

DEPARTMENT OF INDUSTRIAL RELATIONS

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October 28, 2010

Ken Nishiyama Atha
Regional Administrator
Occupational Safety and Health Administration
San Francisco Federal Building
90 – 7th Street, Suite 18100
San Francisco, CA 94103

Dear Mr. Atha:

Thank you for the opportunity to comment on the OSHA report titled, FY 09 Baseline Special Evaluation Report (Enhanced Federal Annual Monitoring and Evaluation Report-EFAME). Attached is a table containing responses to all of the findings contained in both the body of the EFAME and Appendix G, which reports on the OSHA special study of the California Occupational Safety and Health Appeals Board (OSHAB).

For over 35 years Cal/OSHA has been a national leader in occupational safety and health regulation. Cal/OSHA pioneered the partnership excellence process now called the Voluntary Protection Program by OSHA, adopted the first laws guaranteeing workers the right to know about the hazards associated with chemicals they work with, established the nation's first Injury and Illness Prevention Program (IIPP) laws in the early 1990s, and more recently has led the nation in spearheading several new initiatives, including requiring the use of anti-stick needles to protect workers from bloodborne pathogens, as well as adopting and enforcing the nation's first comprehensive heat illness prevention standard for outdoor workers, and the nation's only aerosol transmissible disease standard.

As a national leader in regulating workplace safety and health, we fully recognize and accept the need for competent monitoring and auditing to ensure program effectiveness. Our management team has invested tremendous time and energy in reviewing the findings and recommendations set forth in the EFAME and has developed considered responses and corrective action plans where appropriate for each finding and recommendation.

One thing that has increasingly stood out as we have reviewed the EFAME is that a number of findings reflect less than optimal communication between the auditors and Cal/OSHA staff, which appears to have contributed to the auditors' misunderstanding of how parts of the Cal/OSHA Program differ from OSHA. Accordingly, we are requesting a follow-up meeting with you and your staff so we can finish the discussions begun by the EFAME process and determine the most productive route to resolving any outstanding unresolved issues.

Our hope is that this process will serve as a stepping stone to a national dialog about the OSHA paradigm itself, including how OSHA and the state programs can come to a clearer understanding of what it means for a state to be at least as effective as OSHA, and how we can move cooperatively forward to improve workplace safety and health.

As I have said before, and I believe you agree, it is important to recognize that the federal requirement for state plans to be “at least as effective as” OSHA does not mean that states must always mimic what OSHA does. In fact, I believe an essential part of the wisdom behind the use of this phrase was recognition that states can serve as laboratories for different approaches to be tested and emulated by other states or nationally, as appropriate.

In the end, the gold standard for success is the reduction of workplace fatalities, injuries and illnesses, as well as bringing about concrete changes in workplace behavior to increase safety performance, and we will not be able to address effectiveness adequately until we have metrics in place that tell us how much progress we are making in these areas. Since neither OSHA nor any of the state plans have yet progressed to the point of having metrics like these in place, we should not only be allowing different approaches, we should be welcoming and encouraging them. We and many stakeholders nationwide believe it is long overdue that OSHA confront head on the issue of defining what effectiveness means in this context, and we are still hopeful OSHA will begin to do so.

The fundamental purpose of the OSH Act of 1970 is to ensure safe and healthful working conditions for all who work within our borders. A national dialogue should be initiated to explore how best to measure improvement in worker safety and health on the job, as opposed to just measuring the output of enforcement measures like citations, penalties, etc. In looking toward true performance measures of success and effectiveness, it is critical to examine all aspects of a plan that demonstrate leadership and expertise even if these areas are not a part of the federal OSHA program.

DIR’s response to the EFAME are contained in the attached table. The following are highlights of some of the most important issues it addresses:

Issue: Cal/OSHA Program classification of serious violations

The EFAME and the Special Study both point to differences between the way OSHA handles serious violation classification and the way the Cal/OSHA Program handles this issue. Finding 8 in the EFAME says that Cal/OSHA’s policy on classifying violations does not ensure violations that would be considered “Serious” under the Federal FOM are classified as Serious. The first finding of the Appeals Board Special Study criticizes the Appeals Board for adhering to a definition of serious violation that is not consistent with the intent of the OSH Act because it results in findings in California that violations are not serious when the same violations would be upheld as serious at the federal level.

This has been an active issue of discussion in meetings between stakeholders and Cal/OSHA, many of which have included the Appeals Board as a participant, for over two years. These discussions ultimately resulted in the passage and signing into law of AB 2774 in September of this year, which redefines the elements of serious violations in Labor Code section 6432 and adds several provisions that will provide clear direction to the Appeals Board and Cal/OSHA on the proper standard for a serious violation. AB 2774 was supported by all stakeholders who directly participated in developing the bill and was virtually unopposed by stakeholders statewide.

This legislation makes it clear that California's approach will not be the same as OSHA's on this issue. However, the approach of this bill is consistent with the basic rationale behind the federal approach, and we believe it is not only at least as effective as the federal approach, but the most effective and appropriate approach for California. OSHA may well want to consider taking a similar approach. Cal/OSHA's enforcement instructions will be amended to conform to this new law before it takes effect this January, 2011.

Issue: Targeting of high-hazard places of employment

EFAME Finding 7 states that "Cal/OSHA's targeting system is not identifying industries where serious hazards are more likely to exist," the recommendation being that Cal/OSHA should "re-evaluate the targeting system and the focus of enforcement resources to ensure that programmed inspections are being conducted at establishments where serious hazards are most likely to exist." This finding is simply incorrect, and reflects a misunderstanding of how our high-hazarding targeting system works.

What the auditors have done here is to lump all of Cal/OSHA's "programmed inspections" into the category of high hazard targeting. This means, for example, that all of the heat inspection sweeps we have conducted to evaluate the effectiveness of our campaign and bring the agricultural and other outdoor work industries into compliance with the heat-illness prevention standard have been erroneously characterized as the result of high-hazard targeting.

The vast majority of our programmed inspections for the last two years has been these heat inspection sweeps. As this special emphasis program has matured, we are seeing a dramatically increased rate of in-compliance inspections, which are a significant indicator that we have changed behavior and brought the industries we have targeted into compliance with the heat standard. We do *not* want to see a high rate of serious violations in these inspections at this stage that would be an indicator of failure.

We believe our targeting system is among the best in the nation. Our High Hazard Unit, which is the part of Cal/OSHA that selects high-hazard places of employment based on a predicted likelihood of having a high rate of serious violations, shows, for FY 2009, a rate of 5.7 violations per inspection, with 2.25 of them classified as serious, willful, or repeat (SWR), versus a national average of 3.3 violations per inspection, with 2.1 classified as SWR.

Issue: Confirming abatement of serious, willful, and repeat (SWR) violations.

EFAME Finding 16 claims there were 209 Serious / Willful / Repeat (S/W/R) violations, as identified in OSHA's data system, that were listed as not abated in a timely fashion. Cal/OSHA prioritizes confirmation of abatement even before citations are issued, and has done so for the past two years. We have also collaborated with the Appeals Board to implement a system where unabated serious violations on appeal are prioritized for early adjudication so that the abatement issue can be resolved as early as possible.

While it may be possible in some cases that abatement has not been confirmed as soon as it could have been, we have no evidence from the EFAME this has actually occurred. We have requested specifics from OSHA and when we receive a response we will act appropriately to correct whatever errors that exist. We have begun a review of files on our own to determine whether this

has occurred, but so far this review has not identified any of the cases OSHA is referring to. It appears the OSHA information may have resulted from data entry errors.

Cal/OSHA will address data entry issues through training and quality assurance inspections.

Issue: Training of Cal/OSHA inspectors and other staff

EFAME Findings 45 and 46 note several deficiencies in Cal/OSHA’s provisions for training of its compliance officers. These criticisms are legitimate though dated, as there is no recognition of the substantial changes that have been in place since the beginning of 2010 to address these issues, including seeking more permanent funding from OSHA to support an expanded training unit.

Cal/OSHA completely reorganized its Professional Development and Training Unit in January 2010, and has a standing committee whose purpose is to plan and implement a three year plan for training managers, field staff and administrative personnel. New funding has been granted by OSHA to support an increase in training staff.

Cal/OSHA has implemented an “initial compliance” and other core courses requirements for all compliance officers, and has training schedules planned in three-year cycles, the first to be completed in 2013. Recognition of this new training program has been built into AB 2774 at new Labor Code section 6432, which now provides

“A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.”

Conclusion

Again, we affirm our commitment to correct every true deficiency we reasonably can, but we differ substantially with the EFAME on many of its most critical conclusions. We continue to urge OSHA to revisit its practice of omitting unique state plan achievements out of its analysis, and we look forward to resolving these differences in direct discussions.

