

# United States Senate

WASHINGTON, DC 20510

November 15, 2010

Secretary Hilda L. Solis  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Dear Secretary Solis,

As Ranking Members of the United States Senate Committee on Small Business and Entrepreneurship, and Health, Education, Labor and Pensions Committee, we write today to express concerns with several recent actions taken by the Occupational Safety and Health Administration (OSHA) that could undermine the job creation ability of our nation's over 27.5 million small businesses. As our nation recovers from the most devastating set of economic circumstances since World War II, and with a national unemployment rate stagnating around 10 percent, the federal government should remain focused on fostering an entrepreneurial environment that promotes small business job creation, and not adding yet another layer of uncertainty to bottom-line business operating costs.

For over a decade, dating back to the Clinton administration, OSHA has adopted a collaborative approach with businesses to increase worker safety – with decidedly effective results. Since 1994, workplace injury and illness rates have dramatically decreased from 8.4 incidents per 100 full-time workers to 3.6 incidents in 2009. Additionally, the number of fatal work injuries has fallen from 6,632 in 1994 to 4,340 in 2009. These numbers highlight the effectiveness of the collaborative approach to increase worker safety.

This raises serious questions about why OSHA has recently proposed several significant regulatory changes that will negatively affect small businesses, discussed below, without the benefit of small business review panels or comprehensive outreach to small businesses. Three proposals in particular have raised our concern. First, the Department has made an alarming budget request to eliminate funding and staff for the Voluntary Protection Programs (VPP), a set of programs that have been extremely effective in creating a culture of safety within workplaces of all sizes since 1982. VPP has always drawn bipartisan support and, in recent years, has striven to increase the number of small businesses who participate. Currently, 80 percent of VPP participants are businesses with fewer than 500 employees, and 39 percent have fewer than 100 employees. Your department's proposals will deter VPP growth among these small businesses and diminish the value of attaining VPP status.

Second, on September 3, 2010, OSHA proposed a rule (75 Fed. Reg. 54064) revising its On-Site Consultation program, a program which has been shown to help small businesses in Maine, Wyoming, and throughout the country improve their workplace safety programs and come into compliance with OSHA regulations. The On-Site Consultation program is a great example of the effectiveness of the Agency's collaborative approach to regulatory enforcement, but the proposed changes will discourage participation, lead to the allocation of fewer resources for the program, and undermine the collaborative approach.

According to the new proposed rule, OSHA's On-Site Consultation program is a voluntary program which "provides well-trained professional safety and health personnel, at no cost and upon request of an employer, to conduct worksite visits to identify occupational hazards and provide advice on compliance with OSHA regulations and standards." Small businesses "are the focus of the consultation program," and have benefited immensely from this proven initiative, as have their employees. Upon completion of the consultation, businesses "may seek to participate in the OSHA Consultation's SHARP (Safety and Health Achievement Recognition Program)," which recognizes employers who have demonstrated exemplary achievements in workplace safety and health by: (1) receiving the consultation; (2) correcting all safety hazards; (3) adopting new safety and health management systems; and (4) agreeing to request further consultation if conditions change and new hazards occur. If a business meets these standards, they are exempt from programmed OSHA inspections for "not less than one year."

OSHA's proposed regulation would (a) expand the authority of the Assistant Secretary of OSHA to force OSHA inspections, regardless of SHARP exemptions; (b) expand the statutory ability of OSHA to initiate enforcement visits to SHARP exempted businesses by allowing these enforcement visits to be initiated by mere "referrals" of violations; and (c) limit the deletion period from programmed OSHA inspections that are granted to SHARP participants.

For the reasons listed below, it is apparent that these rule changes will undermine the collaborative spirit of improving workplace safety between OSHA and employers, and instead will lead to a combative relationship between small businesses and OSHA, to the detriment of small businesses and their employees.

***OSHA Should Have Conducted a SBREFA Panel to Determine the Impact These Proposals Would Have on Small Businesses***

Unfortunately, OSHA did not convene a Small Business Regulatory Enforcement and Fairness Act (SBREFA) panel prior to proposing the On-Site Consultation regulations – which is disappointing since this program is aimed at aiding small firms with OSHA compliance. Nor were small businesses or VPP participants consulted prior to the release of a budget request to eliminate VPP funding and staff. While these proposals might not have formally triggered the requirement for a SBREFA panel, OSHA should have voluntarily chosen to convene such a panel because they would directly affect small businesses, and it would provide small businesses the opportunity to provide input during the rulemaking development process and give more information to OSHA in analyzing the impact of these new regulations on small businesses. The concerns raised by the small business community and the Small Business Administration Office



of Advocacy – that these changes to the On-Site Consultation program will be a disincentive to small businesses from participating in the program – must be addressed.

***The Proposed Regulation Will Deter Small Businesses from Participating in the On-Site Consultation Program***

First, allowing the Assistant Secretary to select which sites are inspected, regardless of SHARP status, makes the benefit of the On-Site Consultation program illusory. Currently, under Section 1908.7(b)(4)(ii) (29 CFR Ch. XVII § 1908.7), OSHA is only allowed to perform inspections of businesses that have already obtained deletion or deferrals from the Programmed Inspection Schedule due to SHARP status if the inspections are due to imminent dangers, fatality or catastrophe, or formal complaints.

