



STATE OF MICHIGAN

DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
MICHIGAN OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
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August 17, 2022

Mr. William Donovan, Regional Administrator
Region V
Occupational Safety and Health Administration (OSHA)
United States Department of Labor
230 S. Dearborn Street, Suite 3244
Chicago, Illinois 60604-1694

Subject: MIOSHA's Statement in Response to Comprehensive Federal Annual Monitoring
Evaluation (FAME) Report - October 1, 2020, to September 30, 2021

Dear Mr. Donovan:

Thank you for the opportunity to partner with Federal OSHA and to work collaboratively during the FY 2021 FAME process to ensure that Michigan's state plan program continues to be effective at protecting the safety and health of workers. This letter provides MIOSHA's statement in response to the FY 2021 FAME report. We request this letter be posted with the FAME report on the OSHA webpage.

MIOSHA greatly appreciates your recognition in the FY 2021 FAME of the noteworthy accomplishments we had towards our annual performance goals. We believe the Michigan program for occupational safety and health continues to be highly effective in protecting Michigan workers from on-the-job injuries, illnesses, and exposures, as evidenced by Michigan's downward trend in injury and illness rates and program-related workplace fatalities.

MIOSHA has established and maintains a positive relationship with Federal OSHA. Many Area OSHA Office, Region V, and National Office staff are included in the distribution of MIOSHA policy documents, publications, and newsletters, and are invited to participate in staff training, meetings, and conferences.

MIOSHA prides itself on being a continuous improvement organization and truly values constructive input and feedback. MIOSHA has carefully considered the constructive feedback provided through the evaluation process and FY 2021 FAME report and will continue to take all actions that are appropriate for our state plan program.

Although not required as part of the Corrective Action Plan (CAP) per the revised State Plan Policies and Procedures Manual, the following formal response is provided to you to specifically address the findings and observations noted in the FY 2021 FAME.

Finding FY 2021-01: MIOSHA State Plan has failed to adopt OSHA's initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.

Recommendation FY 2021-01: MIOSHA State Plan should work with their state authorities to complete the legislative changes necessary to enable it to adopt maximum and minimum penalty amounts that are at least as effective as OSHA's maximum and minimum penalty levels.

State Response: MIOSHA has been working with the Michigan state legislature since 2016 to increase the maximum penalties in the Michigan Occupational Safety and Health Act. In 2017, MIOSHA found a bill sponsor in the state Senate, but the bill never made it to a vote prior to the end of the legislative session. Each year since, the agency has attempted to acquire a sponsor for the necessary legislation, but legislators have been reluctant to sponsor another bill partly because OSHA has not made increasing the maximum penalties an "at least as effective as OSHA" issue, nor did OSHA mention the issue as a finding or observation in its FAME. This year, once again, MIOSHA will try to find a sponsor, this time using the letter dated September 2, 2021, from Acting Assistant US Secretary of Labor, James Frederick, to the LEO Director on the subject and the FAME finding as impetus and urgency for the legislation. Draft bill language has been written and submitted to our legislative liaison. In addition, to educate stakeholders, MIOSHA has conducted outreach on the importance of aligning the maximum penalties with OSHA.

Finding FY 2021-02: When a whistleblower complaint does not return a signed statement within a specified time, MIOSHA closes the complaint as withdrawn contrary to the OSHA Whistleblower Investigations Manual (WIM).

Recommendation FY 2021-02: Follow the WIM for the appropriate type of determination when the complainant fails or chooses not to return a signed statement.

State Response: The interview of a whistleblower complainant and their continued cooperation with an ongoing investigation of his/her allegations is a critical component of the investigatory process. The complainant is an essential witness in investigating whether there has been a violation of the whistleblower provision of the Michigan Occupational Safety and Health Act, and in legal proceedings resulting from MIOSHA's investigation. At the start of the investigation, MIOSHA interviews the complainant, transcribes their verbal account into a written statement, and has the complainant review and sign their statement; when the interview is conducted by phone due to distance or COVID-19 protocols, the complainant is mailed their statement to sign.

