NEBRASKA ADMINISTRATIVE CODE

TITLE 230 - DEPARTMENT OF LABOR

CHAPTER 6 - WORKPLACE SAFETY CONSULTATION PROGRAM

001. **General responsibilities and administrative procedures**.

A. This regulation is issued by the Department of Labor, State of Nebraska, pursuant to LB 757 (Laws, 1993), referenced in the Nebraska Statutes at *Neb. Rev. Stat.* '48-443, *et seq*. These regulations apply to Nebraska's public and private employers subject to workers' compensation and are meant to comply with requirements of the National Labor Relations Act.

B. Summary.

Neb. Rev. Stat. '48-443, *et seq*. requires public and private employers subject to Nebraska's Workers' Compensation Act to establish safety committees and it creates the Workplace Safety Consultation Program which requires the Department of Labor, Office of Safety and Labor Standards to provide an inspection/consultation of worksites to help develop occupational safety and health programs for employers with high frequency or severity rates of work-related injuries. The law provides that penalties be assessed for failure to establish a safety committee and refusal of entry for inspections.

The regulation creates program components and prescribes the manner and means of program distribution, implementation, and evaluation. This regulation provides that the Department of Labor will perform inspections of high-frequency employers referred by the Workers' Compensation Court and the Department of Insurance in exchange for fees borne by each employer for those services to ensure that the Workplace Safety Consultation Program covers costs of administration.

C. Confidentiality.

All records made or maintained in accordance with these regulations shall be kept confidential by the Department in accordance with the provisions of *Neb. Rev. Stat.* '48-612. All other parties allowed access to records shall only use such information for the purposes of the Act.

D. Definitions.

The Nebraska Department of Labor adopts the following definitions:

1. "Abandoned Mine" means deserted mine areas where all work has stopped and further work is not evident or intended.

2. "Abate or Abatement" means to eliminate hazards identified by the Nebraska Department of Labor.

3. "Abatement Report" means a final written verification by the employer, provided to the Nebraska Department of Labor by the employer, that all hazards have been corrected, necessary programs have been initiated, and payment by the employer for inspection/consultation services provided by the Nebraska Department of Labor has been made.

4. "Act" means the Williams-Steiger Occupational Safety and Health Act (OSHA) of 1970 [see, 29 CFR 1901.1-1910.999, 29 CFR 1920.1000, *et seq*. for general industry; 29 CFR 1926 for construction] and/or the Mine Safety and Health Act (MSHA) of 1977 [see, 30 CFR, Parts 47-48, 50, and 56-57 for surface and underground metal and non-metal mines].

   OSHA references may be obtained by calling 1-800-642-8963 or by writing to:

   U.S. Government Bookstore
   120 Bannister Mall
   5600 E. Bannister Road
   Kansas City, MO 64137
   (816) 765-2256

   MSHA references may be obtained by calling 202-783-3238 or by writing to:

   Superintendent of Documents
   Government Printing Office
   Washington, D.C. 20402

5. "Active Working Mine" means an area at, in, or around a surface or underground metal or non-metal mine or plant where employees work or travel.

6. "Administrative Hearing" means regulations already adopted under 230 NAC 3 by the commissioner for appeals, contested determinations, orders, etc.

7. "Administrative Subpoena" means the same as described under "administrative hearing".

8. "Business Establishment" means: (a) location where business is conducted or where services or industrial operations are performed, or (b) where the employer maintains records necessary to provide evidence of employer compliance with rules and regulations adopted by the Nebraska Department of Labor.

9. "Commissioner" means the Nebraska Commissioner of Labor.

10. "Complaint" means information, oral or written, provided to the employers safety

committee, or the Nebraska Department of Labor, describing an unsafe or unhealthy conditions which the complainant believes to be true.

11. "Consultation" means those services provided by the Nebraska Department of Labor for a fee under *Neb. Rev. Stat.* ' 48-443, *et seq*., upon the request by an employer for assistance with occupational safety and health issues, to help establish and maintain compliance with federal OSHA or MSHA regulations.

12. "Department" or "Department of Labor" means the Nebraska Department of Labor.

13. "Determination Letter" means a written decision by the Commissioner regarding corrective action with respect to discrimination complaints.

14. "Discrimination Complaint" means information provided from an employee to the Department based upon an alleged employer reprisal for a complaint made by the employee to the Nebraska Department of Labor and/or safety committee.

15. "Division" means the Office of Safety and Labor Standards of the Nebraska Department of Labor and its personnel or designated representatives.

16. "Enforcement Authority" means, OSHA, MSHA, or that authority having the most responsibility or control over workplace safety and health conditions, such as Governor, Mayor, County Commissioner, Superintendent of Schools, Board of Directors, Special Districts, etc.

17. "Entry" means, for purpose of inspection, to gain access by the state's representative to the employer's entire work site, necessary personnel, and all records and documents required by the law.

18. "Fee" means payment by an employer for, but not limited to, consultations, inspections, and investigations to administer the Workplace Safety Consultation Program.

