection	November 17, 2011	November 30, 2012
Single-Rail Ladders	December 15, 2011	March 9, 2012
Helicopter Fueling	December 15, 2011	March 24, 2012
Ladderway Openings	February 16, 2012	Proposal Withdrawn
Tree Work Maintenance or Removal	March 15, 2012	October 25, 2012
Guarding of Microtomes	April 19, 2012	September 6, 2012
First Aid for Electrical Workers-Application & Scope	June 21, 2012	October 5, 2012
Cranes & Derricks in Construction (Clean-Up)	June 21, 2012	November 1, 2012
Use of Forklift Trucks and Excavators for Hoisting Loads	July 19, 2012	November 22, 2012
Definitions for Woodworking Machines and Equipment	July 19, 2012	November 1, 2012
Machinery and Equipment Used and Operated	August 16, 2012	Proposal Withdrawn
Fueling of Helicopters Used in Logging Operations	August 16, 2012	November 17, 2012
Work Area Control (Crane Swing Radius Hazards)	September 20, 2012	April 1, 2013

The Bakery Oven Standard was passed in May 2009. Federal OSHA has written to the Standards Board providing rational on the reasoning why this standard may not be as effective as the Federal standard. The Standards Board responded to Federal OSHA stating their rational on the reasoning why the State’s standard is just as effective as the federal standard. Discussions between the Standards Board and Federal OSHA have been on-going in trying to resolve this difference.

Finding 12-09 (formerly 11-17 and 10-23): State-initiated rulemaking that promulgated a standard on Bakery Ovens was deemed not to be at least as effective as Federal OSHA standards.

Recommendation 12-09: Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.

D. Variances

OSHSB grants or denies applications for variances from standards and responds to petitions for new or revised standards. Any employer may apply for a permanent variance upon showing an alternate program, method, practice, means, device, or process which will provide equal or superior safety for employees. Sixteen variances were reviewed and 4 were granted (Table 12).

Table 12

File Number	Applicant Company Name	Docketing Date	Safety Order	Section	Subject	Decision
11-V-148	Guardmark, LLC	11/1/2011	General Industry	3364	Employee access to restroom facilities	Granted 7/19/2012
11-V-149	Haunted Head Inc. dba Haunted Head Saloon	11/3/2011	General Industry	3272(b)	Walkways, width	Withdrawn 1/03/2012
11-V-151	San Diego Fire-Rescue Department	11/9/2011	General Industry	5199(g)(3)(B)	Use of N-100 in lieu of P-100 masks	Granted 5/17/2012
11-V-152	Grimmway Enterprises, Inc.	11/10/2011	General Industry	3441(a)(2)(B)	Personnel Platform for transporting employees	Postponed, received temporary 1 yr variance from DOSH
11-V-179	Rural Metro Ambulance	12/13/2011	General Industry	5199(g)(3)(B)	Use of N-100 in lieu of P-100 masks	Granted 5/17/2012
12-V-007	Waste Management of California	2/1/2012	General Industry	3700, 3702, and 4344	Dual Drive refuse collection vehicles	Dismissed 11/14/2012 application withdrawn
12-V-008	Waste Management Collection and Recycling, Inc.	2/1/2012	General Industry	3700, 3702, and 4344	Dual Drive refuse collection vehicles	Dismissed 11/14/2012 application withdrawn
12-V-009	Modesto Garbage Co., Inc.	2/1/2012	General Industry	3700, 3702, and 4344	Dual Drive refuse collection vehicles	Dismissed 11/14/2012 application withdrawn
12-V-010	Western Waste Industries	2/1/2012	General Industry	3700, 3702, and 4344	Dual Drive refuse collection vehicles	Dismissed 11/14/2012 application withdrawn
12-V-011	USA Waste of California, Inc.	2/1/2012	General Industry	3700, 3702, and 4344	Dual Drive refuse collection vehicles	Dismissed 11/14/2012 application withdrawn
12-V-073	Anheuser-Bush LLC	4/26/2012	General Industry	3999(c)	"Duck Under" - employee passage under conveyors	Hearing scheduled 1/14/13 - continued to later date

12-V-078	Stanford University	5/16/2012	General Industry	5154.1(c)(2)(B)	Tracer Gas Test procedures, Lab Fume Hoods	Granted 10/18/2012
12-V-158	MAG Instrument, Inc.	8/15/2012	General Industry	3328(d)	Machinery and Equipment - anchored	Withdrawn 9/24/2012
12-V-162	Barnard Impregilo Healy Joint Venture	8/20/2012	General Industry	6090(d)	Decompression - tunnel excavation	Need DOSH Report
12-V-163	Michels/JayDee/ Coluccio Joint Venture	8/22/2012	General Industry	6090(d)	Decompression - tunnel excavation	Withdrawn, Dismissed 1/14/2013
12-V-167	HL Power Co.	8/28/2012	Boiler and Fired PV SO	765	Use of Electric feedwater pump in lieu of steam driven pump	Withdrawn. Dismissed 1/8/13

E. Public Employee Program

Cal/OSHA conducted 520 inspections of public sector establishments. The FY 2012 project goal was to conduct 185 public sector establishments. Public sector establishments are local or state government entities and are treated in the same manner as the private sector. Local and state government entities are subject to monetary penalties. In FY 2012, 67 serious, one willful, and 502 other-than-serious violations were written to government agencies.

6.85% of inspections were in the public sector, which is similar to the National average of 7.0% (Table 13).

**Table 13
Percent of Total Inspections in Public Sector (SAMM 11)**

	FY 2010	FY 2011	FY 2012	FY 2012 State Average (3 years)
	6.88%	6.85%	6.85%	7.0%

F. Discrimination Program

Discrimination cases are handled by the Division of Labor Standards Enforcement (DLSE). DLSE is located in the Labor Commissioner’s Office. DLSE completed 18 cases of 101 cases within the 90 day timeframe. Thirty-one percent (31%) cases were meritorious as compared to the national average of 23% and 75% as compared to the national average of 89% were settled (Table 14). The timeframe for completing an investigation is extensive, but the meritorious rate is very good. Settled cases are somewhat below the national average. Findings and recommendations are listed in the Corrective Action Plan (CAP) (Appendix C).

One DLSE Investigator is not documenting notes or updating files in their Case Management System (CMS). DLSE has reminded this person to document and update files in CMS.

Finding 12-10 (formerly 11-24 and 10-26): DLSE was not documenting their discrimination case files to support their findings in all cases, including failing to include notes of interviews and closing conferences conducted.

Recommendation 12-10: Investigators shall document the discrimination case file to support their findings, including, but not limited to, notes of interviews and closing conferences.

In FY 2011, a finding noted that DLSE was discouraged from accepting complaints filed orally,

by fax, or by e-mail. The RCI Manual has not yet been amended.

Finding 12-11 (formerly 11-35): The RCI Manual discourages DLSE from accepting orally filed, faxed, and emailed 6310 and 6311 discrimination complaints.

Recommendation 12-11: DLSE shall amend the RCI Manual to allow Whistleblower complainants to file 6310 and 6311 complaints orally, by fax, and by email.

The FY 2011 FAME report also noted that DLSE was not closing cases in IMIS. In addition, cases were not being input, tracked or documented as administratively closed. To resolve this issue, DLSE requested IMIS training for their Investigators from Federal OSHA. The training was provided to DLSE in March 2013 and this issue will continue to be monitored in FY 2013.

Finding 12-12 (formerly 11-36): DLSE is not closing all cases in IMIS that have closed. As a result, IMIS does not reflect the number of discrimination cases DLSE actually closed in FY 2011 and hundreds of likely closed cases have remained open in IMIS for years. DLSE also improperly coded some discrimination cases that DLSE did close in IMIS, recorded the wrong filing date in several cases, and did not accurately indicate the complainant’s remedies in merit cases.

Recommendation 12-12: DLSE shall properly close all closed discrimination cases, record the filing date as the date the complainant contacts DLSE, and indicate the complainant’s remedies in merit cases. It is also recommended that (1) DLSE review all currently pending cases and close them out in IMIS as appropriate, (2) establish a procedure to appropriately close out all discrimination cases in IMIS once DLSE issues findings or a closing letter, and (3) ensure Senior Deputy Labor Commissioners and staff are trained in IMIS entry and closure to allow Senior Deputy Labor Commissioners the ability to review DLSE’s IMIS data entry for accuracy and completeness.

