



TOSHA NOTICE

TENNESSEE DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY & HEALTH

**DIRECTIVE NUMBER: 00-01 (CPL-TN 02)
(CPL-TN 2-0.1)**

EFFECTIVE DATE: December 15, 2000

SUBJECT: Voluntary Employer Safety and Health Self-Audits

ABSTRACT

- Purpose:** This notice describes how Tennessee Occupational Safety and Health Division (TOSHA) will treat voluntary self-audits in carrying out enforcement activities.
- Scope:** TOSHA-Wide
- References:** TOSHA Field Operations Manual, Tennessee Occupational Safety and Health Plan Part V, March 29, 1996
- Action Offices:** All Safety and Health Field Compliance Offices
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By and Under the Authority of
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I. PURPOSE:

- A. This notice describes how Tennessee Occupational Safety and Health Division (TOSHA) will treat voluntary self-audits in carrying out civil enforcement activities. Voluntary self-audits, properly conducted, may discover conditions that violate the Tennessee Occupational Safety and Health Act of 1972 so that those conditions can be corrected promptly and similar violations prevented from occurring in the future. This policy statement is intended to provide appropriate, positive treatment that is in accord with the value voluntary self-audits have for employers' safety and health compliance efforts, while also recognizing that access to relevant information is important to the Commissioner of Labor and Workforce Development's inspection and enforcement duties under the Act.
- B. This notice sets forth factors that guide TOSHA in exercising its informed discretion to request and use the information contained in employers' voluntary self-audit reports. All TOSHA personnel applying this policy will receive instruction in order to ensure the consistent and appropriate application of the policy. The policy statement is not a final Agency action. It is intended only as general, internal TOSHA guidance, and is to be applied flexibly, in light of all appropriate circumstances. It does not create any legal rights, duties, obligations, or defenses, implied or otherwise, for any party, or bind the Agency.
- C. This policy has four main components:
 - 1. It explains that TOSHA will refrain from routinely requesting reports of voluntary self-audits at the initiation of an enforcement inspection;
 - 2. It explains that TOSHA will refrain from issuing a citation for a violative condition that an employer has discovered through a voluntary self-audit and has corrected prior to the initiation of an TOSHA inspection (or a related accident, illness, or injury that triggers the inspection), if the employer also has taken appropriate steps to prevent the recurrence of the condition;

3. It contains a safe-harbor provision under which, if an employer is responding in good faith to a violative condition identified in a voluntary self-audit report, and TOSHA discovers the violation during an enforcement inspection, TOSHA will not treat that portion of the report as evidence of willfulness;
4. It describes how an employer's response to a voluntary self-audit may be considered evidence of good faith, qualifying the employer for a substantial civil penalty reduction, when OSHA determines a proposed penalty. See T.C.A. § 50-3-402(b). Under this section of the Tennessee Occupational Safety and Health Act, a proposed penalty for an alleged violation is calculated giving due consideration to the "good faith" of the employer.

II. SCOPE: This notice applies throughout the Division of Occupational Safety and Health (TOSHA), Tennessee Department of Labor and Workforce Development.

III. REFERENCES: TOSHA Field Operations Manual, Tennessee Occupational Safety and Health Plan Part V, March 29, 1996.; Federal Register Volume 65, No. 146, Friday July 28, 2000, Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits

IV. EXPIRATION DATE: This notice will remain in effect until it is replaced or cancelled.

V. ACTION: All Safety and Health Field Compliance Offices are responsible for the implementation of this policy. All safety and health compliance supervisors must insure that this policy is understood and put in place by their compliance officers. Compliance officers will insure that this policy is adhered to as explained below.

VI. DEFINITIONS:

- A. "Self-Audit" means a systematic, documented, and objective review by or for an employer of its operations and practices related to meeting the requirements of the TOSHA Act.
 1. "Systematic" means that the self-audit is part of a planned effort to prevent, identify and correct workplace safety and health hazards. A systematic self-audit is designed by or for the employer to be appropriate to the scope of hazards it is aimed at discovering, and to provide an adequate basis for corrective action;
 2. "Documented" means that the findings of the self-audit are recorded contemporaneously and maintained by or for the employer;
 3. "Objective" means that the self-audit is conducted by or under the direction of an individual or group of individuals who are competent to identify workplace safety or health hazards, given the scope and complexity of the processes under review.
- B. "Voluntary" means that the self-audit is not required by statute, rule, order or settlement agreement. Voluntary self-audits may assess compliance with substantive legal requirements (e.g., an audit to assess overall compliance with the general machine-guarding requirement in 29 CFR 1910.212).
- C. "Voluntary self-audit report" means the written information, analyses, conclusions and recommendations resulting from a voluntary self-audit, but does not include matters required to be disclosed to TOSHA by the records access rule, 29 CFR 1910.1020, or other rules.
- D. "Good faith" response means an objectively reasonable, timely and diligent effort to comply with the requirements of the Act and TOSHA standards.