The proposed regulations provide discretionary authority to OSHA to perform inspections, regardless of deletion or deferral, “as determined by the Assistant Secretary.” This catchall provision is overly broad. Small businesses who voluntarily subject themselves to the SHARP criteria will have no assurances that they will in fact obtain the benefits promised by the program. Instead, they will fear that by voluntarily opening their doors to OSHA, they will be punished by putting the spotlight on their businesses. This will seriously undermine the collaborative spirit of the On-Site Consultation program.

Second, adding “Referral Inspections” as a new category authorizing OSHA inspections, regardless of SHARP or pre-SHARP status, will curb participation in the On-Site Consultation program, and the proposed rules provide no standards as to how this new regulation will be administered. The proposed regulations create a new category in Sections 1908.7(b)(2) and (b)(4)(ii) that allows the termination of onsite consultative visits and allows OSHA inspections to resume, even if the business is in SHARP or pre-SHARP status, if there are referrals of possible hazardous conditions, as determined by the Regional Administrator.

This new regulation will further deter businesses from participating in the On-Site Consultation program by undermining the benefits of the program. Additionally, the proposed rule provides no clarity as to how the Regional Administrator will use referrals to decide whether to initiate an inspection, what criteria are used to determine if referrals are valid, nor does it explain why this authority is necessary for pre-SHARP and SHARP businesses that have recently been inspected.

In addition, limiting the deletion period from OSHA’s programmed inspection schedule for SHARP participants to one year with a potential one year extension, reduces the benefits provided by the On-Site Consultation Program. Section 1908.7(b)(4)(i)(B) currently provides that SHARP status companies be removed from OSHA’s Programmed Inspection Schedule for “not less than one year.” Participants in SHARP are granted an exemption from programmed OSHA inspections for one year and can extend that exemption to up to three years. The new rules propose that the exemption be limited to one year, and that any extension would be limited to one additional year. Again, this new regulation seriously undermines the benefits of the voluntary On-Site Consultation program, and will discourage employers from participating. The

reduced participation in the program will undermine worker safety and promote an adversarial relationship between businesses and OSHA.

These proposed regulation changes will do nothing to protect employees, and indeed, to the extent that it discourages small businesses from engaging OSHA through the consultation program, it will diminish the protection of employees. The companies that are willing to go through this process are the *good* actors. They deserve recognition for taking this voluntary, extra step. Instead, the proposed regulation would raise concerns that they may be setting themselves up for more enforcement and citations. Considering the significant improvement in workplace safety over the past fifteen years, weakening collaborative programs that have done so much to improve worker safety is illogical and counterproductive. Furthermore, it is not clear whether OSHA is interested in retaining this collaborative approach, considering that no SBREFA panel was convened.

***Therefore, we strongly urge OSHA to reconsider moving forward with these changes. If OSHA does insist on finalizing this regulation and altering the VPP, the agency should convene a SBREFA panel allowing small businesses to provide meaningful input.***

Finally, OSHA recently boosted penalties, increased OSHA worksite inspections, including mandatory OSHA follow-up inspections, and reduced the penalty mitigation structure for small firms with fewer than 25 workers, from a 60 percent to 40 percent reduction. We are disturbed that the Agency did not promulgate the new penalty scheme through a notice and comment rulemaking which should have included a SBREFA panel. OSHA's explanation mentions an unnamed "work group," the members of which are not identified nor are the recommendations revealed. Nowhere is there any indication to what extent, if any, the Agency considered the economic impact that its new penalty scheme would impose on small businesses – namely, higher penalty amounts and revised penalty reduction structure.

Actions like these, combined with the VPP budget proposal and changes to the On-Site Consultation and SHARP programs, in addition to changes to the penalty policy, foster the impression that the Agency is abandoning a collaborative approach that has been so successful.

***Therefore, we respectfully request that by December 10, 2010, you provide:***

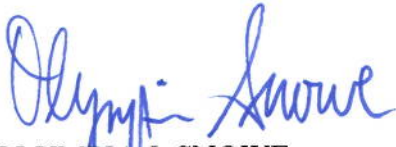
- Your commitment that the collaborative approach will continue to be the primary mechanism of achieving our shared enforcement goals of achieving worker safety without unduly inhibiting small business job creation;
- Detailed answers to the foregoing questions raised about the regulation, including but not limited to specific reasons behind the curtailment of the On-Site Consultation program, OSHA's failure to conduct a SBREFA Panel, and significant changes to OSHA penalty policy;
- A copy of the findings and recommendations of the work group that developed the changes to administrative penalty policy, including those that pertain to small business economic impact;



- A list of the members of the work group, including any and all small business stakeholders;
- A copy of any communications the work group or its members had with outside organizations or individuals regarding small business economic impact; and
- Any additional information with respect to proposed changes to mitigate the economic impact on small businesses, or regulatory alternatives that were considered by the work group.

Thank you for your attention to these issues. We look forward to receiving your response. Should you have any questions, please do not hesitate to contact Alex Hecht, Chief Counsel of the Small Business Committee, at (202) 224-7884, or Kyle Hicks, Republican Labor Policy Director at the HELP Committee, at (202) 224-8-3077.

Sincerely,



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