Finding 12-13 (formerly 11-38): DLSE does not input, track, or document administratively closed discrimination cases in IMIS.

Recommendation 12-13: DLSE shall input, track, and document administratively closed discrimination cases in IMIS.

DLSE Investigators and Senior Deputy Labor Commissioners cannot travel out of state to receive the OSHA 1420 Basic Whistleblower Investigation course. To resolve this problem, DLSE will either put on an equivalent course or bring the OSHA 1420 Basic Whistleblower Investigation course to the State.

Finding 12-14 (formerly 11-40): DLSE investigators and Senior Deputy Labor Commissioners need formal basic training for investigating 6310 and 6311 whistleblower retaliation complaints.

Recommendation 12-14: DLSE investigators and Senior Deputy Labor Commissioners shall attend Federal OSHA’s 1420 Basic Whistleblower Investigations course.

Table 14
11(c) Investigations (SAMM 13, 14, 15)

	FY 2010	FY 2011	FY 2012	FY 2012 National Average (3 years)

Completed Within 90 days (SAMM 13)	1.89%	0%	17.82%	100%
Merit Cases (SAMM 14)	6.60%	5.88%	31.68%	23.4%
Merit Cases Settled (SAMM 15)	57.14	0%	75.00%	89.2%

G. Voluntary Compliance Program

The VPP Manager is assisted by three Associate Safety Engineers. At the end of FY 2012, there were 93 VPP sites enrolled in the program. The FY 2012 projected goal was to have 88 VPP sites. Cal/OSHA has done exceedingly well in this area.

The Cal/OSHA’s Voluntary Compliance Program uses Special Team Members (STM). STMs are qualified candidates from the California VPP Star sites, who are invited to participate as Team Members in the Cal/VPP onsite evaluations and pre-visit processes. STMs are only qualified to join VPP Teams in California versus Federal OSHA’s Special Government Employees (SGEs), who may assist VPP teams nationally.

In the Public Sector, the Consultation Program did 29 visits in FY 2012, exceeding their projected goal of 25 visits. 28 visits were to high hazard establishments. One hundred percent of serious hazards were verified corrected.

H. Program Administration

Cal/OSHA’s current benchmark for safety and health compliance officers is 334 safety and 471 health inspectors. At the end of FY 2012, Cal/OSHA had approximately 186 compliance staff that spent their time in direct program activities conducting inspections which is a substantial difference from the benchmark. While Cal/OSHA currently runs their program under an Operational Status Agreement, final 18(e) approval under the Act cannot be attained without meeting the benchmarks. More importantly, the average number of inspections conducted by the current staff is well below the federal average. In the FY 2012 grant application, there were 222 authorized positions for compliance staff that spent time in direct program activities conducting inspections. This includes Associate Safety Engineers, Associate Industrial Hygienists, Assistant Safety Engineers and Technicians. In August, 2012, 186 of these positions were filled which is a difference of 36 or approximately 16%. However, 94% of the grant and 100% of the federal funds were expended.

Finding 12-15: Sixteen percent of staffing positions funded by the FY 2012 Grant were vacant.

Recommendation 12-15: Fill staffing positions prior to the end of the grant year and ensure a staffing plan is developed to continue to meet future positions authorized and funded by Federal OSHA in the annual grant.

Quarterly meetings are held with Cal/OSHA. A mutual time is chosen and both parties submit issues to be discussed. Issues discussed in past quarterly meetings include Fall Protection, Serious violation rates, marine and construction on military bases, and the Severe Violator Enforcement Program. The quarterly meeting is held with the Deputy Chief of Enforcement.

V. State Progress in Achieving Annual Performance Goals

5-Year Strategic Goal 1: Improve workplace safety and health for all workers through direct intervention methods that result in fewer hazards, reduced exposures, and fewer injuries,

illnesses, and fatalities.

Performance Goal 1.1: To reduce fatalities and occupational injuries and illnesses in construction and agriculture by reducing and eliminating hazards in this industry.

Results: Cal/OSHA met its goal of conducting 3,000 combined inspections in the construction and agriculture industries. Cal/OSHA Enforcement conducted 2,075 construction and 1,062 agriculture inspections.

Outcome: Cal/OSHA's measure was to decrease fatalities in construction and agriculture by 2% when compared to the average of the previous three years, 2008 – 2010. The average number of fatalities was 56 and 45 for construction and agriculture respectively. Cal/OSHA did achieve its goal of reducing fatalities by 2% when compared to the average of the previous three years. California did not see a large increase in fatalities in construction and agriculture in CY 2011. Inspections ensure employers comply with Cal/OSHA's standards and provide awareness and understanding of these regulations which could explain the rationale behind the fatality rate remaining steady.

Chart 1

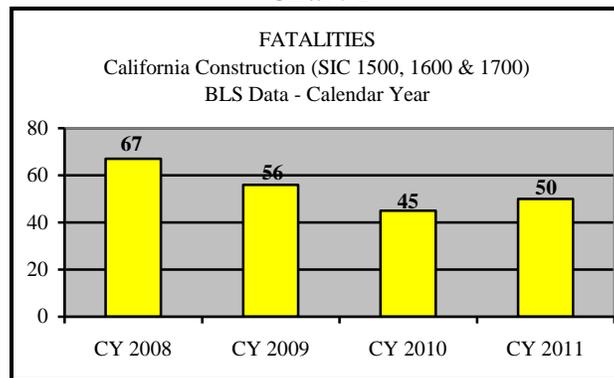
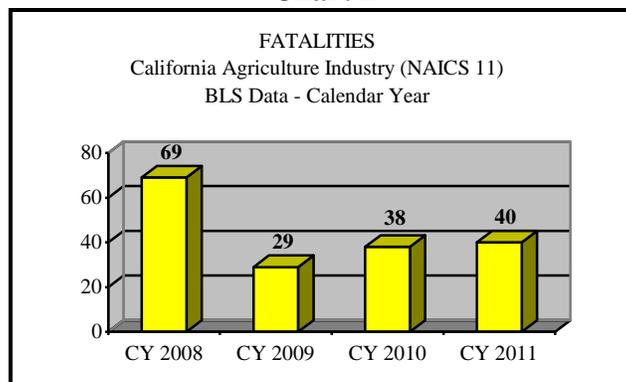


Chart 2



Performance Goal 1.2: To reduce injuries, illnesses and fatalities in selected high hazard industries with a goal of removing the industry from the High Hazard List due to decreased injury and illness rates.

Results: Cal/OSHA's goal was to conduct 400 inspections in the high hazard industries. Cal/OSHA's High Hazard Units conducted 447 inspections in the high hazard industries which met its goal of conducting 400 inspections as verified by an IMIS scan for FY 2012. Also, 1,004 inspections were conducted in the High Hazard North American Industry Classification System

(NAICS codes for FY 2012 as verified by an IMIS scan.

Outcome: The outcome measure was to ensure 95% verified abatement of non-contested serious hazards. As reported by the State, Cal/OSHA verified 97% of non-contested serious hazards abated as verified by an IMIS detailed scan and achieved their goal.

Performance Goal 1.3: Reduce the rate of injuries and illnesses in PSM industries.

Results: Cal/OSHA conducted 62 Program Quality Verification (PQV) inspections at petroleum refineries and other facilities that meet the trigger threshold quantities for the PSM standard. Cal/OSHA's goal was to conduct 25 PQV inspections. Cal/OSHA met its goal. Cal/OSHA conducted eight outreach/compliance assistance activities to industry/professional groups. Cal/OSHA's goal was to participate in eight outreach /compliance assistance activities.

Outcome: Cal/OSHA's primary measure was to verify 95% abatement of non-contested serious hazards. Cal/OSHA verified 100% on non-contested serious, willful, and repeat hazards as verified by an IMIS scan.

5-Year Strategic Goal 2: Promote workplace cultures that increase employee and employer awareness of, commitment to, and involvement in safety and health.

Performance Goal 2.1: DOSH will focus heat illness prevention efforts in the construction, agricultural, and other outdoor industries through training, outreach, development, and promotion.

