

FY 2013 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report

Nevada Occupational Safety and Health Administration (NvOSHA)



Evaluation Period: October 1, 2012 – September 30, 2013

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I. Executive Summary

A. Summary of the Report

The purpose of this report is to assess the Nevada Occupational Safety and Health (NvOSHA) program's performance during the Fiscal Year (FY) 2013. Performance is measured in activities mandated by OSHA, a gauge of NvOSH's progress toward resolving recommendations from the FY 2012 FAME, and the state's achievement of its annual performance plan and five-year strategic goals. As part of this comprehensive evaluation, OSHA reviewed discrimination and enforcement case files, complaint case files, and conducted a special study on inspection targeting. Although NvOSHA is operating an effective program overall, OSHA identified the need for the state to take remedial actions in several areas.

The audit was conducted from January 27 to January 31, 2014. There are 15 findings and recommendations for this evaluation period, including seven findings for the whistleblower discrimination program. The state completed five out of 10 finding and recommendations in the FY 2012 corrective action plan. Five recommendations are carried over from the FY 2012 FAME report.

Finding and recommendation 13-15 has been carried over since the 2009 Special Study. This recommendation directs the state to pursue all available options to retain safety and health compliance officers, consultants and trainers. During this evaluation period, a 10 percent salary increase was passed by the legislature and implemented. This increase brought some stability to staffing (14 vs. 53 percent turnover from last year). However, retaining experienced staff with three or more years' experience and hiring qualified staff continues to be a challenge. The failure to enact this recommendation will continue to impact the state's ability to recruit and retain qualified experienced compliance staff and first line supervisors.

The evaluation of both the Enforcement and Whistleblower programs found staff that is committed to the mission of worker safety. Over half of the compliance officers have less than one year experience and were in the process of building the requisite enforcement related knowledge, skills, and competencies.

The state should continue to focus attention on staff retention, supervisory oversight, and meeting the goals in the Nevada annual performance plan. In addition, the focus on improving enforcement program measures such as targeting of inspections, abatement, citing serious hazards, and timely response to Federal Program Changes should carry on and Whistleblower investigations.

Overall, NvOSHA has made acceptable progress in most areas, and compliance programs have improved over the past three years. Management's attention to whistleblower program improvements and continued due diligence in the compliance program ensures that Nevada workers are adequately protected on the job.

B. State Plan Introduction

The state of Nevada, under an agreement with OSHA, operates an occupational safety and health program in accordance with Section 18 of the Occupational Safety and Health Act of 1970. Initial approval of the Nevada State Plan was published on January 4, 1974 and final approval was published on April 18, 2000.

The Nevada State Plan is administered by the Department of Business and Industry, Division of Industrial Relations (DIR). The Enforcement section includes the Whistleblower Program and is provided by the Nevada Occupational Safety and Health Administration (NvOSHA). Consultation is provided by the Nevada Safety Consultation and Training Section (SCATS). Mr. Don Soderberg replaced Donald Jayne, State Plan Designee and Director of the Division of Industrial Relations in November of 2013. Steve Coffield was the Chief Administrative Officer (CAO) of NvOSHA until March of 2013 and he was replaced by Mr. John Wanamaker. Mr. Todd Schultz is the CAO of SCATS. NvOSHA has a total of 74 full time equivalent (FTE) enforcement positions, and SCATS has 23 FTE consultation positions, and seven trainers.

NvOSHA and SCATS are headquartered in Henderson with offices in Reno and Elko. Federal OSHA standards are adopted by reference and standards contained within 29 CFR, Parts 1910 (General Industry), 1926 (Construction) and 1928 (Agriculture) are enforced. In addition, Nevada has adopted state-specific requirements safety programs, cranes, steel erection, mandatory 10- and 30-hour training for construction projects, asbestos, explosives, ammonium perchlorate, and photovoltaic system projects.

The Nevada State Plan enforcement and consultation programs have jurisdiction and provide services to approximately 72,731 public and private-sector employers and 1.1 million workers in the state with the exception of federal workers, the United States Postal Service (USPS), Tribal lands, and areas of exclusive federal jurisdiction. The state operates its Enforcement program under the 23(g) operational program agreement, which also covers public sector consultation and training. The Nevada operating budget for the 23(g) enforcement and training program (NvOSHA) was \$7,108,054. The federal initial grant award was \$1,505,900. Mid-year sequestration budget cuts reduced federal funding by \$62,800 (4.17%).

C. Data and Methodology

This Federal Annual Monitoring and Evaluation (FAME) report evaluates the state performance of required (mandated) performance areas and related enforcement activities. It also evaluates the state's achievements in meeting their own performance goals as outlined in the grant application. The report represents the combined efforts of OSHA's San Francisco Regional and Las Vegas Area Offices and covered the period of October 1, 2012 to September 30, 2013.

The opinions, analyses, and conclusions described herein are based on information obtained from a variety of sources, including: OSHA's analysis and monitoring of the FY 2012 NvOSHA Corrective Action Plan, which provided the state's status and response to the FY 2012 FAME (Appendix C), other statistical reports (INSP & ENFC) comparing state performance to federal performance, State Activity Mandated Measures (SAMM) report data (Appendix D), State Information Report (SIR) data, quarterly monitoring meetings between OSHA and the state, the state FY 2013 OSHA Annual Report (SOAR) prepared by the Department of Business and Industry, Division of Industrial Relations, Occupational Safety and Health Administration (Appendix E), which contained details of the state's achievements with respect to its annual goals, interviews with the CAO and Program Coordinators, an on-site review of 77 enforcement case files, a review of 10 whistleblower case files, Whistleblower Investigations Manual CPL 02-03-003, NvOSHA's internal Whistleblower Manual and Public Sector Mandated Activities Report For Consultation (MARC).

The sample size was dictated by the population as stipulated in the FY 2013 Federal Annual Monitoring and Evaluation (FAME) Guidance. The total population was the number of inspections closed during FY 2013 and divided into programmed and un-programmed inspections. A percentage of the total population for each category was calculated accordingly. A random numbers table was generated and inspections were selected from the list of programmed and un-programmed inspections respectively. All fatality inspection case files opened and citations issued during FY 2013 were added to the sample for review.

The on-site compliance program audit occurred January 28-31, 2014 in the Henderson office. The team included the Las Vegas Area Office Area Director and the Administrative Assistant. A total of 100 enforcement case files were pulled for review, however during the review, 23 cases were found with opening conference dates outside the parameters of the evaluation period and subsequently removed from the data pool. The files included fatality, un-programmed, programmed, complaint and referral inspections.

For the whistleblower section of the audit, the Region IX Whistleblower Investigator in San Francisco reviewed 10 out of the 68 cases closed in FY 2013. The cases were chosen based on type, investigator and age of case and the five represented categories included: Dismissed/Non-Merit, Litigation/Merit, Settled, Settled-other, and Withdrawn. The files were reviewed for IMIS Issues, screening, investigation, report writing, settlement, case file management, and timeliness.

D. Findings and Recommendations

There are 156 findings and recommendations (See Appendix A) for this evaluation period. Eight of the findings are from the safety and health compliance program. The issues include targeting of inspections, abatement, citing serious hazards and timely response to Federal Program Changes. Many of these findings are common mistakes made by new compliance officers. There are seven findings from the audit of the Whistleblower Program. The audit

found the state had not adequately implemented five of the changes to the investigation process that had occurred in the Federal program over the past couple of years. Overall, NvOSHA meets or exceeds the majority of its FY 2013 performance goals and fulfills its obligations with regard to activities mandated by OSHA.

II. Major New Issues

A significant accomplishment was the amendment to NRS 618.445(2) which eliminated the requirement for complainants to serve the employer a copy of the complaint prior to NvOSHA commencing a whistleblower discrimination investigation. The 2013 legislature passed and the Governor approved the removal of this requirement effective May 18, 2013.

The state recognized the need to restructure and bring legal expertise into the whistleblower discrimination program. This was accomplished by creating and filling a Team Lead position with legal qualifications.

The Safety Consultation and Training Section (SCATS), under 23(g) funding, continued to reach out to the Hispanic community. This outreach effort resulted in 24 safety and health training classes to 327 Spanish speaking participants.

III. Assessment of State Plan Performance

1. Enforcement

a) Complaints

Response Time

A total of 816 complaints were filed with NvOSHA for FY 2013; 534 inspections were conducted and 282 inquiries were processed from these complaints.

NvOSHA responded timely to complaints and met the negotiated mandated activity goal of seven days for an on-site inspection and five days for an inquiry letter, 94% of the time. On average, the state took 5.5 days to open an inspection and 2.6 days to initiate an inquiry. All alleged imminent danger complaints/referrals were responded to within one day. Integrated Management Information System (IMIS) data showed that complainants were timely notified 98 percent of the time.

**Table 1
Complaints (SAMM 1 and 2)**

	FY 2010	FY 2011	FY 2012	FY 2013	Negotiated Goal
Days to Initiate Inspection	5.45 days	6.24 days	5.85 days	5.52 days	7
Days to Initiate Investigation	2.05 days	2.68 days	3.07 days	2.6 days	5

Approximately 21 percent of the case files contained serious hazards that were documented and/or observed in the photos, but were not cited or addressed by a hazard letter. This is due, in part, to limiting the focus of the inspection by only addressing complaint/referral allegations. This practice is contrary to Nevada policy in the Nevada Operations Manual (NOM) Chapter 3.V.a. (page 43) which states that the CSHO will address hazards outside the scope of the inspection if it is in plain sight.