Sincerely,

/Signed/

John C. Duncan
Director

CC: David Michaels
Jordan Barab
Steven F. Witt
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Cal/OSHA's RESPONSE TO THE EFAME

The EFAME contains a total of 46 findings and recommendations. Cal/OSHA has reordered and renumbered these as "Cal 1" through "Cal 46" according to priority, displaying the original OSHA finding numbers immediately below the Cal/OSHA number. A reference table converting the original Fed/OSHA number to the new Cal/OSHA number is located at the end of the response. The findings are divided into two groupings, "critical" and "other".

Findings Cal 1 through Cal 10 are classified as critical by Cal/OSHA because they go to the heart of Cal/OSHA's mission, goals, and service delivery.

All findings are categorized as "agree", "agree in part, disagree in part.", "data needed", or "disagree", with further explanation as appropriate.

CRITICAL FINDINGS

	Finding	Recommendation	Response
<p>Cal 1 (OSHA 7)</p>	<p>Cal/OSHA's Program Targeting System is not identifying industries where serious hazards are more likely to exist.</p>	<p>Re-evaluate the targeting system and the focus of enforcement resources to ensure that programmed inspections are being conducted at establishments where serious hazards are most likely to exist.</p>	<p>Disagree.</p> <p>What the auditors have done is to lump all of Cal/OSHA's "programmed inspections" into the category of "high-hazard" targeting, which significantly dilutes the percentage of serious, willful, or repeat (SWR) violations. Programmed inspections in California consist of both high-hazard targeting and special-emphasis targeting, the latter producing a much lower percentage of SWR violation for the reasons described below. OSHA has ignored the distinction between these two types of inspections.</p> <p>The purpose of high-hazard targeting is specifically to identify workplaces that are expected to have a higher-than-average number of identifiable serious, willful, or repeat (SWR) violations and to conduct inspections to identify and correct these violations. The purpose of special-emphasis targeting is to focus on a particular industry or type of work, usually for an extended period of time, for a number of possible reasons.</p> <p>These reasons include (1) targeting the underground economy, (2) maintaining a high level of certainty of compliance for industries like oil refining, mining, and tunneling, where non-compliance with safety requirements can cause particularly catastrophic accidents, or, (3) as has been the case with Cal/OSHA's heat-illness prevention campaign, retaining a high</p>

	Finding	Recommendation	Response
			<p>degree of enforcement presence long enough to collect the compliance data needed to confirm whether the special emphasis program has changed behavior as intended.</p> <p>Cal/OSHA does not anticipate a high percentage of SWR violations in the majority of its special emphasis inspections because this would indicate that employers remain out of compliance even after extensive work has been done to make sure they are in compliance and will continue to be in compliance.</p> <p>OSHA has failed to recognize this, and consequently, it has diluted the data for high-hazard inspections with the data from special emphasis inspections, the majority of which are showing that employers are in compliance.</p> <p>An analysis of the inspections conducted by Cal/OSHA's High Hazard Unit, which conducts the inspections for the purpose of true high-hazard targeting, shows for FY 2009 an average rate of 5.7 violations per inspection, 2.25 of which are classified as SWR. These rates exceed the national average of 3.3 violations per inspection, 2.1 of which classified as SWR.</p> <p>In addition, Cal/OSHA's HHU found SWR violations in 67.1% of its inspections versus OSHA's rate of 65.8% and the national average of 53%.</p> <p>Action: No change to be made in targeting as a result of this finding. However, Cal/OSHA will be initiating during 2011 a plan to evaluate enforcement/education effectiveness over time in targeted industry segments by looking at overall compliance impact in a fashion similar to what has been done with its heat illness prevention special emphasis program.</p>
<p>Cal 2 (OSHA 24)</p>	<p>Seven fatalities were not opened within one day of reporting; lapse time for inspection of all accident reports ranged from 7.6 days to 38.4 days.</p>	<p>Ensure accidents are opened timely. Generate and review a Fat/Cat tracker to ensure that accidents reports are being evaluated and classified appropriately in order to improve accident lapse time.</p>	<p>Disagree. Cal/OSHA reviewed the three case files and found that in each instance the inspection was initiated in a timely manner. We have been unable to determine the identities of the other four files that OSHA is referring to. The data indicating lack of timeliness were due to IMIS data entry errors.</p> <p>Action: These findings will be reviewed with staff to emphasize the importance of proper data entry and quality assurance reviews of data entry will be initiated.</p> <p>Completion date: January 2011</p>

	Finding	Recommendation	Response
<p>Cal 3 (OSHA 21)</p>	<p>The Complaint Response Log and Complaint Query revealed that half of all complaints inspected were not opened until after five days from receipt of the complaint. Also, the Complaint Employer Response Due standard report revealed outstanding complaints dating back to December of 2008 with employer response pending.</p>	<p>Ensure that complaint IMIS reports are updated and accurate so that they can assist with properly managing the complaint process, And ensure that the Employer Response Due report and Complaint Response Log are regularly updated and cases are followed up on to ensure proper response was received.</p>	<p>Agree in part, disagree in part. Cal/OSHA agrees that, in some cases, complaints are not being opened soon enough. However, OSHA's use of a 5-day metric ignores California law..</p> <p>The California Labor Code and the federally-approved Policy and Procedures Manual contain a requirement to open inspections in response to allegations of imminent danger within 24 hours, serious complaints within 3 days and non-serious complaints within 14 days.</p> <p>Cal\OSHA believes that timeliness in opening inspections in response to complaints is made unnecessarily difficult by our long-standing policy of interpreting Labor section 6309 to require an onsite inspection to all "formal" complaints regarding a workplace hazard, regardless of its seriousness, unless it appears the complaint was filed without any reasonable basis or for the purpose of willfully harassing an employer.</p> <p>Under the same statute, a complaint is formal if made by an employee, or employee representative, which is very broadly defined. This is in marked contrast to OSHA's approach, which does not consider a complaint formal unless signed, dramatically reducing the volume of complaints to which OSHA responds via onsite inspection.</p> <p>Regarding the logging of complaint responses, Cal/OSHA Policy and Procedure requires both initial and final letters go to the complainant in all cases. This OSHA finding includes no information on the identity of the files or cases it is describing, and Cal/OSHA is not aware of which case files were identified as a problematic.</p> <p>As a corrective measure for the first issue Cal\OSHA will give strong consideration to responding to lower priority formal complaints (i.e. those involving non-serious hazards) by conducting an investigation that does not include onsite inspection. This should reduce the onsite inspection workload, resulting in increased ability to ensure timely onsite inspection for higher priority complaints. This</p>

	Finding	Recommendation	Response
			<p>proposal will be vetted with stakeholders.</p> <p>Regarding the second issue, we will review these findings with our management staff to reiterate their responsibility and write a memorandum to district managers making it clear they are responsible to ensure it is accomplished. A file review audit procedure will be implemented to review performance.</p> <p>Completion date: Second quarter 2011</p>
Cal 4 (OSHA 22)	Complaint Letters G and H are not being consistently entered in the database.	Ensure that appropriate G and H notification letters are entered and being sent to all complainants	<p>Agree in part, disagree in part.</p> <p>Action: District and Regional offices will review IMIS reports monthly to ensure the letters are being sent and entered in IMIS. Further, IMIS Coordinators will be instructed to provide refresher training to all staff in all offices to ensure consistent data entry. The appropriate SAMMs Report will be reviewed by the IMIS Coordinators on a monthly basis with a goal of identifying and correcting outliers.</p> <p>Completion date: January 2011</p>
Cal 5 (OSHA 45)	There are substantive gaps in training noted for new hires. Staff members hired as of December 2008 are not scheduled to take the Initial Compliance Course until February 2010. None of Cal/OSHA's VPP staff has attended the OTI Course #2450 Evaluation and Safety and Health Management Systems (SHMS). DLSE investigators and team leaders have not attended the Basic Whistleblower training course.	Ensure staff members receive appropriate training such as the Initial Compliance Course; OTI Course #2450 Evaluation of Safety and Health Management Systems (SHMS) as required by TED 01-00-018, Appendix C and CSP 03-01-003, pages 59-60; or equivalent; and ensure DLSE investigators and team leaders attend the Basic Whistleblower training course or equivalent.	<p>Agree in part, disagree in part. Cal/OSHA's only disagreement is with OSHA's lack of acknowledgement that Cal/OSHA has been actively confronting the need to strengthen training for a significant period of time before the EFAME was begun.</p> <p>Cal/OSHA reorganized its Professional Development and Training Unit (PDTU) in January 2010 after making the necessary changes and additions to management to accomplish this. We have a standing committee whose purpose is to plan and implement a three year plan for training managers, field staff and administrative personnel. Improving training has been an issue under active discussion with stakeholders and will continue to be.</p> <p>Cal/OSHA applied for new federal funds from OSHA to support added staff to its Professional Development and Training Unit, and the funds have been awarded, for which Cal/OSHA thanks OSHA. Accordingly, Cal/OSHA intends to add 3 new staff members to the PDTU during 2011.</p>
Cal 6 (OSHA 46)	Cal/OSHA has not established a curriculum	Establish a curriculum of core courses for newly hired compliance officers that	With regard to mandatory courses, the Initial Compliance course was offered in February

