

## CHAPTER XIII

### CONSULTATION

#### A. General.

##### 1. Purpose and Scope.

- a. The purpose of the NMOHSB Consultation Program is to provide employers and employees with a better understanding of applicable regulation requirements, recognition of workplace hazards, and suitable methods of hazard elimination to achieve a place of employment which is safe and healthful.
- b. An on-site consultation must be requested by the employer. It is not a continuing State-supported consultation service for the businesses in New Mexico. If the business or industry determines it is in need of continuing services, they are responsible for obtaining the services of a private professional consultant(s) or safety/health trained employee(s).
- c. Consultation, education, and training will be provided to employees and employee groups within the State. Any time devoted to such activities must not conflict with the participating employee's work schedule unless requested or approved by his/her employer.

##### 2. Independence and Confidentiality.

- a. On-site consultation shall be conducted by Technical Services Section Consultants and shall be independent of the NMOHSB Compliance Section.
- b. Compliance Section personnel shall not have access to on-site consultation information which identifies the employer, place of employment, or conditions observed, except as provided below:
  - (1) If the employer fails to take necessary action to correct or protect employees from an imminent danger situation.
  - (2) When the employer fails to correct an identified serious violation with the time period recommended by the Consultant.

#### B. Effect Upon Compliance Scheduling.

##### 1. On-Site Consultation in Progress.

- a. An on-site consultation already in progress will have priority over compliance inspections, except as provided below. If a

compliance inspection is scheduled, the Consultant and the employer shall notify the Compliance Officer that the on-site consultation is in progress, and the Compliance Officer shall delay the inspection until it is completed.

NOTE: A request for on-site consultation shall not be the basis for the delay of a compliance inspection.

b. The Consultant shall terminate an on-site consultation already in progress where one of the following types of compliance inspections is about to take place:

- (1) Imminent Danger Investigation.
- (2) Complaint Investigation.
- (3) Fatality/Catastrophe Investigation.
- (4) Compliance Follow-Up Inspection.

2. Exemptions from General Schedule Inspections. Employers participating in the Program of Exemption from Compliance General Inspections shall be exempt from certain inspections in accordance with paragraph D of this chapter.

C. On-site Consultation.

1. Requests.

a. All NMOHSB Technical Services Section personnel are responsible for encouraging employers to request on-site consultation visits, and shall publicize the availability and scope of the service.

b. In response to a specific inquiry, and before an employer's request for an on-site consultation may be accepted, it shall be clearly explained that:

- (1) The service is provided, at no cost to the employer, through State and Federal funds.
- (2) The purpose of the service is to provide employers with a better understanding of applicable regulations requirements, to assist employers in the recognition of safety and health hazards, and to assist them in providing their employees with employment and a place of employment which is safe and healthful.
- (3) While Consultants from the Technical Services Section do not issue citations or propose penalties, the employer must take action to eliminate hazards which, in the

judgement of the Consultant, represent a serious violation or imminent danger situation.

(a) The employer is required to take immediate action to protect the employees from any hazard which, in the judgement of the Consultant, represents an imminent danger to the employees.

1 The Consultant shall request the employer to remove the employees from the danger area and eliminate the hazard(s) prior to the employees' return to the area.

2 If the employer takes immediate action to eliminate employee exposure and eliminates the hazard, the violative condition shall be recorded and no further action taken.

3 If the employer fails to take the required action, the Consultant shall immediately notify the affected employees, document an accurate description of the hazard (pictures if appropriate), action taken, time of action, and persons contacted; notify the employer that the on-site consultation is terminated; and provide the Compliance Manager with relevant information.

(b) An employer is also required to take the necessary action to eliminate employee exposure to any identified hazards which, in the judgement of the Consultant, would be classified as a serious violation. The Technical Services Manager may extend the time period if he/she deems appropriate.

1 If the employer fails to take the action necessary to eliminate a serious hazard within established time frames, the Technical Services Manager shall notify the Compliance Manager and provide the relevant information.

2 The Compliance Manager will make the determination of the enforcement action warranted whenever a violation is referred from the Technical Services Section.

c. An on-site consultation shall be provided only at the employer's request. It shall not result from the enforcement of any right-of-entry under State law.

