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JAMES ASHLEY, DIRECTOR

August 31, 2022

Via email
James Wulff
Regional Administrator
Occupational Safety and Health Administration
90 7th Street, Suite 2650
San Francisco, CA 94103

RE: ARIZONA FAME RESPONSE

Mr. Wulff:

Thank you for the opportunity to provide the Arizona Division of Occupational Safety and Health's (ADOSH) formal response to OSHA's FY 2021 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report. Our audit was conducted off site and was accomplished on two separate weeks, December 13 and 14, 2021 and then December 20 and 21, 2021. This year's FAME evaluation period was October 1, 2020 – September 30, 2021. Our final FAME report was received on August 4, 2022.

Respectfully, ADOSH has concerns with or disagrees with several parts of the FAME, referring to data and information outside the evaluation period. One example is Section II, "New Issues," Healthcare Emergency Temporary Standard (Healthcare ETS). The FAME found that ADOSH was not at least as effective as OSHA because it did not adopt most of the Healthcare ETS. That section of the FAME also references CASPA 2022-AZ-01, which was filed on October 1, 2021—within FY2022 and outside the evaluation period. That CASPA alleged that ADOSH failed to adopt the Healthcare ETS and was thus at least as effective as OSHA. On November 3, 2021, OSHA notified ADOSH that it believed there was merit to that CASPA. OSHA does not include ADOSH's response to that CASPA, which references relevant Arizona law that provided that the Industrial Commission of Arizona (ICA) had to make a finding of "grave danger" to promulgate an ETS under the Arizona state plan that OSHA approved 50 years ago. See A.R.S. § 23 – 414. As a result, the FAME, which is published on OSHA's website and available to the public, does not include all relevant information. And although OSHA did not complete and provide the FAME until August 4, 2022, OSHA did not

include the actions ADOSH took in FY22 before August 4, 2022, to address OSHA's concerns in that CASPA.

A second concern is that ADOSH was not provided the opportunity to review the federal monitor's analysis documents used to evaluate the State Plan contrary to the State Plan Policies and Procedures Manual, CSP 01-00-005 (eff. 5/6/2020) (SP3M) Chapter 6 (Tools for Federal Oversight and Quarterly Monitoring), Sec. III.D.5, p. 62, which provides that the federal monitor must document the findings for each case file reviewed and also the conclusions reached on program impact based on the analysis of all the case files reviewed. It also provides that "State Plans also need to be provided with information on the specific case files that were found to be problematic. This will give the State Plan the opportunity to correct misinformation, refute the allegation, or address the problem."

A third concern is that ADOSH was not provided with the necessary time to evaluate and review CAP items with the Region in accordance with the SP3M Chapter 7, "Federal Annual Monitoring Evaluation and Annual Reports." That chapter provides an overview of the FAME process, the different FAME types, and the overall structure of the Report. Section II.C.2 (annual Reports, Fame Report Corrective Action Plan Due Dates), p. 76, provides that the Region *shall* negotiate with the State Plan a completion date for submission of revised CAP items. (emphasis added). The draft CAP is due to the Region from the State Plan (30 days after issuance of the final FAME Report). The Region and the State Plan have 30 days to make any additional changes to the CAP prior to submitting the draft CAP to DCSP by August 31st annually.

OSHA provided ADOSH with the FAME on August 4 but requested that it submit the draft CAP by August 22, thus cutting short the 30-day timeframe outlined in the SP3M by nearly half. ADOSH therefore requests that this CAP and development time between the Region and the State Plan be observed as written in the SP3M, and that given the intervening Labor Day holiday, the deadline by September 6, 2022.

A fourth concern is OSHA's inclusion in the FAME an alleged training deficiency with ADOSH Compliance Personnel. Over the past several years, the local and Regional offices have been asking more about our training and how employees are provided with the opportunity to learn while they gain experience working for the Division. ADOSH views training as fundamental and necessary for all employees. The report refers to AZ CASPA 2021-01, which was closed out on November 5, 2021, when ADOSH provided a final letter response. OSHA's recommendation was to ensure each CSHO is trained as outlined in TED 01-00-019 or an "at least as effective as" equivalent. Our response continues to be the same then and now as we prioritize training for CSHOs based on knowledge, skills, and abilities. Although OSHA identified a few isolated deviations from the required CSHO training program, OSHA's investigation largely confirmed that ADOSH is compliant with CSHO training requirements. This was also known at the time of the FAME audit and during the drafting of our FAME report.

