

**FY 2021 Comprehensive
Federal Annual Monitoring Evaluation (FAME) Report**

New Mexico Occupational Health and Safety Bureau (NMOHSB)



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Contents

I.	Executive Summary	2
II.	State Plan Background	3
	A. Background	3
	B. Major New Issues	4
III.	Assessment of State Plan Performance	5
	A. Data and Methodology	5
	B. Review of State Plan Performance	6
	1. Program Administration.....	6
	2. Enforcement.....	7
	3. Review Procedures.....	17
	4. Standards and Federal Program Changes (FPCs) Adoption.....	18
	5. Variances.....	18
	6. State and Local Government Worker Program.....	18
	7. Whistleblower Program	20
	8. Complaint About State Program Administration (CASPA).....	24
	9. Voluntary Compliance Program	24
	10. State and Local Government 23(g) On-Site Consultation	25
	11. Private Sector 21(d) On-Site Consultation Program.....	26

Appendices

Appendix A – New and Continued Findings and Recommendations	A-1
Appendix B – Observations Subject to New and Continued Monitoring	B-1
Appendix C – Status of FY 2020 Findings and Recommendations	C-1
Appendix D – FY 2021 State Activity Mandated Measures (SAMM) Report	D-1

I. Executive Summary

This is a biennial comprehensive review of the operation of the State of New Mexico Occupational Health and Safety Bureau (OHSB) under the 23(g) State Plan grant. This report was prepared under the direction of Eric S. Harbin, Regional Administrator, Region VI, Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, and covers the period from October 1, 2020, to September 30, 2021.

The purpose of this report is to assess OHSB activities for the Fiscal Year (FY) 2021 and its progress in resolving ongoing findings. This report also reviews recommendations from the FY 2020 Follow-Up Federal Annual Monitoring and Evaluation (FAME) Report, focusing on the status of corrective activities. OHSB's overall performance, as it relates to mandated activities and the implementation of policies and regulations, continues to be at an acceptable level except for certain elements noted in this report.

The COVID-19 pandemic continued to dominate OHSB's focus during FY 2021, and the Bureau allocated significant staff and resources to the state of New Mexico's COVID-19 response, COVID-19 Complaints, and Referrals. In FY 2021, OHSB logged more than 1,400 complaints and referrals directly from employees and other sources, including the public. More than half of complaints and referrals alleged COVID-19 hazards and violations of public health orders affecting workers, mostly involving employees not wearing face coverings in the presence of others. Most complaints were handled via phone calls to employers for resolution. The complaints and referrals alleged violations of public health orders, COVID-safe practices and/or the OHSB general duty clause. In some cases where there was no response or a response inadequately addressed alleged hazards to workers, cases were elevated to the OHSB compliance section for enforcement.

The OHSB conducted 140 inspections (44%) of their projected goal of 315 inspections for FY 2021 (SAMM 7). Although OHSB reached its goal of 75 projected health inspections, they completed only 65 of 240 (27%) of their projected safety inspections. This was in part because OHSB continued to experience significant staff turnover throughout FY 2021, with an average compliance officer vacancy rate of 29.2%. The COVID-19 Pandemic contributed to the highest number of fatalities (19) in FY 2021, while the construction and oil and gas industries recorded eight fatalities. OHSB continues to place significant emphasis on enforcement and outreach activities in both the construction and oil and gas industries.

The report shows one completed finding, two continued findings, three new findings, and six observations. Four of the observations are new and two are continued from FY 2020. Appendix A describes the new and continued findings and recommendations. Appendix B describes observations subject to continued monitoring and the related federal monitoring plan. Appendix C describes the status of previous findings with completed corrective actions.

II. State Plan Background

A. Background

The New Mexico Occupational Health and Safety Program is administered by the Occupational Health and Safety Bureau (OHSB), which is part of the Environmental Protection Division of the New Mexico Environment Department. The State Plan designee is Secretary of the New Mexico Energy Department James C. Kenney, and the OHSB Bureau Chief is Robert Genoway.

The New Mexico program covers all private sector industries and state and local government workers within the state, except maritime (longshoring, ship building, and ship breaking), federal workers, Tribal lands, military installations, US Postal Service, and other areas of exclusive federal jurisdiction.

The State Plan has a total work force of 833,100 private sector and 176,000 state and local government workers. Total nonagricultural employment grew by 52,000 (6.7%) jobs between December 2020 and December 2021. The private sector service providing industries grew by 43,100 jobs (8.4%) percent, while the goods producing industries grew by 9,800 jobs (11.0%). In the state and local government agencies, there was a loss of 700 jobs (1.3%) in state government, though this was offset in part by gains of 300 jobs (0.3%) in local government.

Leisure & Hospitality reported the largest employment increase, with a gain of 23,300 jobs (33.1%). (Source: New Mexico Department of Workforce Solutions [Employment News Release](#))

The data for the last five years shows a downward trend in accidents and illnesses, including an 21% decrease in the Total Case Incident Rate (TCIR) in all industries and an 18% decrease in state and local government. There has been a slight increase in construction, from 1.4 in FY 2019 to 2.0 in FY 2021.

The federal share of the initial FY 2021 23(g) grant was \$1,140,000.00 and the State Plan share was \$1,140,000.00, for a total program budget of \$2,280,000.00. The State Plan deobligated \$80,000 and lapsed \$57,192 in federal funds during FY 2021, for a total of \$137,192. OHSB has returned unused federal funds, via deobligation or lapse, in each of the past eight fiscal years.

A review of OHSB's 23(g) financial grant was conducted the week of March 21, 2022, and findings and/or recommendations at the time of this report's completion. OHSB abides by the exemptions and limitations on OSHA appropriations, and no inspections were conducted outside of those guidelines. During a Fall FY 2021 Audit, the State auditor discovered an unallowable expenditure of \$13,778.89 for Field Supplies, which will be returned to OSHA. Those funds have not yet been returned to OSHA.

New Mexico administers a combined onsite consultation program under 21(d) and 23(g) funding. OHSB's five consultant positions are funded from a variety of sources, including the 21(d) and 23(g) grants and state money. Private sector consultation is provided by the Bureau under a 21(d) Cooperative Agreement, while public sector consultation is provided under the 23(g) grant.

