



November 2, 2010

OSHA Docket Office
Docket No. OSHA-2010-0010
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, N.W.
Washington, DC 20210

By electronic submission via <http://www.regulations.gov>

Re: Comments on OSHA Docket Number OSHA-2010-0010, Consultation Agreements: Proposed Changes to Consultation Procedures; 75 Fed. Reg. 54064 (September 3, 2010)

To the Docket:

The Coalition for Workplace Safety (CWS) submits the following comments on OSHA's proposed rule revising its On-Site Consultation Program regulations. 75 Fed. Reg. 54064 (Sept. 3, 2010). The CWS is a group of associations and employers who believe in improving workplace safety through five governing principles: cooperation; assistance; transparency; clarity; and accountability. Employers overwhelmingly want to protect their employees and maintain safe workplaces and the undersigned members of the CWS believe that part of OSHA's mission is to help them do this, by serving as a resource to them.

OSHA's On-site Consultation Program and Safety and Health Achievement and Recognition Program (SHARP) exemplify CWS's principles that the greatest improvements to workplace safety can be achieved by providing assistance to employers, particularly smaller sized employers, to help them understand and comply with OSHA standards. CWS firmly believes that OSHA needs to be as much of a resource for employers as it is an enforcement agency to advance our shared goal of making workplaces safer. The specific programs impacted by this rulemaking are some of the most important tools in OSHA's toolbox for improving safety and health in the workplace. Unfortunately, CWS members fear that the proposed changes to the On-Site Consultation Program regulations will discourage employers from participating in the program and thus have a negative effect on workplace safety.

Specifically, it appears from the proposal that the agency is intent on using the On-Site Consultation Program to identify opportunities for enforcement. This is a clear signal to employers that they could be subject to enforcement based on their participation in the programs. As a result, businesses will be more reticent to reach out to OSHA for help – an outcome that does not benefit employers, employees, or OSHA. Indeed, these changes have the potential to

The CWS is comprised of associations and employers who believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability.

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diminish participation in the programs to such a degree that fewer resources will be allocated to them in the future.

CWS also views the proposed rule in the broader context of OSHA's de-emphasis on compliance assistance activities. Speeches by the Secretary and OSHA representatives have highlighted their belief that more enforcement is the panacea for improving workplace safety. In addition, various associations that participate in the CWS have reported that they are being required to satisfy new conditions that make no sense in their industries to have their alliances renewed. CWS is discouraged at what seems to be reluctance by the agency to enter into alliances with associations and employers and otherwise proactively and cooperatively work with employers and employer representatives to improve workplace safety and health. The rulemaking appropriately highlights that the "agency will never have sufficient staff to inspect every establishment." Compliance assistance and cooperative programs, such as the ones that are the subject of this rulemaking, allow the agency to broaden its impact by reaching more workplaces. By de-emphasizing such programs, OSHA seems to be purposefully limiting its reach.

CWS requests that OSHA withdraw the proposed changes in light of the effect they will have on employer participation in the On-Site Consultation Program and SHARP. OSHA should also consider ways to further *encourage* employer participation in the programs. CWS would welcome the opportunity to work with the agency to accomplish this goal.

The Success of OSHA's On-Site Consultation Program and SHARP

OSHA's On-Site Consultation Program has been – and the CWS hopes it will continue to be – a shining success. The program is typically oversubscribed with a waiting list for companies to enter it. OSHA's own website provides just a few examples of how the program has had a direct and positive impact on employee safety and health:

- A small employer of about 100 employees in Massachusetts utilized the consultation service originally in 2005. After implementing a number of recommendations from a highly trained industrial hygienist, including recommendations for establishing a safety and health management system, the employer has had no OSHA recordable fatalities, injuries, or illnesses.
- In 2005, another small employer began a two year process of working with the Program to correct numerous hazards and earned SHARP recognition. As a result of these efforts, the Total Recordable Case Rate for the employer was cut nearly in half, to 10.8 in 2007 from 20.9 in 2006.
- Yet another employer contacted the Program in the early 1990's to help it address growing workers' compensation costs. A consultant visited the facility, conducted a walkthrough, and reviewed and suggested changes to several important safety and health programs, including the company's lockout/tagout program, personal protective equipment program, and machine guarding protocols. As a result, the

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company's safety culture improved and it reported that its Total Recordable Case Rate was significantly below the average for the industry.

And these are just a few of the reported successes. There are other examples included on OSHA's webpage. But more importantly, there are countless other successes that have gone unreported. Employers have reached out to OSHA for assistance in identifying and correcting hazards, have implemented safety and health management systems, and have improved workplace safety and health and OSHA has responded. These successes only demonstrate that OSHA should be identifying as many ways as possible to *increase* participation in the On-Site Consultation Program. As stated above, CWS fears that the proposed rule will have the opposite effect.

The Proposal will Decrease Participation in the Onsite Consultation Program and SHARP

There are a number of reasons why employers take advantage of the On-Site Consultation Program. Small businesses struggle to comply with a myriad of regulations from all levels of government. While the vast majority of small businesses strive to provide safe workplaces for their employees, it is often difficult for these smaller sized employers to navigate the often complex system of OSHA standards and regulations. The On-Site Consultation Program assists employers to not only comply with OSHA requirements, but to better understand ways to make their workplaces safer. The On-Site Consultation Program is a free service with proven success in improving workplace safety and health. One of the most significant obstacles, however, to employers participating in the program is concern about the program's interaction with OSHA's enforcement function. OSHA has had trouble convincing employers that engaging in the On-Site Consultation Program will not – in the vast majority of circumstances – result in an inspection.

