


State of Alaska
Department of Labor
Division of Labor Standards and Safety

DOSH Program Directive 86-10 CH-3

Date: May 17, 1989

To: All LS&S/OSH Staff

From: Tom Stuart, Director 

Subject: OSHA Exemptions and Limitations

A. Purpose: This DOSH Program Directive (PD) updates the industries that are exempted as a result of their lost workday injury rate being below the national average.

B. Directives Affected: DOSH Program Directive 86-10

C. Background: Federal OSHA has updated the list of exempted industries to reflect the latest available Bureau of Labor Statistics occupational injury and illness lost workday rate.

Employers in these industries who employ 10 or less employees are exempted from general scheduled inspections. See pages 4-6 for DOSH PD 86-10 on procedures to be used when inspecting employees in these industries on non-programmed inspections.

D. Filing: Replace existing Appendix A pages A-1 and A-2 with attached Appendix A pages A-1 and A-2 (R 5/89).

5. Effective Date: This directive is effective immediately.

4. Guidelines:

a. Farming Operations: No scheduled safety or health inspections or consultative visits will be conducted for farming operations which employ 10 or fewer employees if the operations do not maintain temporary labor camps.

- (1) The CO shall make an exemption determination as soon as possible after arrival at a farming operation and leave the premises if the operation is exempt.

NOTE: Family members of farm employers shall not be counted as employees when determining employee number.

- (2) A temporary labor camp which is unoccupied at the time of the inspection and is expected to remain unoccupied during the subsequent 12-month period shall not be considered an active camp and does not affect the exempt status of the farming operation.

- (3) COs shall conduct an inspection in accordance with the Compliance Manual under either of the following conditions:

- (a) If a farming operation currently employs, or has employed at any time during the preceding 12 months more than 10 employees; or
- (b) If a farming operation maintains an active temporary labor camp.

NOTE: The inspection may include all working conditions covered by OSH standards; or it may be limited (e.g., to migrant housing facilities), depending on the availability of resources.

- (4) If an inspection is not conducted because a farming employer is exempt, the CO shall complete an OSHA-1 Form according to current IMIS instructions.

- (5) Inspections of farming operations are subject to the penalty limitations stated in this instruction.

- (6) Definitions pertinent to this section are the following:

- (a) A "farming operation" is defined as any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations.

- b) A "temporary labor camp" is defined as farm housing directly related to the seasonal or temporary employment of migrant farm workers.
 - (c) "Housing" includes both permanent and temporary structures located on or off the property of the employer, provided it meets the foregoing definition.
- (7) "State only" funded Inspection of Farming Operations. Alaska Statute 18.60.058 requires the Department to investigate fatalities and Alaska Statute 18.60.088 requires the department to respond by inspection to formal employee complaints. If one of the above circumstances occurs, the State will perform an inspection of a farming operation with 10 or fewer employees, using state only monies.
- (a) Only the Chief or the Deputy Director will assign a CO to a complaint or fatality inspection of a farming operation with 10 or fewer employees.
 - (b) A complaint inspection will be conducted only on a formal complaint and the Chief will evaluate a formal complaint to assure that the hazards are serious enough to warrant an on-site inspection. If the hazards complained about are non-serious in nature, the complaint will be handled by letter.
 - (c) Any inspection conducted as a result of a fatality will be limited to the working condition that caused the fatality. A complaint inspection will be limited to the hazards complained about.
 - (d) All inspection time conducted under paragraph 4.a.(7) will be charged to 780071 for both safety and health. The Administrative Assistant will provide the Deputy Director with the total hours spent on such activity on a bi-weekly basis.
- b. Recreational Hunting, Shooting or Fishing. Recreational hunting, shooting or fishing activities are not subject to OSHA inspections. Organizations (profit or nonprofit) engaged in such activities are, therefore, exempt from inspections.
- (1) Alaska OSH will, therefore, not conduct general scheduled safety and health inspections, and on-site consultative visits of such activities.
 - (2) However, per paragraph 4.a.(7), OSH must investigate fatalities and formal complaints with on-site inspections and therefore, the procedures set out in 4.a.(7)(a)-(d) will be followed if it

is necessary to perform an inspection at a recreational hunting, shooting or fishing establishment.

