Here’s Something That’s REALLY Broken

Fred Walter, Esq.
Walter & Prince LLP

The striking take away from the first forty years of Fed/OSHA – or at least since the ‘70’s – is its utter indifference to fostering disciplined studies of which kinds of workplace interventions succeed in improving workplace safety, and which do not. Fed/OSHA has made no sustained attempt to determine how enforcement, education, consultation and partnering with management, labor, and other interested groups could improve compliance. Today, Fed/OSHA seems stuck in a Dickensian mind-set that assumes employers are evil, employees are powerless, and more enforcement means more compliance, indeed, that enforcement forces “compliance.”

Three years into Fed/OSHA’s emphasis on citations, high penalties and media coverage, and its deconstruction of Consultation and the federal VPP program, it is clear that it values retribution over metrics. It has ignored calls for activities which could measure the true value of enforcement and provide a sober evaluation of the actual impact of OSHA regulations on the bottom line – the reduction of fatalities, injuries and illnesses.

Likewise, Fed/OSHA is pressuring the state-plan states to raise their citation rates and to identify “bad” employers, with not a word of advice on finding ways to make safety programs better.

For example, Fed/OSHA’s EFAME report on Cal/OSHA contained its continuing criticism of the Division’s “failure” to increase the number of Serious citations written each year. As if further beatings will improve morale. As if treating employers more and more like criminals will make them good citizens. But where is the logic in that? If the number of serious citations is always rising, does this demonstrate that workplaces are safer and healthier, or the reverse? And how does this policy do anything to differentiate between employers who are indifferent from those who are struggling to do the right thing?

Further, the EFAME debacle is stifling the role envisioned in the OSH Act for the states to be laboratories for innovation, holding two-way conversations with Fed/OSHA on their experiments. But when Fed/OSHA appreciates innovation, they are prone to plagiarize it without attribution until being shamed into admission. Vis: I2P2, and the “appropriation” by Fed/OSHA of all of Cal/OSHA’s heat illness media products.

And when they don’t like innovation, they play the “as effective as” card. Here are some fun numbers to consider:

27: States (and Puerto Rico) that have been granted initial approval of their plans.
17: Of those 27, the number of states which have received final approval.
4: The number of states which have not adopted the CFR into their own regulatory
scheme. And of those 4,

1: The number of states which have been granted final approval.

The most insidious result of the EFAME reports on the state-plan states, then, may be to speed up the substitution of “no different than” for “as effective as.” Whatever Fed/OSHA may say about encouraging creativity, they lead people to think that they are punishing non-conformity.

You may recall that at last year’s meeting Deputy Assistant Secretary Jordan Barab admitted to the assembled Committee that there is no way to know what “as effective as” means, that is, unless the CFR is imposed on all of the states. And that, he hastened to add, is not what Fed/OSHA want to do. So, the heat is still on the states to mirror federal enforcement standards for quantity. One might be led to think that Fed/OSHA’s reasoning is that if you cannot judge the quality of a product, at least you can count its quantity, and that if everyone is doing what we do, no one can compare us to a better model.

It was easy after the revelations in Nevada for the new sheriffs in town to pull their guns and start blasting away at the states. But as soon as Fed/OSHA had turned the state-plan programs upside down with their EFAME “findings,” the Department of Labor’s own Office of the Inspector General revealed that the emperor has no clothes. We now have proof of what many have said for years:

That “as effective as” has no meaning whatsoever when Fed/OSHA cannot define “effectiveness” even in its own work. And that, therefore, Fed/OSHA cannot provide the states with any meaningful guidance. Word associations like “forest” and “trees,” and “motes” and “beams” come to mind. But the OIG report came too late to aid the state-plan states.

In California the pressure to mimic Fed/OSHA is even affecting rule-making. There now is an effort to demolish our Standards Board, one of the few effective safety agencies we have, and move its functions into Cal/OSHA. The Standards Board is made up of volunteers from all major stakeholders’ groups - that is, by those who will have to live by the rules - and a knowledgeable research staff. They adopt standards after open meetings and with meaningful input from “the regulated community.” The Board provides California with rule-making relatively quickly, by consensus, and on the cheap, in contrast to the federal model which literally can take decades to move a good idea forward. Take, for example, the proposed Beryllium standard.

Who can argue that we all – management, labor, workers and even Fed/OSHA – would not benefit from safety and health programs based on objective criteria of effectiveness? It is time for Fed/OSHA to realize that it needs all the help it can get. Not all good ideas come from inside the Beltway. The states are more nimble than the federal bureaucracy can ever be. Top-down just doesn’t work well in a republic as diverse as ours. What needs to be emphasized in California may not be an issue in Minnesota. Instead of dictating to the states, Fed/OSHA should pursue all opportunities to enhance the two-way conversation intended by the Act’s authors, and ask the states to join together in a true quest for meaning. Not just punishment and headlines, but projects which could foster demonstrable results.
So, here’s a thought from the Left Coast:

Last year, shortly after we met in New Orleans, the Rand Center for Health and Safety in the Workplace released a report on how (in)effective California’s IIPP regulation has been in reducing worker accidents. Whatever you might say about the report, the Rand Center’s most important finding was that where an employer was cited for a non-specific violation of the IIPP regulation, not a lot of change followed. But when specific flaws in a plan were pointed out, there was a significant reduction in injuries during the following years. The more educated the employer, the better the result. Pretty self-evident.

But here’s the point: What if it turns out that the use of Consultation services in conjunction with Enforcement can be more effective than Enforcement alone? What if we tried a system where, after a citeable event, the citation is suspended if the employer chooses to enter a diversion program aimed at improving the safety of its workplace, and the citation is not issued if the employer successfully completes the program? Then, that employer’s experience rate over a fixed period of time could be tracked to see if there has been any significant change in its injury rates.

Or, issue the citation, but put the employer on probation, with active assistance from Consultation. And re-rig IMIS so that if the employer succeeds (however success is defined), the record of the citation is expunged. Call it a pardon program for conscientious employers.

These are not completely new ideas, but the OIG’s findings have given us a compelling reason to look at them again. It might take legislation at the federal and state levels to create permission to try either of these, or some other, experiments. But it is more likely that some state will find a workable, objective set of criteria for measuring “effectiveness” than that we will find success in continuing to do what has been done for decades. Let’s not forget Einstein’s definition of insanity: Doing the same thing over and over, expecting a different result.