19. "Fiscal Year" means the twelve-month period beginning July 1 and ending June 30.

20. "A Fixed Site" means a single physical location where business is conducted or where services or industrial operations are performed.

21. "Frequency" means the number of compensable injuries and occupational diseases reported to the Workers' Compensation Court during a calendar year that result in a finding of a compensable injury pursuant to Nebraska's Workers' Compensation Law.

22. "Hazard" means any existing or potential condition in the workplace that, by itself or by interacting with other variables, can result in death, injury, property damage, and other loss.

23. "High Frequency Employer" means an employer identified and referred to the Department of Labor, by the Department of Insurance and/or Workers' Compensation Court.

24. "Illness" shall mean occupational Illness consisting of any abnormal condition or

disorder other than one resulting from an occupational injury caused by exposure to factors associated with employment.

The following list provides, but is not limited to, five categories of occupation illnesses and disorders that are often used for classification occupational illnesses:

a. Occupational skin diseases or disorders.

b. Dust diseases of the lungs.

c. Respiratory conditions due to toxic agents.

d. Poisoning (systemic effects of toxic materials).

e. Disorders due to physical agents other than toxic such as heat exhaustion and frostbite.

25. "Imminent Danger" means any condition or practice which does not meet recognized industry standards in any place of employment which are such that immediate danger exists which could reasonably cause unexpected death or serious injury. (Requires abatement.)

26. "Incidence Rates" means the number of injuries and/or illnesses or lost workdays per 100 full-time workers and are calculated as (N/EH) X 200,000 where:

N= number of injuries and/or illnesses or lost workdays

EH= total hours worked by all employees during the calendar year

200,000= base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year)

27. "Inspection" means the worksite evaluation, or any follow-up evaluation, for a fee, of a place of employment of a high-frequency employer referred by the Department of Insurance and/or the Workers' Compensation Court to the Department of Labor to assist the employer with occupational safety and health issues by establishing and maintaining compliance with federal OSHA or MSHA regulations.

28. "Law" means *Neb. Rev. Stat.* '48-443, *et seq*.

29. "LWDI" means Lost Workday Injury Rate.

30. "MSHA" means the federal Mine Safety and Health Act.

31. "Multiple Work Sites" means where employers have their employees perform services in more than one location.

32. "Non-fixed Site" means all geographical sites or locations within Nebraska where construction, drilling, or other movable operation is being performed by the employer.

33. "Notice of Appearance" means the written notice of the Department of its intent to interview employees and members of the employer's safety committee that may have information relating to an employee complaint that allegedly resulted in discharge or discrimination. Such notice of appearance shall be contained in the employer notification letter which is sent to an employer by the Department to initiate an investigation.

34. "Occupational Injury" means any injury such as a cut, fracture, sprain, amputation, etc., which results from a work accident or from a single instantaneous exposure in the work environment.

35. "OSHA" means The Occupational Safety and Health Administration within the federal government.

36. "Other-than-serious Violations" means a dangerous condition where accident or illness would most likely result but would probably not cause death or serious injury, but would have a direct and immediate relationship to the safety and health of employees.

37. "Personal Protective Equipment (PPE)" means, but is not limited to, eye and ear protection, safety shoes, hard hats, gloves, belts, etc.

38. "Private Employer" means a person engaged in a business affecting commerce who has employees, defined for workers' compensation purposes, but does not include the federal government or the state or its political subdivisions.

39. "Public Employer" includes the state and its political subdivisions, but does not include the federal government.

40. "Recordable Injuries and Illness" means any occupational injuries or illnesses which result in:
    a. Occupational deaths, regardless of the time between injury and death, or the length of the illness; or

    b. Nonfatal occupational illnesses; or

    c. Nonfatal occupational injuries which involve one or more of the following: loss of consciousness, restriction of work or motion, transfer to another job or medical treatment (other than first aid).

41. "Safe" and "Safety" means, as applied to any employment or place of employment, freedom from danger as is reasonably necessary to control, reduce or eliminate recognized dangers and harmful exposures for the protection of employees, including, but not limited to, conditions and methods of sanitation and hygiene.

42. "Serious Hazard" means a substantial probability that death or serious physical harm will result from a condition which exists from one or more practices, means, methods, or operations, within places of employment. (Requires abatement.)

43. "SIC" and "SIC Code" means the Standard Industrial Classification code referenced in the Executive Office of Management and Budget "Standard Industrial Classification

Manual", incorporated herein by reference, used to classify employers and groups of employers. This publication may be obtained from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161 (Order No. PB-100012).

44. "State Representative" means an inspector/consultant/investigator or other designee of the Commissioner employed by the Department acting on behalf of the Commissioner.

45. "Violation" means noncompliance with any statute or provision of the Department's regulations.

46. "Willful Violation" means a violation or omission that exists under either the OSHA or MSHA Act where the evidence shows either an intentional violation of either the OSHA or MSHA Act or indifference to its requirements. (Only those employers covered by OSHA or MSHA will be referred.) Employers referred by the Department to Federal enforcement for noncompliance may be considered by enforcement to have willful violations within their workplace.