New Mexico transmitted a five-year Strategic Plan and corresponding Annual Performance Plan during the FY 2021 grant application process. State Emphasis Programs remain for construction, oil and gas well drilling and servicing, primary and fabricated metals, silica, hospitals, and nursing care.

The allocated OHSB staff consists of the Bureau Chief; three Program Managers, one each for Compliance, Consultation, and Administration; one Compliance Supervisor; five Safety Compliance Officers (CO); two Health COs; two Compliance Assistance Specialists (CAS); two safety consultants and two and eight tenths administrative staff members.

Most of the staff members work out of the Santa Fe or Albuquerque offices, with one CO stationed in Las Cruces and one CO in Roswell. This has allowed OHSB to provide more rapid response to reports of hazards, including imminent danger situations and accidents, as detailed in this report.

B. Issues

Staffing

OHSB experienced greater than normal staff turnover throughout FY 2019 and FY 2020, with an average vacancy rate of 52% of available positions. For FY 2021, 29% of COs positions remained vacant. The focus for FY 2021 was to fill their vacancies and train new hires as soon as possible so OHSB can continue to meet their benchmarks and inspection goals.

OHSB has promoted one supervisor and added 18 temporary personnel to assist with COVID tracing. They are actively trying to fill vacancies and began onboarding for some of these positions. The State Plan struggles with low salaries, particularly when compared to the private sector, which is an impediment to recruiting and retention.

III. Assessment of State Plan Progress and Performance

A. Data and Methodology

OSHA has established a two-year cycle for the FAME process. FY 2021 is a comprehensive year and as such, OSHA was required to conduct an on-site evaluation and case file review.

A six person OSHA team was assembled to conduct the case file and financial review onsite in Santa Fe, NM between February 22, 2022, and February 25, 2022.

A total of 86 safety, health, and whistleblower case files were reviewed. The safety and health inspection files were selected from closed inspections conducted during the evaluation period (October 1, 2020, through September 30, 2021). The selected population included:

- Twelve fatality case files
- Thirty-four referral case files
- One complaint case file
- Five unprogrammed related case files
- Two Unprogrammed other case files
- Thirty-two whistleblower case files

The analyses and conclusions described in this report are based on information obtained from a variety of monitoring sources, including the:

- State Activity Mandated Measures Report (SAMM) (Appendix D)
- State Indicators Report (SIR)
- Mandated Activities Report for Consultation (MARC)
- State OSHA Annual Report (SOAR) (Appendix E)
- State Plan Annual Performance Plan
- State Plan Grant Application
- Quarterly monitoring meetings between OSHA and the State Plan
- Full case file review

Each State Activity Mandated Measures (SAMM) Report has an agreed-upon Further Review Level (FRL), which can be either a single number or a range of numbers above and below the national average. State Plan SAMM data that falls outside the Further Review Level (FRL) triggers a closer look at the underlying performance of the mandatory activity. Appendix D presents the State Plan's FY 2021 State Activity Mandated Measures Report and includes the FRL for each measure.

In addition to reviewing the above cited case files, the review team interviewed the whistleblower investigator, enforcement staff, and management. Throughout the entire process, OHSB was cooperative, shared information, and ensured staff was available to discuss cases, policies, and procedures. The State Plan staff members were eager to work with OSHA's evaluation team.

B. Review of State Plan Performance

1. PROGRAM ADMINISTRATION

- a) Training

In FY 2021, OHSB maintained a team of approximately 10 COVID-19 response specialists under the New Mexico Department of Workforce Solutions (DWS) grant. Each specialist received OSHA specific training delivered by a Santa Fe Community College health and safety professional. During FY 2021, temporary response specialists were handling most employer outreach interactions in responding to positive worker cases to prevent occupational outbreaks of the virus.

b) OSHA Information System (OIS)

OHSB and the Compliance Program Manager (CPM) uses OIS reports to manage enforcement activities. The enforcement reports are run weekly and printed on Monday.

OHSB staff members did not enter data in a timely and accurate manner, with few exceptions. This included complaints that were entered as referrals, non-covered fatalities were input, abatement information was not updated and interview documentation was not accurate. The CPM continues to follow up on data entry errors since they transitioned to OSHA Information System (OIS).

OHSB uses the standard OIS form letters, modified for State Plan use, for addressing referrals that are not inspected, communicating inspection results to complainants, and contacting victim's family members.

c) State Internal Evaluation Program Report

OHSB developed and implemented a comprehensive State Internal Evaluation Program (SIEP) in FY 2021. The SIEP was initiated to ensure that program operations conform to policies and procedures established by the State Plan.

OHSB's SIEP Report included an internal evaluation of its operations. This is a critical component of the monitoring system and highlights the State Plans' flexibility to design and implement programs that will fit each individual states needs and personnel resources.

Areas of Emphasis for SIEP Program

- Case file documentation
- Citation processing
- Petitions to modify abatement
- Denial of entry/warrant applications
- 23(g) laboratory processes

d) Staffing

During FY 2021, OHSB made a concerted effort to fill staff vacancies and provide newly hired staff with training needed to conduct inspections. OHSB expected low numbers for both health and safety inspections during FY 2021 due to redirecting of

health resources to the ongoing COVID-19 pandemic. In anticipation of increasing field activities in FY2022, OHSB and the Department’s Human Resources Bureau planned a three -day rapid hire event to fill vacancies and expand OHSB by three positions in the Operations and Planning section, two positions in the Certification and Assistance Section, 11 positions in the Compliance and Enforcement Section, and a continuance of 18 COVID response positions funded through New Mexico Department of Health.

2. ENFORCEMENT

Most of the issues addressed throughout this report are measures in the SAMM Report. OHSB performance as indicated in Appendix D of the SAMM report is discussed during quarterly meetings and ongoing communication throughout the year.

As shown in SAMM 7, FY 2021, OHSB percent of total inspections decreased significantly from the 140 safety inspections in FY 2020 to 65 safety inspections in FY 2021. The 75 health inspections conducted in 2021 was higher than in 38 health inspections conducted 2020. However, the State Plan conduction only 140 of their projected 315 inspections overall, just 44% of their goal. (Source: OIS Inspection SAMM report ran on November 8, 2021)

Low inspection numbers have been an ongoing issue for OHSB, predating the pandemic. OHSB stated they open inspections with every employer on construction sites. This could increase their overall inspection count if they were to re-implement this practice.

