

OSHA CONSULTATION How to Get Started

By Wanda D. Minnick, Laura Helmrich-Rhodes, John Mulroy and Dennis McKnight

IT HAS BEEN 43 YEARS since Congress authorized OSHA to largely fund state on-site consultation services (Shapiro & Rabinowitz, 1997), a program that offers free consultation services upon a small employer's request. Today the program covers more than 1 million workers across the U.S. and in 2017 conducted approximately 26,000 visits to small business work sites (OSHA, 2019a). OSHA defines a small employer as having fewer than 250 employees and fewer than 500 employees company-wide.

Small employers have been called the backbone of the country, as they make up nearly half of the private workforce and are enthusiastic about future growth (MSNBC, 2017; SBA Office of Advocacy, 2016). The CEO of the National Federation of Independent Business (NFIB) stated that the 2017 Small Business Optimism Index was the strongest ever in the history of the 45-year old survey (NFIB, 2018). Considering the optimism and anticipated growth of small employers, it is timely to consider the safety and health of their employees.

Figure 1 illustrates the total recordable incident trend for small and large employers. Total recordable incident rates for small employers with 50 to 249 employees have declined over the past 5 years and are comparable to the experience of large employers with more than 1,000 employees (BLS, 2017). Employers with 11 to 49 employees have experienced the largest decline, with recordable incident rates ranging from 3.1 in 2010 to 2.7 in 2016. Employers with fewer than 10 employees have experienced a rather stagnant reduction in total recordable incident rates, however, they have the lowest rate when comparing all employer sizes. Although the

total recordable incident rates have declined, there is still plenty of opportunity to minimize risk and prevent injuries.

This article provides the historical timeline leading to the establishment of OSHA consultation. It explores the steps to participate in the program along with helpful resources. It details the benefits and what to expect during a visit. Finally, the article discusses the myths and realities of the program through the lens of actual participants and OSHA consultants.

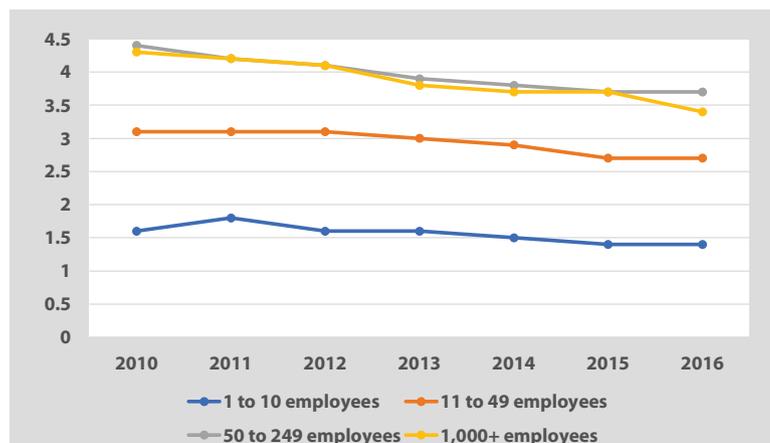
Historical Background

After a 3-year legislative struggle, President Richard Nixon signed the OSH Act of 1970 (OSHA, 2010). The OSH Act did not include a provision for federally funded on-site consultation for sites under the jurisdiction of OSHA, however, states with federally approved state plans and Senator Javits in 1973 were actively pursuing the idea (Nave, 1987; Shapiro & Rabinowitz, 1997). By 1974, 18 states with federally approved state plans provided on-site consultation services (Nave). John Stender, the first director of OSHA, saw the potential in Javits's proposal to allow "OSHA inspectors to go on consultation visits to employers, on which they would not at the same time have to cite

KEY TAKEAWAYS

- Today, the OSHA consultation program covers more than 1 million workers across the U.S. and in 2017 conducted some 26,000 visits to small business work sites.
- Participation in on-site OSHA consultation is free, the visit is confidential and is delivered by state-run agencies. Employers engaged in a consultation visit are deferred from general or programmed OSHA enforcement inspections.
- This article details the process of how to get started and explains what to expect from a visit. It also offers insight into the mission of the program and discusses employer misconceptions.

FIGURE 1
TOTAL RECORDABLE INCIDENT RATES AMONG SMALL & LARGE EMPLOYERS, 2010-2016



Note. Data from Injuries, Illnesses and Fatalities, by Bureau of Labor Statistics, 2017.

for safety and health violations” (DOL, 2015). Although on-site consultation was gaining popularity, the OSH Act required the secretary to issue first-instance citations for violations identified during inspections or investigations making it legally restrictive from providing consultation visits (Nave). The system of first-instance citations was an intentional act of congress; this policy encourages compliance prior to having an inspection or investigation, as many argued the lack of voluntary compliance is what spurred the need for the OSH Act.