Finding 13-01: During case file reviews of complaint generated inspections, serious violations were identified that were not addressed as citations or in hazard alert letters.

Recommendation 13-01: All observed serious hazards during an onsite inspection must be addressed by citation and/or hazard letter.

b). Fatalities

Fatality Response Time

There were nine reported fatalities that were initially determined to be work-related and all inspections were opened within one day (SAMM 21). In the fatality case files reviewed, family members had been appropriately notified of enforcement actions.

There were two cases reviewed where the victim was the owner of the company and the state determined no jurisdiction and closed the file. The determination of no jurisdiction was appropriately used.

c). Targeting and Programmed Inspections

Inspection Targeting

A total of 1,475 safety and health inspections were conducted during FY 2013 and the goal was exceeded by 460 inspections (SAMM 17). This target number had not been achieved since 2010 and had previously been addressed as a finding. In

response, the state reduced the yearly inspection goals from 1,900 to 1,015 to more closely match available resources. The lowering of the inspection goals and the increase in staff retention has enabled the state to exceed inspection goals and finding and recommendation 12-10 has been corrected and closed.

Table 2
Total Number of Inspections

Inspections	FY 2010	FY 2011	FY 2012	FY 2013
2013 State Goal	2,565	2,132	1,900	1,015
Conducted	1,611	1,265	1,203	1,475
Difference	-954	-867	-697	+460

There was no denial of entries during this evaluation period (SAMM 5).

For inspection targeting, the state adopts most of the Federal National Emphasis Programs (NEPs) with a few exceptions for industries not present in Nevada, i.e. popcorn and site-specific targeting. The state conducted 34 NEP inspections during this evaluation period. NvOSHA also has Local Emphasis Programs (LEPs) based on the Bureau of Labor Statistics (BLS) for industries with high injury and illness rate. These LEPs targeted assay laboratories, asbestos in Pre-1980 buildings, set up and break down activities at conventions and events, hotel/casinos, needle sticks and theatrical stage productions.

Only 15 percent of inspections were programmed; 222 out of a total of 1,475. Most inspections conducted were complaints and/or referrals; this focus does not allow adequate resources for inspections at high hazard worksites. A critical part of a state OSHA program is targeting and conducting programmed inspections in high hazard industries. Without inspections, workers working in those industries may be at increased risk of injury or illness.

The low percentage of programmed inspections has been discussed with the state during the quarterly meetings. The state has been committed to increasing their efforts on conducting programmed inspections. In response the state has revamped their targeting lists and has committed additional resources in this area. This issue will be closely monitored during FY 2014.

Observation OB-1: Based on the number of serious violations found during programmed inspections, the targeting system may not be getting CSHOs into high hazard workplaces.

Federal Monitoring Plan: Closely track the percentage of programmed planned inspections in high hazard industries at quarterly meetings.

Currently, most programmed planned inspections occur in the construction industry; however, violations were not found in 50 out of 135 (37 percent)

inspections. This is due in part to the state's decision to return to the practice of opening inspections with every construction employer on a multi-employer worksite, regardless of whether they have workers exposed to a hazard. When questioned, the rationale given for returning to this practice is to establish a history of in-compliance inspections for construction employers. This would enable the employer to be eligible for a 10 percent penalty reduction if a serious citation was issued in a future inspection.

The state's 40 percent in compliance safety inspections significantly exceeds the national average of 29 percent (SAMM 20). A major contributing factor is limiting the scope of the inspection to only address complaint/referral allegations and hazards directly related to a fatality. The in-compliance rate was also impacted by the fact that the majority (85 percent); of the state's inspections are complaints or referrals and the scope of the inspection is limited to the allegations. Other hazards are not addressed by citation (see Finding and Recommendation 13-01 above). The state must improve their complaint and referral screening and increase the use of the inquiry process for non-formal and other-than-serious allegations (see Finding and Recommendation 13-04).

Industrial Hygiene Sampling

Three case files reviewed included sampling; two with air monitoring. Of those cases reviewed, air monitoring was limited to 15-30 minutes, despite evidence in the case file indicating the operation continued longer. No over-exposures were found. The limited sample time to determine eight-hour Time Weighted Averages (TWA) was inconsistent with validated methods to monitor workplace exposures. To eliminate errors associated with fluctuations in exposure, every attempt to sample as much of the work shift as possible must be done when determining compliance with an eight-hour TWA Permissible Exposure Limit (PEL). See guidelines provided in the OSHA Instruction TED 01-00-015 (TED 1-0.15A), Section II: Sampling, Measurement Methods and Instruments.

One inspection involved the collection of a bulk sample for a granite cutting operation. The sample was positive for silica; however, there was no documentation in the case file explaining why air monitoring for silica was not done.

Finding 13-02: Air monitoring for workers with an eight-hour Time-Weighted Average (TWA) exposure to chemicals was limited to 15-30 minutes.

Recommendation 13-02: Every attempt to sample as much of the work shift as possible must be done when determining compliance with an eight-hour TWA Permissible Exposure Limit (PEL).

There were no inspections that met the federal definition of significant case.

The activity goal for percent of programmed inspections with serious/willful/repeat violations (S/W/R) was not met. IMIS data showed that the state's S/W/R was 41.22 percent for safety and 45.16 percent for health programmed inspections. This low percentage indicates that the inspection targeting system was not identifying locations where serious hazards were present. The goal of targeting establishments under the Programmed Inspection Policy is to identify the high hazard industries. Inspection targeting will be addressed further in Section 7: Special Study - State Plan Targeting Programs.

The inability of the state to effectively manage the complaint/referral process and focus resources on the high hazard industries continues to be a serious concern. For the past few years the staff turnover rate and lack of experienced compliance officers has been a contributing factor. This is a repeated finding and recommendation from last year and has been re-numbered to 13-03 (formerly 12-02, 11-06). The state must direct adequate resources toward increasing the number of programmed inspections in targeted industries.

Finding 13-03 (formerly 12-02, 11-06): A high percentage (85 percent) of total inspections conducted were initiated by complaints/referrals/un-programmed inspections, which do not allow adequate resources for programmed inspections at high hazard worksites.

Recommendation 13-03 (formerly 12-02, 11-06): The state must direct adequate resources toward increasing the number of programmed inspections.

d). Citations and Penalties

A majority of the case files reviewed had adequate documentation to support the violations. However, there were nine cases (approximately 12%) with the wrong standard cited. For example, the failure to have a competent person evaluate a trench in downtown Las Vegas was cited under the hazardous waste standard, a general duty violation was cited for guardrails on a scissor lift, and a citation was issued for failure to train a previously trained forklift operator. There were also violations for respirator fit testing without a documented hazard (i.e. over-exposure) and gasoline in a plastic container despite the August 26, 1996 interpretation letter that says the use of plastic gas cans is acceptable. These errors should have been found and corrected during the case file review by the supervisor. The supervisor must carefully review each case file to ensure the correct standard for the hazard is cited and in accordance with policy.

Finding 13-04: Incorrect standards were used to cite hazardous conditions.

Recommendation 13-04: Each case file must be carefully reviewed by the supervisor to ensure the correct standards are issued.

The SAMM 9 reference standard of 2.04 S/W/R violations and 0.88 other than serious violations per inspection with violations was not met. The state had 1.4 S/W/R violations and 1.17 other-than-serious violations per inspection with violations. This measure is also impacted by the practice of limiting the scope of the inspection to only address complaint/referral allegations and factors directly related to a fatality (see Finding and Recommendation 13-01). The following Table 3 provides a summary of this data:

**Table 3
Number and Percentage of Violations**

Violation Type	Number
Total Violations	1,863
Serious	823
Willful	3
Repeat	56
Other	957
FTA	4

The IMIS Enforcement Statistics report shows that 52 percent of all violations cited were other-than-serious. The case file review determined the percentage of violations with hazards appropriately classified was 32.4 percent. Examples of serious hazards that could cause temporary or permanent disability that should have been correctly classified included the failure to provide eye protection when handling chlorine, and a defective snap hook on a lanyard used for fall protection. This was contrary to NvOSHA policy for determining the severity of a violation in the NOM, Chapter 4. Errors in classification of violations should be addressed during supervisory review of the case file.

Finding 13-05: Serious hazards that could cause temporary or permanent disability were not classified as serious violations.

Recommendation 13-05: Supervisors must carefully review each case file and ensure each violation is classified in accordance with the Nevada Operations Manual (NOM), Chapter 4, Section II. Serious Violations.

The grouping of violations was rarely done and only for violations that were closely related and constituted a single hazardous condition. No issues were found with grouping of violations.

The state has appropriately pursued willful and repeat violations. These violations were well documented and penalties were issued in accordance with the NOM. There were a total of three willful and 56 repeat violations cited.

The average percent penalty retained for all violations was 68.52, which exceeded the reference standard of 66 percent (SAMM 24). The average serious penalty assessed per serious violation was \$2,585.83, which exceeded the reference standard of \$2,244.60. The penalty breakdown to account for the size of employer also met or exceeded the reference standard (see Table 4 below).