47. "Worksite" means where employers have their employees perform services.

002. **Safety Committees.**

A. Employers subject to collective bargaining agreements.

On or before January 1, 1994, every public and private employer in Nebraska subject to workers' compensation who has one or more employees and is subject to collective bargaining obligations or is obligated to negotiate with employees who are in a bargaining unit shall have at least one safety committee. The establishment of such safety committee shall be accomplished through the collective bargaining process.

B. Employers not obligated to negotiate with a collective bargaining unit.

On or before January 1, 1994, every public and private employer in Nebraska subject to workers' compensation who has one or more employees not subject to collective bargaining obligations or is not obligated to negotiate with a collective bargaining unit shall establish at least one safety committee.

1. The name(s) of safety committee members shall be kept with and attached to the effective written injury prevention program.

2. There shall be an equal number of committee members representing the employer and the employees. The employer's representative may be a nonmanagement employee(s).

3. The employer shall retain full authority to manage the worksite(s).

4. Committee members shall meet at least once during each three months of operation or in a reasonable timely response to unresolved employee complaint(s), except as follows:

5. Safety Committees need not convene during any calendar quarters where there is 75%

fewer hours worked than any calendar quarter in the previous twelve months but in no event shall there be less than two Safety Committee meetings in any calendar year.

6. Employers of ten or less employees that had no injuries or illnesses normally reported (Form 300 or First Report of Injury NWCC Form 1) or claims filed during the immediately preceding twelve months need only meet once during the following twelve months.

7. An employer shall compensate employee members of the safety committee at their regular hourly wage plus their regular benefits while the employees are attending committee meetings or otherwise engaged in committee activity. Compliance with state and federal wage and hour laws must be adhered to.

8. The safety committee shall maintain written minutes of all meetings for at least 3 years unless otherwise instructed by the Department.

C. Committee membership; purpose.

The purpose of the committee is to bring employees and employers together in a non-adversarial, cooperative effort to promote safety at each worksite. The committee(s) is not and shall not serve as a bargaining unit. There is no authority to act as such or deal with collective bargaining issues. The safety committee is limited to assisting the employer by making recommendations regarding methods of addressing safety and health hazards at each worksite. Recommendations to the employer shall be advisory only and not deal with issues subject to collective bargaining. For those members not representing the employer, the employer shall seek volunteers through a written notice directed to all employees, to match the number of the employer's representatives. Employee safety committee representatives shall be selected as follows:

1. Where none of the employer's employees are represented by an exclusive bargaining agent, employee members shall be comprised of volunteers. In the event that the number of volunteers shall exceed the number of available slots, employee members shall be selected at random from the volunteers. If there are not enough volunteers, employee member(s) shall be selected at random from the remainder of employees by the employer.

2. In the event that some, but not all of employer's employees are members of a collective bargaining unit or obligated to negotiate with a collective bargaining agent, establishment of such safety committee shall be accomplished through the collective bargaining process.

The names of such individuals shall be made available to all employees. Unless determined otherwise by collective bargaining, membership as an employee representative shall be made available to all employees at least once every two years. Employer representatives need not be rotated. If no new members are recruited, existing members may retain their committee membership. Terms may be staggered. It is an employee's right to seek to be an employee safety committee member and to otherwise participate in the selection process without being subject to penalties, discipline, employer interference, or reprisal of any kind.

D. Effective written injury prevention program.

Each employer shall present to the safety committee an effective injury prevention program which shall address all work sites and all classes of workers. Where workers are assigned to work sites covered by another existing injury prevention program, those workers may be covered under that program if it appropriately responds to the duties of the worker.

The program presented by the employer shall approach each category of workplace danger with the intention of totally preventing workplace injuries, if feasible. If total prevention is not feasible, the employer shall control the hazard as completely as is feasible. To the extent that potential exposure exists despite the designed controls, then the employer shall use safety and health rules, work practices, administrative controls, and personal protective equipment (PPE) to control that exposure.

The program shall include safety training addressing the following:

1. Initial safety orientation on rules, policies, and job-specific procedures for employees new to the work in a manner that is readily understood by each employee;
2. Job-specific training for employees before they perform potentially dangerous work; and

3. Periodic refresher training/dissemination of information on at least an annual basis for employees regarding the employer's injury prevention program, on safety rules, policies, and procedures.

The primary consideration that may determine a program to be effective is if it results in reduction or elimination of accidents. Further consideration will be effective preventative measures, documentation, and constant response to unexpected emergencies.

It shall be the duty of each safety committee to adopt and maintain an effective written injury prevention program. The committee may adopt the program presented to them by the employer or may develop its own. Review of that program must be made available to all employees upon request.

E. Accident review.

The safety committee may review all deaths and recordable injuries or illnesses (Form 300 or First Report of Injury NWCC Form 1). After such review, and when appropriate, the committee may make written recommendations regarding future prevention. Such safety committee reviews shall not supersede normal federal enforcement or insurance investigations that may take place.