- c. Employer's Lost Workday Injury Rate Below the National Average. The U.S. OSHA Appropriations Act exempts from programmed safety inspections any employer with 10 or fewer employees currently and at all times during the last 12 months and within an industry having an occupational injury lost workday case rate lower than the national average rate for the private sector as most recently published by the Bureau of Labor Statistics (3.6 for 1986) at the most precise Standard Industrial Classification (SIC) code for which such data is published.
- (1) LWDI Rate. Employers with 10 or fewer employees within an industry classified in a SIC code with an LWDI rate less than 3.6 are exempt from all safety inspections, both programmed and unprogrammed, except as described in 4.c.(3). The affected SIC codes are listed in Appendix A.
 - (2) Exemption From Inspection. The Chief, Safety Compliance shall determine an employer's SIC code before conducting any programmed or unprogrammed safety inspection.
 - (a) If the employer is in an industry within an exempt SIC code, the Chief shall determine if the employer meets the employment criterion in 4.c.
 - (b) If the number of employees cannot be determined prior to the safety inspection, the CO shall determine the number during the opening conference.
 - (c) If the employer currently has and has had 10 or fewer employees at all times during the preceding 12 months, the inspection shall not be conducted except as noted in 4.c.(3).
 - (3) Exceptions in the Appropriations Act. The following activities are permissible in establishments of employers that are otherwise exempt under 4.c.
 - (a) Consultation, technical assistance, and educational and training services may be provided; and surveys and studies may be conducted.
 - (b) Inspection or investigation may take place in response to an employee complaint, in accordance with current complaint procedures. Citations may be issued for any violation during the complaint inspection, whether or not the particular violative condition had been complained of.

- (c) This appropriation rider prohibits penalties from being assessed for serious violations, repeat and for "other" violations when an investigation is a result of a safety complaint in those industries covered by Appendix A. Alaska OSH will not assess penalties for repeat violations regardless of the number of such "other" violations. Alaska OSH must, however, assess a penalty for serious violations as required under AS 18.60.095(b). Also, per AS 18.60.095(g), a penalty must be proposed if the employer fails to post a citation. (See, Paragraph 4.d. on how to handle the time spent on assessing a serious or failure to post a citation violation.)
 - (d) The Appropriations Rider allows penalties to be assessed for all willful violations and for all failure to abate violations.
- (4) Alaska OSH may take any action authorized by AS 18.60.010— .105 in regard to imminent danger situations.
 - (5) Alaska OSH may take any action authorized by the statute with respect to employment accidents involving a fatality or catastrophe. All apparent violative conditions involving safety or health may be cited and penalties proposed regardless of whether the conditions were related to the accident.
 - (6) Alaska OSH may take any action authorized by the Statutes with respect to health hazards.
 - (a) Health inspections shall be scheduled, observed health hazards cited, and penalties assessed for all classifications of violations in accordance with current procedures.
 - (b) Apparent safety violations noted during a health inspection of an establishment are exempted by the Appropriations Rider and OSHA may not cite or refer for later inspection such violations unless such violations result from hazards alleged in a formal complaint, a report of imminent danger or a fatality/catastrophe report. Alaska OSH, however, must per AS 18.60.095(b) and (g) issue citations and penalties for serious violations and failure to post a citation. IHs will, therefore, issue citations or refer such violations. If this should occur, the procedures set out in 4.d.(2) must be followed.
 - (7) Alaska OSH may take action authorized by AS 18.60.089 with respect to alleged discrimination against employees.
 - (8) Penalties authorized under this subparagraph are subject to further limitations described in paragraph 5.

- (9) If it is learned after an inspection that the employer was exempt at the time of the inspection, the Chief shall ensure that the procedures set out in 4.c.(3)(c) and 4.d. are followed.

d. Tracking Time Spent on Assessing Serious Safety Violations:

- (1) When a compliance officer is assigned a complaint inspection of an establishment that is covered by the Appropriations Rider, the Chief, Safety Compliance, will instruct the IH of the restrictions that apply to such an inspection and instruct him to keep track of the time he may spend assessing a penalty for a serious violation or a posting violation. Time spent for such activity must be charged to 780. Should such a penalty be contested, all CO time related to that contest must also be charged to state only monies (780).
- (2) When an Industrial Hygienist is assigned to inspect an establishment covered by the Appropriations Rider, the Chief of Industrial Health Compliance will instruct the IH of the restrictions that apply to such an inspection and instruct the IH to keep track of time he spends citing, penalizing or referring "safety" or regulatory violations. Such time will be charged to 780. Should the safety or regulatory violation or penalty be contested, all IH costs related to that contest must also be charged to state only monies (780).
- (3) The Administrative Assistant will add such hours together with any time spent on restricted farming operations, or recreational hunting and fishing activities, when making the bi-weekly report required in 4.a.(7)(d).
- (4) The department's fiscal section will follow the formula set out in Appendix D to assure the correct amount is charged to state only monies.

5. The OSHA Appropriations Act Continues the Previously Implemented Limitations on the Assessment of Penalties For First Instance Other-Than-Serious Penalties.

- a. Fewer Than 10 Total Violations. The Appropriations Act prohibits assessment of civil penalties for first instance other-than-serious violations unless the establishment is cited for 10 or more total violations found as a result of a single inspection.
 - (1) No penalty shall be proposed for first instance other-than-serious violations unless 10 or more violations are cited.
 - (a) Serious, willful, and repeated violations and failures to abate violations shall be counted to determine the total number of violations.