**Table 4
Penalty for Serious Violations and Employer Size (SAMM 18)**

Employer Size	Avg. Serious Penalty	Reference Standard
1-25 Workers	\$1,033.48	\$1,139.9
26-100 Workers	\$1,997.59	\$1,427.5
101-250 Workers	\$2,684.70	\$1,954.9
251+ Workers	\$3,118.08	\$2,494.8
All Employers	\$1,707.17	\$1,446.8

Citations

Safety citations had a lapse time of 37.3 days and health citations were on average issued in 49 days. The corresponding national average reference standard is 43.4 for safety and 57.05 for health (SAMM 23) and the state performed exceptionally well for this measure.

**Table 5
Safety Citation Lapse Time**

	FY 2010	FY 2011	FY 2012	FY 2013
Goal	47.3	51.9	55.9	43.4
Actual	43.46	58.20	46.73	37.26
Difference	3.84	-6.3	9.17	6.14

**Table 6
Health Citation Lapse Time**

	FY 2010	FY 2011	FY 2012	FY 2013
Goal	61.9	64.8	67.9	57.05
Actual	61.2	81.34	65.57	49.03
Difference	0.7	-16.54	2.33	8.02

e). Abatement

Abatement periods for issued citations were appropriate for the hazard and the state met the negotiated goal of 94 percent for timely certification of abatement.

A total of 8 out of 896 (1 percent) serious hazards were not timely verified as abated. (SAMM 6)

There were six cases without timely certification of abatement for 60 days or more. (SAMM 22) The state investigated and found that abatement had been verified in five out of the six cases. However, there were delays in data entry and updates to IMIS. The sixth case involved a miscommunication with the employer. The violation had been addressed, but the office had not received the certification of abatement.

During the case file review, it was discovered that many files (35 percent) did not have the certification of abatement information from the employer in the case file. The case file is the official record of the inspection and all documents received from the employer, related to the inspection must be included in the case file.

Finding 13-06: There were case files that did not include the abatement certification information received from the employer.

Recommendation 13-06: NvOSHA must ensure that all abatement certification documents received from the employer be included in the case file.

The state conducted 11 follow-up inspections. Follow-up inspections are conducted when necessary to obtain abatement.

f). Worker and Union Involvement

The state laws and policies for worker participation in the inspection can be found in Nevada Revised Statutes (NRS) 618.435 and NOM, Chapter 3, page 41. The state's procedures are equivalent. All case files reviewed and the SAMM measure indicated worker interviews had been conducted for all inspections (100 percent); however, only 86 percent of the cases files had the NvOSHA interview form or documented interview statements. The NOM, Chapter 3, page 52 requires worker statements to be documented in a thorough and accurate manner. Supervisory review of the case file should verify that worker's interview statements were documented in each case file. This finding was also found in the whistleblower investigation Finding and Recommendation 13-08.

There were 15 cases that indicated workers were represented by the union at the site. There were some documented instances where the union was contacted, but declined to participate. Three out of 15 files documented that the union was present and participated in the inspection.

2. REVIEW PROCEDURES

a). Informal Conferences

NvOSHA generally grants employers penalty reductions for size, history, good faith and quick-fix. During the informal conference, penalties, on average, are reduced 31.5 percent, which equates to higher penalty retention than the reference rate of 34 percent (SAMM 24).

NvOSHA's informal conference procedures are equivalent to OSHA; however, the state has an additional provision that gives the employer the opportunity to have the case reviewed by the CAO prior to a review board hearing. Often the informal conferences are held the last day of the contest period or after the 15-day contest period and after a notice of contest has been filed. Management stated that the delay in having the informal conferences was due to the high number of request. During this evaluation period a total of 474 informal conferences were held; most with the two District Directors. The settlement agreement is usually signed two to three weeks later (one case took almost six weeks). After the agreement is signed the employer is sent a second citation with the same abatement dates and revisions agreed to in the settlement discussion.

There were no issues with the state's violations vacated and/or reclassified and penalty reductions. The informal conference notes documented the rationale for any changes and the settlements were appropriate. Informal settlement provisions provided employers the right of review and, worker or their representatives, the opportunity to participate in the proceedings.

b). Formal Review of Citations

The five members of the Occupational Safety and Health Review Board are appointed by the Governor and are made up of two members from management, two from labor, and a representative of the general public. Hearings are open to the general public and Review Board decisions are available to the public upon request.

Nevada's Administrative Rules contain procedures that afford employers the right to administrative and judicial review of alleged violations, initial penalties and abatement periods. Those procedures also provide workers and their representatives the opportunity to participate in Review Board proceedings and to contest citation abatement dates.

The average lapse time from receipt of contest to first level decision is 234 days, which was higher than the reference standard for this measure of 211 days.

The Board provides administrative review of appeals for contested citations issued by Nevada OSHA and affected workers are entitled to participate in hearings before the Board. Decisions of the Board may be appealed to the appropriate State District Court. Appeals from the Nevada District Courts go to the states supreme court. There are at least two cases the state appealed a Board decision to the District court.

3. STANDARDS AND FEDERAL PROGRAM CHANGES ADOPTION

a) Standards Adoption

The Nevada Revised Statutes (NRS) 618 has acceptable procedures for promulgating standards that are at least as effective as those issued by OSHA. The statute provides for the emergency adoption of standards and adopts by reference all federal occupational safety and health standards, which the Secretary of Labor promulgates, modifies or revokes, and any amendments unless the state opts to provide a standard that provides equal protection.

NvOSHA timely adopted two federal standards during this evaluation period; 29 CFR 1910, 1915, 1917, 1918 and 1926 Updating OSHA Standards Based on National Consensus Standards; Head Protection. However, the state did not submit a response or provide status for the adoption of 29 CFR 1926 Direct Final Rule Cranes and Derricks in Construction: Underground Construction and Demolition, which was published in the Federal Register on April 25, 2013.

In addition the state indicated they were not going to adopt Crane standard, 29 CFR 1926 Cranes and Derricks in Construction, Final Rule, published in the Federal Register as a final rule on August 9, 2010. However, to date a formal plan change supplement (PCS) along with a side-by-side comparison document of the state's standard has not been submitted. This can result in the enforcement of a standard that is less effective than the federal standard. See Finding and Recommendation 13-07.

**Table 7
Status of 2012 Federal Standards Adopted**

Standard:	State Response Date:	Intent to Adopt:	Adopt Identical:	Adoption Due Date:	State Adoption Date:
29 CFR 1910, 1915, 1917, 1918, 1926 Updating OSHA Standards Based on National Consensus Standards; Head Protection (11/16/2012)	01/16/2013	Yes	Yes	07/16/2013	03/01/2013
29 CFR 1926 Cranes and Derricks in Construction, Final Rule (08/09/2010)	11/08/2010	No	N/A	10/10/2010	Pending

29 CFR 1926 Direct Final Rule Cranes and Derricks in Construction: Underground Construction and Demolition (04/25/2013)	Pending	Pending	Pending	11/23/2013	Pending
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There was one State Plan-initiated law changed to NRS 618.445, which was effective May 18, 2013. This law involves removing the requirement that a worker must notify his or her employer before filing certain complaints with the Division of Industrial Relations of the Department of Business and Industry. This change is not substantially different than the current federal equivalent statute.

b). OSHA/State Plan-Initiated Changes

There were five FPCs that were due this evaluation period and all notices of intent were provided timely. There were four delinquent FPCs that carried over from previous years (see Table 10 below). The delinquent FPCs were federal directives that were not adopted identical. In two instances, copies of the manuals containing the state's revisions to the federal directives were provided to the area office, but the state has yet to submit a formal plan change which includes a letter and side-by-side comparison document. Formal plan changes need to be submitted for the NOM, Voluntary Protection Program (VPP) Manual, Operational Policy Memo for Discrimination Complaints, and Workplace Violence directive. There were no State Plan-initiated changes during this evaluation period.

The state adopted and timely notified OSHA of legislative and regulatory changes. These changes include procedures for victim's family and changes to the whistleblower discrimination law (see Section 3.a above).

NvOSHA adopted CPL 02-00-017 National Emphasis Program Occupational Exposure to Isocyanates. The CPL 02-13-01 Site-Specific Targeting was not adopted because the state had determined it was not applicable in Nevada. The equivalent to the federal penalty policy was adopted by the state in 2010.

Finding 13-07: Four delinquent plan changes for directives have not been submitted. The state has not provided a response and/or submitted a formal plan change supplement (PCS) and side-by-side comparison document for federal standard(s) that are not adopted identical.

Recommendation 13-07: Submit federal program changes for CPL 02-00-148 Revisions to FOM November 2009, CPL 02-01-052 Enforcement Procedures for Incidents of Workplace Violence, CPL 02-03-003 Whistleblower Investigations Manual, and CPL 03-00-153 Communicating OSHA Fatality Inspection

Procedures to a Victim's Family. Submit formal PCSs, including side-by-side comparison documents for 29 CFR 1926.856 and 858 Direct Final Rule Cranes and Derricks in Construction and Underground Construction and Demolition and 29 CFR 1926 Cranes and Derricks in Construction.