Employers shall report any workplace deaths within 48 hours (OSHA requires 8-hour notification), 24 hours a day, 7 days a week, to the Department's Office of Safety and Labor Standards, (800)627-3611; Omaha residents should call (402)595-3185.

F. Record-keeping procedures.

Each employer shall retain up-to-date records of documents required by these regulations for each place of employment. The employer shall make such records available to the Department upon request, during normal work hours. The employer shall establish record-

keeping procedures to control and maintain all accident and injury records (Form 300 or First Report of Injury NWCC Form 1) which employers shall retain for three years or longer if so advised by the Department. Those employers that are required by OSHA/MSHA to keep records of all work related deaths, any diagnosed occupational illnesses and any occupational injuries which involve loss of consciousness, restriction of work or motion, transfer to another job, or requires medical treatment beyond first aid shall make such records available to the safety committee and the Department upon request. The name(s) of the employee(s) shall not be made available unless agreed to by the employee(s).

G. Safety rules, policies and procedures.

The employer shall communicate to all employees, including non-English speaking employees, the employer's safety rules, policies, and procedures and any changes to such rules, policies, and procedures. A copy of any employer-implemented safety program shall be accessible to all employees and made available to the Department upon request. The employer's safety rules shall include both general work place safety and job site specific safety rules.

003. **Inspection/consultation programming**.

A. Program Planning.

1. Purpose.

Inspection/consultation programming provides general guidelines to the commissioner and the Executive Director of the Department's Office of Safety and Labor Standards in planning inspection operations and related activities and instructions to satisfy the intent of *Neb. Rev. Stat.* '48-443, *et seq*. This program does not supersede federal enforcement regulations or activity. The Department shall not issue penalties for workplace hazards identified by inspection or consultation although such hazards identified shall be abated.

2. Primary Consideration.

The primary consideration in conducting inspection/consultation operations is to enhance workplace safety and health and to decrease the frequency or severity of work-related injuries and diseases. These regulations are intended to contribute to safe working conditions and practices for all employees through the implementation and maintenance of occupational safety and health programs by Nebraska employers. The anticipated effect by these regulations will be to reduce workers' compensation costs for all employers in Nebraska. The goal is a safe and healthy work place.

B. Inspection/Consultation.

1. Programmed.

Inspections of worksites of high frequency employers which are selected according to the Department of Insurance, Workers' Compensation Court, and/or the Department of Labor's scheduling plans for safety and health programs.

2. Unprogrammed-related.

Inspections of employers on multi-employer worksites whose activities were not included in the programmed assignment (e.g., a low injury rate employer requesting consultation at a worksite where programmed inspections are being conducted for high frequency employers).

3. Scope.

Inspections, either programmed or unprogrammed, may fall into one of two categories depending on the scope of the inspection.

a. Comprehensive. A complete inspection, normally but not limited to, high frequency employers, of the potentially high hazard areas of the business establishment or worksite(s).

b. Partial. Voluntary inspection whose focus may be limited due to an employer's request for a consultation covering certain potentially hazardous areas, operations, conditions or practices at the business establishment or worksite.

Each inspection/consultation conducted will normally include, but will not be limited to, a review of the injury and illness records, an assessment of the employer's safety committee(s), written injury prevention program and other required safety programs. In addition, there will be a walk-through to survey conditions, operations, and work practices.

The information gathered during this review and walk-through will be used to confirm or revise the determination made as to whether the state representative's scope should be expanded.

C. Inspection Priorities.

1. Unless otherwise noted in particular cases, priority of accomplishment and assignment of Department personnel resources for inspection/consultation categories shall be as follows:

First priority= programmed inspections

Second priority= requests by employers for consultation

2. The Department shall prioritize inspections of employers using the referred high frequency employer list, based upon severity of injuries, requested consultations, and locations of work to be performed.

D. Inspection register.

1. The Department's inspection registers shall determine which establishments are to be scheduled for inspection during the current fiscal year. This register shall remain confidential within the Department.

2. Normally, no employer shall be selected for inspection more frequently than once per

year.

3. All sites on the inspection register shall be inspected in any order that makes the most efficient use of resources.

4. The Department shall make every effort, including advance notice when appropriate, to assure attendance of necessary persons and minimize interruption of business operations.

5. Employers shall be added to the Department's registers as referred from the Department of Insurance and the Workers' Compensation Court.

6. The register shall be arranged alphabetically by employer name and by location if the same employer has more than one worksite or if two employers have the same name.

E. Inspection Scheduling for Construction.

1. Due to the mobility of the construction industry, the transitory nature of construction worksites and the fact that construction worksites frequently involve more than one construction employer, inspections shall be scheduled from a list of high frequency construction employers and each high frequency employer referred may include an inspection for each construction site(s).