- d. When making the request, the employer may describe those specific working conditions, hazards, and situations for which the on-site consultation is desired. In the case where an employer is a small business, the request for consultation may be less specific.
- e. Compliance Officers are encouraged to inform employers about on-site consultation services available through the Bureau.
- f. Requests for plan reviews from engineers or architects will be accepted if they relate to specific questions on occupational safety or health. General plan and specification review will be done as a low priority. The consultation should be done at the Consultant's office. If it is to be done at a construction site, the general contractor and all subcontractors involved must officially concur (by letter to the Consultant, or by signing engineers/ architects request letter) in the request. If the project is a modification, alteration, or addition to an existing facility, the employer at that facility must also concur in the request.
- g. Consultants are not authorized to make an unscheduled on-site consultation at the workplace of an employer who has not made a request for an on-site consultation. In-person visits to the workplace may be made to explain the availability of the service. Exceptions may be made under the following conditions:
  - (1) The employer specifically requests an immediate on-site consultation, and;
  - (2) The Consultant has sufficient knowledge, preparation, and proper personal protective equipment to assure that a safe and competent consultation will be done, and;
  - (3) The Consultant obtains permission from the Technical Services Manager.
- h. A Consultation Request Form is to be completed for each request (phone call, letter, or in-person contact) for an on-site consultation .
- i. The employer shall be asked when the last compliance inspection was made, and if any items are under citation. Employers may request consultation to assist in the abatement of hazards cited during compliance inspection. However, an on-site consultation may not take place until all citations have become a final order. Any compliance abatement assistance will be coordinated with the Compliance Manager. Items not under citation may be the subject of an on-site consultation within the limits stated above.

- j. An employee requesting consultation about a condition at his/her place of employment, should be told that a Consultation will consultant with him/her or his/her employee group off the worksite, and provide
  - (1) Any information, advice, and recommendations on maintaining safe employment or places of employment;
  - (2) On applicable occupational safety and health regulations, techniques, devices, methods, practices, or programs; and
  - (3) That the employee should inform the employer of any hazardous condition.

2. Scheduling.

- a. Small employers in industries classified as high hazard will be given priority when a scheduling conflict occurs.
- b. All on-site consultations will be scheduled by the Technical Services Manager, except as provided in paragraph C.1.g of this chapter.

3. Procedures.

- a. Format. An on-site consultation shall follow a structured format which will consist of:
  - (1) Preparation.
  - (2) Entry.
  - (3) Opening Conference.
  - (4) Walkaround.
  - (5) Closing Conference.
  - (6) Written Report to the employer.
  - (7) Follow-up inspection, when deemed necessary by the Consultant or requested by the employer.
- b. Preparation. An on-site consultation shall be made only after appropriate preparation by the Consultant.
  - (1) Prior to the visit, the Consultant shall become familiar with as many factors concerning the establishment's operations as possible.

- (2) The Consultant shall review the establishment's citation history.
  - (3) The Consultant shall assure that all necessary technical and personal protective equipment is available, that he/she is qualified to use that equipment; and that the equipment is functioning properly.
  - (4) Additional, for a health consultation, the Consultant shall:
    - (a) Review toxicology of contaminants;
    - (b) Review TLV documentation and NIOSH Criteria Documents;
    - (c) Discuss sample collection with Laboratory personnel, if information is not in the Sampling and Analysis Guide provided by NIOSH or the OSHA Technical Manual (sufficient notice must be given if solutions are to be prepared); and
    - (d) Calibrate direct reading instruments where applicable.
- c. Entry. When entering a place of employment, the Consultant shall:
- (1) Introduce him/herself as a Consultant from the NMOHSB Technical Services Section.
  - (2) Offer a business cards.
  - (3) Show official credentials.
  - (4) State the reason for the visit.
  - (5) Ask for the person requesting the consultation and the highest available management official. In the case of large employers, it is satisfactory to conduct the opening conference with the Safety Director or Manager. The official charged with the safety and health responsibilities should be invited to participate throughout the visit as a matter of courtesy.
- d. Opening Conference.
- (1) The Consultant shall introduce him/herself and anyone else in the party.

- (2) The Consultant review the nature of the consultation request.
- (3) The Consultant shall advise the employer of the employer's obligations and responsibilities under the Act and Regulations. He/she shall advise the employer that, to the extent of his/her capability and training, he/she will identify and provide advice on elimination of those hazards included in the employer's request and any other safety and health hazards observed in the workplace. The employer shall be required to take timely action to eliminate employee exposure to serious hazards which have been identified in the workplace by the Consultant, and review the provisions of paragraph C.1.b.(3).
  - (a) A hazard which is classified as an imminent danger by the Consultant shall be corrected immediately.
  - (b) A hazard which is classified as "serious" shall be corrected within a mutually acceptable time period.
  - (c) The need to correct hazards which are classified as "other" shall be strongly stressed to the employer.
- (4) The Consultant shall determine presence of trade secrets and explain provisions by Bureau uses to maintain their confidentiality.
- (5) The Consultant shall explain the General Schedule Inspection Exemption provisions as described in paragraph D of this chapter.
- (6) The Consultant shall explain the possibility of follow-up visits to assure hazard correction and that he/she will obtain verbal consent if one is deemed necessary by the Consultant or Technical Services Manager.
- (7) The Consultant shall explain to the employer that he will be conferring with individual employees during the course of the visit in order to identify and evaluate particular hazards. He shall encourage the employer to allow employees, their representatives, and members of the workplace safety and health committee, to participate in the on-site consultation.
- (8) The Consultant shall explain the right of the employer to terminate or expand the scope of the visit at any time.
- (9) The Consultant shall assure the employer that the conditions observes shall not be used by any enforcement personnel, except when the employer refuses to take the

required action to protect employees from an imminent danger situation or fails to correct an identified serious hazard in the recommended time period. Additionally, for a health consultation, the Consultant will conduct sampling and testing, and provide for subsequent analysis, if necessary, to confirm the existence of a health hazard.

e. Walkaround.