**Table 8
Status of Federal Program Changes (FPCs) Adoption**

FPC Directive/Subject:	State Response Date:	Intent to Adopt:	Adopt Identical:	Adoption Due Date:	State Adoption Date:
CPL 02-00-148 Revisions to FOM November 2009 (11/09/2009)	03/23/2010	Yes	No	07/17/2010	* Pending submission of plan change
CPL 02-01-052 Enforcement Procedures for Incidents of Workplace Violence (09/08/2011)	11/09/2011	Yes	No	03/08/2012	* Pending submission of plan change
CPL 02-03-003 Whistleblower Investigations Manual (09/20/2011)	11/17/2011	Yes	No	03/20/2012	* Pending submission of plan change
CPL 03-00-016 2012 484 Nursing Home NEP (04/05/2012)	04/06/2012	Yes	Yes	10/05/2012	10/01/2012
CPL 03-00-153 Communicating OSHA Fatality Inspection Procedures to a Victim's Family (04/17/2012)	05/23/2012	Yes	No	10/17/2012	* Pending submission of plan change
CPL 02-00-154 Longshoring and Marine Terminals Tool Shed Directive (07/31/2012)	09/28/2012	Yes	Yes	01/30/2013	01/01/2013
CPL 02-03-004 Section 11(c) Appeals (09/12/2012)	11/08/2012	No	N/A	N/A	N/A
CPL 02-01-54 Inspection and Citation Guidance for Roadway and Highway Construction Work Zones (10/16/2012)	11/09/2012	Yes	Yes	04/16/2013	04/01/2013
CPL 02-13-01	01/17/2013	No	N/A	N/A	N/A

Site Specific Targeting (01/04/2013)					
CPL 02-00-017 National Emphasis Program Occupational Exposure to Isocyanates (06/20/2013)	08/15/2013	Yes	Yes	12/20/2013	12/01/2013
CPL 02-00-155 Federal Program Change Memo for OSHA Instruction (09/06/2013)	11/14/2013	No	N/A	N/A	N/A
CPL 02-01-055 Maritime Cargo Gear Standards and 29 CFR part 1919 Certification (09/30/2013)	11/15/2013	Yes	Yes	03/30/2014	3/01/2014

* Denotes federal approval pending the state must submit a formal plan change, which requires a letter and side-by-side comparison document.

4. VARIANCES

NvOSHA has not granted permanent and/or no temporary variances during this evaluation period.

5. PUBLIC WORKER PROGRAM

A total of 57 inspections (3.86 percent of inspection activity) were conducted in the public sector. This exceeds the projected goal of 29 inspections and the negotiated reference standard of three percent. The process and procedures for conducting inspections in the public sector are the same as the private sector including the issuance of penalties.

6. DISCRIMINATION PROGRAM

NvOSHA investigated claims of whistleblower retaliation for reporting of occupational safety and health issues under NRS §618.445. The state whistleblower investigation team included two supervisors (one in each district office), two primary investigators (one full time and one part time.) Because of a language barrier, one case was investigated by a Spanish-speaking compliance officer. All investigators, including the supervisors, have attended Federal OSHA's Basic Whistleblower Investigator course (#1420).

In FY 2013, the percentage of 11c complaints that were meritorious was 27.94, which exceeded the reference standard of 24.8 percent (SAMM 14).

The state has not submitted their final Whistleblower Investigations Manual (WIM) (CPL

02-03-003) to OSHA for review and approval. However, a draft manual has been shared with OSHA (see Finding and Recommendation 13-07 above).

A legislative change was made to NRS 618.445 and the requirement for complainants to notify the employer prior to filing a whistleblower discrimination claim was removed as of May 18, 2013. Interviews with NvOSHA management confirmed that this practice has been phased out. This was addressed previously as Finding and Recommendation 12-04 and is now considered corrected and closed.

There were several issues noted within IMIS including two cases with incorrect adverse action dates, filing dates and two cases coded as merit, closed in IMIS and then forwarded to the state's legal department to pursue possible litigation. The file closing date should be the date the legal department filed a complaint in state court or the date the case was dismissed after the legal department completed their review. There were three cases docketed after they closed. The WIM Chapters 2(B) and 5(VIII), and OSHA's IMIS User Guide, requires the timely and accurate entry of information in IMIS, including docketing cases into IMIS prior to sending out opening letters notifying parties of the investigation. NvOSHA's draft manual 2(c)(1) and 2(f)(1)(a)(4) also requires that cases be assigned a case number before the investigation begins. NvOSHA's draft manual however is silent regarding whether information entered into IMIS be accurate. NvOSHA's draft manual 2(f)(11)(c) also directs that recommended merit case files be forwarded to the Chief Administration Officer (CAO) for review and then closed on IMIS prior to the state actually filing a claim in state court, while the WIM requires that the case remain open in IMIS until a complaint is actually filed in US District Court (see WIM Chapter 5(V)(E) and 5(V)(VII)(C)). The above issues did not affect the integrity of the investigations and are not findings at this time.

A review of the investigation process found that relevant interviews were not documented in two of the case files. In one case, the investigator indicated that there had been several contacts with the complainant; however, there was only a summary of these conversations in the final report. The other file indicated that "employee interviews were conducted" and again there was no documentation of such interviews. The WIM Chapter 3(III), 3(VI)(D)(3), 3(VI)(E)(10), 3(VI)(H)(5), and 3(VI)(L)(1) requires that interviews be documented in the case file rather than just summarized in the final report.

Finding 13-08: All safety and health enforcement and whistleblower discrimination files did not contain documentation of worker statements obtained during the interview process, as required by The WIM Chapter 3(III), 3(VI)(D)(3), 3(VI)(E)(10), 3(VI)(H)(5), and 3(VI)(L)(1).

Recommendation 13-08: Develop procedures to ensure all safety and health enforcement and whistleblower discrimination files document worker statements in the case file and insert in the draft manual.

There were two cases where there was no evidence that the complainant was forwarded the employer's response and supporting evidence, as required by the WIM Chapter

1(XI)(A)(2). NvOSHA has no such policy. This issue was addressed last year in Finding and Recommendation 12-05. According to NvOSHA, there is no uniform or consistent practice of providing a redacted copy of the company's defense to the complainant although NvOSHA is moving toward it.

Finding 13-09 (formerly 12-05, 11-12): The whistleblower complainant was not provided an opportunity to respond to the employers defenses, as required by the WIM Chapter 1(XI)(A)(2).

Recommendation 13-09 (formerly 12-05, 11-12): Develop and adopt a procedure to ensure that the complainant is provided an opportunity to respond to the employer's defense in line with the WIM Chapter 1(XI)(A)(2).

In three cases, a merit determination was considered but the determination did not include deliberation for awarding punitive damages. One case contained evidence that the company had a history of retaliating against workers for reporting safety complaints and punitive damages were not discussed as a possible remedy in the final report. The WIM Chapter 6(II)(D) requires that punitive damages be explored where the company's conduct is motivated by evil motive or when it involves reckless or callous indifference to the rights of a worker. NvOSHA has no such equivalent policy in their draft manual.

Based on the plain reading of the statute, the state's legal department does not believe §618.445 allows for punitive damage. The state statute §618.445(4) indicates that a court can grant "reinstatement and reimbursement for lost wages and work benefits." Although the OSH Act in Section 11(c)(2) also does not expressly authorize punitive damages (a federal court can grant "all appropriate relief including rehiring or reinstatement of the worker to his former position with back pay"), federal courts have long interpreted this section as allowing for punitive damages (see, for example, Reich v. Cambridgeport Air Systems, Inc., 26 F.3d 1187, 1191 (1st Cir.1994); Perez v. Renaissance Arts and Education, Inc. dba Manatee School for the Arts, et al., LEXIS 141752 (M.D. Florida, September 30, 2013; and Reich v. Skyline Terrance, Inc. 977 F. Supp. 1141 (N.D. Okla. 1997).

In the same three NvOSHA cases mentioned above, awarding for compensatory damages such as mental distress was also not considered by NvOSHA. The WIM Chapter 6(II)(C) requires that compensatory damages be explored as a part of the complainant's make-whole remedies and can include emotional distress claims. NvOSHA has no comparable policy in their draft manual. Comparable to punitive damages, federal courts have long interpreted Section 11(c) as allowing for compensatory damages even though the statute does not specifically itemize compensatory damages as a remedy (see, for example, Cambridgeport Air Systems, 26 F.3d 1187). According to NvOSHA, its legal department recommends against awarding compensatory damages based on the plain reading of §618.445 although retirement benefits such as 401k earnings are available.

Finding 13-10 (12-09, 11-18): NvOSHA remedies did not include or contemplate awarding punitive and/or compensatory damages to the whistleblower complainant in a

recommended merit determination, as required by the WIM Chapter 6(II)(C and D).

Recommendation 13-10 (12-09, 11-18): Develop and adopt procedures to award punitive and/or compensatory damages in recommended merit determinations.