2. The commissioner may make deletions from the inspection register, where the commissioner documents that:

a. Little or no construction activity at a worksite on the list has begun or construction activity has already been substantially completed before an inspection can be made, or

b. A worksite inspection may be carried over if its inspection would require excessive travel and it cannot be combined with other inspection activities, or

c. A worksite inspection may be carried over if the inspection cannot be completed due to the employer's refusal to allow it, or

d. At the end of a fiscal year the number of inspections yet to be completed during that period shall be taken into account in setting the new inspection cycle. Due to staffing availability, not all referrals of high frequency employers from the Department of Insurance and/or Workers' Compensation Court have to be provided an inspection.

F. Inspection Scheduling.

1. Programmed inspections.

High-frequency employers referred by the Department of Insurance and/or Workers' Compensation Court in response to specific evidence of hazardous conditions identifying workplace injuries and their experience modification, previous safety and health history, Nebraska Workers' Compensation Form 1 (used in place of OSHA's

Form 301), incidence rates found on OSHA's 300 log at a worksite are considered programmed fee inspections.

Employers shall be classified based on SIC codes. After employers are ranked by frequency or recordable injuries (highest to lowest), the Department shall identify the upper one-half or top fifty (50) percent of those employer groups as high frequency employers subject to programmed inspection. The frequency data shall be used with other available state or national occupational injury data to rank employers. This information will remain confidential.

2. Requested consultations.

Those consultations conducted in response to employer requests for assistance to help them resolve workplace safety and health issues relating to federal OSHA and/or MSHA regulations are considered fee consultations.

3. Guidelines and procedures.

Programmed inspections may be conducted jointly by both safety and health personnel whenever resources are available and it is likely, based on experience in inspecting similar workplaces, that both safety and health hazards exist. If an inspection has begun as safety only or as health only the state representative may determine during the course of the inspection that the inspection should be expanded. Establishments which appear on both the safety and health registers may be scheduled for a joint safety/health inspection whenever practical. The Department of Insurance and Workers' Compensation Court will provide, whenever possible, the type of inspection necessary for each employer referred as a high-frequency employer.

Employers may be selected by the commissioner for inspection on the additional basis of factors intended to identify the likelihood of workplace injuries. Such factors shall include, but are not limited to:

a. The amount of premium paid by the employer for workers' compensation insurance;

b. The experience modification produced by the experience rating system referenced at *Neb. Rev. Stat.* '44-7524;

c. Whether the employer is covered by workers' compensation insurance under *Neb. Rev. Stat.* '48-146.01;

d. The relative hazard of the employer's type of business as evidenced by insurance rates or loss costs filed with the Director of Insurance for the insurance rating classification or classifications applicable to the employer;

e. The nature, type, or frequency of accidents for the employer as may be reported to the Department of Insurance, the Nebraska Workers' Compensation Court, or the Department of Labor;

f. Workplace hazards as may be reported to the Department of Insurance, the

Nebraska Workers' Compensation Court, or the Department of Labor;

g. Previous safety and health history;

h. Possible employee exposure to toxic substances.

4. Refusal of entry or inspection.

State representatives employed by the Department shall have the right and power to enter any premise, building, or structure, public or private, for the purpose of inspecting any work area or equipment. A refusal by the employer of entry by a state representative employed by the Department shall be a violation of this subsection. If the Commissioner finds, after notice and hearing, that an employer has violated this subsection, he or she may order payment of a civil penalty of not more than one thousand dollars for each violation. Each day of continued violation shall constitute a separate violation.

5. Employer interference.

The employer shall not interfere with or limit the lawful duties of a state representative. Examples of such interference are refusals to permit the walk-through, the examination of records essential to the inspection, the taking of essential photographs, the inspection of a particular part of the premises, employee interviews, or the refusal to allow attachment of sampling devices.

6. Administrative subpoena.

Whenever there is a reasonable need for records, documents, testimony, and/or other supporting evidence necessary for completing an inspection scheduled in accordance with current and approved inspection scheduling or an investigation of any matter properly falling within the statutory authority of the Department, the commissioner may issue an administrative subpoena; see *Neb. Rev. Stat.* '81-119.

Employers who receive advance notice of an inspection must also inform their employees' safety committee representative(s) in advance of an upcoming inspection. Based on advanced notice of inspection, employers who contact the Department of Labor prior to an inspection indicating their reluctance to work with an state representative and/or their refusal to allow entry by a state representative will automatically generate a warrant to be served by the state representative upon arrival at the employer's worksite.

7. State representative's credentials.

State representatives carry official credentials that can be verified by calling the Department's Office of Safety and Labor Standards. When the state representative arrives at the establishment, he or she shall display official credentials.

8. Opening conference.

Upon arrival at the employer's worksite for a programmed inspection visit, the state

representative will briefly review their role with the employer during the visit.

The state representative will explain how the establishment was selected. If the employer is subject to Federal regulations, the state representative will also ascertain whether an OSHA/MSHA enforcement inspection is in progress. If so, the state inspection may be terminated.

The state representative will explain the purpose of the visit, the scope of the inspection, and the standards that are being used as a minimum guideline. A copy of applicable safety and health standards will be provided upon request. The cost of this material shall be included in the cost of the inspection.