Finding	Recommendation	Response
<p>of core courses that all CSHOs are required to take and could not provide a complete list of courses offered as classes are not scheduled on a regular basis. A review of the courses revealed a lack of consistency and appropriate length in comparison to TED 01-00-018 Initial Training Program for OSHA Compliance Personnel.</p>	<p>are equivalent to Federal OSHA (TED 01-00-018 Initial Training Program for OSHA Compliance Personnel). Ensure that training is scheduled on a regular and timely basis and that course curriculums are equivalent to OSHA OTI courses in quality, content, and length. Need to develop a course equivalent to OTI courses 2000 Construction Standard, 2450 Evaluation of Safety and Health Management, multi-disciplinary courses (e.g. OTI course #1280 Safety Hazard Awareness for Industrial Hygienists and #1080 Health Hazard Awareness for Safety Officers), and 8200 Incident Command System.</p>	<p>2010 and was attended by all new staff members.</p> <p>Action: Cal/OSHA is now following OSHA's training directive with classes planned into 2013. Three Accident Investigation classes have already been conducted with four additional classes scheduled for January 2011. Three classes of Investigative Interviewing Techniques were conducted in the month of September 2010, and two additional classes will be scheduled in the November/December 2010 timeframe.</p> <p>Inspection Techniques and Legal Aspects; the Division plans one class per quarter from October 2010 through September 2012.</p> <p>Once mandatory courses have been presented, then the Unit will arrange for technical courses including: scaffolding, excavation, crane/rigging, machine guarding, and agricultural safety.</p> <p>Additional courses may be planned and conducted as appropriate. To achieve the goal of all CSHOs taking required courses within a three year period, the Cal/OSHA will use a combination of contract trainers and qualified internal staff as instructors.</p> <p>Cal/OSHA has also requested that Federal OSHA offer several courses in California, and the OSHA Education Centers in California have been contacted to determine how a training partnership might deliver additional training.</p> <p>With regard to the Division of Labor Standards Enforcement whistleblower investigator training, a request will be submitted to Region 9 to have their Regional Supervisory Investigator present Basic Whistleblower training to DLSE investigators.</p> <p>Action Completed.</p>

	Finding	Recommendation	Response
Cal 7 (OSHA 8)	Cal/OSHA's policy on classifying violations does not ensure violations that would be considered "Serious" under the Federal FOM are classified as Serious.	Adopt Violation Classification policies and procedures equivalent to Federal OSHA regarding descriptions on Supporting "Serious" Classification (Federal FOM, page 4-10 to 4-11), Supporting "Willful" Violations (Federal FOM, page 4-30 to 4-32), and Combining/Grouping Violations (Federal FOM, page 4-37 to 4-39).	<p>Agree in part, disagree in part.</p> <p>Action: California will continue to ensure its program is "at least as effective as OSHA's. California enacted AB2774 on September 30, 2010 which statutorily re-defines a serious violation and prescribes standards for the investigation and resolution of these violations. Cal/OSHA will develop procedures to implement AB 2774 so that it will be enforced starting on the date it takes effect, January 1, 2011.</p> <p>Completion date: January 2011</p>
Cal 8 (OSHA 26)	<p>Cal/OSHA's evaluation and adoption of Federal Program Changes has not been timely. Cal/OSHA has not adopted both the Employer Payment for Personal Protective Equipment, Final Rule, published November 15 2007 and the Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee, published December 12, 2008. They adopted the Final Rule on Electrical Installation Requirements -29 CFR 1910 Subpart S effective February 18, 2010; they were two and a half years late adopting this rule. In addition, California has not submitted a supplement in response to CPL-02-00-148 2009, Field Operations Manual. Many of the procedural issues discussed in this report relate to items not covered in the State's current Policies and Procedures Manual which should be addressed in the response to the Federal FOM.</p>	Implement measures to ensure that new Federal Program Changes are evaluated and adopted in a timely manner, as per 29 CFR 1953.4(b)(1) and (b)(3).	<p>Agree in part, disagree in part.</p> <p>In addition to engaging to a significant degree in adopting standards for which OSHA has no counterpart, the Occupational Safety and Health Standards Board (OSHSB) has been diligent in responding in a timely fashion to OSHA rulemaking.</p> <p>In the case of personal protective equipment, OSHA's finding is in error. California already has and has had for more than two decades solid law requiring employers to pay for personal protective equipment. See <i>Bendix Forest Products v. Division of Occupational Safety and Health</i> (1979) 25 Cal. 3d 465.</p> <p>What we have discovered on reviewing the history of OSHA rulemaking on PPE is that when OSHA amended 29 CFR part 1910.132 in 1994 to require employers to implement a PPE program, Cal/OSHA never responded. Cal/OSHA and OSHSB have therefore agreed to initiate rulemaking to adopt these requirements, and in so doing will reiterate the law requiring employers to pay for PPE.</p> <p>The state was not 2-1/2 years late in adopting the federal standard. The auditor apparently mistook a separate, "clean-up" rulemaking as part of the adoption of the federal standard. The clean-up rulemaking, was not related to the federal adoption; it merely dealt with existing California standards that were identified during the federal adoption as being ambiguous, obsolete, overlapping, conflicting, or no longer necessary.</p>

	Finding	Recommendation	Response
			<p>The State strives to meet its obligation set forth in the Labor Code 142.3 (a)(2) to promulgate standards within 6 months of the promulgation date of the federal Standards to every extent possible and will continue to do so in the future to adopt federal standards in a manner that will ensure Title 8 provides equal or superior safety for California workers.</p> <p>Action: The DOSH Program Office will notify the Deputy Chief and Special Assistant whenever a new Federal Program Change is received. The new FPCs will be discussed at least monthly at managers meetings to determine the scope and extent of the response by California. The Program office will maintain a Federal Program Change log to track activity in this area.</p> <p>Completion date: January 2011</p>
<p>Cal 9 (OSHA 39)</p>	<p>Cal/OSHA operated with only 375 out of 419.5 authorized positions. Also, the current benchmark positions allocated are 122 (36.6%) for safety and 75 (16.0%) for health.</p>	<p>Increase efforts to hire additional staff to fill the 44.5 vacant positions. Continue to reconcile staffing levels with realistic revised benchmarks, taking into consideration allocated versus filled positions, covered workers, and employment in the State.</p>	<p>Agree in part, disagree in part. The Department of Industrial Relations and Cal/OSHA have been operating under various hiring restrictions due to fiscal restraints in the state. Although Governor Schwarzenegger signed an appropriations bill for State Fiscal Year 2011, there has been no indication yet that the hiring freeze will be partially or completely lifted by the current administration.</p> <p>Action: Cal/OSHA will hire additional staff to fill vacant positions consistent with budgetary restrictions. Cal/OSHA will adjust staffing levels as appropriate within the constraints and limitations imposed by the California Legislature and Administration.</p> <p>Completion date: Ongoing.</p>
<p>Cal 10 (OSHA 10)</p>	<p>Employee representatives were not always afforded the opportunity to participate in all phases of the workplace inspection.</p>	<p>Ensure union representatives are presented the opportunity to participate in every aspect of the inspection and keep them informed as required in the Cal/OSHA Policies and Procedures Manual. If unions choose not to participate in the inspection, ensure it is documented.</p>	<p>Data needed. Cal/OSHA agrees with the importance of ensuring that employee representatives are afforded the opportunity to participate in all aspects of inspections. We have specific Policy and Procedure requirements that provide for such opportunities (P&P C-1A – Inspection Procedures) and documentation of such activity during the inspection (P&P C-1A – Forms Completion).</p> <p>However, we cannot address the specific instances OSHA refers to until these cases are identified, and we are still awaiting that</p>

	Finding	Recommendation	Response
Cal 11 (OSHA 16)	There were 209 Serious / Willful / Repeat (S/W/R) violations identified in the SAMM Report that were not abated timely.	Develop a tracking system to ensure all violations are abated timely and/or ensure abatement data is accurately entered into IMIS.	<p>information. We have not been told which case files the federal reviewers looked at where they felt there was problem. If those files are identified to us we will review them to determine if anything was done outside our written policy.</p> <p>Action: These policies are to be part of Cal/OSHA's ongoing training and refresher training. In addition, Cal/OSHA's Quality Assurance Unit will include this issue as part of its ongoing evaluation of files.</p> <p>Completion date: January 2011</p> <hr/> <p>Data needed. Cal/OSHA is unable to respond directly to this finding without more specific information regarding which cases the finding is attempting to address. This information has been requested but has not yet been made available.</p> <p>However, Cal/OSHA takes abatement very seriously and it is a top priority to ensure every violation found is abated.</p> <p>Action: Cal/OSHA is conducting its own review of this issue and will report to OSHA on its findings when complete. We will also use training and quality assurance review to emphasize the issue of verifying abatement in a timely manner and making sure IMIS data reflects this.</p> <p>Completion date: First quarter 2011 and ongoing.</p>