During the review of the case files several examples were found where NvOSHA's requirement to close cases within 90 days led the state to conduct incomplete investigations. During an interview with one of the NvOSHA investigators, it was explained that in FY 2013 they were required to complete investigations within 90 days of filing. Moreover, according to NvOSHA's draft manual 2(e)(6), one of the District Manager's roles is to make "sure discrimination investigations are conducted in a timely manner, pursuant to NRS 618.445." The state completed 75 percent of all their investigations within the 90-day timeframe and, on average, investigations were completed in 88 days (SAMM 16). Further analysis revealed that 22 out of the 68 cases closed last year (32 percent) were closed on the 90th day. In comparison, Federal OSHA completed 31 percent of investigations by the 90th day during FY13.

The pressure to complete cases in 90 days has resulted in quick investigations that are detrimental to NvOSHA's ability to conduct proper analysis and thorough investigations. Evidence of this 90-day deadline pressure was found in an e-mail from a NvOSHA investigator sent to a company attorney on the 89th day, which said he had a "deadline" to close the case the next day. The following examples are cases that appeared to be closed prematurely in order to meet the deadline:

- a. A case was dismissed on the 90th day of filing and the investigator did not fully explore adverse action, which in turn affected the analysis. One crucial element of whether the complainant's quitting was a "constructive discharge" was not properly investigated and NvOSHA dismissed the claim because it felt the complainant did not suffer an adverse action.
- b. A case was settled based on the investigator's recommendation of merit. The investigator only interviewed the complainant and received the company response around the 75th day of filing; the investigator informed both parties that the case appeared meritorious. It was unclear from the case file why the investigator recommended a merit determination. The meritorious recommendation appears premature. The claim was settled on the 81st day.
- c. Another case was completed on the 90th day of filing. On the 75th day of filing, the investigator contacted the company to request interviews and was told the company had gone out of business. There was no other evidence in the case file confirming this was true. Taking the company's allegations at face value, the investigator informed the complainant that the company had gone out of business, which likely resulted in the complainant withdrawing his/her complaint. This represents a failure to test the company's position in that the investigator relied on the company's asserted claim of insolvency and informed the complainant of this, who then withdrew the complaint.
- d. In this case, no activity was recorded in the case file from approximately the 40th day to the 89th day and then the case settled and was closed on the 90th day.

Although the complainant signed the agreement, it appears that he/she may have been pressured to do so. During the screening, the complainant specified that he/she was looking for approximately \$8,600. He/she received no monetary award under the settlement, a limited expungement of their records, and an agreement that the employer would provide a neutral reference to future employers; the latter is something most employers do with or without an agreement. In other words, the complainant essentially received very little consideration in exchange for withdrawing his/her 11c complaint and releasing “any and all claims arising out” of the complaint.

- e. Federal OSHA had been contacted by several complainants regarding NvOSHA’s whistleblower investigation process. In some of these cases, the complainant had been told that the case was deemed “meritorious” when in fact it had been sitting in the legal department. Some of these cases were later dismissed for lack of evidence, suggesting that NvOSHA was prematurely declaring cases “merit” and sending cases forward to the legal department that had not been adequately investigated in order to reach this 90-day deadline. In one dually filed case, NvOSHA indicated to the parties that the case was “meritorious” right before the 90th day of filing; however, the legal department felt otherwise and the claim was ultimately dismissed more than a year later.

Although the state’s statute §618.445, which is based on Section 11(c) in the OSH Act, indicates that cases should be completed within 90 days, this deadline is not an absolute bar to investigating cases that exceed this period. See 29 C.F.R. Part 1977.16. There are several Federal Court decisions which have expressly allowed Section 11(c) to proceed even though they were filed after this 90-day deadline, including months later. See Marshall v. N.L. Industries, 618 F.2d 1220 (7th Cir. 1980); Donovan v. Square D Company, 709 F.2d 335 (5th Cir 1983). Dunlap v. Bechtel Power Corp, 6 OSHC 1605 (M.D. La 1977), Solis v. Consolidated Gun Ranges and N. Brian Hallaq, 2011 WL 148838 (W.D. Washington, 2011).

The quick investigation time could have caused the state to conduct incomplete investigations and analysis of the facts, as shown by the improper dismissal, early withdrawal, and settlement with one-sided settlement terms against a complainant, as discussed above. NvOSHA has acknowledged that the 90-day requirement has likely had some effect on the thoroughness of their investigations and has stated it is drifting away from this 90-day requirement, which can be hard to meet given delays during settlement and from company attorneys.

Finding 13-11: Discrimination investigations are often finalized where a more thorough investigation and analysis is warranted in order to meet the 90-day deadline.

Recommendation 13-11: Revise policies and procedures to ensure the 90 day deadline is directory rather than an absolute deadline to conclude an investigation.

Closing conferences were documented in all cases reviewed. This was a finding and recommendation 12-06, which had been corrected and closed.

The final reports in four cases did not cite to exhibits as required by the WIM Chapter 5(IV)(B). NvOSHA has no such procedure in their draft manual. NvOSHA indicated that there was no consistent practice in place requiring investigators to cite to exhibits in final reports. This was addressed previously in finding and recommendation 12-07 and is repeated again this year.

Finding 13-12 (12-07, 11-15): The final reports in some discrimination case files did not cite to exhibits, as required by WIM Chapter 5(IV)(B).

Recommendation 13-12 (12-07, 11-15): Develop and adopt a procedure to ensure that final reports cite to exhibits.

There were a number of cases that were not appropriately analyzed and/or documented for adverse action, nexus, temporal proximity, resolution of discrepancies, constructive discharge, and/or company's defense, as required in WIM Chapter 3(VI) and NvOSHA's draft manual 3(b and e). The following examples were from these cases:

- a. One case did not discuss in the final report whether the company's apparent post-termination "threat" to arrest the complainant also demonstrated an adverse action.
- b. There were two cases where nexus was not fully addressed. In one case, the final report incorrectly stated that there was no temporal proximity even though the complainant was terminated within hours of raising safety concerns regarding a manager who allegedly terminated them. Another case was settled after the investigator informed the parties that a "merit" recommendation was justified. The file contained no analysis or reason why the investigator felt that the evidence showed that the protected activity motivated the company to take adverse action.
- c. There was one case where discrepancies were not resolved between the parties version of events.
- d. There were two cases that failed to adequately test the company's defenses. In one case, the investigator did not test whether the complainant had been constructively discharged and, in another case, the investigator did not test whether the company had gone out of business as the company had alleged.

This was previously addressed as a Finding and Recommendation 12-09 and 11-18.

Finding 13-13 (12-09, 11-18): Discrimination investigations were not properly analyzed and documented in the final report, as required in WIM Chapter 3(VI) and NvOSHA's draft manual 3(b and e).

Recommendation 13-13 (12-09, 11-18): Where applicable, develop procedures to ensure the proper analysis of adverse action, nexus, temporal proximity, resolution of discrepancies, constructive discharge and/or company's defense within the final report.

There were two cases coded as Merit/Litigation that did not include a complete damage

analysis for back pay. In one case, there were no back pay calculations. Similarly, the other case did not include documentation in the final report or case file of what remedies the complainant should be afforded.

According to the WIM Chapters 5(IV)(B)(5) and 6(II), damage analysis should include back pay, punitive damages and compensatory damages and the final report should describe all appropriate relief due to the complainant. NvOSHA has no equivalent requirement in their draft manual. See Finding and Recommendation 13-10 above for additional related information.

Finding 13-14: Documentation of damage analysis was missing and/or incomplete in discrimination case files, as required by WIM Chapters 5(IV)(B)(5) and 6(II).

Recommendation 13-14: Develop procedures to ensure documentation of damage analysis within the case file.

The settlement of cases was reviewed and there were no trends of discrepancies in this category.

There is significant improvement in the state's case file management. Although nine of the 10 cases reviewed were not technically organized in the manner prescribed in the WIM Chapter 5(III), the files were generally easy to review and organized in a logical fashion.

A total of 75 percent of the discrimination investigations were completed within 90 days. Of the 68 cases closed, 28 percent were meritorious cases. The average number of calendar days for investigators to complete investigations was 86 days.

**Table 9
Status of 11(c) Investigations Completed within 90 Calendar Days
(SAMMs #13 and #14)**

Percent of §618.445 Investigations Completed within 90 days	FY 2011	FY 2012	FY 2013	National Average of State Plans (FY2011 – FY2013)
Completed within 90 days	100%	96%	75%	55%
Merit Cases	23%	32%	28%	20%

7. SPECIAL STUDY – STATE PLAN TARGETING PROGRAMS

Development of Targeting Programs

NvOSHA has a targeting program in place for Construction and General Industry that generally follows Federal OSHA processes. The targeted manufacturing industries are fabricated metal products, plastics and rubber, and non-metallic mineral product manufacturing. In addition, there are six local emphasis programs for assay laboratories,

asbestos, casinos/hotels/motels, conventions and events, needle sticks and theatrical and stage productions. Some written instructions, similar to those in an LEP, were written in the past, but were outdated, and there is no current written procedures in place for the emphasis programs.

Site selection includes prioritization of industries based on BLS data that is published yearly and the Days Away, Restricted or Transferred (DART) rate, selection of establishment and creation of inspection registers using the states employer directory database and randomization steps using a third-party random number table. The state uses the McGraw Hill Dodge reports for targeting ongoing construction projects and inspected all facilities listed as resources permit.