An employee representative from the safety committee or its designee shall accompany the state representative during the inspection.

9. Prior to inspection process.

The employer and a member of the safety committee designated by the committee shall attend the opening conference and to accompany the state representative during the inspection. Where there is no safety committee in place, the state representative may chose, at his/her sole discretion, an employee to accompany the inspection during the inspection process. Minimal disruption of the workplace shall be considered at all times.

10. Employee discrimination.

The state representative shall advise that the law prohibits employers from discharging or discriminating in any way against an employee who has made any oral or written complaint to the safety committee or any governmental agency having regulatory responsibility for occupational safety and health, and any employee so discharged or discriminated against shall be reinstated and shall receive reimbursement for lost wages and work benefits caused by the employer's action.

The employer shall be responsible for all costs and expenses incurred by the Department accordingly for the investigator's time based upon the state's cost of employment for personnel to investigate and actual expenses necessary to reinstate the employee for lost wages and work benefits caused by the employer's action if deemed to be found a valid complaint.

11. The inspection process.

After the opening conference, the state representative and accompanying representatives shall proceed through the establishment to inspect work areas for safety or health hazards.

The route and duration of the inspection are determined by the state representative. The state representative will make every effort to minimize any work interruptions. The state representative shall observe safety and health conditions and practices; consult with employees privately, if necessary; take photos and instrument readings; examine records, collect air samples, measure noise levels; survey existing engineering

controls; and monitor employee exposure to toxic fumes, gases and dusts.

Trade secrets observed by the state representative will be kept confidential. The employer may require that the employee representative(s) have confidential clearance for any area in question.

Employees may be consulted with during the inspection tour. The state representative may stop and question workers, in private, about safety and health conditions and practices in their workplaces. Each employee is protected under state law from discrimination or discharge for exercising his or her safety and health rights to speak freely on workplace conditions.

The state representative will inspect OSHA/MSHA records of deaths, injuries, and illnesses which the employer may be required to keep. Where records of employee exposure to toxic substances and harmful physical agents have been required by OSHA/MSHA, they will be examined for compliance with recordkeeping requirements.

During the course of the inspection, the state representative will point out to the employer any unsafe or unhealthful working conditions observed and recommend corrective actions.

Violations may be corrected immediately. When they are corrected on the spot, the state representative records such corrections of the employer's good faith in compliance.

12. Imminent danger.

Any alleged imminent danger situation brought to the attention of or discovered by the state representative shall be abated immediately, whether or not the inspection was initiated in response to a request from an employer or by a referral of a high frequency employer. Additional inspection activity will take place only after resolution of the imminent danger situation.

13. Elimination of the imminent danger.
When imminent danger is discovered (immediate danger of death or serious injury), the employer shall be so advised and requested to notify their employees of the danger and remove them from the area of imminent danger. It is the duty of the state representative at the site of an imminent danger situation to encourage the employer to do whatever is possible to eliminate the danger.

State representatives may suspend such work operations or equipment determined to constitute an imminent danger situation. Operation of such equipment shall not resume until the dangerous or unsafe condition is corrected to the satisfaction of the state representative.

14. Yellow tag.

A yellow tag shall be placed by an authorized representative of the Department conspicuously in the area where an imminent danger exists. The yellow tag may not be removed until the dangerous condition no longer exists, and the required safeguards

and safety devices are installed. Only an authorized state representative can remove or provide written authorization for the removal of a yellow tag. The Department shall make all reasonable efforts to accommodate business schedules, shifts and other special needs to limit business disruption in securing the removal of a yellow tag seven days a week.

If the tag is not removed by the state representative upon departure, the employer may, in writing, request a hearing by the Department after being issued a yellow tag prohibiting use. The hearing will be held within twenty-four hours of the request or as soon as suitable arrangements can be made for a hearings officer. The employer is required to notify the safety committee(s) of the hearing and their right to attend. The Department's state representative may also inform employer representative(s) of the right to attend, and the time and location of the hearing.

15. Closing conference.

Following the walk-through, the state representative will meet with the employer and a member of the safety committee designated by the committee in a closing conference to discuss the findings of the inspection.

16. Hazard correction and program assistance report.

After the closing conference, the state representative will send the employer a written abatement report explaining their findings and confirm any correction periods. A copy will only be made available to the Workers' Compensation Court and the Department of Insurance. The report may also include suggested means or approaches for eliminating or controlling hazards, as well as recommendations for making the employer's written safety and health program more effective. The employer may contact outside assistance or state representatives for additional assistance at any time. However, such requests after an inspection will be considered consultation for a fee if a state representative is requested to return to the worksite.

The state shall require abatement on serious hazards so that each inspection visit achieves its objective - effective worker protection. If an employer fails or refuses to eliminate or control an identified serious hazard or any imminent danger in accordance with the state representative's recommendations or any extensions granted, the employers report prepared by the Department will be forwarded to OSHA/MSHA officials or the most responsible authority for review and action, as appropriate.