- (1) Activity during the walkaround will be focused primarily on, but not necessarily limited to those conditions, hazards, or situations described in the consultation request. The Consultant shall also identify and provide advice on the elimination of any other safety or health hazards observed while proceeding directly to or from the subject of the request.
  - (a) Descriptive materials should be provided on methods commonly used for elimination or control of identified hazards. This advice should indicate the possibility of a solution and describe the general form of this solution. The Consultant shall not advise on engineering services, engineering design solutions, or product approval.
  - (b) Additional sources of assistance will be discussed with the employer.
- (2) If the condition under consideration is covered by a regulation, the Consultant shall outline how the hazard must be corrected under the provisions of the applicable regulation. Where the regulations specify more than one method of compliance, each method shall be explained. If the regulations allow for equivalent means of compliance, at least one equivalent means shall be explained to the employer. If a hazard could be a violation of the general duty clause, the employer shall be so informed.
- (3) The employer has the right to request termination or expansion of the scope of the visit at any time. Expansion of the scope may require an additional visit if additional preparation is required. Hazards observed up to the time of the requested termination shall be the subject of the usual closing conference, written reports, etc. A written report shall be sent to the Technical Services Manager each time an employer terminates an on-site consultation.
- (4) Photographs, when permitted by the employer, shall be used as a reference for writing reports, analyzing conditions, and in documenting imminent hazard



situations. The Consultant is responsible for taking precautions to assure that taking photographs will not set off a fire or explosion in the place of employment.

- (5) The Consultant shall classify the identified hazards in the workplace and indicate to the employer whether the hazard is an imminent danger, serious, or other than serious violation of the applicable standard.
- (6) During health consultations, observations, comments, measurements, etc., made by the Consultant, shall be recorded on the appropriate forms. Activities may include:
  - (a) Evaluation in the appropriate detail of toxic materials and harmful physical agents used.
  - (b) Observation of the process for administrative controls.
  - (c) Examination of process for engineering controls.
  - (d) Evaluation of the use and storage of personal protective equipment and employee training in its use.
  - (e) Field sampling and testing with direct reading instruments to confirm the existence of hazards.
  - (f) Proper labeling.
  - (g) Proper storage and handling of materials; housekeeping.
  - (h) First aid training.
  - (i) Employee training and education on hazards.
- (7) After the walkaround, the Consultant will decide whether further evaluation of potential health hazards is necessary, and whether a sampling plan is required.

f. Closing Conference. The purpose of the closing conference is to transmit information regarding conditions and practices disclosed by the on-site visit, to answer questions, to develop correction periods, and to review methods of eliminating identified hazards.

- (1) During the closing conference, the Consultant will cover the following points:

- (a) Review each specific area or job visited and discuss the conditions requiring correction.
  - (b) Discuss measurements made by direct reading instruments.
  - (c) Encourage the employer to eliminate all hazards as promptly as possible.
  - (d) Inform the employer that a letter will follow, summarizing the on-site consultation visit. The employer may provide a copy to any Compliance Officer making a subsequent inspection, for use in determining good faith of the employer.
- (2) If serious violations were found during the walkaround, the Consultant shall assist the employer in developing a plan to eliminate the hazards within a specified time period, and will schedule a follow-up inspection to ensure correction. The Consultant shall advise the employer that he may discuss any hazard, classification, or correction period which he believes to be improper, with the Technical Services Manager.
- (3) Additional requirements for health consultations:
- (a) At the time of the closing conference, the Consultant will probably not have results of air samples or other environmental tests. These circumstances should be explained by the Consultant. Additionally, the Consultant should state that a separate closing conference may be necessary at a later date, if health hazards are disclosed by the sample analysis.
  - (b) Review recommendations on engineering or administrative controls or protective equipment required for the abatement of identified health hazards.
- (4) The Consultant shall explain the following:
- (a) The Consultant is available for further consultation on other specific conditions.
  - (b) How the employer can obtain copies of the regulations.
  - (c) The employer should do a voluntary self-inspection of his/her place of employment.

- (d) The employer should develop a formal, effective safety program which the Consultant may review for adequacy.
- (e) The employer should avail him/herself of any applicable training.
- (f) Safe equipment, safe procedures, and a safe workplace are all necessary ingredients for compliance. Since any of these may change at any given moment, no one can say that a place of employment will remain in compliance, unless commitment and cooperation of all employees and management are maintained.

g. Written Report to Employer.