The state did not adopt CPL 04-00-001 Procedures for Approval of Local Emphasis Programs (LEPs) and there is no legal review in the process for implementation of targeted programs.

Public input is obtained through legislative auditors who gather the feedback from the community. Employers are notified of targeted programs from the NvOSHA website. The state relies on federal data from OSHA, Center for Disease Control (CDC), and NIOSH to establish trends and identify emerging hazards.

Evaluation of the Targeting Program

Five-year strategic goals were put in place for FY 2011-2015. These goals are part of the grant and are supported by the yearly updated performance goals that are also included in the grant. There are three performance measures used to determine effectiveness for targeted program; 50 percent of inspections had S/W/R violations, 30 percent in-compliance rate and one percent decrease in DART rate.

Inspections are assigned to CSHOs through supervisors and are tracked in IMIS and on an in-house spreadsheet. Inspections of large employers are conducted by a team usually consisting of an Industrial Hygiene and Safety compliance officers. Inspections are conducted by following the guidance provided in the FOM. The case files are retained under a records disposition policy that is similar to OSHA's. The safety and health inspection files are kept six years, health inspections with sampling are kept 40 years and fatality cases are kept forever.

The state's high employee turnover rate over the past few years, inexperienced staff, and focus on conducting complaint and referral-related inspections has impacted its ability to conduct programmed inspections in targeted industries. Ten percent of inspections are programmed and this issue is discussed in Section 1.c. above and includes a finding and recommendation for programmed targeted inspections.

8. COMPLAINTS ABOUT STATE PROGRAM ADMINISTRATION (CASPA's)

One new CASPA was filed in FY 2013 and is still open. Two CASPA's from previous years were completed and found to be partially valid. These two CASPAs were not significant, the state took appropriate corrective action and both have been closed. The state has met the timeframes for response for all CASPA's filed during this evaluation period.

9. VOLUNTARY COMPLIANCE PROGRAM

The Nevada Voluntary Protection Program (VPP) was discussed during the quarterly meeting. Their program is consistent with Federal OSHA policies; however, since 2008, the state has been in the process of updating their VPP manual and incorporating the changes in Federal OSHA's policies. In 2012, the state indicated that an updated VPP manual was under final review. To date, the state has not posted the manual on their website or provided a copy to Federal OSHA as required by CSP 03-01-003 Voluntary Protection Programs (VPP): Policies and Procedures Manual (see Finding and Recommendation 13-07).

During this evaluation period one VPP site participant was awarded the VPP Star, two VPP renewal audits were conducted, and two new VPP applications were received for consideration.

10. PUBLIC SECTOR ON-SITE CONSULTATION PROGRAM

The 23g public sector consultation activities were conducted by SCATS. There are no issues of concern with the 23g public sector consultation program. This program completed a total of 35 (5 percent) public sector visits, which exceeds the grant projected program activity of 26.

The MARC report for public sector had a 100 percent abatement verification rate, which indicates no employers were sent to enforcement. Hazards were timely corrected 96 percent of the time.

There was one public sector agency in the state's Safety and Health Achievement and Recognition Program (SHARP). This site is a public water utility located in Reno, NV.

11. STATE PLAN ADMINISTRATION

The state is actively pursuing training by sending staff to the OSHA Training Institute (OTI) in Chicago and sponsoring OTI classes at their training facility in Henderson and Reno. Classes in Nevada are opened up for attendance by other state plans (usually California, Arizona, Hawaii and Utah). Class attendees have stated that the Nevada-sponsored classes are more effective because the training focuses on state issues and concerns.

Training of new hires was a priority during this evaluation period. Most new hires attended five to six of the OTI compliance officer required core classes and all staff attended at least one training course. The state plans to continue its focus on training

both in the classroom and field training on conducting inspections.

The Nevada operating budget for the 23g enforcement and training program (NvOSHA) was \$7,108,054. The federal initial grant award was \$1,505,900. Mid-year sequestration budget cuts reduced federal funding by \$62,800 (4.17 percent).

In FY 2013, NvOSHA had a total of 74 full-time equivalents (FTE); 31 safety and 13 health compliance officers, which exceeds their benchmarks of 11 safety and five health compliance officers.

A 10 percent salary increase was passed by the legislature and implemented. This increase brought some stability to staffing (14 vs. 53 percent turnover from last year) but the hiring of experienced staff continued to be a challenge due to the first step salary restriction for all new hires regardless of experience. At the end of the fiscal year, all positions were filled; however, attrition and staff with less than three years' experience (66 percent) will continue to be monitored.

Finding 13-15 (12-01, 11-01, 10-7): Workers with three years of safety and health experience continue to leave employment with NvOSHA and SCATS for higher paying safety positions.

Recommendation 13-15 (12-01, 11-01, 10-7): Continue to pursue all available options to retain safety and health compliance officers, consultants and trainers.

The state continues to experience issues with information management systems. Problems included significant latency with opening the NCR, unexplained program failures/shut-downs, and the NCR rejecting abatement and other updates to files. The Help Desk has not been able to resolve many of these problems.

A full-time Special Projects Officer is involved with program monitoring and updating written policy and procedures. Other program managers (i.e. VPP and training) are also involved in updating procedures and program evaluation projects.

In addition to quarterly meetings, other meetings were held to resolve NCR data issues, whistleblower processes, and implementation of the new monitoring measures. Despite some animated discussions over certain issues, lines of communication remained open and acceptable resolutions were reached.

The state internal evaluation program primarily consists of running monthly and quarterly reports and following up on any issues of concern. The district offices regularly run reports to track inspection related issues such as abatement, penalty collection open cases etc.

IV. Assessment of State Plan Progress in Achieving Annual Performance Goals

NvOSHA is in the third year of their five-year strategic plan, which ends in FY 2015. NvOSHA developed and submitted its FY 2013 annual performance plan as part of its grant application for federal funds.

The state's report on meeting its annual goals is attached in Appendix E State OSHA Annual Report (SOAR). The following is OSHA's assessment of NvOSHA's performance toward meeting its FY 2012 annual performance goals and the state's progress in achieving its 2011-2015 Strategic Plan.

Strategic Goal 1: Workplace Safety and Health. Reduce workplace injuries and illnesses within the state.

Performance Goal 1.1: Reduce worker injury and illness DART (Days Away, Restricted, or Transferred) by 1 percent.

Results:

- a. Conduct 34 percent of Inspections in construction. The state met this goal; 35 percent of their inspections were in the construction industry.
- b. Conduct 336 Inspections in construction. The state exceeded this measure; conducting 493 inspections in construction.
- c. Fifty (50) percent of S/W/R citations issued. The state did not meet this measure; 41.9 percent of S/W/R citations were issued (see Finding and Recommendation 13-01 and 13-02).
- d. Thirty (30) percent of compliance inspections with no violations found. The state did not meet this measure; 44 percent of inspections did not have violations (see Finding and Recommendation 13-01 about addressing all hazards).
- e. One (1) percent decrease in DART rate CY 2009-2010 (minus 0.02). The state met this measure; the DART rate remained the same as FY 2011, but has decreased by 17 percent from the FY 2008 baseline.

NvOSHA targeted the manufacturing industries; however, few inspections were conducted in those industries. For the third year in a row, the state focus was on the training of new staff and inspections in large and/or complex manufacturing facilities have been avoided. Last year over half of their compliance staff was new. Table 10 below provides a snapshot of the targeted industries and inspections in those industries.

Table 10
Industries Targeted for Programmed Inspections and Serious Violations Cited

Inspections	Const	Fabricated Metal	Plastics and Rubber	Non-Metallic Mineral Prod	Assay Lab	Asbestos	Conventions and Events	Casinos	Needle sticks
Total # Inspections	135	2	5	0	1	2	0	2	1
Incompliance Inspections	50	0	1	0	0	0	0	0	0
Total Serious Violations	39	9	15	0	0	1	0	4	1

The state’s failure to provide the necessary resources to conduct programmed inspections in targeted industries has been an ongoing concern that is addressed in each quarterly meeting. This issue is discussed above in Section 1.c Targeting and programmed inspections and includes Finding and Recommendation 13-04.

Performance Goal 1.2: Verify that 100 percent of serious hazards are abated in a timely manner (per SAMM 6 – verify abated within the abatement due date plus 30 calendar days).

Results:

- a. Percent of serious hazards with verified abatement. The state almost met this measure. Only 99 percent of serious hazards identified were verified as corrected. This issue is discussed in greater detail in section III.1.e.

Strategic Goal 2: Employer involvement. Change workplace culture through education, outreach and employer incentives.

Performance Goal 2: Increase the number of participants in the Nevada Voluntary Protection Program (VPP) Star Program by one site.

Results:

- a. Receive and review at least two VPP applications. The state did meet this measure; two VPP applications were received and reviewed.
- b. Conduct at least one VPP audit. The state met this measure; two VPP audits were conducted.
- c. Award at least one VPP Star Site. The state met this measure; one VPP star site was awarded.

NvOSHA received and reviewed two new VPP applications for consideration. In addition, one VPP star site was awarded for a total of eight VPP Stars. The state has successfully added at least one new VPP site per year. However, some employers have discontinued their VPP programs, which have put the state at risk of failing to meet their five-year goal of 12 sites.

