

## PESH Response to

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

### **New FY2021 Findings:**

#### **Finding FY 2021-01 (FY 2020-OB 01, FY 2019-OB-01, FY 2018-OB-08):**

Safety Lapse Time

*In FY 2021, the average safety lapse time (SAMM 11) for citations was calculated at 123.86 days which is above the FRL range of 41.94 days to 62.90 days for safety.*

#### **Recommendation FY 2021-01:**

*Utilize the OIS report system and the SAMM report to track lapse time. Encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. Fill vacant CSHO positions to provide additional resources.*

#### **Finding FY 2021-02 (FY 2020-OB-02, FY 2019-OB-02, FY 2018-OB-09):**

Health Lapse Time

*In FY 2021, the average health lapse time (SAMM 11) for citations was calculated at 164.93 days which is above the FRL range of 52.88 days to 79.32 days.*

#### **Recommendation FY 2021-02:**

*Utilize the OIS report system and the SAMM report to track lapse time. Encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. Fill vacant CSHO positions to provide additional resources.*

### **PESH response to findings FY 2021-01 and 2021-02**

Weekly action reports and open case reports are distributed to supervisors/management. Open cases pending issuance over four months are highlighted for focused attention. As existing backlogs are reduced and older cases are completed, PESH will work with staff to ensure a reduction in lapse time. Hiring and training of additional inspectors is in progress with focus on filling downstate vacancies. In the short-term, staff from outside districts will be allocated as needed to address districts needing immediate resources. A Corrective Action Plan will include specific benchmarks.

#### **Finding FY 2021-03: OIS Reports**

*Open Abatement OIS reports run on January 3, 2022, showed that in some of the RIDS*

*there was overdue abatement from FY 2020 and FY 2021. For example, in RID 253610, there were 10 inspections with overdue abatement, 13 inspections in RID 253620 and 21 inspections in RID 253650 and three (3) inspections in RID 253690. These inspections were opened in either FY 2020 or FY 2021.*

**Recommendation FY 2021-03:**

*PESH needs to develop a written procedure to address how OIS reports will be used to ensure timely abatement of all hazards.*

**PESH response**

As noted in items 1 and 2, Weekly Action Reports are used to flag lapsing cases. Additional measures and monitoring will be detailed in the Corrective Action Plan.

**Finding FY 2021-04 (FY 2020-03): Staffing**

*PESH staffing level is allocated for 43 CSHOs, but currently there are only 30 onboard as of the end of FY 2021. (NY SOAR, FY 2021)*

*PESH continues to struggle to fill staff vacancies. Staffing vacancies affect the State Plan's ability to timely address complaints/referrals/fatalities, as well as achieving their targeting and programmed inspection goals established in their FY 2021 grant. Over the last three years, PESH has seen a reduction in the number of compliance safety and health officers (CSHOs) allocated versus onboard. Information provided for the FY 2021 SOAR showed that there were 30 vacancies. These staffing vacancies affect the State Plan's ability to timely address complaints/referrals/fatalities, as well as achieve its targeting and programmed inspection goals established in the grant application. The State Plan has been under a hiring freeze for years and is currently working with NYDOL's deputy commissioner to prioritize hiring based on the need and availability.*

**Recommendation FY 2021-04:**

*PESH should fill current staffing vacancies with qualified staff, specifically in the NYC office.*

**PESH response**

Backfilling of open items is in progress with an emphasis on downstate districts. Availability of core training through OTI has been limited in FFY2022. Planning is underway for OTI FFY2023 staff training, and in-house and field training is ongoing. Progress in improving staffing levels will be updated in the Corrective Action Plan.

**Finding FY 2021-05**

*In six of 10 (60%) case files, documentation was lacking for COVID-19 fatality inspections, and four of 10 (40%) were lacking evidence of interviews with non-managerial employees.*

**Recommendation FY 2021-05:**

*PESH should consider developing a quality control procedure to ensure that adequate documentation is obtained for fatality inspections. PESH needs to follow their FOM regarding required case file documentation.*

**PESH response**

At the onset of the Pandemic, PESH realized that the magnitude and duration of the impacts on public employers and employees could not be predicted and that we would need to be prepared to the extent possible. This included accepting the reality that our standard enforcement procedures would not allow us to respond to the needs of public employers and employees with adequate speed or flexibility. After the declaration of states of emergency, alternate procedures in the form of an Interim Enforcement COVID-19 Response Plan were developed for handling COVID-19 related complaints and reports of fatalities. Our objective was to use our resources to fulfill mission essential functions and protect workers without unnecessarily risking DOL staff safety and health. The alternate procedures involved conducting investigations using remote means but preserved the requirement to make contact with the employer and affected employee representatives to verify conditions and compliance with applicable standards. Certain documentation, including injury and illness recordkeeping, employee interview forms, and letters to Next of Kin were not required. This accounts for some of the noted deviations from standard practices in the FOM.