OTHER FINDINGS

	Finding	Recommendation	Cal/OSHA Response
Cal 12 (OSHA 17)	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.	Provide Specific guidelines for the "Conduct of the Informal Conference," which includes conference subjects, subjects not to be addressed, and closing remarks (Federal FOM, page 7-4 to 7-5); and hold informal conferences within the 15 working day contest period (Federal FOM, page 7-2). Also ensure guidance obtaining Counsel should an employer bring an attorney to the informal conference (Federal FOM, page 7-3) is provided and that Posting Requirements (Federal FOM, page 7-4) are clearly articulated	Disagree. The Cal\OSHA appeals process is qualitatively different from the Fed/OSHA Contest process. However, in spite of these differences, Cal/OSHA believes that its practices are "at least as effective as" Fed/OSHAs in spite of the differences. Further, Cal/OSHA does have contained within its P&P the process and practices Fed/OSHA is requesting. Action: Continue current policy.
Cal 13 (OSHA 19)	Cal/OSHA does not receive accurate and up to date information on the status of outstanding penalties from the DIR Accounting Office. Penalties are not being effectively collected and those that are no longer collectible are not being identified and removed from the system in a timely manner.	Assure that the DIR Accounting office is providing information on penalty payments and update the details in IMIS. Ensure that penalties are either effectively collected and identify those cases where penalties are no longer collectible in order to reduce the high number of old cases in the system.	Disagree. Cal/OSHA and DIR Accounting make every effort to ensure that the IMIS data is current, including the information on penalty collections and outstanding collections. Many issues in this area that exist are a result of limitations caused by the antiquated information management system OSHA requires Cal/OSHA to use. Action: Continue current policy.
Cal 14 (OSHA 20)	The 15-day "due date" following issuance of the citations on the Debt Collection report is not entered. This date is important for tracking appeals.	Ensure that the 15-day due date for all issued citations is tracked	Disagree. Cal/OSHA does not use the IMIS system for debt collection and therefore the finding is inaccurate. Action: Cal/OSHA will look into whether there is any useful function to entering this information in IMIS given its current tracking system. If there is, instructions to begin entering these data into IMIS will be issued. Completion date: First quarter 2011.
Cal 15 (OSHA 27)	State initiated rulemaking promulgated a Standard on Bakery Ovens that 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.	Disagree. The Standards Board disagrees that the standard for Bakery Oven—Inspections is not as effective as the corresponding Federal standard. The State rulemaking process disclosed that Federal OSHA has stated words to the effect that employers should strive to comply with the most recent national consensus standards, which is the approach taken in the State standard. Specifically, an April 2, 1998 interpretation letter regarding 29 CFR 1919.263(1)(9)(ii) stated that: <i>"Employers are encouraged by OSHA to comply with the current revision of a national consensus standard, such as ANSI Z50.1-1994, in place of an</i>

	Finding	Recommendation	Cal/OSHA Response
			<p><i>applicable OSHA standard based on a previous standard, such as ANSI Z50. 1-1947, as long as the current revision provides at least the level of safety and health otherwise provided by complying with applicable OSHA standard."</i></p> <p>The Standards Board always seeks an advisory opinion from the regional office of Federal OSHA on any proposed changes to Cal/OSH standards. This was done in the Bakery oven case, the state did not receive a response back from federal OSHA expressing any concern with regard to this standard. Prior to this becoming an issue on the evaluation we did not received any response from Federal OSHA that the amended bakery oven standard is not as effective as the Federal standard.</p> <p>Federal OSHA sent the Standards Board a letter dated May 21, 2008 to the effect that the original State proposal (a virtual verbatim rendition of the Federal standard) was at least as effective as the Federal standard. After the State proposal was modified in accordance with the interpretation letter quoted above, the Standards Board sent Federal OSHA a Plan Change Supplement dated May 7, 2009. That Plan Change Supplement clearly sets forth the bakery oven standard as adopted by the Standards Board, and prior to the FAME report, no concerns about that adopted standard were shared with the Standards Board by Federal OSHA. Moreover, the FAME report does not explain why Federal OSHA thinks that the State standard is not as effective as the federal standard. The absence of such an explanation limits the Standards Board's ability to respond and underscores the Standards Board's belief that the State standard is at least as effective as the Federal standard, especially in light of the interpretation letter.</p> <p>Action: Continue current policy.</p>
Cal 16 (OSHA 37)	The Cal/OSHA program does not require a Medical Access Order (MAO) or equivalent to review establishments' medical records.	Adopt MAO procedures and have the employer post it prior to the on-site visit.	<p>Disagree. The EFAME Report is incorrect in this finding. The DOSH P&P C-38, ACCESS TO EMPLOYEE EXPOSURE AND/OR MEDICAL RECORDS, provides clear, explicit and thorough guidance for accessing the necessary medical records during the course of an inspection, and is equivalent to the Federal MAO procedures.</p> <p>Action: Continue current policy.</p>

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 17 (OSHA 38)</p>	<p>Budgetary constraints, including 3 days a month furloughs and hiring freezes, are potentially impacting Cal/OSHA's ability to provide effective enforcement coverage at workplaces throughout the State, during regular working hours and in response to.</p>	<p>Cal/OSHA must ensure that it has sufficient on-board staff available to provide effective worker protection.</p>	<p>Disagree. Cal/OSHA believes that it has effectively managed its staff to respond to and address fatality, accident and illness investigations to include responding to and investigating complaints in California workplaces. This has been accomplished during an extraordinary time in history with operational and budgetary limitations imposed on Cal/OSHA. The EFAME fails to identify specific evidence supporting this finding.</p> <p>Action: Continue current policy.</p>
<p>Cal 18 (OSHA 43)</p>	<p>Indirect cost rates were incorrectly applied and are not allowable costs to the grant.</p>	<p>Ensure that the correct indirect cost rate is properly applied to the costs associated with the appropriate period of the fiscal year. Ensure that expenditures posted to the general ledger are listed individually with as much detail as possible.</p>	<p>Disagree. Cal/OSHA believes the EFAME Report finding is erroneous on this point. The indirect cost rate is calculated based on prior year actual expenditures, and as far as we can determine the correct indirect rates have consistently been used.</p> <p>The approved rate is applied to a base to determine the indirect costs to be charged to the federal grant. The U.S. Department of Labor, Division of Cost Determination, has issued a letter specifically addressing most of the alleged disallowed costs, and determined that they are in fact allowable.</p> <p>In addition, our indirect costs, which include statewide central services costs and DIR overhead, are recorded on the general ledger. Our budget staff monitors the amount of indirect costs charged, and adjusts the charges accordingly to ensure that the appropriate amount is reflected on the ledger.</p> <p>Action. Cal/OSHA believes this issue has been resolved in discussions with Region 9 OSHA representatives.</p> <p>Completed.</p>
<p>Cal 19 (OSHA 2)</p>	<p>The Cal/OSHA Policy and Procedures Manual does not address elements that are required in the complaint process.</p>	<p>Adopt policies and procedures equivalent to Federal OSHA to include the following: E-Complaints Procedures (Federal FOM, page 9-2 and 9-5 to 9-7), the Handling/Processing of Referrals from Other Agencies (Federal FOM, page 9-2), Scheduling an Inspection of an Employer in an Exempt Industry (Federal FOM, page 9-5), Union Reference (Federal FOM, page 9-11), Complaint Questionnaire (Federal FOM, page 9-17 to 9-20), and the Five-day requirement for employer to submit written results of an investigation (Federal FOM, page 9-11)</p>	<p>Agree in part, disagree in part.</p> <p>Action: The DOSH P&P C-7 addresses the Handling/Processing of Referrals from Other Agencies. However, DOSH P&P C-7 will be modified to include Electronic Complaints Procedures, the Union Reference and the Five-day requirement (instead of the 14 days) in Section F.c.(2), and to insert a copy of Form 7 in that document</p> <p>Completion date: January 2011.</p>