Strategic Goal 3: Staff Professional Development

Performance Goal 3: Conduct field training and evaluate the performance of at least 40 percent of field-assigned compliance safety and health officers.

Results:

- a. Eighteen field training contacts with compliance officers.
The state met this measure. There were 16 compliance officers that had field evaluations by the training section; however, there were many field evaluations of new staff by supervisors that were not reported to the training section.
- b. Forty percent of compliance officers evaluated relative to the number of field assigned compliance officers.
The state met this measure. There were on average 40 compliance officers available to do field inspections and 40 percent of compliance officers were evaluated. Individuals on special assignment and vacant positions were not included in the calculation.

V. Other Special Measures of Effectiveness and Areas of Note

The 2013 Legislature approved a 10 percent raise in salary for compliance staff to help alleviate staff turnover. NvOSHA plans to closely monitor how this increase in pay will impact the staffing turnover rate.

The enforcement program has been increasing its outreach efforts by teaming up with SCATS at conferences and in the planning of other upcoming events.

In 2011 the state granted a temporary variance to the Lake Mead Tunneling project which involves the construction of a tunnel and installation of a water intake system under the lake. NvOSHA has continued its close monitoring of this project and participates in the monthly update meeting with the tunneling contractors.

Appendix A – New and Continued Findings and Recommendations

FY 2013 NvOSHA State Plan Comprehensive FAME Report

FY - Rec #	Finding	Recommendation	FY 2012
Finding 13-01	During case file reviews of complaint generated inspections, serious violations were identified that were not addressed as citations or in hazard alert letters.	All observed serious hazards during an onsite inspection must be addressed by citation and/or hazard letter.	NA
Finding 13-02	Air monitoring for workers 8 hour TWA exposure to chemicals was limited to 15-30 minutes.	Every attempt to sample as much of the work shift as possible must be done when determining compliance with an 8-hour Time-Weighted Average (TWA) Permissible Exposure Limits (PEL).	NA
Finding 13-03	A high percentage (85 percent) of total inspections conducted were initiated by complaints/referrals/un-programmed inspections; which do not allow adequate resources for programmed inspections at high hazard worksites.	The state must direct adequate resources toward increasing the number of programmed inspections.	12-02
Finding 13-04	Incorrect standards were used to cite hazardous conditions.	Each case file must be carefully reviewed by the supervisor to ensure the correct standards are issued.	NA
Finding 13-05	Serious hazards that could cause temporary or permanent disability were not classified as serious violations.	Supervisors must carefully review each case file and ensure each violation is classified in accordance with the Nevada Operations Manual (NOM), Chapter 4, Section II. Serious Violations.	NA
Finding 13-06	There were case files that do not include the abatement certification information, received from the employer.	NvOSHA must ensure all abatement certification documents, received from the employer, are included in the case file as soon as possible.	NA
Finding 13-07	Four delinquent plan changes for directives have not been submitted. The state has not provided a response and/or submitted a formal plan change supplement (PCS) and side-by-side comparison document for federal standard(s) that are not	Submit federal program plan changes for CPL 02-00-148 Revisions to FOM November 2009, CPL 02-01-052 Enforcement Procedures for Incidents of Workplace Violence, CPL 02-03-003 Whistleblower Investigations Manual and CPL 03-	NA

Appendix A – New and Continued Findings and Recommendations

FY 2013 NvOSHA State Plan Comprehensive FAME Report

	adopted identical.	00-153 2012 Communicating OSHA Fatality Inspection Procedures to a Victim’s Family. Submit formal Federal Program Changes including side by side comparison documents for 29 CFR 1926.856 and 858 Direct Final Rule Cranes and Derricks in Construction and Underground Construction and Demolition and 29 CFR 1926 Cranes and Derricks in Construction.	
Finding 13-08	All safety and health enforcement and whistleblower discrimination files did not contain documentation of worker statements obtained during the interview process, as required by The WIM Chapter 3(III), 3(VI)(D)(3), 3(VI)(E)(10), 3(VI)(H)(5), and 3(VI)(L)(1).	Develop procedures to ensure all safety and health enforcement and whistleblower discrimination files document worker statements in the case file and insert in the draft manual.	NA
Finding 13-09	The whistleblower complainant was not provided an opportunity to respond to the employers defenses, as required by the WIM Chapter 1(XI)(A)(2).	Develop and adopt a procedure to ensure that the complainant is provided an opportunity to respond to the employer’s defense in line with the WIM Chapter 1(XI)(A)(2).	12-05
Finding 13-10	NvOSHA remedies did not include or contemplate awarding punitive and/or compensatory damages to the whistleblower complainant in a recommended merit determination, as required by the WIM Chapter 6(II)(C and D).	Develop and adopt procedures to award punitive and/or compensatory damages in recommended merit determinations.	NA
Finding 13-11	Discrimination investigations are often finalized where a more thorough investigation and analysis is warranted in order to meet the 90-day deadline.	Revise policies and procedures to ensure the 90 day deadline is directory rather than an absolute deadline to conclude an investigation.	NA
Finding 13-12	The final reports in some discrimination case files did not cite to exhibits, as required by WIM Chapter 5(IV)(B).	Develop and adopt a procedure to ensure that final reports cite to exhibits.	12-07
Finding 13-13	Discrimination investigations were not properly analyzed and documented in the final report, as required in WIM Chapter 3(VI) and NvOSHA’s draft manual 3(b and e).	Where applicable, develop procedures to ensure the proper analysis of adverse action, nexus, temporal proximity, resolution of discrepancies, constructive discharge and/or company’s defense within the	12-09

Appendix A – New and Continued Findings and Recommendations

FY 2013 NvOSH State Plan Comprehensive FAME Report

		final report.	
Finding 13-14	Documentation of damage analysis was missing and/or incomplete in discrimination case files, as required by WIM Chapters 5(IV)(B)(5) and 6(II).	Develop procedures to ensure documentation of damage analysis within the case file.	NA
Finding 13-15	Workers with three years of safety and health experience continue to leave employment with NvOSHA and SCATS for higher paying safety positions.	Continue to pursue all available options to retain safety and health compliance officers, consultants and trainers.	12-01

Appendix B – Observations Subject to Continued Monitoring
FY 2013 Nevada State Plan Comprehensive FAME Report

OB-#	Observation	Federal Monitoring Plan	FY 2012
OB-1	Based on the number of serious violations found during programmed inspections, the targeting system may not be getting CSHOs into high hazard workplaces.	Closely track the percentage of programmed planned inspections in high hazard industries at quarterly meetings.	NA

Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

FY 12-Rec #	Finding	Recommendation	State Plan Response/Corrective Active	Completion Date	Current Status
12-01 (11-01, 10-17)	Workers with three years of safety and health experience continued to leave employment with NvOSHA and SCATS for higher paying safety positions.	Continue to pursue all available options to retain safety and health compliance officers, consultants and trainers.	NVOSHA will continue to pursue all options to ensure that CSHOs are compensated competitively. The legislature approved a pay increase for CSHOs effective July 1, 2014. However, its impact is uncertain at this time and will be closely monitored for the next two years. The state's merit pay freeze and furloughs are still in effect.	07/01/2016	Open This item has been retained and re-numbered to Finding 13-16.

Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

12-02 (11-06)	A high percentage (82%) of total inspections conducted are initiated by complaints (non-programmed inspections) which does not allow adequate resources for programmed inspections at high hazard worksites.	The state must direct adequate resources toward increasing the number of programmed inspections.	<p>NVOSHA follows NOM protocols to determine which complaints warrant on-site inspections. However, what impacts not only the number of programmed inspections but total numbers overall, is an inexperienced staff.</p> <p>Approximately two-thirds of CSHOs have less than three years of experience with the agency. And because of this, CSHOs' priority will continue to be training.</p> <p>NVOSHA has a ready list of establishments in high hazard industries compiled for site-specific targeting program. It is used for assigning programmed inspections to CSHOs as they are able to handle more complex inspections.</p> <p>Corrective action did not resolve this issue.</p>	10/01/2014	Open This item has been retained and re-numbered to Finding 13-03.
12-03 (11-09)	For FY 2011, 56 out of 915 serious hazards were not verified as abated.	<p>NvOSHA must track and investigate all cases with outstanding abatement and promptly take corrective actions to ensure workers are not exposed to ongoing serious hazards that have not been abated. This is a repeat recommendation from FY 2010.</p> <p>Corrective Action Complete – Awaiting Verification</p>	<p>NVOSHA has hired another Administrative Assistant in Henderson to assist in the process of citations, citation abatement, follow-up assignments, etc - COMPLETED 5/21/12. Special Project Officer has briefed the Administrative Assistants on the importance of abatement verification in a timely manner and run and utilizes the IMIS Abatement Tracking reports on a weekly basis - COMPLETED 10/17/12.</p>	10/17/2012	Completed

Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

12-04 (11-10, 11-17)	Discrimination complainants were required to notify their employer of the intent to file a retaliation complaint. In some cases they were required to make personal delivery to the respondent of their NvOSHA complaint. NRS 618.445(2) may have created a chilling effect on a worker who wished to file a whistleblower retaliation complaint and may hamper NvOSHA's ability to conduct inspections regarding the underlying occupational safety and health complaint at issue.	Amend NRS 618.445(2) to not require complainants to serve the employer a copy of the complaint prior to NvOSHA commencing an investigation.	The 2013 legislature passed and the Governor approved the removal of this requirement effective 05/18/2013.	05/18/2013	Completed
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Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