Results: Cal/OSHA's goal was to collaborate with agricultural, construction, landscaping, and other related stakeholders to increase compliance at these worksites by conducting 3,000 inspections. Cal/OSHA conducted 3,137 inspections (2,075 and 1,062 inspections in construction and agricultural industries) of which 2,835 construction and agricultural inspections addressed heat illness prevention. Cal/OSHA met its goal. Cal/OSHA Compliance Assistance conducted over 60 seminars emphasizing heat illness. The Enforcement staff participated in an additional 180 outreach events where heat illness prevention was addressed. The goal of providing a minimum of 10 seminars was exceeded.

Outcome: Cal/OSHA's outcome measure was to decrease fatalities in construction and agriculture by 2% when compared to the average of the previous three years 2008-2010. The average number of fatalities was 56 and 45 for construction and agriculture respectively. Cal/OSHA did achieve its goal of reducing fatalities by 2% when compared to the average of the previous three years. California did not see a large increase in fatalities in construction and agriculture in CY 2011.

Performance Goal 2.2: To improve communication with and education to high-risk, non-English employee populations regarding workplace safety and health rights, responsibilities, and hazards.

Results: Cal/OSHA's goal was to distribute over 15,000 publication and flyers in English and other languages. Cal/OSHA distributed over 15,000 publication and flyers at outreach activities. These publication and/or flyers were in Spanish, Hmong, and Punjabi languages. The Consultation Research and Education had a goal of developing and updating 10 educational materials. Twelve publications were developed or updated. Consultation met its goal. Cal/OSHA's goal was to distribute over 5,000 hard copies and several thousand electronic Spanish publication copies. Cal/OSHA distributed over 5,000 hard copies of publications in other languages.

Outcome: Distributing publications in the person's native language will improve their understanding of the requirements. However, Cal/OSHA should consider holding classes on their requirements which could provide a greater understanding of their standards.

Performance Goal 2.3: To identify new partnerships and renew existing partnerships into the California Voluntary Protection Program (Cal/VPP) and/or Cal/VPP for Construction.

Results: One new VPP site was added to the fixed-site leadership level and 20 sites were renewed. In construction, two new Cal/VPP sites were added and four sites were renewed. Lastly, Cal/OSHA held two workshops to promote VPP. Cal/OSHA met its goal of adding new sites to their VPP program and conducting workshops. However, the goal of renewing five construction sites was not met. Cal/OSHA fell short by one for establishment renewal.

Outcome: New partnerships were added and existing ones renewed. Cal/OSHA needs to continue to encourage establishments in becoming VPP sites. Cal/OSHA could publicize the benefits to employers on becoming a VPP site.

5-Year Strategic Goal 3: Secure public confidence and maximize Cal/OSHA's capabilities by improving the effectiveness and efficiency of Cal/OSHA's programs and services.

Performance Goal 3.1: Reduce the time from opening conference to issuance of a citation on a statewide basis.

Results: Citation lapse time was 85.76 days and 97.41 days for safety and health inspections respectively according to the IMIS database. The citation lapse time increased in FY 2012. Cal/OSHA attributes the lapse time to AB 2774.

Outcome: This goal was not achieved. Cal/OSHA needs to reduce their lapse time. Reducing lapse time will reduce the time spent on writing reports and increase inspection rates. Cal/OSHA needs to explain how AB 2774 impacts their lapse time.

Performance Goal 3.2: Reduce statewide fatality investigation response time (fatality investigation response time is measured from the time the district office receives notification of the fatality to the date of opening conference).

Results: Cal/OSHA responded to 90% of work-related fatalities within one day in FY 2012.

Outcome: Cal/OSHA's goal was to improve their response time by 5%, using the FY 2010 data, (approximately 80% of fatality reports responded to within one day). This goal was achieved.

VI. Other Areas of Note

Complaint About State Program Administration (CASPA):

In FY 2012, three CASPAs were filed against Cal/OSHA involving the Port of Oakland, Southern California Edison, and the Griffith Company. In two of these CASPAs findings and recommendations were made to Cal/OSHA. Federal OSHA is still waiting for the State's response. No recommendation was made in one CASPA.

Two recommendations made to Cal/OSHA based on these complaints were: to follow their administrative policy when the complainant requests a copy of the taped interview, and to respond to complaints within their time frames (three working days for serious, and 14 calendar days for non-serious violations). One best practice: to email the complainant a response letter even though no mailing address was initially provided, was suggested.

High Hazard Employer Special Project:

Cal/OSHA's Process Safety Management (PSM) staff provided Federal OSHA 3300 Process Safety Management for the Petroleum Refining Industry to 25 Washington State compliance staff. The training consisted of dissecting the 13 elements of the Federal PSM standard. In April 2012, Cal/OSHA's PSM Training Team was again requested by Washington State OSHA to provide training on the Federal OSHA 3300 PSM course for the Chemical Industry.

The Mining and Tunneling Unit has continued to work cooperatively with the San Francisco Public Utilities (SF-PUC) Commission to help improve safety and their Bay Tunnel construction project. SF-PUC has participated in several focus meetings on the New Irvington Tunnel construction project. Lastly, the Mining and Tunneling Unit participated in meetings with the General Contractor, and Owner Representatives to discuss in detail personal and vehicle decontamination, foot and body protection, employee training, air monitoring and analysis, respiratory protection HEPA ventilated cabs, dust control and wetting, and medical evaluation for the Calaveras Dam Reconstruction Project.

Cal/OSHA has established working relationships with employers and government agencies to provide services ensuring that workers are protected from hazards. Cal/OSHA participated in the Labor Enforcement Task Force (LETF) to combat the underground economy. Underground economy refers to any business that deals in cash and/or uses other schemes to cover up its true tax liability from government licensing, regulatory, and taxing agencies. Cal/OSHA partnered with DLSE, the Employment Development Department, Contactor's State Licensing Board, California Department of Insurance, Board of Equalization, Bureau of Automotive Repair, and the State Attorney General.

Appendix A – New and Continued Findings and Recommendations
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Rec #	Findings	Recommendations	FY 11
12-01	Complaint investigations were not being initiated within three working days for serious hazards or fourteen calendar days for other-than-serious complaints in 6% of case files reviewed.	An opening conference shall be held within three working days for serious complaints and 14 calendar days for other-than-serious complaints. <i>Corrective Action Completed-Awaiting Verification</i>	11-01
12-02	One of two case files reviewed, a final letter, indicating the results of the investigation, was not mailed to the next of kin.	Final letters shall be sent to the next of kin after completion of the investigation. <i>Corrective Action Completed-Awaiting Verification</i>	11-05
12-03	The percent of programmed inspections with serious, willful or repeat violation is significantly lower than the National average.	Improve targeting of programmed inspections to reach high hazard workplaces.	11-07
12-04	Cal/OSHA's policy on classifying violations does not ensure violations that would be considered "Serious" under the Federal Field Operations Manual (FOM) are classified as Serious.	Cal/OSHA needs to incorporate the new definition of a serious violation into their policy and procedures manual.	11-08
12-05	When determining Repeat Violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).	Consider employer history statewide when citing repeat violations.	10-9 and 11-42
12-06	In three of the case files reviewed, the Union was present at the work site but was not involved in the opening conference and in three cases, union involvement was not properly documented.	An opening conference shall be held with the Union either jointly with the employer or separately, and properly documented. <i>Corrective Action Completed-Awaiting Verification</i>	11-11
12-07	The Employer Payment for Personal Protection Equipment issue has not been resolved.	OSHSB needs to resolve the issue regarding Employer Payment for Personal Protective Equipment.	11-15
12-08	Cal/OSHA has been late in responding to 6 out of 13 Federal Program Changes and did not respond to 3 out of 13 Federal Program Changes.	Cal/OSHA needs to respond by the due date to all Federal Program Changes.	11-16
12-09	State-initiated rulemaking that promulgated a standard on Bakery Ovens was deemed not to be at least as effective as Federal OSHA standards.	Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.	11-17