Planned vs. Actual Inspections (SAMM 7)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Goal	315	345	360	400	400
Conducted	140	183	325	219	320
Differences	(175)	(162)	(35)	(181)	(80)

a) Complaints

New Mexico has interpreted the New Mexico Occupational Health and Safety Act to define complaints as only those signed notices of alleged hazards filed by current workers or their representatives. All other notices of alleged hazards, including those from former workers and unsigned notices from current workers or employee representatives, are classified as referrals. All complaints are responded to by inspection in accordance with the New Mexico OHS Act and regulations. Referrals may be handled by phone and fax, letter, or inspection, as determined by the CPM. Appendix D shows there was one complaint inspection conducted by OHSB during FY 2021, accounting for less than 1% of inspection activity. Referral inspections

accounted for 55% (83/150) of inspection activity. (Source: OIS Summary report dated March 15, 2022)

The OHSB FOM time frame for response by inspection to complaints of serious and/or other than serious hazards is five working days. The goal for responding to imminent danger complaints and referrals is one working day.

SAMM 1 shows OHSB averaged 10.5 working days to respond to all serious and/or other than serious complaints by inspection, which is outside the FRL of five working days. The FRL for SAMM 3 shows 100% (2/2) of the imminent danger complaints and referrals responded to during the period were inspected within one working day, matching their previous five-year performance in this area.

Because the New Mexico OHS Act so narrowly defines complaints, the State Plan's response to referrals alleging serious hazards has historically been reviewed at quarterly monitoring meetings. OHSB responded to 679 of 697 (97%) referrals alleging serious hazards within 10 working days. (Source: OIS UPA One Liner Report) An investigation may include an onsite inspection or inquiry by phone and fax, or letter. Until the definition of a complaint in NM OHSB is adjusted to be at least as effective as the federal OSHA the SAMM 2 metric will not reflect the most up to date information.

b) Fatalities

The FAT/CAT - State Accident Report for OHSB shows 49 fatalities were reported to OHSB in FY 2021. 68.42% of the fatality inspections were initiated within one day. (Source: OIS FAT/CAT - State Accident, 03/16/2022).

Of the fatalities, 21 were COVID-19 related; six were from unknown causes; six were heart attacks; five were over-the-road; two were natural causes; two were seizures; two were crushed by; one was a fall; one was a struck-by; one was shot during a traffic stop; one was burned; and one was not determined if fatality was work-related or naturally caused. (Source: OIS FAT/CAT - State Accident, 03/16/2022).

Five of the overall fatality cases for FY 2021 were over-the-road but were not properly coded according to the NM FOM, Chapter 11, Paragraph N. Special Issues Related to Workplace Fatalities "as not work related/no inspection".

OHSB has miscoded some of the fatalities and thus an accurate analysis of fatalities conducted in one day may be skewed. The SAMM item 10 shows 68.42% 13 of 19 fatalities responded to in 1 day in OIS. (Source: OIS FAT/CAT - State Accident, 03/16/2022).

For the FY 2021 Comprehensive Fame Review, OSHA reviewed a total of 12 fatality case files that were closed in FY 2021. 8 of the 12 (67%) were responded to within one day. The total percent of Work-Related Fatalities Responded to in one workday

was 66.67% (10 of 15) (Source: OIS SAMM Report 11/8/2021). This was not only outside the further review level, it showed a negative trend the past couple of years.

Percent of work-related fatalities responded to in one workday (SAMM 10)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017	FRL
	66.7%	83.33%	100%	100%	100%	100%

The documentation in the files included interview statements, photographs, and investigation summaries.

Bureau of Labor Statistics (BLS) Rates

An overview of New Mexico’s private industry Total Case Incident Rate (TCIR) and Days Away, Restricted or Transferred (DART) rates for the calendar years 2016 through 2020 is provided in the table below. At the closing of this monitoring period, 2020 was the most recent year for which data was available. (Source: www.bls.gov)

Five-Year Trend for Rates

Industry	CY 2020	CY 2019	CY 2018	CY 2017	CY 2016	% Change, 2016-2020
Private Industry						
TCIR	2.7	2.8	3.1	3.1	3.4	-21%
DART	1.5	1.2	1.4	1.3	1.6	-6%
Construction						
TCIR	2.0	2.0	2.8	2.6	2.2	-10%
DART	1.3	1.9	1.8	1.6	1.2	8%
Manufacturing						
TCIR	--	3.2	4.1	3.0	2.8	14%**
DART	--	1.9	2.7	1.8	1.4	36%**
State and Local Government						
TCIR	3.2	4.2	4.7	4.9	4.4	-27%
DART	1.2	1.5	1.6	1.7	1.7	-29%

The data for the last five years shows a downward trend in private industries, with an increase of 14% TCIR and 36% DART in the manufacturing industry. State and local governments displayed a 27% TCIR and 29% DART decrease, while construction shows a 10% TCIR decrease with an 8% DART increase. These achievements in rate reductions may be attributed to OHSB’s emphasis on increased enforcement presence in high hazard industries.

c) Targeting and Programmed Inspection

Chapter Two of the OHSB FOM directs OHSB personnel to establish targeting based on annual projections of inspection activity as determined through annual performance planning.

OHSB uses the high hazard industry list based on Dunn and Bradstreet listings, which is provided by OSHA’s Directorate of Technical Support and Emergency Management (DTSEM), to target high hazard manufacturing and general industry sites. Dodge reports are used to target programmed construction inspections. The University of Tennessee provides OHSB a randomly selected list of construction projects from identified or known active projects. This list contains the projected number of sites the Bureau plans to inspect during the next month. Projects are selected in accordance with OSHA Instruction CPL 02-00-141, Inspection Scheduling for Construction.

The State Plan continued to implement State Emphasis Programs (SEPs) for fabricated metal products, oil and gas well drilling and servicing operations, construction, exposure to silica, nursing and long-term care. OHSB also continued activities at facilities with hazards involving primary metals processing and the use of hexavalent chromium through the adoption of national emphasis programs. The Bureau uses BLS and New Mexico Department of Health data on health-related exposures when developing SEPs.

Finding FY 2021-02: OHSB completed 140 of their 315 projected inspections (44%), including only 65 of 240 (27%) of projected safety inspections. (SAMM 7).

Recommendation: OHSB should ensure managers monitor and adjust as necessary when inspection activities are below projected weekly or monthly goals.