During this time, there was amplified pressure on OSHA from small businesses that generally viewed the agency as an economic threat. In response, small businesses “flooded their congressmen with letters about alleged harsh tactics by OSHA inspectors, such as forcing businessmen to close because of safety violations and threatening employers with jail sentences” (DOL, 2015). Congressman William Steiger argued the importance of first-instance sanctions but only if the compliance information was readily available prior to inspections. It was believed that small employers lacked the resources to adequately comply or be fully knowledgeable of the new standards. “Through Congressman Steiger’s efforts, the House adopted an amendment to FY 1975 appropriations authorizing the consultation services program” and on “May 20, 1975, the Department of Labor approved 90% funding for on-site consultation services in states without approved plans” (Nave, 1987). Within 5 years, on-site consultation services were provided in 45 states, the District of Columbia, Puerto Rico and the Virgin Islands (Nave).

Consultation Overview

OSHA consultation offers small employers on-site OSH compliance assistance to reduce injuries and illnesses, identify workplace hazards and help the employer establish site-specific programs to comply with OSHA standards (OSHA, 2019a). Although the authors have approached this section from the perspective of the Pennsylvania OSHA consultation program, the information is generalizable to all OSHA consultation programs because of its federal nature. It is free to participate in on-site consultation; the visit is confidential and delivered by state-run agencies. Many sites that participate that do not have the resources to employ a full-time safety person; however, companies that employ safety professionals also participate. The program is targeted to small- and medium-sized businesses and does not mandate a limit to the number of employees at the company-wide or site level. OSHA consultation does not exclude large organizations; however, organizations with access to corporate or staffing resources simply fall to the bottom of OSHA consultation scheduling priority and, when performed, visits are often limited in scope to address a specific compliance challenge.

Consultation is available to employers in any industry. For example, visits can be conducted for employers in healthcare, manufacturing, service-related industries or construction; however, employers in the construction industry must receive approval from the general or controlling employer before scheduling a consultation visit (OSHA, 2015). The consultation visit is voluntary, and the employer retains the right to modify or terminate the consultation visit at any time, including terminating the visit “before its completion” (Busick, 2005; OSHA, 2015). If the employer exercises this right, the employer remains obligated to correct any imminent danger or serious hazards identified during the visit up to this point.

The employer may request a full-service visit or a limited-service visit. A full-service visit will result in a survey of all working



JOHNNYREIG/E/GETTY IMAGES

Considering the optimism and anticipated growth of small employers, it is timely to consider the safety and health of their employees.

conditions, whereas a limited-service visit could be limited to, for example, a noise survey of a specific work task or department.