Rec #	Findings	Recommendations	FY 11
12-10	DLSE was not documenting their discrimination case files to support their findings in all cases, including failing to include notes of interviews and closing conferences conducted.	Investigators shall document the discrimination case file to support their findings, including, but not limited to, including notes of interviews and closing conferences.	11-24
12-11	The RCI Manual discourages DLSE from accepting orally filed, faxed, and emailed 6310 and 6311 discrimination complaints.	DLSE shall amend the RCI Manual to allow Whistleblower complainants to file 6310 and 6311 complaints orally, by fax, and by e-mail.	11-35
12-12	DLSE is not closing all cases in IMIS that have closed. As a result, IMIS does not reflect the number of discrimination cases DLSE actually closed in FY 2011 and hundreds of likely closed cases have remained open in IMIS for years. DLSE also improperly coded some discrimination cases that DLSE did close in IMIS, recorded the wrong filing date in several cases, and did not accurately indicate the complainant's remedies in merit cases.	DLSE shall properly close all closed discrimination cases, record the filing date as the date the complainant contacts DLSE, and indicate the complainant's remedies in merit cases. It is also recommended that (1) DLSE review all currently pending cases and close them out in IMIS as appropriate (2) establish a procedure to appropriately close out all discrimination cases in IMIS once DLSE issues findings or a closing letter, and (3) ensure Senior Deputy Labor Commissioners and staff are trained in IMIS entry and closure to allow Senior Deputy Labor Commissioners the ability to review DLSE's IMIS data entry for accuracy and completeness. <i>Corrective Action Completed-Awaiting Verification</i>	11-36
12-13	DLSE does not input, track, or document administratively closed discrimination cases in IMIS.	DLSE shall input, track, and document administratively closed discrimination cases in IMIS. <i>Corrective Action Completed-Awaiting Verification</i>	11-38
12-14	DLSE investigators and Senior Deputy Labor Commissioners need formal basic training for investigating 6310 and 6311 whistleblower retaliation complaints.	DLSE investigators and Senior Deputy Labor Commissions shall attend Federal OSHA's 1420 Basic Whistleblower Investigations course.	11-40
12-15	Sixteen percent of staffing positions funded by the FY 2012 Grant were vacant.	Fill staffing positions prior to the end of the grant year and ensure a staffing plan is developed to continue to meet future positions authorized and funded by Federal OSHA in the annual grant.	

Appendix B – Observations Subject to Continued Monitoring
 FY 2012 California State Plan Abridged FAME Report

Rec #	Observations	Federal Monitoring Plan	FY 11
12-01	In 37 of the 268 cases reviewed, a response letter was not always sent to the complainant for complaint inspections or inquiries.	To ensure that this item has been fully addressed, a spot check will be conducted at the end of FY 2013.	11-02
12-02	Case file workload does not appear to be managed in a manner to ensure the most expedited issuance of citations. The “first in-first out” case file management system being used seems to negatively affect this rate.	Monitor Cal/OSHA policies and procedures to assist in lowering the citation lapse time such as completing less complicated cases before the completion of cases requiring extensive research and development, where appropriate.	11-41

Appendix C – Status of FY 2011 Findings and Recommendations
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Rec. #	Findings	Recommendations	Cal/OSHA Corrective Action Plan	State Action Taken	Status
11-01 (formerly 10-01)	Complaint investigations were not being initiated within three working days for serious hazards or fourteen calendar days for other-than-serious complaints in 6% of case files reviewed.	An opening conference shall be held within three working days for serious complaints and 14 calendar days for other-than-serious complaints.	Cal/OSHA will strive to continue improving its performance in initiating complaint investigations in a timely fashion and decreasing the complaint response time. The average number of days from the receipt of a complaint to the opening conference decreased in FFY 2011 by 24% as compared to FFY 2009. Cal/OSHA will run Complaint Logs and Unsatisfied Activity reports on an ongoing basis to ensure these requirements are regularly being met.	Cal/OSHA will run reports to determine if complaints are being handled within the specified time periods as outlined in the Policy and Procedures Manual (P&P-C7). In FY 2012, there was a CASPA filed involving responding to complaints within the specified time period.	Awaiting Verification
11-02 (formerly 10-02)	In 37 of the 268 cases reviewed, a response letter was not always sent to the complainant for complaint inspections or inquiries.	Response letters shall be sent to complainants who provide a complete address after complaint inspections or inquiries are completed.	District and Regional Offices are reviewing IMIS reports monthly to ensure that the letters "g" and "h" are being sent and entered in IMIS, and training on this was provided to Managers. The appropriate SAMM Report will be reviewed by the IMIS Coordinators on a monthly basis with a goal of identifying and correcting outliers.	FY 2012 IMIS data indicated 16 cases where complainants not notified. Cal/OSHA was notified of the cases where the complainant was not notified. Cal/OSHA has reviewed the cases and submitted their response. In their response, Cal/OSHA has indicated letters to the complainants were mailed.	Observation
11-03 (formerly 10-13)	A diary sheet, or an equivalent activity summary sheet, was not used or was not updated	Diary sheets, or equivalent, shall be used for complaint inquiries and inspections.	Cal/OSHA's Policy and Procedures (P&P) do not require that a diary sheet, or an equivalent summary sheet be	The P&P does not require a diary sheet.	Closed

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	for complaint inquiries.		used for complaint inquiries (investigations by letters "d" and "m"), and a review of the corresponding FOM provisions did not succeed in finding the requirement for creating this type of record. However, Cal/OSHA is in the process of revising the entire P&P and the requirement for a diary sheet or equivalent for investigations by letters will be considered.		
11-04	Data entry errors resulted in fatalities being recorded for non-work related deaths and investigations being recorded as untimely. The coding in IMIS for fatality inspections was not updated once it was determined that the fatality was not work related.	Ensure IMIS data is updated to reflect the correct coding for non-work related fatalities and is entered correctly to reflect timely investigations.	Cal/OSHA trained all of the District and Regional Managers in June 2011 on the proper procedures of IMIS coding of non-work-related Accident Reports and corresponding investigations. Consequently, the implementation of the correct procedure only started around the last quarter of the evaluation period for this Monitoring Report (FFY 2011). Managers and IMIS coordinators were reminded to run quarterly Fatality Logs for each of the District Offices to identify data entry errors, and correct them in timely fashion.	Cal/OSHA was coding non-work related deaths as fatalities. Cal/OSHA has instructed their Managers on the proper coding of non-work related fatalities. FY 2012 IMIS data indicated Cal/OSHA was coding non-work related fatalities correctly.	Completed
11-05 (formerly 10-03)	One of two case files reviewed, a final letter, indicating the results of the investigation, was not mailed to the next of kin.	Final letters shall be sent to the next of kin after completion of the investigation.	Cal/OSHA reminded District and Regional Managers to implement within District Offices procedures to ensure the mailing a final letter to the	P&P C-170 indicates that family members shall be contacted early in the investigation and to mail them a copy of the	Awaiting Verification

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			next of kin, after the completion of fatality investigations. Also, as part of the Policies and Procedures revision project, P&P C-170 will be revisited to include more specific instructions regarding this letter.	citations, settlement agreements, or Appeals Board decisions as they are issued. In FY 2013, fatality cases will be reviewed to ensure final letters to the next of kin are being mailed.	
11-06 (formerly 10-04 & 10-20)	Twelve fatality investigations were not initiated within one day.	Initiate fatality inspections within one day of being notified of a fatality which warrants an inspection.	Cal/OSHA's policy is to open fatality investigations within one day of being notified of the fatal incident, and in all of the twelve identified fatal cases, special circumstances occurred that explain the delay. The majority of them were data entry errors due to incorrect coding of non-work – related Accident Reports. Managers and IMIS coordinators were reminded to run quarterly Fatality Logs for each of the District Offices to identify data entry errors, correct them in timely fashion, and continue training staff.	FY 2012 IMIS data indicates there were 12 fatalities which were not responded within one day. After Cal/OSHA was notified, they provided an explanation. One case was not responded to within one day due to staff unavailability. Coding issues were responsible for the other cases and were corrected.	Completed
11-07 (formerly 10-07)	The percent of programmed inspections with serious, willful or repeat violation is significantly lower than the National average.	Improve targeting of programmed inspections to reach high hazard workplaces.	In 2011, Cal/OSHA identified an issue relating to the improper coding of Programmed Inspections (a number of should have been coded as unprogrammed activities, and all of the District and Regional Managers were trained on the correct coding of Programmed	Cal/OSHA identified the improper coding of Programmed Inspections, and District and Regional Managers were trained on the proper coding procedures. Federal OSHA will work with Cal/OSHA in	Open