Observation FY 2021-OB-02: (Continued from Observation FY 2020-03): Of the 54 files reviewed during the FY 2021 Comprehensive FAME Report, the in-compliance rate for safety and health inspections was 67%, which was above the FRL range of 24.24% to 36.36%.

Percent In-Compliance (SAMM 9)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Safety	33.33%	38.57%	43.46%	54.07%	66.8%
Health	34.69%	20.93%	33.33%	36.84%	37.6%

The SAMM Report (dated: November 08, 2021) showed OHSB’s in-compliance rate for safety inspection at 33.33% and health inspections at 34.69% (SAMM 9). The in-compliance rates in the SAMM report may not accurately reflect the rate for the entire FY 21 since 86/140 (61.43%) inspection files were still open at the time SAMM report was ran.

Observation FY 2020-03, New Mexico's in compliance rates for safety and health inspections did not meet the Further Review Level based on a three-year national average.

Recommendation: OHSB should determine the root cause of their high in-compliance rate and ensure that COs conduct effective inspections and recognize and identify hazards according to policies described in Chapter 3 of NM FOM. Additionally, OHSB must ensure its targeting program reaches high-hazard industries.

According to FY 2021 SAMM Report, Percent of Initial Inspection with Worker Walk Around Representation or Worker Interview was 54 of 54 (100%) of inspections conducted employee interviews (SAMM 13). The data entered into OIS did not reflect what was actually contained in the inspection case files. During the case file review, 34 of 54 (63%) case files reviewed lacked documentation of employee interviews and 31 of 54 (57%) lacked documentation of any employees contacted at all.

The FY 2019 Comprehensive FAME report identified that in 10 of 54 (19%) of the non-fatality case files reviewed, employees were not interviewed, and 19 of 54 (35%) of these case files lacked documentation of employee interviews. This trend has not only continued but worsened.

Finding FY 2021-01 (Formerly FY 2019-01): 34 of 54 (63%) case files reviewed lacked documentation of employee interviews and 31 of 54 (57%) lacked documentation of any employees contacted at all.

Recommendation: OHSB should implement a corrective action to ensure Supervisors/Compliance Officers are trained on when and how to conduct interviews. Chapter 3 of the OHSB FOM requires employee interview documentation be consistently in the case file and adequately documented.

d) Citations and Penalties

The New Mexico Occupational Health and Safety Bureau Compliance Section cited 244 violations, according to the Inspection Summary report in FY 2021 with violation contest 34.81% rate.

SAMM 11 for FY 2021 shows OHSB average citation lapse times of 107 working days for safety and 103.03 working days for health. The further review level is based on a three-year national average. The range of acceptable data not requiring further review is 38.08 to 57.13 for safety and 45.78 to 68.68 for health.

The table below shows the State Plan citation lapse time has gradually increased.

Average Lapse Time (SAMM 11)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Safety	107	86.18	51.59	56.26	67.25
Health	103.03	96.74	52.44	71.00	57.55

This measure is a continuing concern for the State Plan. In FY 2020, New Mexico average lapse time for safety inspections was 86.42 days, with an acceptable range of 40.46 to 60.70 days. The average lapse time for health inspections was 97 days, with an acceptable range of 48.31 to 72.47 days.

It should be noted the high lapse times were identified prior to COVID-19 reaching pandemic levels in New Mexico. OHSB safety and health lapse times continue to be issue which has been increasing significantly.

Finding FY 2021-03: The average lapse time for health inspections was 103.3 days and the average lapse time for safety inspections was 107 days. This exceeded the FRL range of 38.08 to 57.13 for safety and 45.78 to 68.68 for health. (SAMM 11).

Recommendation: OHSB should determine the cause and take action to decrease its high lapse time for safety and health inspections.

OHSB maintained 1.78 serious/willful/repeat violations per inspection for SAMM 5 which is within the FRL of 1.43 to 2.15. However, OHSB had an average of 0.28 other-than-serious violations, which is below the FRL range of .78 to 1.16.

The Inspection Summary Report for FY 2021 shows OHSB COs identified 244 violations. Of these: 78.69% were serious - 4% were willful - 0% repeat and 19.67% were other-than-serious.

Penalty Increases

With the passage of the Bipartisan Budget Bill on November 2, 2015, OSHA raised its maximum penalties effective August of 2016. As required by law, OSHA then increased maximum penalties annually, on January 1, 2019, January 1, 2020, and January 1, 2021 according to the CPI. State Plans are required to adopt both the initial increase and subsequent annual increases. The New Mexico Legislature passed Senate Bill 229 (SB 229), signed into law on April 6, 2017, and amended the Occupational Health and Safety Act, 50-9 NMSA 1978, to adjust maximum and minimum penalties in conformance with Federal law. This policy is effective for all citations issued on or after June 1, 2017, for violations occurring after April 6, 2017. The legislation may be viewed on the New Mexico Occupational Health and Safety Bureau's website at https://www.env.nm.gov/Ohsb_Website/Announcements.htm. This has resulted in a substantial increase of OHSB's average penalties.

OHSB’s penalty per serious violation in the private sector (SAMM 8: 1-250+ workers) was \$5,305.61 in FY 2021, which was above the acceptable further review level range of \$2,153.97 to \$3,589.95.

Average Penalty Assessed per Serious Violation (SAMM 8) (Private Sector)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Average current serious penalty in private sector - total (1 to greater than 250 workers)	\$5,305.61	\$2,251.51	\$2,207.27	\$1,909.40	\$1,025.59
a. Average current serious penalty in private sector (1-25 workers)	\$1,920.00	\$1,270.00	\$1,501.48	\$925.00	\$671.64
b. Average current serious penalty in private sector (26-100 workers)	\$5,170.73	\$2,441.84	\$2,301.41	\$2,684.21	\$1,070.63
c. Average current serious penalty in private sector (101-250 workers)	\$9,280.00	\$4,649.26	\$3,405.59	\$3,026.00	\$1,569.85
d. Average current serious penalty in private sector (greater than 250 workers)	\$7,099.41	\$3,749.47	\$3,368.91	\$2,485.38	\$2,694.00

SAMM 12, Penalty Retention Percent Penalty Retained, shows OHSB retains 93.14%, which is 19.52% higher than the nationwide average.

e) Abatement

There were a number of private sector inspections which had unabated violations that were greater than 60 calendar days past the issuance date—six for safety and nine for health. In addition, there were 39 Open, non-contested cases with abatement incomplete in excess of 60 calendar days.

