

Minutes

Labor-Management Advisory Council Meeting

July 12, 2018

Employment Relations Division, Helena, MT

Advisory Council members present:

Lt Governor Mike Cooney
Al Smith, Montana Trial Lawyers Association
Larry Jones, Montana Self-Insureds Association
Lance Zanto, Worker's Compensation Management Bureau
Don Judge, Injured Worker's Resources Council
Doug Buman, Laborers' International Union of North America
Vicki Evans, MCCF
Bill Dahlgren, Sun Mountain
Jim Larson, Teamsters Local 190

Project Core Team members present:

Eric Strauss, ERD Administrator
Bill Wheeler, ERD Deputy Administrator
Bryan Page, Safety & Health Bureau Chief
Mark Cadwallader, Department Legal Counsel
Jason Swant, Project Manager

Others present via GoTo Meeting:

Annette Hoffman, MT Region, SCLHS	Barry O'Leary
Brenda Lambert	Jason Todhunter
Leah	Mike Marsh
Monica Sanchez	Tammy Lynn
Mike Bartow, ERD	Tera Taylor, ERD
Peggy Coggeshell, ERD	Tonee West, MSF

WA Division of Occupational Safety & Health: Anne Soiza

ERD: Julia Brennan, Bill Wheeler, Peter Van Nice, Cindy Zimmerman

Montana Chamber: Bridger Mahlum

MMIA: Thom Danenhawer, Britani Laughery

MCCF: Tim Barth

MT Stockgrower's Association: Jay Bodner

MT Contractor's Association: Cary Hegreberg

Talcott Construction: Dax Nebel, Scott Maher

MFBF: John Youngberg, Liv Starick

I. Welcome and Introductions

Lt Governor Mike Cooney chaired the meeting and greeted those present

II. Montana OSHA Plan – Don Judge, Lance Zanto

Anne Soiza was invited to attend the meeting and lend her expertise to the discussion of a state OSHA plan. Anne was appointed State of Washington Dept. of Labor and Industries Assistant Director for the Division of Occupational Safety & Health in March of 2012 after a lengthy career in public health and safety. She also currently serves as chair of the National Advisory Committee on Occupational Safety & Health (NACOSH), which advises the US Secretaries of Labor and Health and Human Services.

Anne started with Labor & Industries in 1987 in what is now the Division of Occupational Safety & Health (DOSH). While at L&I, she held several industrial hygienist field and technical policy positions. She held the senior management positions for Training and Outreach and Statewide Compliance from 1998 – 2008.

She was appointed Washington's director of pipeline safety in 2008 at the Washington Utilities and Transportation Commission. She returned to L&I late in 2009 as the L&I deputy assistant director for DOSH.

Anne has a Bachelor of Science degree in chemistry from Willamette University and worked in the chemical industry in the Midwest and the DOH (formally DSHS) Radiation Control Program before joining L&I.

She spoke to the group about state OSHA plans and how the state plan in Washington works. WA knows from research that “Good safety programs prevent deaths”. Most businesses want to do the right thing but need help, especially small businesses who get no/little assistance from OSHA.

Lance Zanto mentioned there was a misunderstanding in the process from the last legislative session and does the committee want to go down this path again during the next legislature? Anne stated to begin the process, the legislature passes a statute at least as effective as the federal OSH Act. Which means the state plan must meet the minimum requirements outlined in the OSH Act before Federal OSHA will approve. If all the steps are in place, then OSHA will buy off on approval. This includes the adoption of state regulations or adoption by reference of the OSHA safety and health regulations and a state agency operations manual at a minimum. However, some stakeholder’s may want some state specific rules not included in the federal OSHA plan.

III. Enabling Legislation – Bryan Page

Enabling legislation created and state plan developed - OSHA review can takes 1-2 years. Then the legislature must approve funding measures and the review of the narrative can take another 1-2 years.