Difference Between Consultation & Enforcement

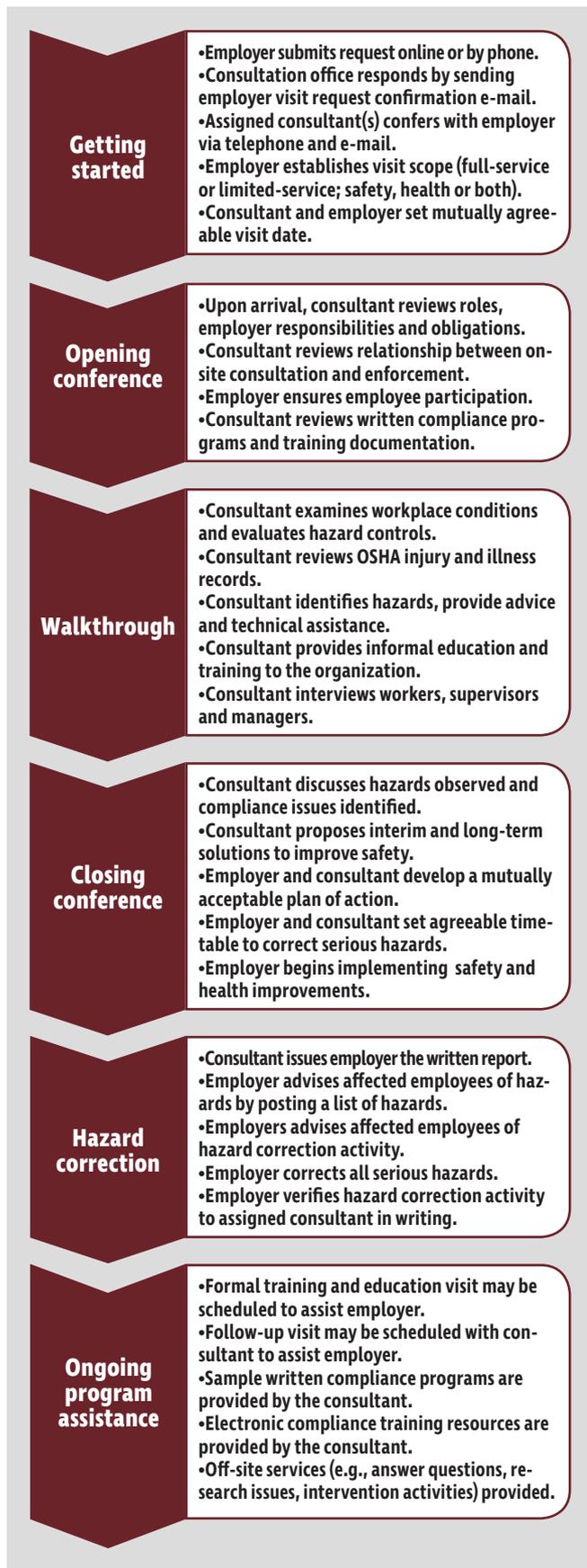
OSHA’s consultation program and enforcement program are separate, codified by 29 CFR 1908.7(a)(1), which states that consultation visits performed “by a state shall be conducted independently of any OSHA enforcement activity” (OSHA, 2000). Many small employers do not realize that OSHA consultants are state employees, not federal compliance officers, and cannot issue citations (OSHA, 2015).

To further separate consultation from enforcement, OSHA requires consultation visits to remain 100% confidential from enforcement. Part 1908.7(a)(3) requires the consultation projects to protect the identity of employers participating in the consultation process. In addition, visit documentation “shall not be provided to OSHA for use in any compliance activity,” unless the employer fails to correct an imminent danger or serious hazard as agreed upon during the closing conference (OSHA, 2015). OSHA enforcement is never made aware of consultation activity unless the participating employer refuses to correct a hazard.

Benefits

Employers engaged in a consultation visit are deferred from general or programmed OSHA enforcement inspections. This deferral applies to any area of the facility covered by the scope of the consultation visit, which may be the entire facility if the visit is full service. This deferral period begins with the opening conference and remains through the period time required to correct the observed serious hazards, a period commonly lasting 1 to 2 months. Part 1908.7(b)(1) states that consultation visits “in progress will have priority over OSHA compliance inspections . . . OSHA may, in exercising its authority to schedule compliance inspections, assign a lower priority to worksites where consultation visits are scheduled.” Employers must understand that to receive an inspection deferral, a visit must be

FIGURE 2
OSHA CONSULTATION PROCESS



in progress. Simply submitting a request for consultation will not result in automatic enforcement deferral; the visit must be initiated by the assigned consultant through an on-site opening conference. Also, regardless of visit status, if OSHA receives a formal complaint from an employee, or if a fatality or catastrophic event occurs during the visit process, enforcement retains the right to stop a consultation visit in progress and conduct an inspection.

An additional benefit from consultation participation is the availability of compliance assistance resources, including compliance training materials and sample written compliance programs for the employer to adopt. Consultants can provide employers targeted train-the-trainer compliance training. Many states offer additional free on-site training through other state agencies. For example, Pennsylvania's Department of Labor and Industry provides businesses in the state free on-site assistance to help employers develop an effective safety committee, or provide web-based or on-site classroom-style compliance training to the organization's workers (Pennsylvania Department of Labor and Industry, 2019).

OSHA consultation locations vary by state. For example, in Pennsylvania the OSHA consultation office is housed in the Department of Safety Sciences at Indiana University of Pennsylvania. During federal fiscal year 2017, this consultation office conducted more than 700 on-site visits across the state identifying more than 4,500 workplace hazards. This office also provided OSHA compliance training to more than 3,000 employers and employees. Businesses can locate the OSHA consultation office for each state using the OSHA's (2019b) consultation directory. This directory can also be used to initiate contact with the state office to request a visit (all state consultation offices are listed with contact information). All employer obligations and rights will be communicated to the employer when the request for consultation assistance is made (OSHA, 2015).