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			<p>inspections in June 2011. Consequently, the implementation of the correct procedure only started around the last quarter of the evaluation period for this Monitoring Report (FFY 2011), which can explain in part the low percentage of programmed inspections with serious/willful/repeat violations. For the inspections that were correctly coded as Programmed, many of them having been conducted by the High Hazard Unit, the results illustrate that Cal/OSHA's targeting system is more effective in identifying high hazard workplaces than SAMM 8 shows. For example, the percentage of programmed inspections conducted in FFY 2011 by the High Hazard Unit which finds serious/willful/repeat violations is 34.6% for Safety (compared to 58.5% National Data averaged over 3 years), and 22.2% for Health (compared to 51.7% National Data averaged over 3 years). Cal/OSHA will strive to improve its performance in targeting and conducting programmed inspections of</p>	<p>improving their targeting procedures.</p>	

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			workplaces where serious safety and health hazards exist, including a project to improve High Hazard employer targeting using claims data from the workers' compensation information system maintained within the Department of Industrial Relations.		
11-08 (formerly 10-08)	Cal/OSHA's policy on classifying violations does not ensure violations that would be considered "Serious" under the Federal Field Operations Manual (FOM) are classified as Serious.	Cal/OSHA needs to incorporate the new definition of a serious violation into their policy and procedures manual.	On January 1, 2011, pursuant to AB 2774 (codified at Labor Code section 6432), Cal/OSHA's definition of a Serious violation changed from one identical with the Federal FOM, to one that would expand the number and nature of violations to be classified as Serious for citations issued as result of inspections opened after January 1, 2011. Cal/OSHA is now in the process of revising P&P C-1B to incorporate the new definition of a Serious violation based on one year of experience with enforcement and appeals under the new statutory definition.	Cal/OSHA has not updated P&P C-1B, and has not incorporated the new definition of "serious" in their manual.	Open
11-09 (formerly 10-34)	The rules of evidence used by Cal/OSHA prevent many serious hazards from being appropriately classified without the use of	Cal/OSHA must take the appropriate action-administrative, judicial, or legislative-to ensure that OSHAB's test for acceptance of compliance	Pursuant to AB 2774 (see Labor Code section 6432(g)), Cal/OSHA compliance officers who can demonstrate at the time of a hearing before the Occupational Safety and	Labor Code 6432(g) does establish an Industrial Hygienist or Safety Engineer may be deemed competent if their Division mandated training is	Completed

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	<p>“Expert” testimony and relevant medical training on specific injuries. Federally, expert testimony is not always required to establish whether a hazard is serious. In some cases, expert testimony may be needed, but Cal/OSHA appears to be applying a test that far exceeds well-settled law in both the Occupational Safety and Health Review Commission (OSHRC) and Federal courts. Cases have been identified showing an extreme standard of evidence to prove classification of violations where the compliance officer’s ability to identify, evaluate, and document conditions in the workplace are not considered. A medically qualified person is necessary to sustain violations based on exposure to on exposure and “work-relatedness” under the current Appeals process.</p>	<p>officers’ testimony is at least as effective as the test at the federal level and results in a similar classification of violations as serious.</p>	<p>Health Appeals Board that their division-mandated training is current, shall be deemed competent to testify to establish the elements of the serious violation. This is at least as effective as the test at the Federal level, and should result in a similar classification of violations as serious.</p>	<p>current and may offer testimony on establishing a serious violation. There have been no ALJ decisions that have resulted in a reduction of the classification based on a perceived lack of qualification of the Division Investigator-witness since the implementation of the legislation.</p>	
11-10	Cal/OSHA did not verify	Verify all Serious, Willful,	A tracking system that has	In FY 2012, there were 37	Completed

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(formerly 10-14)	that all Serious, Willful, or Repeat violations were abated.	or Repeat violations are abated.	been developed, using the Select Violations Abatement Report, resulted in increase in the overall percentage of serious/willful/repeat violations verified abated from 84.8% for FFY 2010 to 92.9% for the evaluation period, namely FFY 2011. Cal/OSHA will strive to continue toward the goal of verifying 100% of the serious/willful/repeat violations which become final.	violations not verified. Cal/OSHA has reviewed the violations and has provided an excel spread sheet indicating the date and reason for having these violation not verified on a timely basis such as the employer is out of business, or the date verified was not entered into the IMIS database.	
11-11 (formerly 10-10)	In three of the case files reviewed, the Union was present at the work site but was not involved in the opening conference and in three cases, union involvement was not properly documented.	An opening conference shall be held with the Union either jointly with the employer or separately, and properly documented.	Cal/OSHA has re-emphasized the requirement to document efforts to involve unions in the opening conference, which requirement is outlined in its P&P C-1A, and has completed the training of all Managers and compliance officers on this subject. However, the last session of the training was held in the third quarter of the evaluation period for this Monitoring Report (FFY 2011). Prior to the completion of the training, the documentation of the actions taken to involve unions was missed in the three cases identified in this report. Cal/OSHA will continue its review of case files to ensure that all required actions are properly documented.	Cal/OSHA will continue to verify records to ensure an opening conference is held with the Union if one is present. In FY 2013, a records review will take place to ensure Union participation or notification has taken place during an inspection.	Awaiting Verification

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<p>11-12 (formerly 10-15)</p>	<p>Informal Conference policy allows conferences to be held beyond 15 days and lacks guidance on obtaining counsel and does not require conference information to be posted properly and consistently throughout the State.</p>	<p>Cal/OSHA needs to revise P&P C-20 to allow informal conferences to be held within 15 working days of the issuance of citations and penalties, and not to exceed this time frame.</p>	<p>Cal/OSHA's appeal process differs substantially from the Fed/OSHA contest process, in that the Cal/OSHA process is less formal, more flexible, and more open, allowing for fuller discussion and input by employers and complete resolution of disputes. Cal/OSHA believes that its Informal Conference practices are "at least as effective as" Fed/OSHA's. Cal/OSHA's P&P C-20 contains specific guidelines for the conduct of Informal Conferences in harmony with the appeals process.</p>	<p>If an appeal is filed, Cal/OSHA can hold an informal conference up to the day of the appeal hearing. This policy allows greater flexibility and conserves resources for those cases that need to be heard in front of the Occupational Safety and Health Appeals Board.</p> <p>If no appeal is filed, Cal/OSHA can hold the informal conference up to the 15th working day from the issuance of the citation.</p>	<p>Closed</p>
<p>11-13</p>	<p>DOSH's (Cal/OSHA) interpretation is that they don't have the authority to adjust this penalty at the informal conference according to 342(a). On the other hand OSHA believes that the Appeals Board does have the authority to adjust the proposed penalty and does so routinely when these violations are appealed.</p>	<p>Cal/OSHA using all available appeal resources must strongly select sufficiently strong cases for appeal that would set precedent regarding retention of penalties overall and a minimum penalty for violations of 342(a).</p>	<p>Cal/OSHA believes that Labor Code Section 6409.1(b) requires the Division to assess an unadjustable \$5,000 penalty for violations of Title 8, Section 342(a). OSHAB has taken the position that it has the authority to adjust the \$5,000, depending on the circumstances of each specific case, and continues to do so. The California Legislature has not, as of August 31, 2012, enacted new legislation clarifying whether penalties for violations of Section 342(a) are unadjustable or whether they can be adjusted, the</p>	<p>OSHAB have issued three Decisions after Reconsideration. A \$ 5,000 penalty was upheld when the employer failed to report an injury as required under Section 342(a). In another case, when employers are late in reporting an injury under Section 342(a), OSHAB has allowed the standard reduction for size, good faith and history. This finding is complete.</p>	<p>Closed</p>