IV. Question and Answer

Q. When you find a violation, what do you do?

A. When a compliance safety and health professional finds a hazard on a jobsite that is or could expose a worker to harm, the inspector documents the hazardous situation in writing and compiles an investigation report. After a closing conference where the violation and abatement timeframes are discussed, the report is finalized, and the agency issues a citation and notice to the employer with alleged violations, an agreed to abatement date. Calculation protocols for penalties are under state control (size adjustments, good faith, repeat tables, etc.). State plans current average serious penalties must be at least -25% of the national average serious penalty and is an ALAEA issue. Final report must be posted where visible for both employers and employees. For Safety and Health visits, the consultation is confidential. It's at request of the employer and no penalties are assessed if employer promises to fix the problem. Serious violations must have penalties and this is one of the basic tenets of the "at least as effective as" (ALAEA) criteria for state plan approval. It is embedded in federal OSH Act statute.

Q. What is the difference between consultation and enforcement?

A. State plans should have a balanced program – compliance and consultation who do boots on the ground worksite visits. The #1 way to reduce fatalities and major injuries is on-site visits regardless to compliance or consultation OSH professionals. In WA, consultation and compliance records are kept completely separate and consultation reports are not publicly disclosable. We have a prohibition of compliance staff talking with consultation staff regarding what consultation found on a jobsite.

Consultation comes in based on an employer invite and issues reports with serious 'hazards noted' with no penalties. The contract is that the employer must agree to fix all serious hazards found. Compliance comes in based on complaints and referrals, hospitalizations, fatalities or local and national emphasis programs. They issues reports with violations and serious violations or higher must carry penalties and must be fixed.

Q. How to interact with OSHA on repeats?

A. It helps to have a state plan understanding the reason for this question. State plan authority ends at the state border. States can't use other state's violations to penalize employers (repeats). OSHA authority includes all 26 or so states it has and so it has authority to issue multi state repeat violations and penalties to multi-state employers. OSHA has a 5 year look back window and WA has a 3 year look back window for repeat violation history.

Q. How do employers protest a violation?

A. Need a functioning appeals process and informal appeals process as well – meet with employers without their lawyers informally first we find best. We resolve or settle about 90% of our appeals at this informal level.

Q. How do you correlate inspection schedules and industries?

A. Since WA is a monopolistic workers compensation state, they have access to every injury and fatality claim data field for millions of workers in WA. We data mine and obtain rankings to determine which industry and job classes have the most injuries/fatalities and at the highest rates of injury.

Q. Does OSHA do consulting?

A. OSHA's essential charter is to establish national rules and enforcement of the rules to stop preventable worker fatalities, injuries and illnesses. OSHA gives out grants to some states and universities to do onsite consultations but extremely few staff nationwide are supported through these grants to the point that there is little lasting impact at workplaces.

Q. How effective is consultations?

A. Increases your presence in the workforce - more boots on the ground. WA has found their ROI is about 2:1 and provides cost savings to WC system. Employers better able to manage safety and health systems for 2-4 years after an onsite visit by a compliance and/or consultation professional. Compliance activity with violations issued has the most ROI to the WA WC system when ranked by cost savings experienced followed then by consultation activity.

Q. How long does OSHA allow for rule making?

A. States have 6 months to adopt equivalent rules whenever it becomes effective in OSHA – which could take years after OSHA issues its first drafts.

Q. For state OSHA plans, who oversees the public sector and the private sector?

A. States have to adopt jurisdiction over public sector to become a state plan state and then optionally can adopt jurisdiction over the private sector. Example: WA rules and penalty calculations policy are the same for the public sector and private sector. Public sector workplaces experience injuries and illnesses at much higher rates than the private sector. Fatality, injury and illness prevention is really important in the public sector to reduce operational costs and risk management for controlling public worker injury claims costs.