Previously, when MIOSHA encountered repeated difficulty obtaining the complainant's interview, or signature validation of their interview statement, MIOSHA sent the complainant a letter informing them that the agency was interpreting their lack of responsiveness to be an indication that they no longer wished to pursue the matter, and that unless a response to the letter

was received, the agency was closing the complaint as “withdrawn.” In MIOSHA’s experience, this procedure effectively prevented investigations from lingering indefinitely due to an inability to reach the complainant or to obtain the complainant’s cooperation.

However, MIOSHA now recognizes that the above procedure was not directly in line with the WIM. The WIM states that when a complainant shows a lack of cooperation with the investigation, a letter should be sent to notify the complainant that a failure to cooperate with the investigation will lead to the “dismissal” of the complaint for lack of cooperation. The critical distinction between a “withdrawal” and a “dismissal” is that the issuance of a dismissal is in fact a determination and gives the complainant the right to appeal the dismissal of the complaint. A withdrawal would be an independent action on the part of the complainant, is not a determination by the agency, and thus affords the complainant no appeal rights.

Starting in September 2022, in accordance with the OSHA WIM, the letter to the complainant will instead state that the complaint will be dismissed due to “lack of cooperation”, and it will inform the complainant of their right to appeal that determination. Staff will be trained on the new procedure. MIOSHA has already adopted the OSHA WIM by reference in division instruction GISHD-ADM-16-1R2, Whistleblower Program.

Observation FY 2021-OB-01: Five of the fatality case files reviewed for FY 2021 did not include a copy of the fatality report and/or the investigation report. Two of 20 (10%) did not contain a copy of the fatality report. Four of 20 (20%) did not contain a copy of the investigation report.

State Response: We would like to note that MIOSHA had entered the Fatality/Catastrophe Reports (form OSHA-36) and Investigation Summaries (form OSHA-170, also known as the investigation report) in the OSHA Information System (OIS), the federal database operated by OSHA that contains the MIOSHA inspection data. For the referenced files, MIOSHA had simply not downloaded the documents from OIS into MIOSHA’s separate electronic case file. MIOSHA agrees to ensure that the documents are retained in the agency’s case files in addition to being available in OIS. To that end, we are instituting these changes:

- The enforcement divisions will use a tracking spreadsheet to verify that the Fatality/Catastrophe Report and Investigation Summary form are saved in the agency’s case file.
- The written procedures for the audit of fatality case files will be revised to include a check for these two forms.
- An email will be sent to affected staff reminding them to insert the two forms in the MIOSHA case file.
- Support staff will be retrained to confirm that the two forms are in the MIOSHA case file.

Observation FY 2021-OB-02: Four of 20 (20%) fatality case files reviewed for FY 2021 did not contain an initial and/or results letter to the next-of-kin.

State Response: MIOSHA agrees to this improvement. MIOSHA is implementing the following measures:

- The enforcement divisions will use a tracking spreadsheet to verify that the first and second next-of-kin letters are sent and saved in the case file.
- The written procedures for the audit of fatality case files will be revised to include a check for these two letters.
- Support staff will be retrained to ensure the two letters are sent.

Observation FY 2021-OB-03: In the case of whistleblower complaints referred from OSHA, MIOSHA maintains a practice of entering MIOSHA's receipt date as the filing date rather than the date the complaint was filed with OSHA.

State Response: Since March 2022, MIOSHA has been using the date the complaint was filed with OSHA as the filing date. This has advanced the receipt date typically by one to five days due to the time it takes OSHA to transfer the complaint to MIOSHA.

In conclusion, MIOSHA appreciated working with the evaluation team. The team was courteous in working with our staff. Please know that MIOSHA's commitment to providing a comprehensive and effective program remains firm.

Thank you for this opportunity to submit a statement in response to the FY 2021 FAME report. If you have questions or would like additional information, please contact me at (517) 284-7772.

Sincerely,

Barton G. Pickelman, CIH
MIOSHA Director

cc: Susan Corbin, Director, LEO
Sean Egan, Deputy Director, LEO
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