Of the case files reviewed during the FY 2021 FAME Comprehensive FAME, 36 of 54 (67%) were in compliance and the remaining eight (33%) contained written documentation, photos, work orders, or employer’s certification of abatement. There were no Petitions for Modification of Abatement (PMA) requested and no follow-up inspections were conducted, per the review.

f) Worker and Union Involvement

The New Mexico Field Operations Manual (NMFOM), Chapter 3, pages 3-8, Section D and Chapter 7, page 7-2, Sections C.1 and C.2 afford workers and/or employee representatives the opportunity to participate in every phase of the inspection process.

OHSB, FOM, Chapter 3, Inspection Procedures,

VII. Walkaround Inspection

1. Employees represented by a certified or recognized bargaining agent. During the opening conference, the highest-ranking on-site union official or union employee representative shall designate who will participate in the walkaround.

Finding FY 2021-05: Out of a total of 54 files reviewed during the FY 2021, Comprehensive FAME Report, five inspection case files were identified as having unions in their establishments. Out of those five inspections, all five (100%) lacked documentation of employees represented by a certified or recognized bargaining agent/Union Official involved in the walk around inspection process.

Recommendation: OHSB should determine the cause and take action to ensure that union or employee representatives are contacted and given the opportunity to participate in the inspection process, as required in Chapter Three of the OHSB FOM. Case files should be documented accordingly.

3. REVIEW PROCEDURES

a) Informal Conferences

The informal conference process in New Mexico allows for either amendments to citations or entering into Informal Settlement Agreements. The Bureau documents these changes in the OIS with the code ISA.

For FY 2021, the State Information Report (SIR) measure 5A shows 1.66% (3/181) of violations vacated Pre-Contest for private sector inspections. SIR measure 5B shows 17.65% (3/17) of violations vacated after a contest had been filed for private sector inspections. SAMM 12 is the penalty retention percent penalty retained. OHSB retained 93.14% (\$557,138.10/\$622,303.50) of their penalties prior to contest. OHSB has consistently retained large percentages of its penalties over the years, and FY 2021 was even higher than previous years.

Penalty Retention Percent Penalty Retained (SAMM 12)	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
	93%	74%	84%	90%	82%

b) Formal Review of Citations

Once an employer, employee, or employee representative has contested a citation, a settlement can be considered at the Informal Administrative Review level. In accordance with OHS Regulation 11.5.5.306.D (1) (a), the Bureau has 90 days in which to enter into a formal settlement agreement or file an administrative complaint

with the New Mexico Occupational Health and Safety Review Commission (NMOHSRC). The Bureau Chief or his designee may conduct the Informal Administrative Review.

These include changes made through formal settlement, OHS Review Commission decisions, and court decisions. The SIR measures 6A and 6B address changes to citations and penalties subsequent to contest. Measure 6A shows 0.58% (1/173) of violations reclassified Pre-Contest for private sector inspections and 6B shows 50% (7/14) of violations reclassified after a contest had been filed for private sector inspections.

SIR measure 7A shows 86.66% penalty retention for Pre-Contest private sector inspections, and 7B shows 88.72% penalty retention after contest had been filed for private sector inspections.

SIR measure 8 is the average lapse time from receipt of contest on average of first level decision. The New Mexico average was 140.73 days; the national data shows 189.28 days. Almost all cases result in formal settlement agreements in New Mexico; only a few each year reaches the Review Commission level.

The NMOHSRC is comprised of three members appointed by the Governor for terms of six years. There is also a Commission Secretary who handles all administrative matters such as correspondence and scheduling. The NMOHSRC meets on an as-needed basis. All settlement agreements subsequent to contest are sent to the NMOHSRC for approval and all such settlements during the period were approved.

The Office of General Counsel provided legal representations for OHSB. The attorneys are housed in Santa Fe and Albuquerque, NM. It is common for an attorney to work closely with the compliance staff during the preparation of a case. COs and supervisors stated that they have a good working relationship with the attorneys and they are knowledgeable of OSHA requirements and what is needed for a case to be legally sufficient.

4. STANDARDS AND FEDERAL PROGRAM CHANGE (FPC) ADOPTION

a) Standards Adoption

In accordance with 29 CFR 1902, State Plans are required to adopt standards and federal program changes within a six-month period. State Plans that do not adopt identical standards and procedures must establish guidelines which are "at least as effective as" the federal rules. State Plans also have the option to promulgate standards covering hazards not addressed by federal standards.

OHSB regulations provide those amendments to OSHA standards that have been adopted by the New Mexico Environmental Improvement Board (EIB) are considered

“adopted by reference” without conducting a hearing. Any new OSHA standards or State-initiated standards proposed for adoption require a public hearing.

During this evaluation period, OSHA developed and issued two Emergency Temporary Standards in 2021 pertaining to COVID-19. On June 21, 2021 the COVID-19 Healthcare Emergency Temporary Standard was issued. On November 5, 2021 the COVID-19 Vaccination and Testing Emergency Temporary Standard was issued. OHSB implemented both Emergency Temporary Standards immediately.

5. VARIANCES

OHSB did not issue any permanent or temporary variances in FY 2020 or 2021. OHSB has only issued one temporary variance in its 44-year history. The Bureau honors all multi-state variances that have been issued by OSHA.

6. STATE AND LOCAL GOVERNMENT WORKER PROGRAM

According to the OHSB FY 2021 grant application, approximately 7% of workers in the state work in state and local government. For FY 2021, the State Plan projected they would conduct 30 state and local government inspections (20 safety and 10 health). According to the Inspection Summary Report for FY 2021, they conducted 19 inspections.

Penalties are assessed for violations identified in state and local government inspections. Penalties for serious violations are deemed “paid” (waived) if abatement is verified by the established abatement date.

SAMM 6 shows 13.57% (19/140) of the total inspections OHSB conducted were in the state and local government.

The FRL is based on a number negotiated by OSHA and the State Plan through the grant application. The range of acceptable data not requiring further review is from 7.92% to 8.75%. In the five years prior to FY 2021, the State Plan has exceeded their goal for this measure.