	Finding	Recommendation	Cal/OSHA Response
Cal 20 (OSHA 9)	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.	Agree in part, disagree in part. Action: Cal/OSHA does consider the employer's enforcement history statewide for fixed employers sites. DOSH will undertake the process of engaging in rulemaking to propose modifying Title 8, Section 334(d)(1) to make repeat violation evaluation based on a statewide basis. Completion date: January 2012
Cal 21 (OSHA 18)	The percent of penalty retention during post-contest procedures has decreased since FY 2007 and the percent of violations reclassified continues to increase.	Assess pre-contest procedures to ensure violations and penalties are being appropriately reclassified and decreased respectively and develop procedures to increase the percentage of penalties being retained during the post-contest.	Agree in part, disagree in part. Cal/OSHA believes that the signing into law and implementation of AB 2774 will harmonize differences between those citations Cal/OSHA has been classifying as serious and those the Appeals board has been willing to uphold as serious. The applicability of the serious classification is the single greatest factor resulting in differences between pre-contest and post-contest penalties Action: To enhance the pre-contest citations and penalties review procedures, the Division plans on amending its Policy and Procedure C-20, to emphasize the importance of holding the Informal Conference before the deadline for filing an appeal. The Division has created and will be augmenting an internal Quality Assurance Unit that will conduct audits of District office operations on various program and policy issues. Cases settled through Informal Conferences and post-appeal negotiations will be randomly reviewed for adherence to applicable regulations and procedures. Completion date: Third Quarter, 2011
Cal 22 (OSHA 34)	Applicants in the Cal/VPP are not disqualified for open enforcement investigations, contested citations, notices under appeal, or affirmed 11(c) violations that are unresolved or outstanding enforcement within the last three years.	Adopt Federal OSHA's specific "disqualifying" factors (CSP 03-01-003 VPP Policies and Procedures Manual, Chapter V).	Agree in part, disagree in part. Federal policies referenced in the EFAME report above were already in effect, although not formalized in Cal/OSHA's VPP Policy and Procedure, D-64. Action: Cal/OSHA will adopt policies equivalent to Federal OSHA CSP 03-01-003, VPP Policies and Procedures Manual, Chapter V. Completion date: January 2011

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 23 (OSHA 36)</p>	<p>Detailed Specific Team Member qualifications are not required for participation in a Cal/VPP onsite investigation.</p>	<p>Adopt detailed qualifications for both the Team Leader and Special Team Member (STM) positions to ensure qualified personnel are reviewing potential VPP sites. (CSP 03-01-003, VPP Policies and Procedures Manual, Chapter VI).</p>	<p>Agree in part, disagree in part.</p> <p>Action: Cal/OSHA did have qualifications and its personnel were qualified and trained. However, in response to this finding, Cal/OSHA has revised and adopted more detailed specifications for both the Team Leader and Special Team Member (STM) qualifications. These have been included in VPP P&P D-64. We are also contemplating further specifications for level 1, 2 and 3 qualifications.</p> <p>Completed except for further specifications which will be completed second quarter 2011.</p>
<p>Cal 24 (OSHA 40)</p>	<p>Cal/OSHA failed to process the unpaid bills of 1,229, 548.69 before December 30. Also, after the end of the grant year closeout, DIR drew down FY 2009 funds on January 21, 2009 in the amount of \$1,201,656.98.</p>	<p>Ensure all bills are processed timely and closely monitor grant draw downs of funding to ensure grant funds are properly managed. Liquidate all obligations incurred under the award no later than 90 days after the end of the funding period.</p>	<p>Agree in part, disagree in part. The EFAME Report implies that DIR accounting staff received the invoices for the aforementioned amount, but failed to process them in a timely manner. In reality, what occurred was that the encumbrance of \$1,229,548 was not liquidated by December 31. This was an error caused by misunderstanding of the accounting requirements for federal funding. The \$1,229,548 encumbrance outstanding as of December 31, 2009, was disencumbered from federal funds and re-encumbered to 100% state funding source.</p> <p>Action: Accounting policies and procedures have been revised and they will be communicated to appropriate personnel in DOSH. Accounting staff were not aware that funds also have to be withdrawn before December 30. The Accounting Procedure Manual has been revised to ensure that the final close out report is submitted and that federal funds are drawn down before December 30.</p> <p>Completion date: January 2011</p>
<p>Cal 25 (OSHA 44)</p>	<p>A "Program Report Narrative" that describes in detail the ARRA activity for each quarter was not submitted in a timely fashion.</p>	<p>Submit all required ARRA reports in a complete and timely fashion.</p>	<p>Agree in part, disagree in part. DOSH has submitted all ARRA reports as required by the ARRA grant. All have been timely with the exception of the first report.</p> <p>Action: None</p>

	Finding	Recommendation	Cal/OSHA Response
Cal 26 (OSHA 5)	The CPPM does not address elements that are required in the fatality process	Adopt policies equivalent to Federal OSHA's on Interview Procedures and Informer's Privilege (Federal FOM, page 11-7); on Investigation Documentation, which includes: Personal Data—Victim, Incident Data, Equipment or Process Involved, Witness statements, Safety and Health Program, Multi-Employer Worksite, and Records Request (Federal FOM, page 11-9 to 11-10); and on Families of Victims, which includes Contacting Family Members, Information Letter, Letter to Victim's Emergency Contact, and Interviewing the Family (Federal FOM, page 11-12 to 11-13).	Agree. Action: Cal/OSHA will review and update its P&P relative to fatality cases. Completion date: First quarter 2011.
Cal 27 (OSHA 6)	Cal/OSHA has not updated its protocols for its Agriculture Safety and Health Inspection Project (ASHIP), and Construction Safety and Health Inspection Project (CSHIP) since FY2000.	Update ASHIP and CSHIP protocols at least annually.	Agree. Action: The ASHIP and CSHIP protocols have been updated and distributed to Regional and District Managers. Regional enforcement goals have been discussed and implemented under each protocol. While there is no requirement in California to update special emphasis protocols such as these annually, we will make every effort to keep the written protocols current. Completed.
Cal 28 (OSHA 23)	The Referral Log identified that the five offices had referrals that had not been appropriately inspected or investigated in a timely fashion, including some referrals that were deemed Serious in nature. Thirteen referrals showed no response at all.	Generate and review the Referral Log on a regular basis and ensure that all referrals are handled appropriately and timely	Data needed. Cal/OSHA formally requested that Region 9 provide a list of the specific inspections referenced on the Referral Logs that were allegedly not inspected in a timely manner, and thirteen instances where there apparently was no inspection at all. That requested information has not been provided. Action: California will respond when that information has been provided and the files analyzed. Completion date: Pending

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 29 (OSHA 35)</p>	<p>Cal/VPP participants are not required to submit a new statement of commitment, signed by both management and any authorized collective bargaining agents, as appropriate within 60 days of a change.</p>	<p>Adopt Federal OSHA's "60 day" policy for submission of a new statement of commitment. (CSP 03-01-003, VPP Policies and Procedures Manual, page 49).</p>	<p>Agree.</p> <p>Action: Cal/OSHA has revised and updated DOSH VPP P&P D-64 to be consistent with the Federal policy referenced in this finding/recommendation. Cal/OSHA will meet the "at least as effective as" standard regarding a 60 day new statement of commitment recommendation.</p> <p>Completed</p>
<p>Cal 30 (OSHA 41)</p>	<p>The Standards Board and Appeals Board could not provide actual hours, time-sheets or employment status at any given time for all employees.</p>	<p>Provide periodic certifications of employment status for all employees.</p>	<p>Agree.</p> <p>Action: DOSH Appeals Board and Standards Boards will provide periodic certifications of employment status for all employees.</p> <p>Completion date: January 2011</p>
<p>Cal 31 (OSHA 42)</p>	<p>Travel costs in October 2009 (FY 2010) were paid with money from FY 2009 and some area office rent payments were erroneously charged to the current year grant funds and some funds are used improperly.</p>	<p>Ensure expenditures are paid with funds from that funding period and any miss-allocated expenditures should be reallocated to State matching funds or return the grant monies that were incorrectly allocated.</p>	<p>Agree.</p> <p>Action: DIR's Accounting Procedures Manual has been revised to ensure that travel costs are reimbursed with funds from the proper periods. Accounting Procedures Manual has been revised to ensure that rental costs are recorded in the proper periods</p> <p>Completed.</p>
<p>Cal 32 (OSHA 1)</p>	<p>In eleven of the 109 complaint case files reviewed, Cal/OSHA did not respond to the complaint in a timely fashion. Twenty-four of the 109 complaint case files reviewed did not have initial letters to the complainant. Twenty-seven case files did not include follow-up letters to the complainant.</p>	<p>Ensure that complaints are responded to in a timely fashion. Ensure that initial notifications are made and all complainants are provided the results of their complaint in a timely manner.</p>	<p>Data needed.</p> <p>Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed.</p> <p>Action: Cal/OSHA will ensure that complaints are responded to in a timely fashion, that initial notifications are made and all complainants are provided the results of their complaint in a timely manner. The DOSH P & P C-7 has been updated, and all management and staff have received training in these requirements. Cal/OSHA will conduct routine quality assurance audits on an ongoing basis to ensure these requirements are regularly being met.</p> <p>Completion date: Completed.</p>