Additionally, in lieu of adding redundant hardcopies to each casefile, related policy and program documents, including any related to respiratory protection, for some of the larger NYC agencies (MTA, HHC, NYPD) have been maintained in archive folders on the PESH shared drive.

The alternate procedures were updated as necessary to adapt to the evolving phases of the pandemic. In late May 2021, when it became apparent that our resources would not be able to cope with the backlog of fatalities that were over a year old, the grouped procedure was implemented. This decision was out of necessity, and we recognized that our ability to verify past conditions and substantiate citations was compromised by the passage of time. It must be noted that grouping of fatalities from certain large NYC agencies was tenable because policies are generally implemented department-wide and because general conditions had been assessed during prior individual fatality inspections conducted at various points of the Pandemic timeline.

**Finding FY 2021-06:**

*In 10/12 (83%) fatality inspections were not responded to within one working day of the report. SAMM #10 reported that the State Plan responded 38.46% of the time within one workday of a fatality notification. The FRL is 100%.*

**Recommendation FY 2021-06:**

*PESH should respond to worker fatalities within one workday which is the SAMM reference agreed upon measure and federal OSHA requirement.*

### **PESH response**

Ten of the twelve reviewed fatalities were COVID-19 related where, given the scale of the pandemic, work-relatedness of exposures could not be ascertained.

As noted in the PESH response to Finding FY 2020-04:

*Given the widespread transmission of the virus, it is inaccurate to include all “potential workplace-related COVID-19 fatalities”, which occurred during a global pandemic, as “Work-Related Fatalities” under this metric. Of the public employee COVID-19 fatalities PESH was informed of, none have been verified to be the result of workplace exposure to SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2). PESH responds to a majority of workplace deaths within one workday of a reported incident. Some exceptions are made when lack of an occupational exposure does not warrant an immediate response, such as health-related incidents where there are no related workplace exposures indicated.*

### **Finding FY 2021-07:**

*In 10/12 (83%) of the fatality inspections both the initial notification of inspection and results of the inspection next-of-kin letters were not sent to the families of the victims. The practice of sending next-of-kin letters was ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only. Due to the novel nature of these fatalities, there was confusion by the New York State Plan whether these letters should be sent since it was often unclear if the victim was exposed to the virus at work or through community spread.*

### **Recommendation FY 2021-07:**

*PESH needs to follow their FOM regarding issuing letters to the families of victims. PESH will report quarterly to OSHA on the percentage of next-of-kin letters sent to families.*

### **PESH response**

This item is addressed by the next-of-kin (NOK) explanation contained in the response to finding FY2021-5. The Interim Enforcement COVID-19 Response Plan included modification to policy, including NOK notifications. This was consistent with OSHA. This is further supported by the second sentence of the finding statement itself.

### **Finding FY 2021-08 (FY 2020-08):**

#### *Federal Standard Changes*

*PESH has not adopted the FY 2015 Federal Standard Number 1904 – Occupational Injury and Illness Recording and Reporting Requirement as it is a requirement for all State Plans.*

*PESH anticipated adopting the 1904.39-reporting standard in January 2016, but approval from the NY Counsels Office has not been received to date. It is OSHA's understanding that SLG employers are following the requirements and reporting worker fatalities within eight hours, as well as hospitalizations, amputations, and loss of an eye; to PESH. However, a federal register notice has not been posted informing employers of these requirements.*

*Additionally, PESH has not adopted the FY 2017 Final Rule on Walking-Working Surfaces and Personal Protective Equipment.*

**Recommendation FY 2021-08:**

*PESH should take action to adopt the FY 2015 Federal Standard Number 1904 – Occupational Injury and Illness Recording and Reporting Requirement by obtaining approval from the NY Counsels Office to allow publication in the NY Register by September 30, 2022. Additionally, PESH should take the same actions to adopt the FY 2017 Final Rule on Walking-Working Surfaces and Personal Protective Equipment by September 30, 2022.*

**PESH response**

Progress and projections concerning adoptions will be noted in the Corrective Action Plan.