SAMM 6	FY 2021	FY 2020	FY 2019	FY 2018	FY 2017
Percent of Total Inspections in Local Government Workplaces	13.57%	3.83%	7.08%	1.83%	12.81%

7. WHISTLEBLOWER PROGRAM

The FAME review included an evaluation of the New Mexico Occupational Health and Safety Bureau (OHSB) whistleblower program, including policy and procedures and investigative files. The Review Team evaluated thirty-two (32) complaint files from fiscal

year (FY) 2021, conducted a data analysis of the OSHA IT Support System (OITSS) and OHSB reports and interviewed personnel responsible for the program at all levels: two investigators, Bureau Chief, Division Director, and Office of General Counsel.

OHSB Whistleblower Program is at a pivotal point of reform. Implementation of training for proper data input, complaint tracking, and casefile management are warranted to ensure the program is at least as effective as OSHA.

In FY 2020, follow-up FAME, it was noted that there were some duplicate entries in OITSS. OHSB had only one employee with access to OITSS over the last few years, and that employee reported having trouble with their account. Federal OSHA attempted to assist with a Help Desk ticket in January 2021 and believed the issues were resolved at the time of the FY 2020 follow-up FAME.

However, continuing data issues indicate a much larger problem than initially believed. OHSB currently maintains some complaints in physical folders and tracks the program’s work on manual spreadsheets. They had not entered all complaints into OITSS, extending back multiple years. This makes it extremely difficult to track complaints. During the review, duplicate and erroneous entries were found. Therefore, the State Activity Mandated Measures (SAMMs) which are derived from OITSS, were not accurate and OSHA is unable to effectively monitor the state’s whistleblower program.

OHSB has been inconsistent with utilizing OITSS to track their complaints or analyze their whistleblower program. Seven open cases in OITSS were over 1000 days old – of which, four were over 2000 days old. However, in reality these seven cases had been closed for a long period of time but not accurately recorded as closed in OITSS. The OITSS reports also showed OHSB had closed seven docketed cases in FY 2021 and had docketed three new cases in FY 2021. These data sets are inconsistent in OITSS with OHSB’s manual records.

The following chart shows the difference in a few data points uncovered during the recent OSHA review:

FY2021 Data Point	OITSS Data	OHSB Data
Cases over 1000 days old	7	0
New Cases Docketed	3	5
Docketed Cases Closed	7	Unknown
Administrative Closures	72	Unknown
Average Age of Open Cases	532	Unknown
Average Days to Complete	198	119
Average Days to Screen	85.2	Unknown

*Note: OITSS calculations could not be verified.

Three complainants called recently federal OSHA to inquire about the status of their complaints with OHSB. Federal OSHA was unable to find information in OITSS regarding these complaints.

Nine complaint referrals from federal OSHA were not entered in OITSS. Five complaint referrals from federal OSHA had not been processed and the remaining four complaints had physical records. Two complaints pending legal review were dismissed by OHSB and were not updated in OITSS.

The Review Team recommends OHSB update the FY 2021 data (from October 1, 2021) and ensure accurate data entry moving forward. OHSB's plans for restructuring could bring supervision of the whistleblower staff under a new Compliance and Enforcement Section Chief and may improve the general oversight of OHSB's whistleblower program.

Observation FY 2021- 01:

OHSB has not properly entered data in OITSS for several years.

Federal Monitoring Plan:

OSHA will continue to monitor performance in this area during quarterly meetings.

Among the possible corrective actions OHSB may consider is: OHSB staff should be trained to enter all complaints into OITSS/OIS accurately and update records when case status changes; OHSB management should run and review key OITSS/OIS reports on a regular basis to ensure data is accurate and the program is on track; and OITSS data should be audited and corrected back to the beginning of FY 2022 (October 1, 2021).

Complaint Files.

Some complaints were administratively closed, not entered in OITSS and kept in physical folders without case numbers. These complaints and investigator notes were typically accessible; some did not have a screen out letter. However, by not entering the administrative closures in OITSS, the true volume of work performed by OHSB is not reflected in IMIS reports and is not available for data analysis and resource decisions by management.

The Administrative closures and docketed cases are kept in physical files. OHSB is moving to electronic case files (ECFs) during FY 2022 and the move to ECFs may resolve some of the concerns found with the files. In most instances, the physical files contained required case documentation except for the recorded interviews. The recorded interviews are stored on either a network drive or the investigator's recorder. The ECFs may enable OHSB staff to store the recorded interviews in the case file.

Although some case files were found without a case activity log, many had notes on the folder with the same information usually contained in a case activity log. Several individual files were missing closing letters. In some of the administratively closed files, OHSB did not send a "screen out" letter or email, which is a federal requirement.

There were two screen outs that appear to be *prima facie* allegations. OSHA reviewed and could not determine based on the physical files whether a complaint interview was conducted or required.

One possible technical issue was raised by the investigator regarding archiving emails in Adobe Acrobat into the ECFs. OHSB should investigate to ensure that case related emails can be saved in the ECFs.

OHSB may consider developing standard file structure and naming conventions to ensure file access and retrieval are effective.

OHSB should also consider conducting case file reviews to ensure Complainant interviews and final letters to Complainants are present in the case files, both for administrative closures (“screen outs”) as well as docketed cases. The date on the final letter should match the closing date in OITSS.

Observation FY2021-06

OHSB did not adopt identical TED 01-00-020, Mandatory Training Program for OSHA Whistleblower Investigators. According to the FY 2017 FAME Report, OHSB were developing a state specific training program for the whistleblower program, and it was to be completed by the summer of 2018. As of March 2022, OHSB has neither adopted the federal whistleblower training directive, nor developed their own training directive.

Federal Monitoring Plan:

OHSB will monitor OHSB’s progress in completing a training program for whistleblower investigations and discuss during quarterly meetings.

8. COMPLAINT ABOUT STATE PROGRAM ADMINISTRATION (CASPA)

There were no CASPAs filed against New Mexico OHSB in FY 2020 or 2021.

9. VOLUNTARY COMPLIANCE PROGRAM

The Cooperative Programs in OHSB is administered under its 23(g) grant program. OHSB cooperative programs include seven Voluntary Protection Program (VPP) sites, six partnerships, and two alliances.