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 33 (OSHA 3)</p>	<p>Twenty-three of the 52 fatality inspections did not contain adequate information to determine whether Cal/OSHA communicated with the victim's family concerning the process and results of the investigations.</p>	<p>Ensure that family members of the fatality victim are contacted regarding the investigation and that all required correspondence is completed in a timely manner and documented in each case file.</p>	<p><u>Data needed.</u></p> <p>Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed.</p> <p>Action: Cal/OSHA will ensure that family members of fatality victims are contacted regarding the investigation and that all required correspondence is completed in a timely manner and documented in each case file. The DOSH P&P C-170&170A, Accident Investigation, sets forth procedures for communicating with the fatality victim's family concerning the process and results of the investigations (Section D.6.c.). To assist District Offices in achieving compliance with and tracking this requirement, the Case File Summary Sheet (IMIS Training Manual, Office Procedures) has been revised to include check boxes and dates for initial contact with next of kin and final results of the investigation.</p> <p>DOSH staff participated in a training session on September 27th 2010. This training was mandatory for all compliance personnel, District Managers, and Regional Managers. The requirement for communicating with victims families was made clear to all personnel during this training. A follow-up memo will be sent reminding staff of the language in our P and P regarding contact the victim's families. The same memo will outline a procedure for tracking such communication.</p> <p>Completed.</p>
<p>Cal 34 (OSHA 4)</p>	<p>Two of the 52 fatality inspections were not initiated in a timely fashion and the reasons for the delay were not documented in the case file.</p>	<p>Ensure that Compliance Officers initiate fatality inspections timely after initial notification and that Compliance Officers communicate and document reasons for any delays in the case file.</p>	<p>Data needed. Cal/OSHA does initiate fatality inspections timely after initial notification and Compliance Officers communicate and document reasons for any delays in the case file. The two subject case files were reviewed and it was determined that both fatality inspections were in initiated in a timely fashion. However, a data entry error into IMIS had occurred with the opening dates of the inspections.</p> <p>Action: The importance of accurate data entry has been reinforced with all field staff.</p> <p>Completed.</p>

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 35 (OSHA 11)</p>	<p>In Fifty-eight of 157 case-files Employee Interviews are not capturing employer knowledge, exposure to hazard(s), and/or the length of time hazardous conditions existed. In addition, interviews are not capturing the employee's full legal name, address and phone number(s). In all cases reviewed, employer knowledge is not being adequately documented in a narrative form to assure a legally sufficient case.</p>	<p>Ensure that employees are interviewed to determine employer knowledge, exposure to hazard(s), length of time hazardous condition existed, and obtain the employee's full legal name, address and phone number(s). Adopt policies for conducting employee interviews equivalent to Federal OSHA's. Train employees on interviewing techniques. (Federal FOM, page 3- 23 to 3-27).</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated.</p> <p>Action: Cal/OSHA will reinforce through training to ensure all personnel are clear on Cal/OSHA existing P&Ps with regard to this item.</p> <p>Completion date: First quarter 2011</p>
<p>Cal 36 (OSHA 12)</p>	<p>Sixty-three of 157 Case files were missing copies of the OSHA 300 and did not indicate if information had been entered into the IMIS system. Citations were not issued to the employer for failing to maintain the log</p>	<p>Ensure that compliance officers request and include copies of the 300 in the case file for each inspection for the last three years and enter the data into IMIS. If the employer cannot provide them, document it in the file and issue appropriate citations.</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated.</p> <p>Action: The DOSH P&P C-1A will be modified to require that, during every inspection of establishments which are required to keep records of occupational injuries and illnesses, CSHOs must obtain copies of the employer's Log 300 for the previous three years. These logs will be retained in the physical Case File for each inspection.</p> <p>Completion date: January 2011</p>
<p>Cal 37 (OSHA 13)</p>	<p>Twenty-eight of 157 case files lacked complete injury and illness descriptions and did not clearly describe the hazard or exposure. And in 91 cases, photos did not always describe the violation, exposure, specific equipment/process, location, and employee job title (if applicable), the date and time of the picture and the inspection number.</p>	<p>Ensure that all aspects of the injury and illness documentation are included in the 1B or equivalent form to identify the hazard in enough detail to clearly describe the hazard or exposure. Ensure that photos identify the violation, exposure, specific equipment/process, location and employee job title (if applicable) and include the date and time of picture and the inspection number.</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated.</p> <p>Action: Cal/OSHA will ensure through training that these practices are reinforced to all personnel and quality assurance reviews will be performed.</p> <p>Completion date: First Quarter 2011.</p>

	Finding	Recommendation	Cal/OSHA Response
<p>Cal 38 (OSHA 14)</p>	<p>In 50 of 157 case files, narratives were either missing or lacked important details about what occurred during the inspection. And in 60 cases, diary sheets did not reflect inspection history.</p>	<p>Ensure that inspection narratives adequately describe the inspection and that diary sheets adequately reflect inspection activity, including but not limited to, opening conference date, closing conference date, supervisor review, telephone communications, and informal conference dates.</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding, without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated. Cal/OSHA disagrees with this finding and believes that it is already meeting the recommendations made.</p> <p>Action: This issue will be addressed in ongoing training, and quality assurance reviews will be performed.</p> <p>Completion date: First quarter 2011.</p>
<p>Cal 39 (OSHA 15)</p>	<p>Exposure monitoring was not conducted prior to issuing citations to employers in four health inspections.</p>	<p>Ensure that health inspectors conduct appropriate sampling to evaluate exposure and support violations. Ensure the information is properly entered into IMIS.</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated.. A review of cases from the audited office did not reveal findings consistent with those of OSHA, and in the absence of further data from OSHA, Cal/OSHA disagrees with this finding and recommendation.</p> <p>Action: Continue current policy.</p>
<p>Cal 40 (OSHA 25)</p>	<p>The Citations Pending Report revealed that in three of the five offices, 19 cases have citations pending that are over 180 days old and in the four offices, of the 225 citations that have not been issued, 207 show either no opening or no closing date. The Unsatisfied Activity Report identified unsatisfied activity in four of the five offices.</p>	<p>Generate and Review a Citations Pending Report to monitor that citations are reviewed and issued in a timely manner. Generate and review the Unsatisfied Activity Report to identify outstanding activities which need to be scheduled for inspection.</p>	<p>Data needed. Cal/OSHA is unable to confirm this finding, without information from OSHA identifying the files it reviewed. Cal/OSHA P&P addresses the issues stated.</p> <p>Action: Continue current policy.</p>

Division of Labor Standards Enforcement (DLSE) Responses

These are findings pertaining to the discrimination program administered by the DLSE.

	Finding	Recommendation	Cal/OSHA Response
Cal 41 (OSHA 29)	Oral complaints are not accepted and docketed in WB cases.	Accept and docket orally filed and emailed complaints in IMIS upon receipt and do not require a Complainant to submit a complaint in writing (Form 205) (DIS 0-0.9 Federal Whistleblower Manual, Chapter 7, Section V (A)).	Disagree. While DLSE mirrors some of the federal policies, we maintain the right to follow our own guidelines for conducting investigations consistent with California law and resources with the understanding that these must be "at least as effective as" the Federal policies. Written complaints are required consistently as a matter of policy for several similar State agencies, including the Department of Fair Employment and Housing (DFEH) and the Equal Employment Opportunity Commission (EEOC). The complaint form requires information which is necessary to evaluate it for jurisdiction and validity. Oral complaints leave too much room for error and result in incomplete and/or inaccurate information. Action: Continue current policy.
Cal 42 (OSHA 31)	Complainant interviews were not conducted or documented in each case file and signed statements were not always obtained feasible. Interviews with all relevant witnesses, including management and third parties are not being interviewed.	DLSE should attempt to interview all relevant witnesses, including management and third parties. Attempt to obtain signed statements from each relevant witness when possible. Witnesses should be interviewed separately and privately to avoid confusion and to maintain confidentiality. (Retaliation Complaint Investigation Manual, Chapter 3 and DIS 0-0.9 Federal Whistleblower Manual, Chapter 3).	Disagree. While DLSE mirrors some of the federal policies, we maintain the right to follow our own guidelines for conducting investigations consistent with California law and resources with the understanding that these must be "at least as effective as" the Federal policies. It is DLSE's policy to interview parties and pertinent witnesses assuming they can be located and respond to the investigator's request for an interview. A witness or party is not interviewed when the initial complaint does not meet a prima facie case of retaliation. Action: Continue current policy.
Cal 43 (OSHA 32)	Investigators do not conduct closing conferences with Complainants but should do so as per OSHA's whistle blower manual (See DIS 0-0.9, Ch. 3, Section J). and the equivalent of OSHA's Final Investigative Report or similar summary of relevant facts is not prepared for all WB case files.	Conduct closing conferences with Complainants as per DIS 0-0.9 Federal Whistleblower Manual, Chapter 3, Section J, and prepare a summary of relevant facts for case files that are signed and dated by both the Investigator and the evaluating Team Leader. (DIS 0-0.9 Federal Whistleblower Manual, Chapter 4, Section III, and Chapter 5, Section IV).	Disagree. While DLSE mirrors some of the federal policies, we maintain the right to follow our own guidelines for conducting investigations consistent with California law and resources with the understanding that these must be "at least as effective as" the Federal policies. Parties are advised in which direction DLSE is heading, giving all an opportunity to settle or withdraw the complaint. If the matter is not settled or withdrawn, the final report is completed. Action: Continue current policy.