VII. BACKGROUND: On October 6, 1999, OSHA published a "Proposed Policy Statement Concerning the Occupational Safety and Health Administration's Use of Voluntary Employer Safety and Health Self-Audits" in the **Federal Register**. 64 FR 54358 (1999). The policy statement described the Agency's proposal regarding the manner in which it would treat voluntary employer self-audits that assess workplace safety and health conditions, including compliance with the Act. The proposed policy statement provided that the Agency would not routinely request voluntary employer self-audit reports at the initiation of an inspection. Further, the proposed policy provided that, where an employer identified a hazardous condition through a voluntary self-audit, and the employer promptly undertook appropriate corrective measures, OSHA would treat the audit report as evidence of good faith, and not as evidence of a willful violation. It was, and remains, the Agency's intention to develop and implement a policy that recognizes the value of voluntary self-audit programs that are designed to allow employers, or their agents, to identify and promptly correct hazardous conditions. In limited situations, however, documentation related to voluntary self-audits plays an important role in the Agency's ability to effectively and faithfully carry out its inspection and enforcement obligations under the Act.

Although the Agency is not required by the Administrative Procedures Act, 5 U.S.C. 551, et seq., to engage in notice and comment rulemaking procedures prior to the adoption and implementation of this policy, OSHA requested public comment regarding its proposed policy statement in order to gain input and insight from employers, employees, employee representatives, and other interested parties. OSHA received and thoroughly reviewed comments from a variety of sources. The Agency has modified the proposed policy to incorporate those comments that further OSHA's dual purposes in proposing the voluntary self-audit policy -- i.e., to provide appropriate, positive treatment that is in accord with the value that voluntary self-audits have for employers' safety and health compliance efforts, while maintaining the Agency's authority to gain access to voluntary self-audit documentation in limited circumstances in which access is important to effectively and faithfully enforce the Act. The Agency has not incorporated those comments that it considered to be contrary to its purposes in proposing this policy or that it considered to be beyond the scope of its intent in proposing the policy.

VIII. POLICY FOR THE TREATMENT OF VOLUNTARY SELF-AUDIT REPORTS:

A. No Routine Initial Request for Voluntary Self-Audit Reports

1. TOSHA will not routinely request voluntary self-audit reports at the initiation of an inspection. TOSHA will not use such reports as a means of identifying hazards upon which to focus inspection activity.
2. However, if the Agency has an independent basis to believe that a specific safety or health hazard warranting investigation exists, it may exercise its authority to obtain the relevant portions of voluntary self-audit reports relating to the hazard.
3. An employer voluntarily may provide TOSHA with self-audit documentation and may be eligible to receive the benefits that are detailed in this policy.

B. No Citations for Violative Conditions Discovered During a Voluntary Self-Audit and Corrected Prior to an Inspection (or a Related Accident, Illness, or Injury That Triggers the Inspection).

It is TOSHA's current enforcement practice to refrain from issuing a citation for a violative condition that an employer has corrected prior to the initiation of an TOSHA inspection (and prior to a related accident, illness, or injury that triggers the inspection), if the employer has taken appropriate steps to prevent a recurrence of the violative condition, even if the violative condition existed within the six month limitations period during which

TOSHA is authorized to issue citations. Consistent with this enforcement practice, TOSHA will not issue a citation for a violative condition that an employer has discovered as a result of a voluntary self-audit, if the employer has corrected the violative condition prior to the initiation of an inspection (and prior to a related accident, illness, or injury that triggers the inspection) and has taken appropriate steps to prevent a recurrence of the violative condition that was discovered during the voluntary self-audit.

C. Safe Harbor -- No Use of Voluntary Self-Audit Reports as Evidence of Willfulness.

A violation is considered willful if the employer has intentionally violated a requirement of the Act, shown reckless disregard for whether it was in violation of the Act, or demonstrated plain indifference to employee safety and health. Consistent with the prevailing law on willfulness, if an employer is responding in good faith to a violative condition discovered through a voluntary self-audit and TOSHA detects the condition during an inspection, TOSHA will not use the voluntary self-audit report as evidence that the violation is willful.

This policy is intended to apply when, through a voluntary self-audit, the employer learns that a violative condition exists and promptly takes diligent steps to correct the violative condition and bring itself into compliance, while providing effective interim employee protection, as necessary.

D. "Good Faith" Penalty Reduction

Under the Act, an employer's good faith normally reduces the amount of the penalty that otherwise would be assessed for a violation. TOSHA will treat a voluntary self-audit that results in prompt action to correct violations found, in accordance with paragraph A.3. above, and appropriate steps to prevent similar violations, as strong evidence of an employer's good faith with respect to the matters covered by the voluntary self-audit. This policy does not apply to repeat or willful violations.

Good faith penalty reductions will be calculated using the guidance provided in the TOSHA Field Operations Manual (FOM), Tennessee Occupational Safety and Health Plan Part V., dated March 29, 1996; Chapter IV – "Post-Inspection Procedures"; Paragraph C.2.j. (5)(b) – "Good Faith".