Consultation Visit Expectations

OSHA (2019c) provides information about the consultation visit on its website. Figure 2 outlines the flow of the entire visit process. The following discussion details what to expect from request through visitation and follow-up.

The employer's request is submitted and routed electronically to a qualified safety or health consultant using OSHA's (2019b) consultation directory. The responsible consultant contacts the employer to discuss the employer's specific compliance assistance needs. The employer and consultant agree to a mutually convenient day and time for the visit.

Consultation visits are structured similarly to OSHA inspections (Busick, 2005). The process of performing an initial visit consists of five steps (OSHA, 2019a):

- 1) an opening conference;
- 2) a walkthrough of the facility under the direction and control of the employer;
- 3) a closing conference;
- 4) issuance of a detailed written report within 20 days of the visit;
- 5) hazard correction by the employer after the visit is completed.

Upon arrival, the consultant holds the opening conference with the employer and clearly explains all consultation program objectives and employer obligations. Employee participation is a requirement for all on-site visits conducted by OSHA consultation involving hazard identification, and the consultant may interview employees during the visit (OSHA, 2015). Another right retained by the employer during the visit is the right

to request a private meeting with the consultant to “discuss matters [the employer] may not wish to discuss in the presence of the employee representative” (OSHA, 2015).

The consultant requests records associated with the visit scope, including the employer’s injury and illnesses history documented on the OSHA 300 log, 300A summaries and 301 injury and illness forms. The consultant requests safety and health training records and applicable industrial hygiene surveys. The consultant conducts formal and informal interviews with management and employee representatives.

The opening conference addresses all elements of the program participation. The consultant conducts a facility walkthrough accompanied by the employer and employee representatives. If the visit is limited service, the walkthrough focuses only on the areas of specific concern to the employer. If the employer is requesting no-cost industrial hygiene surveys, the consultant begins personal or area sampling to quantitatively evaluate a potential hazard. Results of any industrial hygiene sampling are included in the written report to the employer, and any serious health hazard revealed through personal or area sampling must be corrected by the employer.

During the walk-through the consultant may conduct informal training on applicable OSHA standards with the employer and employee representatives. The consultant will spend time discussing observed hazards and possible corrective actions to comply with OSHA. The consultant may point out hazards that are not specifically covered by OSHA standards, but that pose a risk of injury or illness to workers and are covered by applicable national consensus standards such as National Fire Protection Association or ANSI. These hazards are included in the consultant’s confidential written report to the employer.

After the walk-through and review of associated records, a closing conference is conducted between the consultant and the employer and employee representatives. The consultant will discuss in detail all compliance deficiencies and the due dates for correcting the hazards, and thoroughly explain the applicable OSHA standard. The consultant makes recommendations to correct the hazard during the closing conference and mutually agrees upon hazard correction due dates with the employer.

Within 20 days of the initial visit, the consultant issues the written report explaining any compliance deficiencies, the risk of exposure to workers, and OSHA standard referenced and the effective corrective action plan (OSHA, 2015). The written report includes the list of hazards that the employer must post in a “prominent place where it is readily observable by all employees” for no less than 3 working days or until all hazards identified are corrected (OSHA, 2015). Failure to post the list of hazards results in a loss of visit-in-progress status (OSHA, 2015).

Employers can verify their hazard correction activity in two ways. First, the employer may submit the Employer Report of Action Taken form attached to the written report issued by the consultant. The employer describes the action taken to correct the hazard, the date the corrective action was completed, and provides information on the employer’s plan to prevent recurrence of the hazard. The employer may submit this form in hard copy or e-mail.

Another option to verify corrective action taken by the employer is for the consultant to conduct a follow-up visit or a training-and-assistance visit. When the consultant returns, s/he will personally verify the employer’s actions to effectively abate noted hazards. Throughout the visit in progress, the con-

sultant contacts the employer periodically to ensure that the employer is on track to meet the due dates in the written report.

If an employer cannot meet the due date associated with a hazard in the written report for reasons beyond its control, the employer may request an extension from the consultation office manager. Request for an extension must be in writing, contain the reason(s) the hazard has not been corrected, include how many additional days are needed, and include a detailed description of the interim protection provided to the affected workers (OSHA, 2015). When an extension is granted by the project manager of the responsible consultation project, a new list of hazards is issued and the employer is obligated to post the revised correction dates (OSHA, 2015).

