



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Division of Occupational Safety and Health • PO Box 44600 • Olympia, Washington 98504-4600

July 14, 2020

Barbara Yee Goto, Acting Regional Administrator
U.S. Department of Labor, OSHA
300 Fifth Avenue, Suite 1280
Seattle, Washington 98104-2397

RE: Washington FY 2019 FAME Response

Dear Ms. Goto:

Thank you for providing us with a copy of the final FY 2019 evaluation of Washington's State Plan program. We appreciate your recognition of our continued high performance levels, and our commitment to resolving issues that are identified in the Federal Annual Monitoring Evaluation (FAME) report.

There were four findings in the FY 2019 FAME report.

Finding FY 2019-01:

DOSH's standards for fall protection in residential construction are not at least as effective as that of OSHA's.

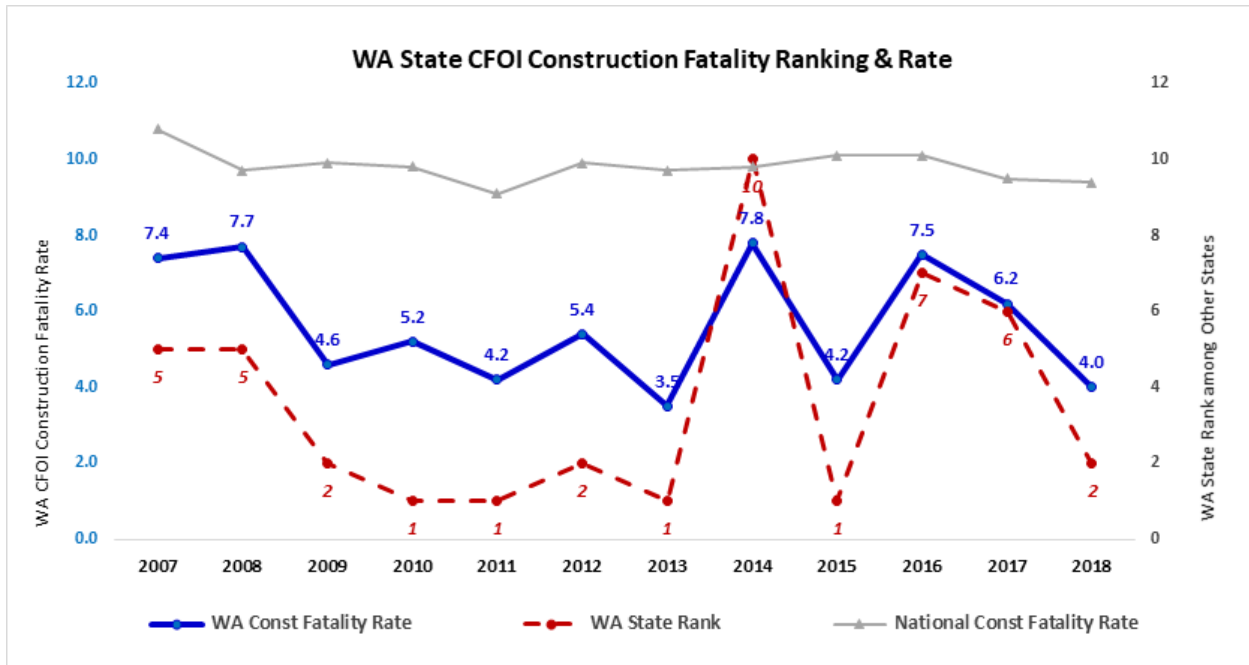
Recommendation FY 2019-01:

DOSH should implement a fall protection standard that is at least as effective as the federal standard.

We do not agree with this finding and respectfully submit the following:

Despite OSHA's continued concern that our Unified Fall Protection rules do not appear to be "at least as effective as" Federal OSHA Standards, we respectfully disagree with OSHA's determination. We are confident that our Unified Fall Protection requirements adopted June 2, 2020 that apply to all employers in Washington State under our jurisdiction are more effective than the comparable Fall Protection Standards enforced by OSHA.

OSHA has yet to fully define the criteria necessary to establish whether State Plan Standards are “at least as effective” by any means other than evaluating whether the state’s rules are “the same as” OSHA’s, which State Plans are not required to meet. In order to measure “at least as effective as” one must include the results of the *implementation* of the policies and standards. Washington State has been ranked either #1 or #2 for the lowest construction industry fatality rate in the nation in seven of the last ten years. Falls from elevation are the leading cause of fatalities and hospitalizations in construction, and so it follows that this ranking directly correlates to the issue at hand, whether our Fall Protection Rules are “at least as effective as” OSHA’s.