- (1) A written report shall be prepared for each on-site consultation and sent to the employer. It shall identify the Consultant, the location of the consultation, the name of the individual who requested the consultation, and with whom the findings were discussed. The report shall restate the employer's request and describe the working conditions examined by the Consultant. All serious violations shall be described and applicable regulations shall be identified in the report.
- (2) To the extent possible, the report shall include recommendations for elimination or control of each identified hazard. It shall include the dates for completion of corrective action, where appropriate. Serious violations which were corrected at the time of the consultation, shall also be noted in the report.
- (3) Additional sources of assistance should be discussed, including specific engineering consultation, medical advice and assistance, etc.
- (4) The employer will be requested to provide information on actions taken to correct each serious violation. Photographs of corrections are encouraged.

D. Program of Exemption from Compliance General Schedule Inspections.

(1) Requests.

- a. NMOHSB personnel shall encourage employers inquiring about the Program of Exemption from Compliance General Schedule Inspection to contact the Technical Services Manager.

b. Employers who request the Program of Exemption from Compliance General Schedule Inspection will be briefed on the requirements of the program, and that the exemption applies only to general schedule inspections.

(1) The exemption will not affect complaint or accident inspections.

(2) The exemption will not affect completion of any compliance inspections in progress.

(2) Employer Requirements to Participate.

a. The employer must have a fixed (non-mobile) establishment. Construction, logging, well drilling, etc., worksites will not be eligible, except associated fixed worksites such as equipment repair shops are eligible.

b. The employer must accept a complete safety and health on-site consultation.

c. The employer must correct all hazards identified by the Consultant during the on-site consultation or follow-up visit(s), and inform the NMOHSB Technical Services Manager by letter.

d. The employer must develop, implement, and maintain (if not already in practice) an effective safety and health program which fulfills the general guidelines included in the OSHA Small Employer Handbook.

e. The employer must post the "Notice of Participation" prominently next to the NMOHS poster, upon completion of the initial visit.

f. The employer must post the "Certificate of Exemption" and summary of corrected hazards, next to the NMOHS poster. The Notice of Participation may be removed at this time.

(3) The Technical Services Manager shall:

a. Ensure that all on-site consultations under this program are done in accordance with paragraph C.

b. Ensure that employers meet the criteria established in paragraph D.2 prior to issuing the "certificate of exemption."

c. Ensure that each Consultant will:

(1) Encourage the employer to develop and use an internal employee complaint procedure.

(2) Respond to information requests from the Compliance Manager which are made necessary by referrals from any agency other than the NMOHSB, or verification of abatement which would normally be accomplished by a compliance follow-up inspection.

d. Upon verification that the employer has corrected all hazards and established an effective safety and health program, notify the Bureau Chief. The Bureau Chief will issue a "certificate of exemption" with an expiration date one year following the date of initial visit.

(4) Notify the Compliance Manager:

a. To remove the employer's establishment from possible selection for general schedule inspection, immediately following the initial visit.

b. To replace the employer's establishment for possible selection from the general schedule inspection listing, immediately following a determination that the employer will not be eligible for an exemption.

c. Of the name and address of each business for which an exemption has been granted.

E. Participation. Upon entry into an establishment to conduct a general schedule inspection, a follow-up inspection, or an inspection in response to a referral from an agency other than the NMOHSB, the Compliance Officer shall determine if an employer is participating in the program for Exemption from Compliance General Schedule Inspection. When the employer is participating in the program, the CO shall:

1. Ensure that the notice to employees of the employer's participation in the program or the Certificate of Exemption is prominently posted next to the NMOHS poster.

2. Hold a brief meeting with the employer and, when there is an authorized employee representative, with that representative.

3. Inform the employee and authorized employee representative that the inspection will be delayed, provided that correction of all hazards is proceeding in accordance with the agreed upon time frames, and that progress in the development of an effective safety and health program is being made. Once correction of all hazards and development of an effective safety and health program is completed, an exemption from the inspection will be granted.

4. In the case of a follow-up inspection or an inspection in response to a referral from another agency, inform the employer and the

authorized employee representative, that the NMOHSB Chief will advise the Technical Services Manager of the alleged hazard(s) at issue in the proposed inspections, and that the Technical Services Manager will be responsible for determining whether a hazard exists and for assisting the employer in any required abatement.

5. After leaving the worksite, inform the Compliance Manager, who shall in turn inform the Bureau Chief, that the employer is participating in the Program for Exemption from General Schedule Inspection. At that time, and periodically during the delay, the Bureau Chief shall contact the Technical Services Manager to verify that satisfactory progress toward meeting the requirements is being made.