Unfortunately, OSHA's proposal to add "referrals" as a new category for justifying concluding an in-progress consultation visit or to conduct enforcement actions at sites in pre-SHARP and SHARP status¹ will only increase the fears of employers that participating in the On-site Consultation Program or SHARP will expose them to enforcement actions. In addition, this fear is exacerbated by the proposed rule's failure to provide any guidance as to when or how these "referrals" may occur. Under what circumstances is a referral justified? What criteria will the Regional Administrator use to determine if a referral should result in an OSHA inspection? When viewed in the context of OSHA's recent public emphasis on enforcement, tightening the relationship between the On-Site Consultation Program/SHARP and agency enforcement – rather than reinforcing the separation – will discourage employers to avail themselves of the program.

This new emphasis on enforcement related to these programs is even more debatable given that the employers at issue are taking extra steps to satisfy their safety and health

¹ See 75 Fed. Reg. 54066, "OSHA proposes to add a new category which will allow for termination of an in-progress onsite consultative visit, as well as enforcement inspections at worksites that are otherwise in pre-SHARP or SHARP status....With this change, referrals will now be a basis to initiate enforcement activity at worksites subject to deferrals or deletions from programmed inspections as a result of either an in progress consultation visit, or a worksite in pre-SHARP or SHARP status."

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obligations. They are employers that have (1) affirmatively reached out to the Consultation Program for assistance or are seeking SHARP status, (2) have committed to fixing hazards identified by on-site consultants, and, most importantly, (3) have established a safety and health program to prospectively deal with safety and health issues in the workplace. These are precisely the employers that OSHA should not be focusing on when determining how to utilize limited enforcement resources.

In addition, OSHA's proposal to make an exception from pre-SHARP and SHARP deferral or deletion status for "other critical inspections" as determined by the Assistant Secretary will further dissuade participation and, in particular, will do so for employers in high-hazard industries. In the proposed rule, OSHA provides an example of a type of programmed inspection that would not otherwise be included in the existing exceptions to the deferral or deletion status:

One such situation might arise in connection with workplace accidents that generate widespread public concern about a particular hazard or substance. As part of a national response to these hazards, OSHA may need to conduct programmed inspections of all sites within a specific industry. 75 Fed. Reg. 4065.

What OSHA is saying in this example is that if it decides to embark on an emphasis program – which it frequently does – to investigate a hazard or industry, it may wish to inspect all employers in that industry, regardless of whether the employer is in pre-SHARP or SHARP status. Particularly for employers in high hazard industries, the promise of deferral or deletion from programmed inspections, associated with SHARP status, will thus be illusory, as OSHA could easily determine that they should be thrown in to an emphasis program that happens to deal with their industry or a particular hazard. OSHA should be seeking ways to *encourage* employers in high-hazard industries to pursue SHARP status, as opposed to making changes that will discourage them from participation.

CWS is also concerned that the proposed rule lacks the necessary clarity to be effectively administered and is actually contrary to the proposal's stated intent of clarifying when programmed inspections should take place. The proposal does not set forth any criteria to be used by the Assistant Secretary in making the determination of what is a "critical" inspection. It suggests, but does not make clear, that the determination will be made personally by the Assistant Secretary, and not just the Assistant Secretary's designee. Furthermore, there is no mention of a public pronouncement regarding the determination of a critical inspection, as OSHA recently did in its Severe Violator Enforcement Program. CWS understands that this language in its existing regulations is related to ending a consultation visit to initiate an enforcement inspection. But that too suffers from the same defect – what standards does the agency apply to invoke the exception? The uncertainty created will just discourage employers from participating in the program, which is CWS's greatest fear.

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OSHA Should Have Consulted with Small Businesses before Promulgating the Proposed Rule

OSHA performed no analysis to determine the impact of the proposed changes on participation in the On-Site Consultation Program and SHARP. For such a successful program, OSHA should have taken the time to ensure that the changes it is proposing will not discourage employer participation. Merely asking for comments on a proposed regulation is not the same as seeking direct input from those employers who will be most affected by this change, and about whom the agency should be most concerned.

CWS suggests that OSHA would have benefited from conducting a Small Business Regulatory Enforcement and Fairness Act (SBREFA) panel to discuss the policy decisions reflected in it. While this proposal may not have presented the specific trigger of having a “significant economic impact on a substantial number of small entities” which would have mandated such a review, OSHA always has the option to conduct these reviews voluntarily.² In many ways, the On-Site Consultation Program is principally geared to assisting small employers in finding and correcting hazards and implementing safety and health management systems. *It is a program for small businesses.* It thus would have been advantageous for the Agency to get early input from these beneficiaries before forming the proposed rule. SBREFA is an ideal mechanism for gathering this information. It also would have allowed the Agency to question the small businesses on the impact of the proposed changes on SHARP participation and participation generally in the On-Site Consultation Program. OSHA’s resistance to doing so suggests that the agency is not concerned about these impacts.

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OSHA should withdraw this proposal based on the likelihood that it will diminish participation in the On-Site Consultation and SHARP programs and the lack of an analysis of its impact on small businesses. There is no pressing need for the proposed changes, particularly considering the real possibility that finalizing the rule will decrease participation in the programs and the reality that the employers involved are those who are proactively seeking to improve safety in their workplaces. Proposing a rule that could discourage employers from participating in these programs is too important to rush through. If OSHA insists on continuing with this rulemaking, the agency should conduct a SBREFA panel review to get direct input from the small businesses who will be most affected by these changes. Furthermore, if OSHA does move forward with this rulemaking it should provide some actual clarity to the situations in which employers in these programs will be subject to enforcement activities. Instead of finalizing this regulation, CWS urges OSHA to develop incentives and strategies that will encourage as many employers as possible to participate in these programs and CWS is available to help OSHA in this process and welcomes the opportunity to do so.

Sincerely,

² See 5 U.S.C. 603, 605(b), 609(b).