The visit-in-progress status ends on the mutually agreed upon hazard abatement date contained in the report when the consultant closes each identified hazard in the OSHA consultation database. The employer is then removed from inspection deferral status. However, having participated in the OSHA consultation program, the employer has benefited from this no-cost compliance assistance, gaining a significantly higher degree of compliance.

Myths & Realities of Consultation

Small employers have many questions and assumptions about the consultation process as evidenced by interviewing Pennsylvania OSHA consultants. Their responses reveal several misconceptions held by employers as well as insights to the mission of this OSHA program.

Myth: Engaging consultation increases risk of inspection.

Reality: Using the state consultation service does not put an employer on a “hit list” or increase the potential for inspection in any way. This service prepares an employer for an inspection to decrease the potential for fines by increasing the employer’s compliance. Participating signals to OSHA that management has taken positive steps to protect employees and improve overall safety management. OSHA enforcement can consider management commitment when reducing fines, also known as good faith (Michaels, 2012). One item that does increase the likelihood of inspection is working in a sector that has been identified as high-hazard resulting in inclusion in a national or regional emphasis program. More recently, the change in the reasons to notify OSHA has increased the likelihood of formal inspection as well. The changes include the requirement to call if one person has been hospitalized or if an amputation has occurred. This has significantly increased the number of inspections.

Enforcement target lists sometimes trigger a letter from the state consultation offering free compliance assistance. One Pennsylvania OSHA consultant recounted a conversation with an employer who had received such a letter and was convinced it was a marketing ploy. The employer could not believe that the site visit by both a safety and a health professional was a free service because it simply seemed too good to be true.

Myth: If we do not do what the consultant requires, we will be immediately turned over to enforcement.

Reality: Each recommendation has a due date and the assigned consultant or the program director may extend that due date based on reasonable movement toward completion and documentation of the employer’s reason for delay that is beyond the employer’s control.

According to data from the past 7 years, this has only happened twice in more than 5,000 visits by Pennsylvania consultation. Both companies were previously cited by enforcement and referred to consultation for compliance assistance. In other

words, both were already in the enforcement channel and given free, highly qualified help, and still refused to comply.

Myth: Compliance officers are the same people who complete the on-site consultation visit so I do not want to share my concerns.

Reality: In most states, the compliance safety and health officer is not the same. Each area office has a compliance assistance officer, however, those are not the same position as the state consultation program.

Myth: We cannot use OSHA consultation because OSHA does not cover us due to low numbers.

Reality: According to one Pennsylvania OSHA consultant, many employers think that because they have 10 or fewer employees, they are not obligated to comply with the OSH Act. The reality is that the definition of employer does not have a number threshold. If there is one employee, then that employee is protected by OSHA regulations. The magic number of 10 becomes important for OSHA injury and illness recordkeeping.

A lack of understanding and sense of being overwhelmed appears to have a chilling effect on small employers interested in seeking OSHA consultation according to Pennsylvania OSHA consultants. Owners reported to consultants that they feel overwhelmed by the vast content on the OSHA website and also fear being equally overwhelmed by what may be required if they seek advice. Further, they do not understand that employers control the scope of the visit. In other words, employers concerned about HazCom compliance can request a limited visit. This option provides employers with time to organize and implement that particular protection and request another visit at a later date. The commitment is there on the employers' part and they can improve their safety efforts on their own timeline.

There is a downside to using this limited-visit option, especially in states such as Pennsylvania where there tends to be a backlog (i.e., lag time between request and date of visit). One consultant attributed this delay to the high quality of the service and excellent reputation for positive impact. Surveys of Pennsylvania companies that have used this service consistently report that they would recommend it to others.

Conclusion

OSHA Consultation is a free service that can help a company achieve compliance. It is preferable to be viewed as acting in good faith when facing fines, and working with OSHA consultation is a good-faith effort. Participation in the OSHA consultation program requires a commitment to improve the safety and health efforts of the company. Those not committed, looking for a free pass or not taking the time to learn about the process may be disappointed to learn that effort is required. Ultimately, raising awareness of the OSHA consultation program and encouraging participation is much better than reacting to a serious injury or a visit from an OSHA enforcement officer. **PSJ**

References

- Bureau of Labor Statistics (BLS). (2017). Injuries, illnesses and fatalities. Retrieved from www.bls.gov/iif/oshsum.htm#16Summary_Tables
- Busick, J. (2005). Is OSHA's consultation program for you? *Safety Compliance Letter*, 2451, 7.
- Michaels, D. (2012, March 27). Annual review and scheduled modification to OSHA's interim administrative penalty policy (Memorandum). Retrieved from www.osha.gov/dep/enforcement/admin_penalty_mar2012.html
- MSNBC. (2017, Dec. 15). *Small business outlook for 2018* (Video). Retrieved from www.msnbc.com/your-business/watch/small-business-outlook-for-2018-1117456451755?v=a

