

**Kentucky Education and Labor Cabinet
Occupational Safety and Health Program
Response to Federal Annual Monitoring Evaluation for
Federal Fiscal Year 2021**

I. COMMENT REGARDING FAME REPORT

OSHA's Federal Fiscal Year (FFY) 2021 Federal Annual Monitoring Evaluation (FAME) identified five (5) findings and two (2) observations.

II. OSHA FINDINGS, STATUS, RECOMMENDATIONS, and KENTUCKY RESPONSES

OSHA Finding FY 2021-1

“KY OSH conducted a total of six programmed health inspections, during this period.”

OSHA Recommendation

“KY OSH should work with OSHA to negotiate a benchmark for programmed inspections and develop and implement a strategy to ensure a more representative number of programmed (planned) health inspections are conducted.”

OSHA Finding FY 2021-2

“KY OSH conducted a total of 30 programmed safety inspections, during this period.”

OSHA Recommendation

“KY OSH should work with OSHA to negotiate a benchmark for programmed inspections and develop and implement a strategy to ensure a more representative number of programmed (planned) safety inspections are conducted.”

State Response to Finding FY 2021-1 and Finding FY 2021-2

The SARS-CoV-2 pandemic continued to have a significant impact on the Kentucky OSH Program during the October 1, 2020-September 30, 2021, FAME review period and adversely impacted the ability to conduct programmed inspections. Kentucky informed OSHA of that fact in prior FAME Responses, in 2020, and during OSHA's FFY 2021 onsite FAME activity.

Although Kentucky advised OSHA that an increase in programmed inspections during FFY 2021 was not likely, Kentucky *increased* programmed inspections in 2021. OSHA did not recognize the increase in the FFY 2021 FAME.

Kentucky inspections are conducted in the order of priority established in Kentucky's Field Operations Manual. Other inspection types, such as imminent dangers, fatalities, hospitalizations, amputations, and complaints, are prioritized over programmed inspections.

Kentucky is confounded by OSHA’s recommendation that Kentucky “should work with OSHA to negotiate a benchmark for programmed inspections.” OSHA’s recommendation is misleading. For several years, Kentucky repeatedly asked OSHA to identify a benchmark for programmed inspections. OSHA did not respond or provide any guidance to Kentucky. Nonetheless, Kentucky is more than happy to work with OSHA to establish an acceptable benchmark for programmed inspections.

The second portion of OSHA’s recommendations recommend Kentucky implement a strategy to ensure a more representative number of programmed safety and health inspections are conducted. The language is unnecessary. OSHA is aware that Kentucky has a strategy in place to conduct programmed inspections. OSHA is also aware Kentucky is bound to conduct inspections based on the order of priority established in Kentucky’s Field Operations Manual.

Kentucky will strive to perform more programmed planned safety and health inspections.

OSHA Finding FY 2021-3

“In FY 2021, KY OSH had a significantly high average citation issuance lapse time for safety and health inspections, which were outside the FRLs.”

OSHA Recommendation

“KY OSH should develop and implement a process to reduce the average lapse time for safety and health inspections to be within the acceptable FRL range.”

State Response

The SARS-CoV-2 pandemic continued to have a profound effect on the Kentucky OSH Program during the October 1, 2019-September 30, 2021, FAME review period and adversely impacted citation issuance lapse time for safety and health inspections.

Improved lapse time is one (1) of the Kentucky OSH Program’s top goals.

OSHA Finding FY 2021-4

“The Kentucky State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.”

OSHA Recommendation

“The Kentucky State Plan should continue to work with their state authorities to complete the legislative changes necessary to adopt the maximum and minimum penalty increase and subsequent annual increases to be at least as effective as OSHA penalty levels.”

State Response

OSHA’s finding is incorrect; the Kentucky State Plan did not fail to adopt OSHA’s penalty increase and subsequent annual increases. The Kentucky State Plan has no authority to increase maximum penalties or implement an annual penalty adjustment based on the Consumer Price Index. Kentucky penalties are established by statute, specifically Kentucky Revised Statute 338.991. Adjustment to Kentucky penalties requires legislative action.

Page nineteen (19) of the FFY 2021 FAME acknowledges Kentucky's September 30, 2021, response to OSHA regarding state OSH penalties. Page nineteen (19) also acknowledges state legislation introduced in 2022 to increase OSH penalties.

Kentucky will continue work to seek legislative action to amend Kentucky's OSH penalties.

OSHA Finding FY 2021-5

"The case file review identified eight 8 out of 14 (57%) cases, where KY OSH failed to acquire and/or maintain correct retaliation case file documentation: to wit, (1) no case activity logs or incomplete logs, (2) insufficient/inaccurate correspondence tracking information (Specifically screening documentation between CP and Investigator was not present in the majority of files reviewed), and (3) erroneous IMIS entries."

OSHA Recommendation

"KY OSH should ensure all required documentation of the investigation is complete and included in the file to ensure the accuracy of IMIS data entries."

State Response

Kentucky will improve acquiring necessary documentation as well as IMIS data entry accuracy.

OSHA FY 2021 Observation 1

"KY OSH's Division of OSH Compliance did not make available for review their FY 2022 State Internal Evaluation Program (SIEP) Audit as required by the State Plan Policies and Procedures Manual."

OSHA Federal Monitoring Plan

"The OSHA Area Office will closely monitor and review the State Internal Evaluation Program to ensure KY OSH is performing audits of their internal operation, as required by the SPPM."

State Response

This is not a new issue discovered during the FFY 2021 FAME. Kentucky's internal evaluations are legally privileged. OSHA is acutely aware of that fact and acutely aware why Kentucky cannot make the state internal evaluation audit available for OSHA review.

In years past, Kentucky asked OSHA how the issue of privilege could be addressed so that OSHA can review Kentucky's internal evaluations. Kentucky's inquiry was made with OSHA at the area office, region, and national level. OSHA informed Kentucky there is no apparent remedy. Although this is a legal issue and OSHA cannot offer Kentucky a remedy, OSHA now chooses to issue an observation. OSHA's observation is hollow, disingenuous, and setting Kentucky up to receive a finding.

OSHA FY 2021 Observation 2

In FY 2021, the total in-compliance rate (SAMM 9) for all safety inspections was 48.03% and 67.35% for health inspections. The percentages for safety and health were well above the FRLs.

OSHA Federal Monitoring Plan

The OSHA Area Office will closely monitor and review the SAMM, SIR, and other available data with the State Plan on a quarterly basis to ensure in-compliance rates are within the acceptable FRL range.

State Response

OSHA articulates an explanation for Kentucky's in-compliance rates on page twelve (12) of the FAME. Furthermore, at no time during the FFY 2021 FAME did OSHA identify in any casefile that Kentucky missed a hazard(s) and/or failed to issue a citation(s). OSHA has neither demonstrated nor articulated how Kentucky's in-compliance rate is worthy of an observation. Kentucky's in-compliance rate is simply outside of the Further Review Level. OSHA's observation has no basis and is setting Kentucky up to receive a finding.