12-05 (11-12)	In some cases, discrepancies were not resolved and complainants were not provided an opportunity to respond to respondent's defenses.	After completing the respondent's side of an investigation, investigators must resolve discrepancies, including providing the complainant an opportunity to respond to the respondent's defenses.	NVOSHA revised its Whistleblower Manual and submitted it to the Local Area Office AD for review and comment on 08/22/13. Documentation of follow-up questions to resolve discrepancies are now being noted in the Activity-Investigation Log. The 2013 Legislature approved a Chief Investigator position to oversee the Nevada Whistleblower Program. This position has been filled the first of November 2013. Corrective action did not resolve this issue.	09/30/2013	Open This item has been retained and re-numbered to Finding 13-09.
12-06 (11-14)	Closing conferences with discrimination complainants at the end of a discrimination investigation were not documented in the case file.	The discrimination investigator must document the closing conference with the complainant at the end of the investigation where the investigator informs the complainant about the breadth and findings of the investigation and advises the complainant of their rights to appeal a non-merit determination. Corrective Action Complete – Awaiting Verification	Case files were double-checked revealing that 50% of cases included documentation of a closing conference via a letter. Documentation of the closing conference is and will be noted in the Activity/Investigation Log. The closing letter is being updated to include information on the Closing Conference, adding examples such as "Per our discussion during the Closing Conference on (date)..., found no merit", etc - ECD 5/1/13 with the revision of the NVOSHA Discrimination Manual. Closure packet to Area Director - ECD - 5/6/13	5/16/13	Completed

Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

12-07 (11-15)	Discrimination investigative reports did not cite to exhibits.	The discrimination investigator must cite to exhibits in the investigative report	NVOSHA revised and submitted its Whistleblower Manual to the Las Vegas Area Office Area Director for review and comment on 08/22/13. Discrimination officers will be trained when the manual is implemented.	11/01/2013	Open This item has been retained and re-numbered to Finding 13-13.
12-09 (11-18)	Several discrimination investigations failed to adequately test the respondent's defenses or failed to provide an adequate analysis of the evidence, including considering temporal proximity, disparate treatment, and animus.	The discrimination investigator must broadly view and test defenses offered by respondent in addition to other evidence to determine if there is evidence that the complainant suffered disparate treatment or animus, suffered adverse action in temporal proximity to the respondent learning of the protected activity, and/or whether there is evidence that the respondent's defense was developed in response to, rather than independently of, complainant's protected activity. Corrective Action Complete – Awaiting Verification	Supervisors and WB Investigators attended the 1420 Basic Whistleblower Investigation Courses in Jan/Feb and July/Aug 2012.	10/18/2012	Open This item has been retained and re-numbered to Finding 13-09.

Appendix C – Status of FY 2012 Findings and Recommendations

FY 2013 Nevada State Plan Comprehensive FAME Report

12-10 (11-04)	The state failed to meet their inspection goals by 41%.	Reasonable inspection goals based on history and available resources should be established. Focus attention and the necessary resources to meet inspection goals.	NVOSHA adjusted its inspection goals for FY2013. The number of inspections has already been met and exceeded.	08/30/2013	Completed
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Appendix D – FY 2013 State Activity Mandated Measures (SAMM) Report

FY 2013 Nevada State Plan Comprehensive FAME Report

OSHA is in the process of moving operations from a legacy data system (IMIS) to a modern data system (OIS). During FY 2013, OSHA case files were captured on OIS, while State Plan case files continue to be processed through IMIS. The SAMM, which is native to IMIS, is not able to access data in OIS, which impacts OSHA's ability to process SAMM standards pinned to national averages (the collective experience of State Plans and OSHA). As a result, OSHA has not been able to provide an accurate reference standard for SAMM 18, which has experienced fluctuation in recent years due to changes in OSHA's penalty calculation formula. Additionally, OSHA is including FY 2011 national averages (collective experiences of State Plan and OSHA from FY 2009-2011) as reference data for SAMM 20, 23 and 24. OSHA believes these metrics are relatively stable year-over-year, and while not exact calculations of FY 2013 national averages, they should provide an approximate reference standard acceptable for the FY 2013 evaluation. Finally, while SAMM 22 was an agreed upon metric for FY 2013, OSHA was unable to implement the metric in the IMIS system. OSHA expects to be able to implement SAMM 22 upon the State Plan's migration into OIS.

U.S. Department of Labor				
Occupational Safety and Health Administration State Activity Mandated Measures (SAMMs)				
State: Nevada			FY 2013	
SAMM Number	SAMM Name	State Plan Data	Reference/Standard	Notes
1	Average number of work days to initiate complaint inspections	5.52	(Negotiated fixed number for each state) – 14	State data taken directly from SAMM report generated through IMIS.
2	Average number of work days to initiate complaint investigations	2.6	(Negotiated fixed number for each state) – 5	State data taken directly from SAMM report generated through IMIS.
4	Percent of complaints and referrals responded to within 1 work day (imminent danger)	100%	100%	State data taken directly from SAMM report generated through IMIS.
5	Number of denials where entry not obtained	0	0	State data taken directly from SAMM report generated through IMIS.
9a	Average number of violations per inspection with violations by violation type	1.4	SWR: 2.04	State data taken directly from SAMM report generated through IMIS; national data was manually calculated from data pulled from both IMIS and OIS for Fiscal Years (FY) 2011-2013.
9b	Average number of violations per inspection with	1.17	Other: .88	

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FY 2013 Nevada State Plan Comprehensive FAME Report

U.S. Department of Labor				
Occupational Safety and Health Administration State Activity Mandated Measures (SAMMs)				
State: Nevada			FY 2013	
SAMM Number	SAMM Name	State Plan Data	Reference/Standard	Notes
	violations by violation type			
11	Percent of total inspections in the Public Sector	3.86	3%	State data taken directly from SAMM report generated through IMIS.
13	Percent of 11c Investigations completed within 90 calendar days	75	100%	State data taken directly from SAMM report generated through IMIS.
14	Percent of 11c complaints that are meritorious	27.94	24.8% meritorious	State data taken directly from SAMM report generated through IMIS: National data was pulled from webIMIS for FY 2011-2013.
16	Average number of calendar days to complete an 11c investigation	88.35	90 Days	State data taken directly from SAMM report generated through IMIS.
17	Planned vs. actual inspections – safety/health	993/482	(Negotiated fixed number for each state) – 703/312	State data taken directly from SAMM report generated through IMIS; the reference standard number is taken from the FY 2013 grant application.
18a	Average current serious penalty – 1-25 Employees	a. 1033.48		State data taken directly from SAMM report generated through IMIS; national data is not available.
18b	Average current serious penalty – 26-100 Employees	b. 1997.59		
18c	Average current serious penalty – 101-250 Employees	c. 2684.70		
18d	Average current serious penalty – 251+ Employees	d. 3118.08		
18e	Average current serious penalty – Total 1 – 250+ Employees	e. 1707.17		

Appendix D – FY 2013 State Activity Mandated Measures (SAMM) Report

FY 2013 Nevada State Plan Comprehensive FAME Report

U.S. Department of Labor				
Occupational Safety and Health Administration State Activity Mandated Measures (SAMMs)				
State: Nevada			FY 2013	
SAMM Number	SAMM Name	State Plan Data	Reference/Standard	Notes
19	Percent of enforcement presence	2.95%	National Average 1.5%	Data is pulled and manually calculated based on FY 2013 data currently available in IMIS and County Business Pattern data pulled from the U.S. Census Bureau.
20a	20a) Percent in Compliance – Safety	Safety – 39.60	Safety – 29.1	State data taken directly from SAMM report generated through IMIS; current national data is not available. Reference data is based on the FY 2011 national average, which draws from the collective experience of State Plans and federal OSHA for FY 2009-2011.
20b	20b) Percent in Compliance – Health	Health – 51.76	Health – 34.1	
21	Percent of fatalities responded to in 1 work day	100%	100%	State data is manually pulled directly from IMIS for FY 2013
22	Open, Non-Contested Cases with Abatement Incomplete > 60 Days			Data not available.
23a	Average Lapse Time – Safety	37.26	43.4	State data taken directly from SAMM report generated through IMIS; current national data is not available. Reference data is based on the FY 2011 national average, which draws from the collective experience of State Plans and federal OSHA for FY 2009-2011.
23b	Average Lapse Time – Health	49.03	57.05	
24	Percent penalty retained	68.52	66	State data taken directly from SAMM report generated through IMIS; current national data is not available. Reference data is based on the FY 2011 national average, which draws from the collective experience of State Plans and federal OSHA for FY 2009-2011.
25	Percent of initial inspections	100%	100%	State data taken directly from SAMM report

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FY 2013 Nevada State Plan Comprehensive FAME Report

U.S. Department of Labor				
Occupational Safety and Health Administration State Activity Mandated Measures (SAMMs)				
State: Nevada			FY 2013	
SAMM Number	SAMM Name	State Plan Data	Reference/Standard	Notes
	with employee walk around representation or employee interview			generated through IMIS.