	Finding	Recommendation	Cal/OSHA Response
Cal 44 (OSHA 33)	DLSE presently does not prepare a "Summary of Relevant Facts", or the equivalent of OSHA's Final Investigative Reports for their case files and should adopt the identical format prescribed in OSHA's whistleblower manual (see DIS 0-0.9, Ch. 4, Section III).	Prepare a Summary of Relevant Facts, or the equivalent of OSHA's Final Investigative Reports, for case files. The reports should be signed and dated by both the Investigator and the evaluating Team Leader. DLSE should adopt the identical format prescribed in the DIS 0-0.9 Federal Whistleblower Manual, Chapter 4, Section III). Case files should be reviewed for accuracy and accountability regardless of the type of determination made	Disagree. DLSE disagrees with this finding. While DLSE mirrors some of the federal policies, we maintain the right to follow our own guidelines for conducting investigations consistent with California law and resources with the understanding that these must be "at least as effective as" the Federal policies. A final report or findings is submitted to the parties with a copy to the file. Further, a chronology or Individual Work Plan (IWP) is placed in each file. Action: Continue current policy
Cal 45 (OSHA 30)	Opening and closing letters were inconsistently sent to both Complainant and Respondent or not placed in the case files, and dates were not recorded on the DLSE 900 diary sheet.	Consistently maintain and track opening and closing letters and phone calls in the case file. All documents received and telephone calls made during the course of the investigation should be written in the DLSE 900 diary sheet (DIS 0-0.9 Federal Whistleblower Manual, Chapter 3 and 4 2, Section IV.B.2 III(D&E), Chapter 3, Sections IV (B)(1) and IV (K), and Chapter 4, Section IV(B)(2). Ensure that the DLSE 900 is regularly updated (Retaliation Complaint Investigation Manual, Chapter 2).	Agree in part, disagree in part. Action: DLSE will ensure that it consistently maintains and tracks opening and closing letters and phone calls in the case file. DLSE's existing policy is that all contacts and correspondence dates are input into the Case Management System (CMS), and that these pages are printed and placed in the file. The importance of maintaining accurate and chronological file notes will be reiterated to staff. Completion date: January 2011
Cal 46 (OSHA 28)	Of the 128 WB investigations, 96% were not completed within the 90-day period as required.	Take necessary measures to ensure that investigations are completed within 90 day period (Section 11 (c) of the OSH Act and implementing regulation 29 CFR Part 1977.6 Section 98.7(e) of the California Labor Code establishes an even shorter timeframe – 60 days.)	Agree. Action: DLSE will ensure that investigations are completed within the 90 day period (Section 11 (c) of the OSH Act and implementing regulation 29 CFR Part 1977.6 Section 98.7(e) of the California Labor Code establishes an even shorter timeframe – 60 days.). As of June 30, 2010 DLSE already achieved a 10% decrease in the time it took to complete an investigation. Completion date: January 2011

The below table identifies the original Fed/OSHA # and shows the new Cal #.

Original Fed/OSHA Item #	Cal #						
1	32	13	37	25	40	37	16
2	19	14	38	26	8	38	17

3	33	15	39	27	15	39	9
4	34	16	11	28	46	40	24
5	26	17	12	29	41	41	30
6	27	18	21	30	45	42	31
7	1	19	13	31	42	43	18
8	7	20	14	32	43	44	25
9	20	21	3	33	44	45	5
10	10	22	4	34	22	46	6
11	35	23	28	35	29		
12	36	24	2	36	23		

Special Study on California Occupational Safety and Health Appeals Process

General comment: A number of the Special Study findings pertain to practices of the Appeals Board and are followed by recommendations that Cal/OSHA take action to correct the perceived deficiency. It is important for all to recognize that there is no direct route available for an executive branch agency like Cal/OSHA or OSHA itself to alter the practices or case law of a court that is part of a judicial branch or any other adjudicatory body that operates under authority independent of the executive branch, as is true of both the Appeals Board in California and the Occupational Safety and Health Review Commission that reviews OSHA appeals.

Accordingly, while OSHA may operate under the premise that it must identify and call for changes in a state's adjudicatory process that may argued to create an effectiveness issue for the purposes of the OSH Act, it must acknowledge that even if the state plan administrator were to agree completely with this premise, there would be no direct route by which the administrator could order a corrective measure to be made. As is the case with OSHA vis a vis the Review Commission, the tools available consist of litigation, a resource intensive endeavor whose outcome is never certain, communication with stakeholders for the purpose of raising awareness, and the political process.

Cal/OSHA and the Appeals Board do not agree on some issues and disputes between them have been and will continue to be the subject of litigation as was the intent of both the OSH Act and the California Occupational Safety and Health Act. How decisions to litigate are made is a matter of legal judgment, and Cal/OSHA has made and will continue to make its best judgment on the advisability of proceeding to litigation in each individual case. In addition, the power of working with stakeholders to engage in discussions with a body like the Appeals Board should not be ignored or minimized. California law requires the Appeals Board to hear comments from the public at its monthly meetings and discussions in this context have produced and will likely continue to produce significant and positive change.

#	Findings	Recommendations	Proposed Response
1	<p>In its decisions OSHAB is not defining "serious hazard" or interpreting "substantial probability" consistent with Federal OSHA interpretations, OSH Review Commission, and with Court of Appeals decisions. The "more likely than not" construct used by OSHAB is not consistent with the intent of the OSH Act nor the requirements of Section 18 that a State Plan must provide a program of standards and enforcement that is at least as effective as the OSHA program.</p>	<p>Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB 's interpretation of "serious hazard" is consistent with and at least as effective as the Federal definition.</p>	<p>Agree in part, disagree in part.</p> <p>Action: California will ensure its program is "at least as effective as" (not "equivalent") to Fed/OSHA. California enacted AB2774 on September 30, 2010 which statutorily re-defines a serious violation and prescribes standards for the investigation and resolution of these violations.</p> <p>This legislation represents the culmination of a dialog with stakeholders initiated by Cal/OSHA over two years ago about how to address differences between the California approach and the federal approach.</p> <p>The Special Study mischaracterizes the approach of the Appeals Board by stating that "when evaluating the classification of serious violations, OSHAB requires Cal/OSHA to present empirical data showing a substantial probability that an injury or illness is "more likely than not to be serious." Where the state and OSHA, and Cal/OSHA and the Appeals Board have parted company in the past is over how to define "substantial probability" and "serious physical harm".</p>

#	Findings	Recommendations	Proposed Response
2	<p>Writs of Mandate on OSHAB Decisions and DARs that result in loss of citations, citation classifications, or penalties are not being filed by Cal/OSHA in many cases where warranted.</p>	<p>Cal/OSHA must select sufficiently strong cases for appeal that would set precedent to challenge OSHAB decisions and practices regarding the classification of violations as serious in order to ensure that California meets the criteria in 29 CFR 1902.37(b)(14), which states: Wherever appropriate, the State agency has sought administrative and judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.</p>	<p>Agree in part, disagree in part. Cal/OSHA does not disagree with the proposition that it should seek legal review in the courts of adverse Decisions After Reconsideration (DARs) of the Appeals Board, where it is concluded that such action is likely to achieve a beneficial result. It has done and continues to do this, the most recent example being the filing of an appeal in Granite Construction, Denial of Reconsideration, 07-R5D1- 3611 (June 2010).</p> <p>DOSH has also taken administrative action to address issues of this nature through its stakeholder meeting process, one outgrowth of which has been AB 2774.</p> <p>Action: DOSH will continue to seeks legal review of matters it deems appropriate for such action and to take other administrative action as opportunities arise to make improvements.</p>
3	<p>The rules of evidence used by OSHAB 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 the OSHAB appears to be applying a test that far exceeds well settled law in both the OSHRC and Federal courts.</p>	<p>Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB's test for acceptance of compliance officers' testimony is as least as effective as the test at the federal level and results in a similar classification of violations as serious.</p>	<p>Agree in part, disagree in part. California law has recently changed with the signing of AB2774. New Labor Code section 6432(g) provides clarifying guidance binding on the Appeals board on the sufficiency of competent compliance officer testimony to establish each element of a serious violation.</p> <p>While there is disagreement on parts of the finding, moving forward under the new law makes this disagreement immaterial.</p>
	<p>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.</p>	<p>[See recommendation #3]</p>	<p>See Responses 1, 2, and 3.</p>
	<p>A medically qualified person(s) is necessary to sustain violations based on exposure and "work relatedness" under the current Appeals process.</p>	<p>[See recommendation #3]</p>	<p>See Responses 1, 2, and 3.</p>
4	<p>OSHAB's reduction of penalties including those for violations of 342(a), result in Cal OSHA's having a significantly lower percentage of penalty retention rate post content (<i>sic</i>).</p>	<p>Cal/OSHA, using all available appeal resources, must 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>Disagree.</p> <p>The EFAME states that the California penalty retention rate is substantially lower than it actually is. In fact, our request to IMIS for these data shows that Cal/OSHA's remaining penalties are higher for each year moving forward. In FFY 2007, 2008 and 2009 the Cal/OSHA retention rate is 48.1%, 52.5% and 60.6% respectively. Cal/OSHA's 3-year average rate is 53.3%. This compares favorably with the Federal rate of 58.5% and is the exact opposite trend that is shown in the EFAME, Table 8. We would like to discuss this issue further with OSHA to determine how OSHA obtained these data.</p> <p>Regarding penalty "retention" in general, this issue is affected most heavily by how well serious violations</p>