17. Abatement period.

The abatement period shall be the shortest interval within which the employer can reasonably be expected to correct the identified violation(s). An abatement date shall be set forth by the state representative in the report as a specific date, not a number of days. When the abatement period is very short (i.e., five working days or less) and it is uncertain when the employer will receive the report, the abatement date shall be set so as to allow for a mail delay and the agreed-upon abatement time. When abatement is witnessed by the state representative during the inspection. The abatement report shall indicate abated immediately.

The abatement period shall not exceed thirty calendar days, without the written consent of the Department. All available information shall be considered in determining what is a reasonable period. Such considerations may include, but are not limited to, the following:

a. The gravity of the alleged violation.

b. The availability of needed equipment, material, and/or personnel.

c. The time required for delivery, installation, modification or construction.

d. Training of personnel.

If, however, the employer contests the hazard identified, the hazard need not be corrected until a final decision is made by the Commissioner.

18. Abatement periods exceeding thirty calendar days.

When an initial abatement date is granted that is in excess of thirty calendar days, the reason shall be documented in the case file.

19. Effect of contest upon abatement period.

In situations where an employer appeals either (a) the period set for abatement, or (b) the report itself, the abatement period shall be considered not to have begun until there has been a final determination by the Commissioner of the report and abatement period. In accordance with these regulations, the abatement period begins when the report or a final order of the commissioner is issued. A follow-up inspection of the worksite may be conducted for purposes of determining whether abatement has been achieved within the time period set forth in the report, unless an appeal has been filed. A Failure to Abate Report may be issued on the basis of the state representative's findings. Employers failing to abate hazards identified within the report shall be referred to the appropriate enforcement authority or to the authority having the most responsibility or control over work place safety and health conditions. The employer shall be billed for additional follow-up inspections and reports.

20. Economic feasibility.

Economic feasibility will only be considered in relating to length of abatement period, not whether abatement shall occur.

004. **Inspection/consultation fees**.

A. Employers shall be charged for services provided pursuant to the following fee schedule:

1. For safety consultations/inspections performed on or before August 31, 2002:

a. Safety consultation/inspection fee for employers with:

10 or less employees.....$200.00

11-25 employees $375.00
26-100 employees $550.00
101 or more employees $750.00

b. Industrial hygienist consultation/inspection fee for employers with:

10 or less employees $200.00
11-25 employees $375.00
26-100 employees $550.00
101 or more employees $750.00

[See, 230 NAC 6(003)(F)(3)].

c. All actual costs associated with consultations, inspections, or investigations including but not limited to the following:

i. Lab tests and supplies,

ii. Books, materials, and publications,

iii. Copies and printing.

d. All follow-up consultations/inspections or investigations will be billed as above.

2. For safety consultations/ inspections performed on or after September 1, 2002:

a. The inspection/consultation fee for a safety consultation/ inspection shall be $300, plus $85.00 per hour for actual on-site inspection time with no additional charge for time spent preparing for the inspection or preparing inspection reports. For billing purposes, time spent at the on-site inspection shall be rounded to the nearest one-tenth of an hour. In the event that more than one safety inspector is present during the safety inspection/consultation, there will be no additional charge. See, also 230 NAC 6(003)(F)(3)].

b. The inspection/consultation fee for an Industrial hygienist consultation/inspection shall be $300, plus $85.00 per hour for actual on-site inspection time with no additional charge for time spent preparing for the inspection/consultation or preparing inspection reports. For billing purposes, time spent at the on-site inspection shall be rounded to the nearest one-tenth of an hour. In the event that more than one industrial hygienist is present during the inspection/consultation, there will be no additional charge. See, also 230 NAC 6(003)(F)(3)].

c. All actual costs associated with consultations, inspections, or investigations including but not limited to the following:

i. Lab tests and supplies,

ii. Books, materials, and publications,

iii. Copies and printing.

d. All follow-up consultations/inspections or investigations will be billed as above.

3. Discrimination complaint investigations
(if employee prevails)..... $25.00/hour

4. At the end of each program year, the program operating costs shall be evaluated by the Commissioner and the Commissioner shall issue a report to the Governor as to whether costs recovered are sufficient to maintain the program on a self-funded basis.

5. Travel and lodging is included in initial charges and is not an added cost.

B. Employers requesting a consultation shall be charged in accordance with 230 NAC 6(004)(A). Additional time may be determined necessary by the consultant and employer, if agreed upon by the employer.

C. All costs due to the Department will be paid by the employer when forwarding the final Abatement Report.

D. Payment made into the Workplace Safety Consultation Program cash fund shall be made as billed for work performed by the Department. Payment for work and associated costs shall be made by the employer when forwarding the Abatement Report to the Department. Upon satisfactory abatement, along with the employer's certified payment for associated costs, the employer will have complied with the requirements of the law. The Department may make periodic inspections to ensure compliance has been made as indicated by the employers written abatement report. Should the state representative find the employer has not corrected identified hazards or has falsified an abatement report, the state representative may initiate another inspection of which the employer will again incur inspection costs that will include a personal follow-up by the state representative to verify abatement.