VPP Participants:

- Georgia-Pacific - Santa Teresa
- Intel Corporation - Rio Rancho
- NextEra Energy Resources/NM Wind Energy - House
- NuStar Energy - Albuquerque
- Onward Energy/Southwest Generation Valencia - Belen
- The Roco Corporation- Rio Rancho
- Tri-State Generating and Transmission - Prewitt

Alliances:

- Consulate of Mexico in Albuquerque, New Mexico
- Southeast New Mexico Service Transmission, Exploration, and Production Safety (SENM STEPS) Network

OHSB improved strategic partnership programs through comprehensive onsite verification activities and by conducting reviews of existing agreements. The Bureau currently has partnerships with industry groups such as the Associated General Contractors, the Associated Contractors of New Mexico, the Associated Builders and Contractors, the New Mexico Utility Contractors Association, the Mechanical Contractors Association, and the American Subcontractors Association. OHSB and partner members focus work on common safety issues. There are 72 member companies participating in six industry association partnerships.

The New Mexico Construction Safety Coalition held virtual meetings in FY 2021 that emphasized best practices in preventing COVID-19 transmission at partner worksites. The Coalition is composed of OHSB staff and representatives for each of the 6 OSPC partnership associations.

OHSB conducted minimal compliance assistance activities in the state and local government agencies as part of the overall goal of reducing the injury rate, which continues to experience injury and illness rates greater than the private sector. As stated previously, in addition to providing technical assistance to several state and local government agencies, OHSB presented occupational safety and health information to a total of 25 county, city and state government agencies, reaching 29,599 workers and impacting many more. Limited outreach activities were focused on State Emphasis Programs (SEPs) within the industries of construction, primary and fabricated metals, oil and gas well drilling and servicing, and hospitals and nursing care during FY 2021. The Bureau continued its SEP for silica exposure in the construction and earth products manufacturing industries.

Compliance Assistant Specialist Activity		
Type	FY 2021	FY 2020
Email Alert	0	0
Interpretation	6	0
Meeting	1	10
Newsletter	0	0
Other Compliance Activities	91	4
Social Media	1	0
Speech/Presentations	0	0
Technical Assistance	100	1
Training	1	0
VPP Site Visit	0	0
Total	200	15
Number of Workers Attended	208	17
Number of Workers Affected	89,375	301

10. STATE AND LOCAL GOVERNMENT 23(g) ON-SITE CONSULTATION PROGRAM

The State and Local Government Consultation Program conducted 16 consultation visits throughout New Mexico reaching approximately 5,348 workers and impacting many more. Based on their FY 2021 grant proposal, New Mexico OHSB had established a goal of 35 consultation visits and were not able to meet their goal. Through these visits, they identified 38 hazards.

The MARC indicates OHSB conducted three visits statewide. All visits were initial visits with employers with fewer than 500 employees during the year.

The MARC metric 3 indicates OHSB consulted with workers in 100% of the state and local government sector initial visits. OHSB conferred with employees on 100% (3/3) of initial visits.

MARC 4 has several subsections, two of which have goals. The first is to ensure that 100% of serious hazards are verified to have been corrected within 14 days of the original correction due date. OHSB verified correction of 100% (6/6) of identified serious hazards within this timeframe. The second goal is to verify correction of at least 65% of serious hazards either on site or by the original correction due date. OHSB verified correction of 100% (6/6) of identified serious hazards either on site or by the original correction due date.

MARC 5 shows there were no serious hazards with corrections more than 90 days past due.

11. PRIVATE SECTOR 23(g) ON-SITE CONSULTATION PROGRAM

Private sector consultation services are provided in New Mexico under a 21(d) Cooperative Agreement, and state and local government agencies consultation services are provided under the 23(g) State Plan grant. Performance related to 21(d) funding work is reported in the Regional Annual Consultation Evaluation Report (RACER).

Appendix A – New and Continued Findings and Recommendations

FY 2021 New Mexico Comprehensive FAME Report

FY 20XX-#	Finding	Recommendation	FY 20XX-# or FY 20XX-OB-#
FY 2021-01	35 of the total 54 inspections reviewed (65%) lacked documentation of employee contact or interview where 100% was reportedly interviewed (SAMM 13).	Ensure COs conduct and document employee interviews as required by the OHSB FOM Chapter 3.	FY 2020-01 and FY 2019-01
FY 2021-02	OHSB conducted 140 inspections of their projected goal of 315 (44%), (SAMM 7).	OHSB should implement a corrective action to ensure yearly goals are met. Managers should monitor and adjust if goals are not being met weekly to monthly.	FY 2020-02
FY 2021-03	The average lapse time for health inspections was 103.3 days and the average lapse time for safety inspections was 107 days. This exceeded the FRL range of 38.08 to 57.13 for safety and 45.78 to 68.68 for health. (SAMM 11).	OHSB should periodically review all open cases with compliance officers to prevent high lapse times.	
FY 2021-04	12 of the 12 (100%) fatality inspections lacked documentation for initial contact with family members, and/or family members did not receive final notification of inspection results.	Family members of employees involved in fatal or catastrophic occupational incidents should be contacted early in investigation, be allowed to discuss incident circumstances and be sent a letter of findings in accordance with the NM FOM.	
FY 2021-05	Unions not contacted: Out of a total of 54 files reviewed for FY 2021, five inspection case files had unions and none of the union's representatives were contacted during inspections.	Follow OHSB, FOM, Chapter 3, During the opening conference, the highest-ranking on-site union official or union employee representative shall designate who will participate in the walkaround.	

Appendix B - Observations Subject to New and Continued Monitoring
FY 2021 Mexico Federal Annual Monitoring Evaluation

Observation # FY 20XX-OB-#	Observation# FY 20XX- OB-# or FY 20XX-#	Observation	Federal Monitoring Plan	Current Status
FY 2021-OB-01	FY 2020-OB-01	SIR item 3A: OHSB did not complete abatement in 6 safety inspections more than 60 days and 8 Health inspections more than 90 day. The metric has improved in 2021	OSHA will continue to monitor performance in this area during quarterly meetings and FY2022 case file review	Continued
FY 2021-OB-02	FY 2020-OB-03	Of the 54 files reviewed, the in-compliance rate for safety and health inspections was 67%, which was above the FRL range of 24.24% to 36.36% (SAMM 9)	OSHA will continue to monitor performance in this area during quarterly meetings.	Continued
FY 2021-OB-03		SIR item 9: The number of valid complaint UPAs (4) handled as an inspection which have been open for more than 60 calendar days and number of valid complaints (34) handled as a phone/fax which have been open more than 30 calendar days	OSHA will continue to monitor performance in this area during quarterly meetings.	New
FY 2021-OB-04		OHSB working definition of a complaint is not at least as effective as the federal program and results in fewer complaints. Of the 54 inspection case files reviewed, 1 was based on a complaint. The remaining 53 inspections averaged 1 day to initiate a complaint inspection, meeting the negotiated goal of 1 day (SAMM 1A).	OSHA will continue to monitor performance in this area during quarterly meetings.	New
FY 2021-OB-05		During the review of a fatality inspection, equipment malfunctioned repeatedly, next-of-kin were not notified of findings and employee interviews were missing	OSHA will continue to monitor performance in this area during quarterly meetings.	New
FY 2021-OB-06		OHSB has not properly entered data in OITSS for whistle blower activities	OSHA will continue to monitor performance in this area during quarterly meetings.	New