**Finding FY 2021-09:**

*Responding to Worker Retaliation Cases Timely*

*At the conclusion of the review period (FY 21) PESH had 48 pending whistleblower retaliation investigations with an average number of days pending of 453. The oldest case was filed on November 6, 2017. As of February 7, 2022, there were four (4) pending cases from FY 2018, six pending cases from FY 2019, 14 pending cases from FY 2019 and 24 pending cases from FY 2021. Approximately five of the pending cases have been referred to the New York State Department of Labor's Counsel's Office as meritorious complaints or for additional guidance and/or analysis. PESH's discrimination program cannot be at least as effective as OSHA's if it is unable to complete complaint investigations or litigate meritorious complaints.*

**Recommendation FY 2021-09:**

*OSHA will monitor quarterly with the SAMM report.*

**PESH response**

Recent progress has included counsel assistance with screening new complaints and focusing investigation efforts during the initial phases of investigations. Additional staff are being scheduled to receive whistleblower training and several staff are phasing into taking cases under the guidance of experienced investigators. Case review and determination backlogs are being cleared. Status updates will be included in the Corrective Action Plan.

**Observation FY 2021-OB-07: Consultation Case File Documentation**  
*Consultation case file documentation was lacking.*

**PESH response**

For one casefile, Appendix B had been completed by the employer, with detailed descriptions of corrective action taken, and signed and dated before the correction due date. However, the corrected date fields were not filled in. As all of the hazards had the same correction date, it is our opinion that this is not a significant matter worthy of note or corrective action. The version of our CPPM in effect at the time (PESH Directive A20-02, effective April 14, 2020) does not necessarily require use of Appendix B for verifying correction of hazards; any written means may be used, including letter or email.

The case noted as having excessive abatement periods for audiometric testing and training was from a visit to a Town Police Department. The noise exposure was related to firearms qualification that is conducted once per year. The abatement periods provided are deemed reasonable due to the lack of exposure until the next annual qualification cycle, observed use of hearing protection by officers, as well as allowing the employer to distribute the testing and training over time in a way that minimizes disruption to the small department.

**Observation FY 2021-OB-08 (FY 2020-OB-04, FY 2019-OB-03 and FY 2018-OB-07):**  
*Written policies and procedures for NY PESH's on-site consultation program are not equivalent or at least as effective as OSHA's latest CPPM (CSP 02-00-003) dated November 19, 2015, and CSP 02-00-004 dated March 19, 2021.*

*Examples of where NY PESH's Consultation Policy and Procedures Manual (CPPM) Directive A 05-1, differs from OSHA's CPPM include, but are not limited to, the following:*

*There is no requirement to provide a copy of the list of identified hazards to the union. (OSHA's FY 2015 and FY 2021 CPPM requires that the union be provided with a copy of the list of identified hazards.) Additionally, there is no requirement to provide an updated list of hazards to the employer or union representative when the correction dates are extended.*

*In both NY PESH's CPPM and the report to the employer, there is no requirement to post the list of hazards identified at the worksite. (OSHA's FY 2015 and FY 2021 CPPM requires the list of hazards be posted at the worksite for at least three days or until the hazard is abated/corrected.)*

*There is no deadline established to issue the report to the employer after the closing conference. Both the 2015 and 2021 versions of the CPPM have a deadline for issuing the report to the employer. Additionally, the PESH manual doesn't address the deadline for conducting a second closing conference when air sampling results are pending.*

*NY PESH never adopted FORM 33; however, an evaluation of the worksite's Safety and Health Management System (SHMS) is required for full-service consultation visits per their CPPM on full-service visits only. PESH conducts a limited number of full-service visits. There were no full-service visits selected for review.*

*The PESH manual does not identify that three-years and the current year of injury and illness records should be reviewed, compared against the Bureau of Labor Statistics (BLS) for their industry and noted in the report to the employer.*

*The roster and syllabus are not required to be in the file for training visits in the PESH CPPM. Both versions of the federal CPPM require this documentation.*

### **PESH response**

*The PESH CPPM in effect during the time frame of this FAME was dated April 14, 2020 (PESH All Staff Directive A20-02) and replaced the version referenced in this review. While outside the review period, it should be noted that a further updated version based on the most recent OSHA CPPM was issued on November 19, 2021. The most recent negotiations have been based on this version. We agree that the remaining four points of difference will be the focus of future discussion, but also maintain that the PESH CPPM does not need to be identical to the OSHA CPPM to be ALAE. The primary rationale behind our position includes recognition that: 1) the PESH penalty system differs significantly from that of OSHA and other states and significantly affects employer incentive for requesting consultation assistance; 2) the OSHA CPPM has consistently evolved to more closely resemble enforcement; and 3) the four main points of difference, if not recognized, will significantly reduce the amount and extent of consultation requests, thereby effectively reducing the effectiveness of our program.*