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			<p>factors relevant to any adjustments, and a clear minimum penalty. Depending on the results of the next legislative session, the Division will evaluate which cases could be taken up on a writ to the Superior Court for judicial clarification of meaning of the existing Labor Code Section 6409.1 (b).</p>		
<p>11-14</p>	<p>Cal/OSHA field staff does not have sufficient legal training or background to present cases at hearings. Pre-hearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the DAR process and furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.</p>	<p>Cal/OSHA must take appropriate action to ensure that their enforcement actions are appropriately defended at contest, either through attorney representation or, if necessary, through a system where Cal/OSHA field staff are trained and provided with adequate access to technical and legal resources to ensure at least as effective presentation of cases to OSHA. Cal/OSHA must determine whether the problems associated with the current system of having compliance officers' defend their own cases during contest can be corrected. If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements as is</p>	<p>Cal/OSHA believes its enforcement actions are appropriately defended at contest, either through attorney representation or by field staff presenting the cases at hearings, as evidenced by the percentage of violations vacated by the OSHAB (10.8% vs. 23.5% in the Federal system) and violations reclassified by OSHAB (8.8% vs. 13.3% in the Federal system). Although penalty retention rate by OSHAB is lower than Federal OSHA (39.3% vs. 62.3%), this could be attributed to the much higher initial penalties in California law resulting in higher penalties issued by Cal/OSHA (average for serious violation is \$6,390) as compared to Federal violations (average of \$1,680 for serious</p>	<p>According to OSHAB, the Administrative Law Judges (ALJ) applies the same rules to both attorney and non-attorney representation. OSHAB has not discerned great settlements with attorneys and poor ones with Cal/OSHA field staff.</p> <p>To defend cases in front of OSHAB, Cal/OSHA Compliance Officers must complete a five day course.</p>	<p>Closed</p>

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		done in the Federal Program and most other OSHA-approved State Plans.	violation).		
11-15 (formerly 10-22)	The Employer Payment for Personal Protection Equipment issue has not been resolved.	OSHSB needs to resolve the issue regarding Employer Payment for Personal Protective Equipment.	Cal/OSHA determined that existing case law specifically permits the issuance of a citation of first impression for an employer who fails to pay for required PPE, and that California's requirement that employers pay for required PPE is broader and more protective than the federal counterpart, because the California requirement is not subject to exceptions, while the federal requirement is. This determination was supported by the staff counsel for the OSHSB at an advisory meeting the Board conducted on March 22, 2012 at which Federal OSHA representatives were in attendance. The consensus of the attendees, which included labor, management, Cal/OSHA and Board staff, was that the current law and regulations addressed this issue, and no further regulatory action was necessary. Cal/OSHA did determine that there is a misleading sentence in P&P C-6, which states that an order to take special action may be issued "To require the	OSHAB have upheld Cal/OSHA citation for failing to pay for required personal protective equipment. Cal/OSHA's Personal Protective Equipment Regulation, Title 8, Article 10 requires employers to pay for required personal protective equipment. Cal/OSHA needs to remove the sentence where it states Cal/OSHA may issue an order to take special action ""To require the employer to pay for safety devices which are required for employees pursuant to applicable Safety Order"" is still in P&P C-6.	Open

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			employer to pay for safety devices which are required for employees pursuant to applicable Safety Order." This sentence is incorrect, and will be removed from the P&P. In addition, an instruction has been issued to enforcement staff directing them to issue citations when it is determined that an employer is not paying for required PPE.		
11-16 (formerly 10-22)	Cal/OSHA has been late in responding to 6 out of 13 Federal Program Changes and did not respond to 3 out of 13 Federal Program Changes.	Cal/OSHA needs to respond by the due date to all Federal Program Changes.	Cal/OSHA is intensifying its efforts to respond by the due date to all Federal Program Changes.	Cal/OSHA has not responded to several Federal Program Changes.	Open
11-17 (formerly 10-23)	State-initiated rulemaking that promulgated a standard on Bakery Ovens was deemed not to be at least as effective as Federal OSHA standards.	Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.	The Occupational Safety and Health Standards Board's (OSHSB) position is that rulemaking on the Bakery Oven Inspections, PCS 361, was not completed. In reviewing California's Bakery Oven standard, Federal OSHA determined it was not as effective as the Federal Standard. A response had been submitted from OSHSB at the end of the rating period. At the time of this report, Federal OSHA was in the process of evaluating it. This was also reported in both the FFY 2010 and FFY 2009 reports as	The State sent a letter to Federal OSHA indicating the Bakery Oven Standard is commensurate with the Federal standard. Discussions between Federal OSHA and the Standards Board are on-going to resolve this issue.	Open

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			Findings 10-23 and 09-27, respectively. The date of the letter from OSHSB to Federal OSHA was September 3, 2010, and an answer has not yet been received.		
11-18	DLSE was not properly screening all newly filed discrimination complaints.	As soon as possible upon receipt of the discrimination complaint, the available information shall be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a prima facie allegation.	DLSE will prepare and complete a screening template to use when screening and reviewing all new complaints and attach same to each complaint/file.	DLSE Investigators have a document process for screening complaints. Once a complaint is received, DLSE will review the complaint for jurisdiction, and record the received date. If there is no protected activity, DLSE will send a letter either asking for additional information or will send a negative reply to the complainant.	Completed
11-19	DLSE was not properly notifying all whistleblower complainants of their right to dually file with Federal OSHA.	Because employers in state plan states do not use the federal OSHA poster, the States must advise whistleblower complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent federal protection.	DLSE is improving training and staff accountability to ensure that complainants are notified of the right to dually file with Federal OSHA. When complaint forms are provided to the public either in the office or in person they are to be provided with our procedural pamphlet which states any employee or job applicant who alleges retaliation for having complained about a workplace health or safety issue has the right to file a concurrent	DLSE has a pamphlet that indicates an employee who is alleging retaliation because of a workplace safety and health issue has the right to concurrently file a complaint with Federal OSHA. DLSE has indicated this pamphlet is mailed to the complainant and is on their website.	Completed

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			complaint with federal OSHA within 30 days of the occurrence of the adverse action. When a case is accepted for filing, DLSE's procedure includes mailing the RCI-4 to claimants advising of their dual rights to file with Federal OSHA.		
11-20 (formerly 10-26)	DLSE was not interviewing whistleblower complainants in all cases.	The investigator shall arrange to meet with the whistleblower complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations.	DLSE staff has been instructed and are required to interview all whistleblower complainants in every case. DLSE has issued a directive to staff to ensure this is being done, and this was covered in training on Sept. 25, 2012.	DLSE does not interview all witnesses. DLSE interviews all relevant witnesses. Investigators have been reminded to take detail notes when speaking with witnesses. The Deputy Chief has issued an email to the staff reminding them to document information from witnesses. Attorneys for DLSE have developed a template for witnesses to sign.	Completed
11-21 (formerly 10-26)	DLSE was not interviewing company officials in all whistleblower cases who have known direct involvement in the case to test assertions made by the company.	The investigator shall interview all company officials who have known direct involvement in the whistleblower discrimination case and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation.	DLSE staff has been instructed to interview all company officials when investigating whistleblower complaints.	DLSE Investigators interviews all relevant witnesses. Investigators have been reminded to take detail notes when speaking with witnesses. The Deputy Chief has issued an email to the staff reminding them to document information from witnesses. Attorneys for DLSE have developed	Completed

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				a template for witnesses to sign.	
11-22 (formerly 10-26)	DLSE was not conducting further interviews with relevant witnesses in all discrimination cases.	The investigator shall fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the whistleblower complainant's and respondent's positions and contact made with all relevant witnesses with every attempt made to gather all pertinent data and materials from all available sources.	DLSE staff has been provided digital recorders to record all interviews with relevant parties to the whistleblower investigation. We will again advise staff to record interviews and have witness statements signed by the witness when the witnesses are cooperative and willing to sign the statements and return them to DLSE.	DLSE Investigators have recorders. Recorders are used only if the person being interviewed agrees to the recording. If the person does not agree to be recorded, the Investigators document the interview. The interview is summarized in writing. DLSE is interviewing all relevant witnesses.	Completed
11-23 (formerly 10-26)	DLSE was not conducting closing conferences with Whistleblower complainants.	Upon completion of the field investigation, and after discussion of the case with the Senior Deputy Labor Commissioner and legal department as necessary, the investigator shall conduct a closing conference with the whistleblower complainant.	DLSE adopted Federal OSHA's process of conducting closing conferences and issuing Final Investigation Reports in October 2011. The review of cases did not include any cases where the new procedure had been adopted. DLSE is in compliance with this finding.	Since October 2011, DLSE has been conducting closing conferences and writing Final Investigation Reports which are placed in the file.	Completed
11-24 (formerly 10-26)	DLSE was not documenting their discrimination case files to support their findings in all cases, including failing to include notes of interviews and closing conferences conducted.	Investigators shall document the discrimination case file to support their findings, including, but not limited to, including notes of interviews and closing conferences.	DLSE continually re-enforces the requirements that all interviews and documentation received is properly noted in the file as well as their findings. This is will be addressed again in the upcoming training.	DLSE has indicated one Investigator who is not documenting notes or updating the file in their case management system (CMS). All other investigators are updating the file in CMS and documenting notes.	Open