- (b) If 10 or more violations are cited, then all violations are subject to proposed penalties.
 - (2) Penalties may be proposed for serious, willful and repeated violations and failures to abate violations regardless of the total number of violations.
 - (3) If, upon reinspection of a workplace, an employer is cited for a violation of the same standard cited during a previous inspection, the violation shall be treated as a second-instance (repeated) violation; and a penalty may be proposed regardless of the classification of the alleged violation.
 - (4) For purposes of this limitation, regulatory violations shall be treated as other-than-serious violations unless cited as willful or repeated.
 - (5) Combining two or more instances of violations of one standard or grouping two or more violations of more than one standard into one citation item shall be considered a single violation.
 - (6) The Chief shall propose penalties based on the number of violations on the citation at the time of issuance.
 - (a) Penalties shall be proposed based on the number of violations on the citation. If additional citations are issued later, e.g., citations of alleged health violations issued after receipt of laboratory results, additional penalties shall be proposed based on the number of violations on the later citation.
 - (b) In no case shall the number of violations on the later citation be totalled with those on the earlier citations to make the required 10 violations.
 - (7) Amendments to and settlements and withdrawals of citations or any part thereof are subject to this limitation. Whenever the total number of violations is reduced to less than 10, the Chief shall ensure that all penalties for other-than-serious and regulatory violations are deleted.
 - (8) This limitation is applicable also to penalties involved in proceedings before the OSH Review Board. The Chief shall take appropriate action to ensure that proposed penalties for other-than-serious violations are withdrawn whenever amendments or settlement reduce the total number of violations to less than 10.
- b. Prior Consultation. The OSHA Appropriations Act prohibits the proposal or assessment of civil penalties for other-than-serious violations found during the inspection of an employer of 10 or fewer employees

if, prior to the inspection giving rise to the alleged violations the employer cited received a consultation visit.

- (1) For this exemption to apply, the employer must:
 - (a) Have voluntarily requested consultation from the Consultation and Training Section.
 - (b) Have had the consultant examine the specific hazardous conditions cited;
 - (c) Have been advised by the consultant of the need to correct these conditions; and
 - (d) Have made or be in the process of making a reasonable good faith effort to eliminate the hazard created by the conditions cited insofar as it was identified by the consultant, unless changing circumstances or workplace conditions render inapplicable the advice obtained from the consultant.

NOTE: 1. A good faith effort is any appropriate action by the employer to abate the hazard. The quality and completeness of the employer's efforts are the only relevant factors to be considered.

2. Reinspections shall not be conducted merely to verify the employer's reported efforts to correct the violations.

- (2) Penalties may still be assessed for serious, willful and repeated violations and for violations which pose an imminent danger, regardless of the employer's prior consultation efforts.
- (3) During the opening conference the CO shall determine if the employer currently has or has had 10 or fewer employees at any time during the preceding 12 months. If so, the CO shall:
 - (a) Inform the employer of the prior consultation limitation described in 5.(b) and offer to answer any questions concerning the limitation.
 - (b) Advise the employer that Alaska OSH must be given adequate information to determine whether the employer is exempt from penalties for other-than-serious violations under the prior consultation limitation.
 - (c) Point out that the employer need not reveal that consultation services have been received, discuss any matter related thereto, or provide a copy of the consultation report.

- (4) At any time during the consultation the CO shall, of course, accept any information or material offered by the employer showing prior consultation.

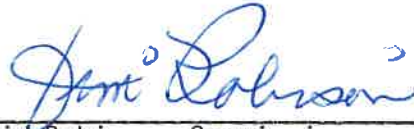
NOTE: There is no restriction as to when the prior consultation was provided.

- (5) There is no need to apply this limitation if the total number of violations is less than 10 or if there are no other-than-serious violations.
- (6) If the prior consultation limitation applies, the citation shall be issued without penalties for those other-than-serious violations which were subject to prior consultation.
- (7) If the employer provides information which qualifies the establishment for the exemption after the Citation and Notification of Penalty has been issued but before it becomes a final order, the Chief shall take appropriate action to delete the penalty. If the citation and penalty have become a final order, no further action shall be taken with respect to this limitation.
- c. The OSHA Appropriations Act also prohibits OSHA from scheduling or conducting state plan monitoring visits where the workplace or environment has been inspected by the State. There are several exceptions to this prohibition which are outlined under OSHA Instruction CPL 2.51D. Also, the Act restricts OSHA enforcement activities occurring on the outer continental shelf if such action exceeds the authority granted OSHA by the Outer Continental Shelf Lands Act or its 1978 amendments.



Bob Bacolas, Director

Reviewed and Approved



Jim Robison, Commissioner