If an employer's name is referred to the Department by the Workers' Compensation Court or the Department of Insurance for three consecutive years, the Department will again inspect and personally verify correction of hazards. Such costs will be incurred by the employer. Inspections may take place for the same employer by the Department every three years when referred.

E. State representatives shall not personally collect penalties or fees.

005. **Appeals**.

A written Notice of Intent to appeal must be filed with the commissioner within thirty days of receipt of the Notice of Abatement. A hearing will be conducted pursuant to 230 NAC 3 of the Department's regulations, with further appeal pursuant to the Administrative Procedure Act.

A. Informal conference.

If in disagreement prior to an employer's written notice of intent to contest, the state representative shall advise those attending the closing conference:

1. That a request for an informal conference with the Workplace Safety Consultation

Program manager is strongly encouraged. The informal conference may be by phone or set up at the Workplace Safety Consultation Program manager's office. The informal conference provides an opportunity to:

a. Resolve disputed violations and penalties without the necessity of recourse to the contested litigation process which can be time consuming and expensive;

b. Obtain a more complete understanding of the specific safety or health standards which apply;

c. Discuss ways to correct apparent violations;

d. Discuss problems with proposed abatements dates;

e. Discuss problems concerning employee safety and health practices.

2. That the informal conference does not extend appeal or abatement periods.

B. An employer may appeal an inspection fee if the employer feels the number of hours of inspection billed exceeds the actual number of hours spent on the inspection, or was grossly excessive for the level of inspection performed. Written Notice of Intent to appeal must be filed within thirty days of the date of mailing of the bill for the inspection. A hearing will be conducted pursuant to 230 NAC 3 of the Department's regulations with further appeal pursuant to the Administrative Procedure Act. Informal resolution of disputes is encouraged.

006. **Discrimination complaints**.

An employee shall not be discharged or discriminated against by his or her employer because he or she makes any oral or written complaint to the safety committee or any governmental agency having regulatory responsibility for occupational safety and health. Any employee so discharged or discriminated against shall be reinstated and shall receive reimbursement for lost wages and work benefits caused by the employer's action. An employee must file a complaint within fifteen days of the alleged occurrence. Upon the receipt of the complaint, the Department shall investigate and make a recommendation to the Commissioner. The Commissioner shall issue a final determination. Further appeal shall be pursuant to 230 NAC 3 and the Administrative Procedure Act.

A. Employer notification letter.

1. The employer shall be notified of the complaint and the substance of the allegation.

2. The employer shall be asked to investigate the alleged complaint and respond to the Department within a specified time. This letter shall be sent by certified mail with return receipt requested. The employer's response will supplement any field investigation.

If the employer is not found in violation, a separate letter shall be sent notifying the employer of the dismissal. This letter shall simply state that the complaint has been dismissed, subject to appeal by the complainant. If the complaint has no merit, the complainant shall be notified by letter that the complaint has been dismissed and/or the case approved for administrative closing.

B. Final investigation report.

After the investigation has been completed, the Labor Law Investigator shall submit a "Final Investigation Report", setting forth the facts of the case, the recommendations and the reasons therefore. If the employer is found in violation, the Final Investigative Report shall include a section dealing with backpay and the Department's fees for time and expenses involved in the investigation.
The commissioner shall forward the employer a final determination letter, stating the facts of the case and the employer's obligation to reinstate the employee in their former position with full back pay and benefits as the employee would have had, prior to the employer's action. Fees for the investigation borne by the employer shall be included in the commissioner's determination letter. Payment must be made to the Department within fifteen working days of receipt of determination letter to close the case file.

007. **OSHA/MSHA standards as a reference**.

A. The Department is NOT an OSHA or MSHA enforcement authority, however, *Neb. Rev. Stat.* '48-443, *et seq*. requires review, determination and enforcement of safety issues. For that reason, OSHA standards and MSHA standards shall be considered in determining minimum acceptable standards.

B. The Department shall use as a standard reference the Occupational Safety and Health Act (OSHA) of 1970, and the Mine Safety and Health Act (MSHA) of 1977, as cited in the definition of "Act" at &001(C)(4). These Acts are available for inspection at:

Nebraska Department of Labor
Office of Safety and Labor Standards
5404 Cedar Street, 3rd Floor
Omaha, NE 68106

008. **Publication and mailing costs.**

The Department of Labor assesses a fee of $5.00 for the cost of copying and mailing 230 NAC 6 of the Department's regulations. To obtain a copy, please write or call:

Nebraska Department of Labor..... Tel.: (402)595-3185
Office of Safety and Labor Standards
5404 Cedar Street, 3rd Floor
Omaha, NE 68106

Nebraska Department of Labor..... Tel.: (402) 471-2239
Office of Safety and Labor Standards
301 Centennial Mall, South, Lower Level
Lincoln, Nebraska 68508

The Department of Labor's regulations may also be located on the internet at http://www.nol.org/home/SOS/Rules/labor/labor.htm.