The Census of Occupational Injuries (CFOI) occupational fatality statistics are extremely relevant when determining a rule’s effectiveness, especially for this rule. Injury statistics are one of the primary pieces of evidence used by OSHA to justify updating existing rules or adopting new requirements, and we agree with this approach. OSHA’s continued refusal to consider this information and concentrate on the exact words alone in the rule excludes much of the statistical evidence that shows that our past and current Fall Protection Rules are more effective than OSHA Standards.

Our newly adopted Unified Fall Protection Rule maintains the requirement for fall protection at four feet, and this rule applies to all industries in Washington State. The comparable OSHA rule requires fall protection at six feet.

The maximum height a worker in Washington State can work without fall protection is ten feet, and then only under specific narrow exceptions applying to the task performed. Comparably, OSHA allows worker exposure to falls of 15 feet for crane assembly or disassembly work and up to 30 feet for steel erection work. Additionally, OSHA allows the employer to claim that conventional fall protection at six feet is infeasible, thereby creating an exemption to OSHA’s own rule from the use of conventional fall protection at an unlimited height.

Washington State does not allow any employer to claim that fall protection is infeasible. The comparable OSHA rule gives the employer, not OSHA, the ability to claim that fall protection is infeasible regardless of height. This OSHA rule makes the requirement to use fall protection subjective, makes the standard difficult to enforce, and places the burden on the CSHO to determine whether fall protection is feasible.

Finding FY 2019-02:

In 58% (46 of 79) of retaliation case files, accurate filing dates were not entered into WebIMIS.

Recommendation FY 2019-02:

DOSH should ensure accurate filing dates are entered into WebIMIS

Response: Thank you for bringing this to our attention. We are committed to following our manual or revising it when needed if a change in policy is warranted. We will review these cases against our written policy and provide OSHA with an update at our regularly scheduled monitoring meeting.

Finding FY 2019-03:

In 41% (15 of 37) of retaliation case files, there was insufficient evidence in the case file to confirm complainants were given the opportunity to resolve discrepancies and rebut respondents' defense.

Recommendation FY 2019-03:

DOSH should ensure case files are documented to show that complainants were given the opportunity to resolve discrepancies and rebut respondent's defense.

Response: Thank you for bringing this to our attention. We are committed to ensuring that complainants have an opportunity during the course of the investigation to rebut any defense the respondent may provide by offering additional evidence or witnesses. This is discussed with the complainant throughout the investigation and at the closing conference. We will review these cases to determine whether the issue that OSHA noted is due to not following the manual, or not sufficiently documenting steps that were taken, and will provide OSHA with an update at our regularly scheduled monitoring meeting.

Finding FY 2019-04:

In 5% (two of 42) of administratively closed case files, complaints were improperly closed for untimeliness; however, both complaints were filed timely.

Recommendation FY 2019-04:

DOSH should ensure that DIM guidance for calculating filing dates of complaints is followed.

Response: We disagree with this finding. We rechecked both of these cases.

1. In the first case the adverse action occurred on 12/6/2018 and the complaint was postmarked on 1/7/2019, a total of 32 days later.
2. In the second case, the adverse action occurred on 11/16/2018 and the complaint was faxed to us on 12/17/2018, a total of 31 days later.

Neither of the complainants in these two cases provided evidence that met the criteria designated in our manual, section C.3.b. for tolling the complaint. Both were untimely. If during the case file review OSHA observed evidence suggesting that either of these cases should have been tolled or that the timeliness was calculated inaccurately, we are happy to discuss this further.

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Thank you again for the time that you and your staff have invested in conducting a review of our program. We appreciate your collaborative approach and the opportunity to work collegially to address any areas that have demonstrated deficiencies. We also appreciate this opportunity to provide further evidence where we disagree that a deficiency exists.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne F. Soiza". The signature is written in a cursive, flowing style.

Anne F. Soiza
L&I Assistant Director
Division of Occupational Safety and Health

Enclosure

cc: Jack Rector, Deputy Regional Administrator
Dave Baker, Washington Area Director
Abby Lopez, State Programs Manager
DOSH Senior Management Team
Zach Green, DOSH Operations Analyst