

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

- (a) The actual or potential harm that results or may result from your noncompliance;
- (b) The frequency of incidents and/or duration of the noncompliance;
- (c) Whether there is a pattern or prior history of noncompliance;
- (d) Whether the noncompliance was pervasive within your organization, including such factors as the following:
 - (1) Whether and to what extent your organization planned, initiated, or carried out the noncompliance;
 - (2) The positions held by individuals involved in the noncompliance, and whether your principals tolerated their noncompliance; and
 - (3) Whether you had effective standards of conduct and control systems (both with respect to your own organization and any contractors or affiliates) at the time the noncompliance occurred;
- (e) Whether you have demonstrated an appropriate compliance disposition, including such factors as the following:
 - (1) Whether you have accepted responsibility for the noncompliance and recognize the seriousness of the conduct that led to the cause for issuance of the PIE;
 - (2) Whether you have cooperated fully with the Department during the investigation. The Director may consider when the cooperation began and whether you disclosed all pertinent information known to you;
 - (3) Whether you have fully investigated the circumstances of the noncompliance forming the basis for the PIE and, if so, have made the result of the investigation available to the Director;
 - (4) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity

that constitutes the grounds for issuance of the PIE; and

- (5) Whether your organization has taken appropriate corrective actions or remedial measures, including implementing actions to prevent recurrence;
- (f) With respect to noncompliance with a DOT agency regulation, the degree to which the noncompliance affects matters common to the DOT drug and alcohol testing program;
- (g) Other factors appropriate to the circumstances of the case.

§ 40.391 What is the scope of a PIE?

- (a) The scope of a PIE is the Department's determination about the divisions, organizational elements, types of services, affiliates, and/or individuals (including direct employees of a service agent and its contractors) to which a PIE applies.
- (b) If, as a service agent, the Department issues a PIE concerning you, the PIE applies to all your divisions, organizational elements, and types of services that are involved with or affected by the noncompliance that forms the factual basis for issuing the PIE.
- (c) In the NOPE (see § 40.375(b)(4)), the initiating official sets forth his or her recommendation for the scope of the PIE. The proposed scope of the PIE is one of the elements of the proceeding that the service agent may contest (see § 40.381(b)) and about which the Director makes a decision (see § 40.387(b)(3)).
- (d) In recommending and deciding the scope of the PIE, the initiating official and Director, respectively, must take into account the provisions of paragraphs (e) through (j) of this section.
- (e) The pervasiveness of the noncompliance within a service agent's organization (see § 40.389(d)) is an important consideration in determining the scope of a PIE. The appropriate scope of a PIE grows broader as the pervasiveness of the noncompliance increases.
- (f) The application of a PIE is not limited to the specific location or employer at which the conduct that forms the factual basis for issuing the PIE was discovered.