Appendix C - Status of FY 2021 Findings and Recommendations

FY 2021 New Mexico Comprehensive FAME Report

FY 20XX-#	Finding	Recommendation	State Plan Corrective Action	Completion Date (if Applicable)	Current Status (and Date if Item is Not Completed)
FY-2020-01	During FY 2019, in 19% (10/54) of the case files reviewed, employees were not interviewed and 35% (19/54) of these case files lacked documentation of employee interviews.	OHSB should ensure basic employee interview documentation is consistently in the case file and adequately documented using narrative to explain what occurred during the inspection or why citations were or were not recommended, as required by OHSB FOM.	OHSB will continue to schedule and ensure completion of courses and conduct internal training to address documenting interviews.		Open
FY 2020-02	In FY 2020, OHSB conducted 54 health inspections, which was 53% below their goal of 115. The range of acceptable data not requiring further review is from 109.25 to 120.75 for health. OHSB conducted 140 Safety Inspections, which was 51% of their goal of 275. The 178 total inspection was 52% of its goal of 345.	The State Plan should continue efforts to understand and address its high turnover rate and fill staff vacancies in order to reach their health inspection goals.	OHSB has implemented a manager driven inspection assignment process and hired more personnel to conduct inspections		Open

**Appendix D – FY 2021 State Activity Mandated Measures (SAMM) Report
FY 2021 New Mexico Comprehensive FAME Report**

U.S. Department of Labor				
Occupational Safety and Health Administration State Plan Activity Mandated Measures (SAMMs)				
State Plan: New Mexico – OHSB			FY 2021	
SAMM Number	SAMM Name	State Plan Data	Further Review Level	Notes
1a	Average number of workdays to initiate complaint inspections (state formula)	10.5	5	The further review level is negotiated by OSHA and the State Plan.
1b	Average number of workdays to initiate complaint inspections (federal formula)	4.25	N/A	This measure is for informational purposes only and is not a mandated measure.
2a	Average number of workdays to initiate complaint investigations (state formula)	4.10	0	The further review level is negotiated by OSHA and the State Plan.
2b	Average number of workdays to initiate complaint investigations (federal formula)	1.81	N/A	This measure is for informational purposes only and is not a mandated measure.
3	Percent of complaints and referrals responded to within one workday (imminent danger)	100%	100%	The further review level is fixed for all State Plans.
4	Number of denials where entry not obtained	0	0	The further review level is fixed for all State Plans.
5	Average number of violations per inspection with violations by violation type	SWRU: 1.78	+/- 20% of SWRU: 1.79	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 1.43 to 2.15 for SWRU and from 0.78 to 1.16 for OTS.
		Other: 0.28	+/- 20% of Other: 0.97	
6	Percent of total inspections in state and local government workplaces	13.57%	+/- 5% of 8.33%	The further review level is based on a number negotiated by OSHA and the State Plan through the grant application. The range of acceptable data not requiring further review is from 7.92% to 8.75%.

**Appendix D – FY 2021 State Activity Mandated Measures (SAMM) Report
FY 2021 New Mexico Comprehensive FAME Report**

7	Planned v. actual inspections – safety/health	S: 65	+/- 5% of S: 245	The further review level is based on a number negotiated by OSHA and the State Plan through the grant application. The range of acceptable data not requiring further review is from 232.75 to 257.25 for safety and from 109.25 to 120.75 for health.
		H: 75	+/- 5% of H: 115	
8	Average current serious penalty in private sector - total (1 to greater than 250 workers)	\$5305.61	+/- 25% of \$2,871.96	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$2,153.97 to \$3,589.95.
	a. Average current serious penalty in private sector (1-25 workers)	\$1920.00	+/- 25% of \$1,915.86	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$1,436.89 to \$2,394.82.
	b. Average current serious penalty in private sector (26-100 workers)	\$5170.73	+/- 25% of \$3,390.30	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$2,542.73 to \$4,237.88.
	c. Average current serious penalty in private sector (101-250 workers)	\$9280.00	+/- 25% of \$4,803.09	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$3,602.31 to \$6,003.86.
	d. Average current serious penalty in private sector (Greater than 250 workers)	\$7099.41	+/- 25% of \$5,938.59	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$4,453.94 to \$7,423.23.
9	Percent in compliance	S: 33.33%	+/- 20% of S: 30.30%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 24.24% to 36.36% for safety and from
		H: 34.69%	+/- 20% of	

**Appendix D – FY 2021 State Activity Mandated Measures (SAMM) Report
FY 2021 New Mexico Comprehensive FAME Report**

			H: 36.12%	28.90% to 43.35% for health.
10	Percent of work-related fatalities responded to in one workday	66.67%	100%	The further review level is fixed for all State Plans.
11	Average lapse time	S: 107	+/- 20% of S: 47.61	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 38.08 to 57.13 for safety and from 45.78 to 68.68 for health.
		H: 103.03	+/- 20% of H: 57.23	
12	Percent penalty retained	93.14%	+/- 15% of 66.38%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 56.42% to 76.33%.
13	Percent of initial inspections with worker walk around representation or worker interview	100%	100%	The further review level is fixed for all State Plans.
14	Percent of 11(c) investigations completed within 90 days	0%	100%	The further review level is fixed for all State Plans.
15	Percent of 11(c) complaints that are meritorious	43%	+/- 20% of 25%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 18.40% to 27.60%.
16	Average number of calendar days to complete an 11(c) investigation	198	25%	The further review level is fixed for all State Plans.
17	Percent of enforcement presence	0.93%	+/- 25% of 1.23%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.92% to 1.54%.