

§1908.7(a)(3). The state may also disclose information contained in the consultant's written report to the extent required by 29 CFR 1910.1020 or other applicable OSHA standards or regulations.

(h) *Confidentiality.* (1) The consultant shall preserve the confidentiality of information obtained as the result of a consultative visit which contains or might reveal a trade secret of the employer.

(2) Disclosure of consultation program information which identifies employers who have requested the services of a consultant would adversely affect the operation of the OSHA consultation program as well as breach the confidentiality of commercial information not customarily disclosed by the employer. Accordingly, the state shall keep such information confidential. The state shall provide consultation program information requested by OSHA, including information which identifies employers who have requested consultation services. OSHA may use such information to administer the consultation program and to evaluate state and federal performance under that program, but shall, to the maximum extent permitted by law, treat information which identifies specific employers as exempt from public disclosure.

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#### § 1908.7 Relationship to enforcement.

(a) *Independence.* (1) Consultative activity by a State shall be conducted independently of any OSHA enforcement activity.

(2) The consultative activity shall have its own identifiable managerial staff. In States with Plans approved under section 18 of the Act, this staff will be separate from the managing of compliance inspections and scheduling.

(3) The identity of employers requesting onsite consultation, as well as the file of the consultant's visit, shall not be provided to OSHA for use in any compliance activity, except as provided for in §1908.6(f)(1) (failure to eliminate imminent danger,) §1908.6(f)(4) (failure

to eliminate serious hazards,) paragraph (b)(1) of this section (inspection deferral) and paragraph (b)(4) of this section (recognition and exemption program).

(b) *Effect upon scheduling.* (1) An onsite consultative visit already in progress will have priority over OSHA compliance inspections except as provided in paragraph (b)(2) of this section. The consultant and the employer shall notify the compliance officer of the visit in progress and request delay of the inspection until after the visit is completed. An onsite consultative visit shall be considered "in progress" in relation to the working conditions, hazards, or situations covered by the visit from the beginning of the opening conference through the end of the correction due dates and any extensions thereof. OSHA may, in exercising its authority to schedule compliance inspections, assign a lower priority to worksites where consultation visits are scheduled.

(2) The consultant shall terminate an onsite consultative visit already in progress where one of the following kinds of OSHA compliance inspections is about to take place:

- (i) Imminent danger investigations;
- (ii) Fatality/catastrophe investigations;
- (iii) Complaint investigations;
- (iv) Other critical inspections as determined by the Assistant Secretary.

(3) An onsite consultation visit may not take place while an OSHA enforcement inspection is in progress at the establishment. An enforcement inspection shall be deemed "in progress" from the time a compliance officer initially seeks entry to the workplace to the end of the closing conference. An enforcement inspection will also be considered "in progress" in cases where entry is refused, until such times as: the inspection is conducted; the RA determines that a warrant to require entry to the workplace will not be sought; or the RA determines that allowing a consultative visit to proceed is in the best interest of employee safety and health. An onsite consultative visit shall not take place subsequent to an OSHA enforcement inspection until a determination has been made that no citation will be issued, or if a citation

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is issued, onsite consultation shall only take place with regard to those citation items which have become final orders.

(4) The recognition and exemption program operated by the OSHA consultation projects provide incentives and support to smaller, high-hazard employers to work with their employees to develop, implement, and continuously improve the effectiveness of their workplace safety and health management system.

(i) *Programmed Inspection Schedule.*

(A) When an employer requests participation in a recognition and exemption program, and undergoes a consultative visit covering all conditions and operations in the place of employment related to occupational safety and health; corrects all hazards that were identified during the course of the consultative visit within established time frames; has begun to implement all the elements of an effective safety and health program; and agrees to request a consultative visit if major changes in working conditions or work processes occur which may introduce new hazards, OSHA's Programmed Inspections at that particular site may be deferred while the employer is working to achieve recognition and exemption status.

(B) Employers who meet all the requirements for recognition and exemption will have the names of their establishments removed from OSHA's Programmed Inspection Schedule for a period of not less than one year. The exemption period will extend from the date of issuance by the Regional Office of the certificate of recognition.

(ii) *Inspections.* OSHA will continue to make inspections in the following categories at sites that achieved recognition status and have been granted exemption from OSHA's Programmed Inspection Schedule; and at sites granted inspection deferrals as provided for under paragraph (b)(4)(i)(A) of this section:

- (A) Imminent danger.
- (B) Fatality/Catastrophe.
- (C) Formal Complaints.

(5) When an employer requests consideration for participation in the recognition and exemption program under paragraph (b)(4) of this section, the

provisions of §1908.6(e)(7), (e)(8), (f)(3), and (f)(5) shall apply to other-than-serious hazards as well as serious hazards.