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11-25	DLSE was not preparing the equivalent of a Final Investigation Report at the end of their investigations of Discrimination complaints.	Investigators shall prepare the equivalent of the Final Investigation Report at the end of all their investigations to include at a minimum the sections proscribed in DIS 0.09 Chapter (IV)(B), and keep such report in the discrimination case file.	See Findings 11-23.	Since October 2011, DLSE has been conducting closing conferences and writing Final Investigation Reports which are placed in the file.	Completed
11-26	DLSE was not organizing its discrimination case files in a consistent manner for all cases.	Investigators shall organize all discrimination case files consistently in a manner that satisfies at a minimum the case file organization required in DIS 0.09 Chapter 5 (III), including the separation of transmittal and other administrative materials from evidentiary material, the use of exhibit tabs separating evidentiary materials, and a table of contents identifying all evidentiary material by exhibit.	DLSE adopted the file organization required in DIS0.09: DLSE files are separated and evidentiary material is tabbed. Due to the volume of investigatory files DLSE receives, preparing a table of contents and list of exhibits is cumbersome and not required if the documents are separated and tabbed for easy identification.	The files are separated by tabs. For example one tab may have records of adverse actions, another tab may contain information on the parties, etc. but there is no specific order. DLSE does not do table of contents.	Completed
11-27	For all discrimination cases deemed settled, DLSE was not requiring that the settlement be in writing.	For all discrimination cases deemed settled, DLSE shall follow the procedures required in DIS 0.09 Chapter 6 (IV), including requiring that the settlement be in writing.	DLSE always strives to have copies of the settlements submitted for the file. This is not possible in most cases as the parties wish to keep the settlements confidential and does not provide DLSE with a copy. If the complainant withdraws the complaint once it has been settled, DLSE	Settlements written by DLSE are in the file. However, if the parties agree to settle outside of DLSE, between attorneys, DLSE will request a copy of the settlement from the parties. DLSE may or may not receive these settlements.	Completed

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			cannot force the Complainant or Respondent to continue to participate in any investigation. DLSE does, however, always document the file noting a settlement was reached between the parties and that the complaint has been withdrawn.	If DLSE cannot get a copy of the settlement, they should dismiss the case and record this in IMIS.	
11-28	DLSE did not gather all relevant evidence available in the discrimination cases. As a result, the investigator could not evaluate the evidence and draw conclusions based on the evidence and the law.	DLSE shall gather all relevant evidence in order to evaluate the evidence and draw conclusions based on the evidence and the law, including interviewing whistleblower complainants, respondent witnesses who have known direct involvement in the case, and third party witnesses with relevant information.	Please see Findings 30.	DLSE Investigators completed training on December 12, 2012. Training included how to conduct an effective investigation, and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.	Completed
11-29	DLSE did not properly investigate and analyze protected activity, employer knowledge, adverse action, and nexus (including disparate treatment, pretext, animus, and dual motive).	During all phases of the discrimination investigation, the investigator shall bear in mind and look for evidence dealing with protected activity, employer knowledge, adverse action, and nexus (including disparate treatment, pretext, animus, and dual motive).	Please see Findings 30.	DLSE Investigators completed training on December 12, 2012. Training included how to conduct an effective investigation, and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.	Completed
11-30	DLSE did not adequately test the respondent's reason for taking adverse	DLSE shall fairly pursue all appropriate investigative leads which develop during	DLSE recognizes staff needs additional training on interviewing techniques,	DLSE Investigators completed training on December 12, 2012.	Completed

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	action.	the course of the discrimination investigation, with respect to both the complainant's and the respondent's positions. After completing the respondent's side of the investigation, the investigator should again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.	evidence gathering and conducting a thorough investigation, which includes contacting all of the relevant parties and witnesses as well gathering supporting documents. Understanding the elements of a violation is an essential part of the investigation and the upcoming RCI training will focus on these items in addition to how to analyze evidence, determine if a nexus exists and whether dual motives were involved.	Training included how to conduct an effective investigation, and investigative techniques. They also had Federal Mediators train them on how to mediate negotiations in May 2012 and January 2013.	
11-31	DLSE did not promptly notify the parties that it had opened an investigation in many discrimination cases until several months after the complaint had been filed.	DLSE shall promptly notify whistleblower complainants that it has opened an investigation upon receiving the complaint. DLSE shall promptly notify respondents that it has opened an investigation upon receiving the complaint, unless an inspection is pending.	DLSE's practice has been to notify the parties of the filing of a complaint once the complaint is assigned to an investigator as part of the investigator's role. Due to the large volume of cases received and DLSE's backlog, parties were not immediately notified of the acceptance or filing of a complaint. DLSE has changed its practice and will mail the RCI 7 notification to parties once a complaint has been accepted for investigation.	Clerks docket the case in IMIS, send an opening letter to the complainant, and assigned an investigator to the case. Once the case is assigned to the investigator, letters are sent to the complainant and respondent. To docket the case, DLSE stated they needed the date the opening letter was sent. This information is needed to docket the case in IMIS. Opening letters are immediately sent once the case has gone through the screening process.	Completed
11-32	DLSE did not provide the parties with appeal rights in all dismissed	DLSE shall provide the parties with appeal rights in all dismissed discrimination	All findings mailed to the parties include the parties' right to file an appeal.	DLSE mails form 9.2, case closed investigation letter. The letter contains	Completed

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	discrimination cases.	cases, including those where the complaint was dismissed due to the complainant's lack of cooperation.	However, cases closed as abandoned when a complainant fails to respond to contact requests or other requests were mailed a closing letter that did not include appeal rights. DLSE has modified the closing letter (DLSE 15, see attached) to include appeal rights (DLSE's statutes do not require mailing of letters/notices by certified mail).	language telling the complainant he/she has the right to file a CASPA.	
11-33 (formerly 10-25)	DLSE is not always sending an opening letter to the parties in discrimination cases.	DLSE shall send an opening letter to the parties in discrimination cases.	DLSE sends the RCI 4 which advises the Complainant that the complaint filed has been accepted and asks Complainant to provide the name, address and phone number of relevant witnesses. DLSE will ensure staff is sending this letter on each case. (DLSE's statutes do not require mailing of letters/notices by certified mail).	DLSE sends form RCI 4.1 and RCI 4.2, opening letters to the employee and employer, respectively. .	Completed
11-34 (formerly 10-25)	DLSE is not always sending a closing letter to the parties in discrimination cases.	DLSE shall send a closing letter to the parties in discrimination cases. Letters to all parties must be sent certified, return receipt.	DLSE requires staff mail a closing letter to the parties either by way of the form 15 closing letter or the final findings of the investigation. DLSE will ensure all staff mail closing letters to the parties in every case.	DLSE sends form 9.2, case closed investigation letter to all parties.	Completed
11-35	The RCI Manual discourages DLSE from accepting orally filed,	DLSE shall amend the RCI Manual to allow Whistleblower complainants	On Feb. 1, 2011, DLSE established a procedure for accepting oral complaints and	The RCI Manual has not been amended.	Open