A fifth concern is with Finding FY 2021-01. Through AZ CASPA 2021-01, OSHA discovered that an inspection with a *draft* citation was not issued. ADOSH was aware of the inspection and was investigating whether information related to the inspection was complete and accurate as both the assigned CSHO and Supervisor were no longer with the Division. The federal monitors did not have any information to determine whether the citation had all the necessary prima facie elements of proof to support issuance of the citation. So, to imply that it was a citation that should have been issued is incorrect. The ADOSH Director sought to clarify this issue with OSHA when it appeared in the draft FAME report but OSHA's local, Regional, and National Offices declined to consider the clarifying information.

A sixth concern is with Finding FY 2021-02 and 03 related to a lower number of inspections in FY 2021 than ADOSH's projected 5-year goals. These findings, however, for which OSHA is requiring ADOSH to "determine the cause and implement corrective action to meet inspection goals" and "determine the cause of the low number of construction inspections and violations issued and implement corrective action" completely ignores the COVID-19 pandemic. Across the nation, OSHA's own inspections were down in FY 2021. This was largely because of the COVID-19 pandemic and possibly lack of CSHOs to conduct inspections. This was the same for ADOSH. More CSHOs will increase inspection numbers and ADOSH continues to look for ways to attract new talent to our workforce.

A seventh concern is with Finding FY 2021-05. The finding states that ADOSH files had 23 violations where the severity assessed was not supported by case file documentation. OSHA recommends that ADOSH implement oversight of the case files to ensure the severity assessment supports the most likely injury to occur. Then the section states that interviews revealed an inconsistent understanding of when it is appropriate to group citations which is a common challenge for new compliance staff. This finding and recommendation do not harmonize because severity and probability assessments are a different issue than grouping violations. ADOSH is thus struggling to understand how to close out an action item when two distinct issues are being presented.

An eighth concern is with Observation FY 2021-OB-05. ADOSH had an average penalty retention rate of 93.09% of the original penalty, which was better than the Further Review Limit (FRL) range of 58.72% to 79.44%. This was confirmed by the data and reports used by federal monitors, although the observation was made that violations were vacated and reclassified after an employer contested citations. OSHA, like ADOSH, has a process for a hearing if citations are contested. During preliminary meetings, employers, and their representatives raise additional facts and legal arguments that must be weighed and considered before the actual hearing. Vacating or reclassifying citations is accomplished only when all sides are considered.

A ninth concern is Finding FY 2021-09 (FY 2020-07), Table 4 "Status of FY 2021 Federal Standards Adoption," in that it does not provide an accurate picture of what was

missing or ADOSH's extensive work to provide documentation to the local and Regional OSHA offices. Many standards were simply lacking supportive documents to show that the AZ Attorney General's office had approved the rule and the Secretary of State posted the rule in the Arizona Administrative Register. But those standards had been adopted and were being enforced. In addition, there are several inaccuracies in OSHA's own records about what ADOSH adopted and when, which have been cut and pasted from past FAMEs without regard to accuracy. ADOSH detailed some of these inconsistencies in its July 5, 2022 comments in response to the federal register notice of intent to revoke and reconsider Arizona's 18(e) status. In publishing a notice to postpone the public hearing in that matter, OSHA acknowledged that with one minor exception, all the corrected dates ADOSH and the ICA provided in their comment to the federal register notice were accurate. 87 Fed. Reg. 50025, 50026 (Aug. 15, 2022). However, the FAME is silent on that and simply restates inaccurate information from past FAMEs. The remaining six standards not adopted by ADOSH during the Evaluation period were officially adopted on July 8, 2022, yet that was not included in the FAME report issued nearly a month later.

The tenth and final concern we have are with the findings related to the Federal Program Changes (FPCs) in Tables 5, 6, and 7 that required more paperwork by the local and Regional OSHA offices. Several FPCs remain open, although communication with OSHA has and continues to take place until these FPCs are fully reviewed and approved. ADOSH anticipates these remaining FPCs to be closed by the end of FY 2022. ADOSH would have liked OSHA to have included language in the FAME that ADOSH has been working collaboratively with OSHA to resolve these open items.

In conclusion, ADOSH raises the concerns in this letter to highlight inaccuracies in the FAME reports and add context omitted by OSHA to ensure the public has complete and accurate information about the findings and observations in the FAME.

If you should have any further questions, please do not hesitate to contact me directly at 602-542-5726.

Sincerely,

Jessie Atencio
ADOSH Director

JA/pm/mn/sm