Q. Are Independent Contractors subject to state OSHA plan?

A. No, and WA doesn't enforce on sole proprietors. WA requires anyone who claims to be an IC to be fully licensed, registered, bonded, to have a specific contract for the job, and to be providing more than personal labor to be an IC. Otherwise, they are an employee and their employer or higher level contractor will be responsible for their safety and health. It should be noted that a person can also function as an employee on one jobsite and as an IC on another depending on the conditions. WA also does not by policy enter an employer's home to conduct inspections.

Q. How frequently does WA adopt stricter OSHA rules?

A. Infrequently. Business and labor stakeholder are involved in all WA rulemaking draft discussions and offer wording changes before the formal legal public hearing process starts. Sometimes, the legislature orders the WA DOSH to adopt a state specific rules on bad hazards such as heat stress fatality prevention or cancer causing hazardous drug exposures.

Q. Can OSHA take over your state plan?

A. When state plan is approved, OSHA has no jurisdiction over the public and private sector if you have a full state plan. Yes, they can take over your state plan entirely or specific industries within the state if they deem that the state is not maintaining ALAEA practices and compliance efforts. That is not done overnight but can indeed happen and has in some states.

Q. Have states with state plans decertified and gone back to federal OSHA plan?

A. There are 27 state plans and none have decertified that I am aware of.

Q. What is the difference in penalties between OSHA and WA state plan?

A. Average federal OSHA penalty- \$4,000

Average WA state plan penalty- \$1,800

States don't have to follow OSHA's method of calculating normal penalties but must adopt in the authorizing statute the penalty maximums set by Congress for all OSH related violations issued in the US, whether by OSHA or a state plan state. Maximums are issued less than 0.1% of all violations in WA and involved highly important serious willful violations of large employers, usually associated with fatality investigations. We don't hit the maximum penalty with small employers because by policy because we give 70% off for employers of 10 or fewer employees and 60% off for employers of 10-25.

Q. Is there a follow-up- process for violations?

A. Yes, Abatement Check Process - requirement for state plan approval. WA has near 100% closure on violation issued as do most state plans and OSHA. Employers submit signed proof and or a declaration that they have abated hazards association with the violations (under the threat of prosecution). WA checks between 5-10% on physical follow-up. We take employers at their word.

Q. Do you attach liens on equipment?

A. WA DOSH is not in the business of putting people out of business. WA wants healthy businesses which provide safe and productive worksites. Since we are required to collect penalties we try to work things out to help worksites be safer long term. There are financial hardship appeals and companies must show their books and we grant them regularly. We also establish in the informal process payment plans with proven abatement of the hazards. Example: Hire a FT Safety and Health person instead of paying a fine is a common settlement for 'higher fines', especially from a high hazardous industry employer like logging or construction.

Q. How did WA's state plan start?

A. Started with enforcement - 2/3 field compliance and 1/3 consultants/outreach. States can have any balance they want but must have the minimum number of compliance staff OSHA agrees to by their formula.

Q. Are there standards for investigating?

A. OSHA FIRM – field operations manual and written policy manual. State plan states must have their own operations manual and states must submit every change to OSHA for their approval.

Q. Do businesses have a voice?

A. Businesses can help shape state plan rules – with OSHA they have no say except through Congress and public hearing process. WA has a legislative mandated WISHA Advisory Committee of equal business and labor representation that advises my position. WISH Act is the name of our enabling WA statute.

Q. Do you have to adopt OSHA's directives?

A. No, not exact wording but you need a directive (policy statement) on the topic. OSHA will approve the directive using ALAEA principles.

Q. Can OSHA interfere with state plan rules?

A. They won't if you meet the minimum standards ALAEA. They will audit annually on grants and quarterly on state plans performance measures such as the number of inspections number of violations issued, timeliness of issuance, average serious penalty amount, etc. – injury and fatality rates are lower in state plans in general.

V. Public Comment

There was no public comment

VI. Next Steps

1. Do you want to move forward? Group needs to come to a consensus on how to proceed