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	<p>faxed, and emailed 6310 and 6311 discrimination complaints.</p>	<p>to file 6310 and 6311 complaints orally, by fax, and by e-mail.</p>	<p>is in the process of amending the current manual to reflect the change. The manual is expected to be completed within the next 60 days. Fax and e-mail complaints may be too unreliable for the general public. We are working on developing a more accessible, online system overall for DLSE, and will consider online submission in that project.</p>		
<p>11-36</p>	<p>DLSE is not closing all cases in IMIS that have closed. As a result, IMIS does not reflect the number of discrimination cases DLSE actually closed in FY 2011 and hundreds of likely closed cases have remained open in IMIS for years. DLSE also improperly coded some discrimination cases that DLSE did close in IMIS, recorded the wrong filing date in several cases, and did not accurately indicate the complainant’s remedies in merit cases.</p>	<p>DLSE shall properly close all closed discrimination cases, record the filing date as the date the complainant contacts DLSE, and indicate the complainant’s remedies in merit cases. It is also recommended that (1) DLSE review all currently pending cases and close them out in IMIS as appropriate (2) establish a procedure to appropriately close out all discrimination cases in IMIS once DLSE issues findings or a closing letter, and (3) ensure Senior Deputy Labor Commissioners and staff are trained in IMIS entry and closure to allow Senior Deputy Labor Commissioners the ability to</p>	<p>DLSE has experienced difficulties in balancing the cases opened and closed in IMIS. DLSE makes every effort to properly open and close cases in IMIS. DLSE has requested additional training on IMIS procedures. DLSE has been advised that a training date will be scheduled.</p>	<p>DLSE has not received training on IMIS.</p>	<p>Awaiting Verification</p>

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		review DLSE’s IMIS data entry for accuracy and completeness.			
11-37	DLSE is not opening all new cases in IMIS. As a result, IMIS does not reflect the number of discrimination cases DLSE actually opened in FY 2011.	DLSE shall open all new discrimination cases filed in IMIS.	DLSE will ensure all cases are opened in IMIS. Please see Finding 11-36.	DLSE is opening cases in IMIS.	Completed
11-38	DLSE does not input, track, or document administratively closed discrimination cases in IMIS.	DLSE shall input, track, and document administratively closed discrimination cases in IMIS.	DLSE has begun entering all administratively closed cases in IMIS.	DLSE is having issues with closing cases in IMIS. Some cases can be closed in IMIS, but not always.	Awaiting Verification
11-39	Of the 128 whistleblower (WB) investigations, 96% were not completed within the 90-day period as required.	Ensure whistleblower investigations are completed within 90 days.	DLSE is working with staff providing training and support to assist with completing investigations in a timely manner. However, due to the large number of cases received, DLSE has difficulty completing investigations in 90 days. DLSE strives to complete investigations in a manner that is at least equal to that of Federal OSHA Whistleblower investigations.	DLSE is striving to close cases in 90 days.	Closed-Per Policy Decision
11-40	DLSE investigators and Senior Deputy Labor Commissioners need formal basic training for investigating 6310 and	DLSE investigators and Senior Deputy Labor Commissions shall attend Federal OSHA’s 1420 Basic Whistleblower	DLSE is providing in-house training for all RCI staff. DLSE as a state agency is not allowed out-of-state travel to attend Federal OSHA's 1420	DLSE Investigators cannot travel out-of-state and therefore have not attended the OSHA 1420 course. However, DLSE	Open

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	6311 whistleblower retaliation complaints.	Investigations course.	Basic Whistleblower Investigations course. DLSE has requested this training be provided in California to allow DLSE staff to participate in this training.	can either put on an equivalent course or bring the OSHA 1420 Basic Whistleblower Investigation course to the State.	
11-41	Case file workload does not appear to be managed in a manner to ensure the most expedited issuance of citations. The “first in-first out” case file management system being used seems to negatively affect this rate.	Develop policies and procedures to assist in lowering the citation lapse time such as completing less complicated cases before the completion of cases requiring extensive research and development, where appropriate.	Citations lapse time has been negatively impacted by the adoption of AB 2774, effective January 1, 1011, which requires Cal/OSHA to notify employers in writing at least 15 days prior to issuing Serious citations. This is an added challenge to the management of case file workload. However, while the citation lapse time for safety increased by 2 days as compared to 2009 (76 vs. 74 days), it decreased by 3 days for health inspections (81 vs. 84 days). Cal/OSHA will continue to strive to lower the citation lapse time for both types of inspections by using a combination of means and methods, including: monthly run and use of the Citation Pending Report to track and monitor on-going investigations at the District Office level, case management at individual level by District Manager and Regional Seniors to assist and encourage	This will be an observation and will be reviewed during an onsite visit in FY 2013.	Observation

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			<p>CSHO's to complete investigation, streamlined review of proposed citations, by District Managers, Senior Management, Legal Unit, quarterly monitoring and review of lapse time by Senior Management, leadership training for District Managers and Regional Managers.</p>		
11-42	<p>When determining repeat violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).</p>	<p>Consider employer history statewide when citing repeat violations.</p>	<p>The definition of Repeat Violations, for violations other than Field Sanitation Violations, is set forth by Title 8 CCR, Regulations of the Director of Industrial Relations, Section 334(d)(1). The definition of the Repeat Violation contained in the Cal/OSHA P&P C-1B, as mentioned in this finding, is based on the aforementioned regulations.</p>	<p>Discussions with Cal/OSHA have been ongoing.</p>	<p>Open</p>

Appendix D – FY 2012 State Activity Mandated Measures (SAMM) Report
FY 2012 California State Plan Abridged FAME Report

NOV 09, 2012
 RID: 0950600

MEASURE	From: 10/01/2011 To: 09/30/2012	CURRENT FY-TO-DATE	REFERENCE/STANDARD
1. Average number of days to initiate Complaint Inspections	44183 14.93 2958	2461 12.68 194	Negotiated fixed number for each state
2. Average number of days to initiate Complaint Investigations	40872 8.27 4937	6813 11.70 582	Negotiated fixed number for each state
3. Percent of Complaints where Complainants were notified on time	2917 99.69 2926	271 100.00 271	100%
4. Percent of Complaints and Referrals responded to within 1 day -ImmDanger	206 99.52 207	16 94.12 17	100%
5. Number of Denials where entry not obtained	0	0	0
6. Percent of S/W/R Violations verified			
Private	707 94.90 745	33 82.50 40	100%
Public	13 81.25 16	0 .00 2	100%
7. Average number of calendar days from Opening Conference to Citation Issue			
Safety	320351 85.77 3735	29231 85.97 340	2032800 55.9 36336
Health	95215 97.35 978	10687 84.81 126	647235 67.9 9527

0*CA FY12

**PRELIMINARY DATA SUBJECT TO ANALYSIS AND REVISION

Appendix D – FY 2012 State Activity Mandated Measures (SAMM) Report
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NOV 09, 2012
 RID: 0950600

MEASURE	From: 10/01/2011 To: 09/30/2012	CURRENT FY-TO-DATE	REFERENCE/STANDARD
8. Percent of Programmed Inspections with S/W/R Violations			
	320	31	76860
Safety	20.86	23.31	58.5
	1534	133	131301
	7	2	9901
Health	8.33	16.67	53.0
	84	12	18679
9. Average Violations per Inspection with Violations			
	2788	222	367338
S/W/R	.59	.47	2.1
	4723	468	175950
	12611	1173	216389
Other	2.67	2.50	1.2
	4723	468	175950
10. Average Initial Penalty per Serious Violation (Private Sector Only)	18719387	1518445	624678547
	7074.59	7162.47	1990.5
	2646	212	313826
11. Percent of Total Inspections in Public Sector	520	34	1684
	6.85	5.62	7.0
	7587	605	24102
12. Average lapse time from receipt of Contest to first level decision	578044	35867	3197720
	353.97	329.05	187.0
	1633	109	17104
13. Percent of 11c Investigations Completed within 90 days*	18	0	
	17.82	.00	100%
	101	8	
14. Percent of 11c Complaints that are Meritorious*	32	1	1619
	31.68	12.50	23.4
	101	8	6921
15. Percent of Meritorious 11c Complaints that are Settled*	24	1	1444
	75.00	100.00	89.2
	32	1	1619

*Note: Discrimination measures have been updated with data from SAMM reports run on 1/3/2013
 **PRELIMINARY DATA SUBJECT TO ANALYSIS AND REVISION

Appendix E – FY 2012 State OSHA Annual Report (SOAR)
FY 2012 California State Plan Abridged FAME Report

[Available Upon Request]