National Federation of Independent Business (NFIB). (2018, Jan. 9). Average monthly optimism sets all-time record in 2017 (Press release). Retrieved from www.nfib.com/content/press-release/economy/average-monthly-optimism-sets-all-time-record-in-2017

Nave, M.E. (1987). *Impact of voluntary compliance and compliance inspection programs on experience rates among small employers in California* (Doctoral dissertation). Retrieved from <https://guides.library.oregonstate.edu/finding-theses-and-dissertations>

OSHA. (2000). Relationship to enforcement. (29 CFR 1908.7). Retrieved from www.osha.gov/laws-regs/regulations/standardnumber/1908/1908.7

OSHA. (2010). OSHA celebrates 40 years of accomplishments in the workplace. Retrieved from www.osha.gov/OSHA40/OSHATimeline.pdf

OSHA. (2015, Nov. 19). Consultation policies and procedures manual (Directive No. CSP 02-00-003). Retrieved from www.osha.gov/OshDoc/Directive_pdf/CSP_02-00-003.pdf

OSHA. (2019a). On-site consultation. Retrieved from www.osha.gov/dccsp/smallbusiness/consult.html

OSHA. (2019b). OSHA's consultation directory. Retrieved from www.osha.gov/dccsp/smallbusiness/consult_directory.html

OSHA. (2019c). What happens during an on-site consultation visit? Retrieved from www.osha.gov/dccsp/smallbusiness/consult_gettingstarted.html

Pennsylvania Department of Labor and Industry. (2019). Health and safety division, Pennsylvania workplace safety committee certification program. Retrieved from www.dli.pa.gov/Businesses/Compensation/WC/safety/Pages/default.aspx

Shapiro, S.A. & Rabinowitz, R.S. (1997). Punishment versus cooperation in regulatory enforcement: A case study of OSHA. *Administrative Law Review*, 49, 713-762.

U.S. Department of Labor (DOL). (2015). John Stender administration, 1973-1975: OSHA becomes an agency in crisis. Office of the Assistant Secretary for Administration and Management. Retrieved Aug. 26, 2015, from www.dol.gov/oasam/programs/history/oshal3stender.htm

U.S. Small Business Administration (SBA) Office of Advocacy. (2016). Small business profile. Retrieved from www.sba.gov/sites/default/files/advocacy/United_States.pdf

Wanda D. Minnick, Ph.D., CSP, is an associate professor and the Master of Science Coordinator in the Department of Safety Sciences at Indiana University of Pennsylvania (IUP). She holds a Ph.D. in Administration and Leadership Studies from IUP and earned an M.S. in Environmental, Health and Safety Management from Rochester Institute of Technology. Her undergraduate degree is in Safety Sciences from IUP. She is a professional member of ASSP's Western Pennsylvania Chapter and a member of the Society's Women in Safety Excellence Common Interest Group.

Laura Helmrigh-Rhodes, Ed.D., CSP, is a full-time, tenured faculty member in Safety Sciences at IUP and an OSHA-authorized instructor. Prior to teaching, she was a consultant/inspector for the Pennsylvania OSHA Consultation Program. Her teaching responsibilities are in the areas of OSHA compliance, fire protection, safety training. Her safety and human resources consulting firm, Safety Geeks LLC, focuses on OSHA compliance, employee on-site training, insurance risk management and safety-related webinars. Helmrigh-Rhodes is a professional member of ASSP's Western Pennsylvania Chapter.

John Mulroy, CSP, is an assistant professor and program director for the Pennsylvania OSHA Consultation Program in the IUP Safety Sciences Department. He has an M.S. in Environmental Management from Duquesne University, a B.A. in English and a B.S. in Safety Sciences from IUP, and is a doctoral student. He has more than 20 years of environmental, safety and health compliance experience. Mulroy is a professional member of ASSP's Western Pennsylvania Chapter, and a member of the Society's Academics, Consultants and Management practice specialties.

Dennis McKnight, M.S., is a field engineer with Case Foundation Co. Prior to this, he was a graduate assistant for the Department of Safety Sciences at IUP. He holds an M.S. in Safety Sciences from IUP and a B.S. in Safety Management from Slippery Rock University of Pennsylvania.