(c) *Effect upon enforcement.* (1) The advice of the consultant and the consultant's written report will not be binding on a compliance officer in a subsequent enforcement inspection. In a subsequent inspection, a compliance officer is not precluded from finding hazardous conditions, or violations of standards, rules or regulations, for which citations would be issued and penalties proposed.

(2) The hazard identification and correction assistance given by a State consultant, or the failure of a consultant to point out a specific hazard, or other possible errors or omissions by the consultant, shall not be binding upon a compliance officer and need not affect the regular conduct of a compliance inspection or preclude the finding of alleged violations and the issuance of citations, or constitute a defense to any enforcement action.

(3) In the event of a subsequent inspection, the employer is not required to inform the compliance officer of the prior visit. The employer is not required to provide a copy of the state consultant's written report to the compliance officer, except to the extent that disclosure of information contained in the report is required by 29 CFR 1910.1020 or other applicable OSHA standard or regulation. If, during a subsequent enforcement investigation, OSHA independently determines there is reason to believe that the employer: failed to correct serious hazards identified during the course of a consultation visit; created the same hazard again; or made false statements to the state or OSHA in connection with participation in the consultation program, OSHA may exercise its authority to obtain the consultation report.

(4) If, however, the employer chooses to provide a copy of the consultant's report to a compliance officer, it may be used as a factor in determining the extent to which an inspection is required and as a factor in determining proposed penalties. When, during the course of a compliance inspection, an OSHA compliance officer identifies the existence of serious hazards previously

identified as a result of a consultative visit, the Area Director shall have authority to assess minimum penalties if the employer is in good faith complying with the recommendations of a consultant after such consultative visit.

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#### § 1908.8 Consultant specifications.

(a) *Number.* (1) The number of consultant positions which will be funded under a Cooperative Agreement pursuant to this part for the purpose of providing consultation to private sector employers will be determined by the Assistant Secretary on the basis of program performance, demand for services, industrial mix, resources available, and the recommendation of the RA, and may be adjusted periodically.

(2) States shall make efforts to utilize consultants with the safety and health expertise necessary to properly meet the demand for consultation by the various industries within a State. The RA will determine and negotiate a reasonable balance with the State on an annual basis.

(b) *Qualifications.* (1) All consultants utilized under Cooperative Agreements pursuant to this part shall be employees of the State, qualified under State requirements for employment in occupational safety and health. They must demonstrate adequate education and experience to satisfy the RA before assignment to work under an Agreement, and annually thereafter, that they meet the requirements set out in § 1908.8(b)(2), and that they have the ability to perform satisfactorily pursuant to the Cooperative Agreement. Persons who have the potential but do not yet demonstrate adequate education and experience to satisfy the RA that they have the ability to perform consultant duties independently may, with RA approval, be trained under a Cooperative Agreement to perform consultant duties. Such persons may not, however, perform consultant duties independently until it has been determined by the RA that they meet the requirements and have the ability indicated.

All consultants shall be selected in accordance with the provisions of Executive Order 11246 of September 24, 1965, as amended, entitled "Equal Employment Opportunity."

(2) Minimum requirements of consultants shall include the following:

(i) The ability to identify hazards; the ability to assess employee exposure and risk; knowledge of OSHA standards; knowledge of hazard correction techniques and practices; knowledge of workplace safety and health program requirements; and the ability to effectively communicate, both orally and in writing.

(ii) Consultants shall meet any additional degree and/or experience requirements as may be established by the Assistant Secretary.

(c) *Training.* As necessary, the Assistant Secretary will specify immediate and continuing training requirements for consultants. Expenses for training which is required by the Assistant Secretary or approved by the RA will be reimbursed in full.

#### § 1908.9 Monitoring and evaluation.

(a) *Assistant Secretary responsibility.* A State's performance under a Cooperative Agreement will be regularly monitored and evaluated by the Assistant Secretary as part of a systematic Federal plan for this activity. The Assistant Secretary may require changes as a result of these evaluations to foster conformance with consultation policy. If the State policies or practices which require change are such that the State's assurance of correction of serious hazards and of the effectiveness of employers' safety and health programs is in doubt, the Assistant Secretary may, pending the completion of the changes, suspend recognition of a State's consultative visits as a basis for exemption from compliance inspection as permitted under § 1908.7(b)(4).

(b) *Consultant performance—(1) State activity.* The State shall establish and maintain an organized consultant performance monitoring system under the Cooperative Agreement:

(i) Operation of the system shall conform to all requirements established by the Assistant Secretary. The system shall be approved by the Assistant Secretary before it is placed in operation.