

SAFETY AND SECURITY ENFORCEMENT PROCESS OVERVIEW CHANGES

JULY 2016

- ❖ The excerpts below show the changes made, in redline/strikeout, from the April 2015 version to the July 2016 version of the Enforcement Process Overview.
- ❖ The page numbers below refer to page numbers of the July 2016 version of the document.
- ❖ In the July 2016 version of the document on this website, the areas where these changes have been made are marked by a vertical line in the left margin.

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Interview Attendance

The Office of Enforcement generally limits contractor attendance in interviews to only the employee(s) being interviewed and, if requested by the interviewee, his or her Union or other personal representative (PR). The Office of Enforcement limits interview attendance to help ensure that interviewees feel free to express themselves without undue influence. Interviews with company managers and groups (e.g., a causal analysis team) may be less limited depending on the circumstances. Attendance of any PR, particularly when an interviewee's supervisor has been selected as a PR, must be approved in advance by the Office of Enforcement. This will typically occur during the investigation planning process when a list of interviews and the interview schedule is determined. In almost all cases, the contractor's legal counsel will not be permitted to attend interviews, unless it can be demonstrated that such counsel has been specifically requested by the interviewee or the interviewee is a company principal that is directly represented by such counsel. In any event, at the beginning of each interview, and with the PR(s) not present, the Office of Enforcement investigators will confirm PR selection by the interviewee. In general, the Director of Enforcement has the authority to permit or restrict attendees in interviews pursuant to the broad authorities in Sections 820.21(a), 824.5, and 851.40(a). These sections permit the Director to take actions deemed necessary and appropriate to the conduct of the investigation.

Pages 42 and 43

Enforcement Letter

If the Office of Enforcement identifies a matter of safety or security concern but decides not to pursue an enforcement investigation or issue an NOV, and where settlement is not appropriate, the Director may issue an enforcement letter consistent with 10 C.F.R. Sections 851.40(j) (worker safety and health), 820.21(g) (nuclear safety), or Part 824, Appendix A,

Paragraph VII, *Enforcement Letter* (classified information security). An enforcement letter is not a formal enforcement sanction in that it imposes no requirements, enforcement citation, or penalty on the contractor. The enforcement letter usually identifies one or more conditions: (1) where performance may have been deficient but not of sufficient significance to warrant an NOV; and/or (2) where contractor attention is required to avoid a more serious condition that would result in an NOV. Thus, the enforcement letter can serve as a strong warning on matters that need attention. An enforcement letter may also highlight any contractor actions that were appropriate and contributed to the decision not to issue an **PNOV**, and some letters have been issued solely to recognize positive contractor actions. The Office of Enforcement consults with DOE line management on the message and conclusions in **developing** the enforcement letter, **and the contractor is typically provided an opportunity to offer factual accuracy comments** before issuance.

Enforcement letters typically do not require a response from the contractor. Instead, enforcement staff continue to monitor contractor performance and, as part of normal interface, regularly communicate with the contractor and local DOE Field Element for follow-up and resolution of the matter.

Because enforcement letters do not contain sanctions and are not intended to be punitive, it is the Office of Enforcement's position that DOE line management should not penalize a contractor using contractual means merely for receiving an enforcement letter. While it may be appropriate for DOE line management to address the underlying events or issues that are the subject of an enforcement letter through its contract management mechanisms, merely receiving such a letter from the Office of Enforcement should not be construed as detrimental to the contractor.

Advisory Note

Occasionally, events or situations arise that do not warrant an enforcement letter, but which highlight an opportunity to improve contractor performance in an area covered by a safety- or security-related enforceable regulation (e.g., weaknesses in noncompliance identification, the causal analysis process, or extent-of-condition determination). In such instances, the Office of Enforcement may choose to send a descriptive email (i.e., "advisory note") to the responsible DOE Field Element Manager, in his/her Federal oversight role, signed out by the cognizant enforcement office director. These communications are not intended to take the place of an enforcement letter, impose any additional requirements, or require any response from either the contractor or the responsible DOE Field Element; additionally, they are not posted on the EA website. As with enforcement letters, Office of Enforcement staff first consult with DOE line management on the message and any conclusions. As such, the Office of Enforcement expects that the responsible DOE Field Element Manager will share with the contractor the information contained in the advisory note. However, that decision, and the exact form of the feedback to the contractor, is left to the discretion of the DOE Field Element Manager.

Pages 49 and 50 (second paragraph under “Base Civil Penalty” section)

The respective enforcement policies establish base civil penalty amounts by severity level that are a percentage of the maximum civil penalty **allowed** per violation per day. DOE is required by the Federal Civil Penalties Inflation Adjustment Act of 1990 ~~(as amended by the Debt Collection Improvement Act of 1996)~~ to **periodically** adjust the maximum, per-day civil penalty amounts ~~at least once every four years~~ for inflation. This Act was amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires Federal agencies to make an initial “catch-up” adjustment and then make subsequent inflation adjustments to the civil penalty amounts annually beginning in January 2017. The actual “catch-up” adjusted maximum civil penalty amounts, effective as of July 28, 2016, are identified in each of the applicable enforcement regulations. However, the Office of Enforcement has elected to round the amounts slightly downward for ease of administration. Table 1 provides the civil penalty ~~values in effect~~ amounts that the Office of Enforcement will apply as of the ~~January 2014~~ July 2016 “catch-up” inflationary adjustment for each enforcement area. These amounts are subject to adjustment again in January 2017.

**Table 1. Base Civil Penalty Amounts (as of ~~January 2014~~ July 28, 2016)
(with percentage of maximum civil penalty per violation per day)**

	Worker Safety & Health	Nuclear Safety	Classified Information Security
Severity Level I	\$ 908 0k (100%)	\$ 196 160k (100%)	\$ 140 120k (100%)
Severity Level II	\$ 454 0k (50%)	\$ 988 0k (50%)	\$ 706 0k (50%)
Severity Level III	Not Applicable	\$ 201 6k (10%)	\$ 141 2k (10%)

Page 57 (6th paragraph under Section VIII, “Contractor Employee Whistleblower Protection”)

In general, the Office of Enforcement’s practice is to delay acting on a retaliation matter until DOE’s OHA or DOL has completed its process (i.e., investigation, hearing, initial decision, and final agency decision) and has ruled that retaliation occurred, **and where the agency decision is appealed, to further delay action until** ~~without waiting for~~ all **possible** appeal avenues ~~have~~ been exhausted. While it is recognized that completion of the appeal process may substantively extend the amount of time necessary to close a case ~~Based on the long time period for the appeal process,~~ the Director of Enforcement has determined that the desire for timely case completion is outweighed by the questions of legal uncertainty and fairness raised if the Office of Enforcement issued an enforcement outcome based on a determination of retaliation that is subsequently overturned on appeal ~~deferral until appeals are complete is not justified due to the amount of time required to bring the case to closure and experience to date that, barring unforeseen circumstances, the record is generally complete when OHA or DOL issues a Final Order.~~