#	Findings	Recommendations	Proposed Response
			<p>stand up on appeal, and this in turn is affected by the clarity and reasonableness of the standards applied to adjudication of appeals of serious citations as well as the quality of the inspection work product supporting the citations. AB 2774 and the new training measures that have been implemented by DOSH should fully address these concerns.</p> <p>DOSH must make its own decisions about how to allocate its resources, and these in turn depend in part on the certainty of success on appeal of legal issues to the courts.</p> <p>DOSH does and will continue to take an appellate posture consistent with its resource capabilities and legal judgments about the most effective strategies to rectify “perceived” problems.</p> <p>Regarding 8 CCR section 342(a), this regulation requires reporting of <i>every</i> workplace fatality, serious injury, or serious illness, and each of these reports obligates Cal/OSHA to conduct an inspection in response. This is different than the OSHA program requirements resulting in differences between case comparisons. The OSHA counterpart only requires reporting and an inspection in response when the number of fatalities, serious injuries or serious illnesses is <i>three or more</i>.</p> <p>DOSH has conducted stakeholder meetings to discuss making amendments to section 342, and it will be proceeding to propose such amendments, which will help to clarify some of the issues regarding section 342 penalties.</p>
5	Cal/OSHA field staff do not have sufficient legal training or background to present cases at hearings.	Cal/OSHA must take appropriate action to assure 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 OSHAB.	Agree in part, disagree in part. We fully recognize the need for robust training in this area and have already established a program to provide it. DOSH established a new training program, which addresses these issues, in January of this year. Please see Responses to EFAME Findings 44 and 45.
6	OSHAB schedules multiple cases for the same Cal/OSHA staff member on the same day or in the same week without consideration for the time each party indicates is necessary to present their case.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to address the problems associated with over scheduling of cases and assure that CSHOs or attorneys have adequate time between scheduled dates to prepare for upcoming hearings. If CSHOs are to continue to present their own cases, Cal/OSHA must provide adequate legal and administrative support to help them review the case file and prepare to testify.	Agree in part, disagree in part. OSHAB has changed the calendaring practice previously in place that allowed the backlog to be eliminated, and this finding is no longer an issue.

#	Findings	Recommendations	Proposed Response
7	<p>OSHAB's notification system is inaccurate and inefficient, Reconsideration Orders are unclear on the specific issue(s) being reconsidered and notifications are not always sent to the correct Cal/OSHA office.</p>	<p>Cal/OSHA must take appropriate action to assure that the system for hearing contested cases includes a method of notification that ensures clear, concise, accurate and timely notification to parties involved in the appeals process and is at least as effective as the OSHRC method.</p>	<p>Disagree.</p> <p>The general statements in the finding and recommendation are not consistent with case and quantitative information OSHAB has. OSHAB scheduled 1,823 hearings in 2009 and there were no occasions where DOSH staff missed a hearing attributable to "hearing notification issues."</p> <p>OSHAB has requested specific information from OSHA on these assertions. Once the requested information has been received, a complete answer will be provided.</p>
8	<p>Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration 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 – administrative, judicial, or legislative – action to assure that all parties are afforded opportunity for hearings in an appropriate manner consistent with the OSH Act including following the protocols outlined in the policies and procedures "Gold Book"; formally documenting the Pre-hearing conferences; and developing a system which results in timely and objective ALJ hearing procedures and decisions.</p>	<p>Disagree</p> <p>OSHAB already records all pre-hearing conferences. OSHAB ALJs are bound to act impartially and fairly by numerous statutes and Board regulations, including the Administrative Adjudication Code of Ethics (Govt. Code § 11475 et.seq.), which incorporates relevant Codes of Judicial Ethics applicable to court judges, Department of Industrial Relations' "Incompatible Activities Statement," its "Conflict of Interest Regulations," and the Board's Regulations (Title 8, CCR §§ 350.1, 352, 376.1, and 385).</p> <p>Also there is no "backlog of Decisions".</p> <p>OSHAB has requested additional information from OSHA on these items. It is not possible to fully consider these items until the requested information is received, at which time a fuller response can be made.</p>
9	<p>Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration process and Furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.</p>	<p>Cal/OSHA must determine whether the problems associated with the current system of having CSHO's defend their own cases during contest can be corrected. (See Recommendation #6). 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.</p>	<p>Agree in part, disagree in part.</p> <p>See response to finding 5. Resources place limits on how many attorneys DOSH can hire, and it must be kept in mind that each attorney hired means a compliance officer who could have been hired was not. DOSH has to make its best judgment about the degree to which compliance officers and other staff can operate without direct representation by an attorney and operate accordingly.</p>

#	Findings	Recommendations	Proposed Response
10	ALJs follow the OSHAB regulations (Gold Book) for amending Cal/OSHA citations.	Cal/OSHA must take appropriate action to establish the necessary rules and/or practices with OSHAB that allow amendment of citations in a manner at least as effective as Federal case law and OSHRC procedures - including amendment for technical errors and to conform with evidence presented. Cal/OSHA should also take steps to assure that case files contain accurate information, especially regarding company name and standards cited, through staff training and improved case file review, and fully utilize all appeals processes when citations/cases are vacated for minor technical errors.	Disagree OSHAB disagrees with the finding and recommendation. The Board's practice and procedure provide for amending citations before a hearing and, when good cause is demonstrated and prejudice is not established, during a hearing and, after a hearing, in order to conform to proof or to correct technical, clerical errors. OSHAB requested specific case information where OSHA claims an ALJ has not allowed a reasonable amendment. OSHA has not yet provided this detailed information and therefore it is not possible to fully reconcile this with the information that OSHAB has available to it. Upon receipt a more complete response can then be provided.
11	Witness availability has affected the outcome of appealed cases.	When an appeal does occur, Cal/OSHA should consider witnesses availability when determining whether settlement is warranted. Utilize informal conferences as a means of lowering the appeals rate and more successful retention of citations including violation classifications and appropriate penalties.	OSHAB Disagrees. Witness availability is a crucial issue and has been the subject of much discussion in stakeholder meetings. In response, the Appeals Board has agreed to increase the number of venues it makes available for appeals, which most stakeholders believe has a direct impact on witness availability. OSHAB has requested additional information from OSHA on these items. It is not possible to fully consider these items until the requested information is received, at which time a fuller response can be made.
12	Cal/OSHA's Informal Conference policies do not encourage informal settlement and are not similar to the Federal Program.	Cal/OSHA must discontinue the automatic 50% reduction of proposed penalties based on an assumption of future abatement. Cal/OSHA should adopt policies on informal conferences that are at least as effective as federal policies.	Agree in part, disagree in part. Penalty amounts and credits are set by regulation. DOSH has had extensive discussions with stakeholders about amending its penalty regulations and intends to address through rulemaking the issue of the abatement credit as well as a number of other issues. DOSH does not believe its informal conferences are less effective than OSHA's.
13	Through its practices Cal/OSHA is effectively extending the 15 working day contest period established by statute by 10 days by accepting contests by phone, allowing 10 additional days for submission of documentation regarding the grounds for contest, and allowing the use of a "check-off box" form, in lieu of a written submission, for the filing process.	Cal/OSHA must determine whether this practice is in accordance with State Law and evaluate how these practices affect their contest rate. The State should determine whether the adoption of contest, informal conference, and settlement procedures more in line with statutory requirements and Federal practice would resolve many of the issues identified in this report. Absent a determination to change these practices, the State must submit a plan change supplement for Federal review, documenting its entire appeals process with a detailed comparison to the Federal program showing how it is "at least as effective," and a legal opinion that it is in accordance with State law.	Disagree. Our legal review indicates the Board's Notice of Contest procedure is compliant with Labor Code section 6601. In all of the public discussions we have had with labor and management stakeholders over the years, this issue has never been raised. No explanation has been provided of what rationale leads OSHA to contend that allowance of an additional 10 days for an employer to perfect an appeal with documentation, if the 15-day deadline to "notify" the appeals board of intent to appeal has been met, will have a negative impact on program effectiveness. We cannot find such a rationale.