## FY 2022 Follow-up Federal Annual Monitoring Evaluation (FAME) Report

 **State of New York Public Employee Safety and Health (PESH) Bureau**



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 **New York, NY**



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# Executive Summary

The purpose of this report is to assess the New York Public Employee Safety and Health (PESH) State Plan’s performance for Fiscal Year (FY) 2022, and its progress in resolving outstanding findings from previous Federal Annual Monitoring Evaluation (FAME) reports.

NY PESH is responsible for protecting the health and safety of more than two million state and local government (SLG) workers in New York. NY PESH continues to have a presence in SLG workplaces through its inspection activity, partnerships, and outreach activity. NY PESH’s Five- Year Strategic Plan focuses enforcement, compliance assistance, and consultation visits to reduce injury and illnesses in fire service, police, nursing homes, and hospitals. A secondary focus area of this strategic plan is to provide focused outreach to the New York State Department of Corrections and Community Supervision (NYSDOCCS) to assess their injury and illness records and recording practices, identify trends, and recommend appropriate corrective actions, to reduce the high rates of injuries among this industry sector. FY 2022 was the first year of their new five-year strategic plan.

During FY 2022, 38 NY PESH compliance safety and health officers (CSHOs) conducted 675 inspections, as compared to FY 2021 when 568 inspections were conducted by 30 CSHOs. The percent increase of inspections (18.7) did not directly correlate with the percent increase in CSHOs (26.7) primarily due to training and development. The number of enforcement inspections conducted in FY 2022 increased from FY 2021, but the State Plan did not meet their annual performance goal of 700 safety and 450 health inspections for FY 2022 (FY 2022 NY SOAR).

The retention and recruiting of both enforcement, consultation, and administrative staff continues to impact program performance and NY PESH’s ability to meet annual performance plan goals. New York PESH made progress in filling positions in FY 2022 but there are still vacant positions. The State Plan is planning to fill two health CSHO positions, two safety CSHO positions, two safety consultant vacancies, one health consultant position and three clerical/administrative vacancies in FY 2023. These hires will bring NY PESH closer to the number of positions allocated in their grant (FY 2022 NY SOAR).

During FY 2022, NY PESH conducted 140 consultations to state and local government employers –

 an increase of 16% in the number of visits from FY 2021. In addition, to providing consultation services, PESH conducted compliance assistance activities for both enforcement and consultation. During FY 2022, there were 228 compliance assistance activities conducted by seven NY PESH consultants and 37compliance assistance activities performed by PESH enforcement staff. The total number of compliance assistance activities performed for FY 2021 was 265 compared to 232 in FY 2022. During FY 2022, a directory was developed to facilitate the dissemination of important program updates with SLG stakeholders, including organized labor organizations. The first notice distributed with this system was related to NY PESH’s adoption of the Heat National Emphasis Program (NEP) (FY 22 NY SOAR).

NY PESH received 40 whistleblower cases in FY 2022, compared to 58 in FY 2021. Seventeen of these cases were dismissed as non-merit, no case was settled, and two cases were determined to have merit. Forty-eight cases were pending at the close of FY 2022. The management of PESH recently set up a new process to meet with the NYS Department of Labor Counsel on a bi-weekly basis, to review and resolve pending cases, which has improved the tracking and closure of open cases (FY 22 NY SOAR).

During the FY 2022 performance period, NY PESH was responsive to OSHA, including providing requested information in a timely manner, actively participating in the regular quarterly meetings, and adopting the federal program changes. However, the State Plan has not adopted the FY 2015 Federal Standard Number 1904 – Occupational Injury and Illness Recording and Reporting Requirement. The State Plan needs to make adopting this standard a priority in FY 2023 to ensure SLG workers have the same protection as workers covered by federal OSHA.

The number of Complaints About State Program Administration (CASPAs) significantly increased since 2020. These CASPAs are predominately related to the alleged deviations of NY PESH’s policies and procedures by their New York City District Office for inspections at the Metropolitan Transit Authority (MTA) facilities. In response to the significant increase in CASPAs, Region II initiated a Special Study that focused on the activities of the New York City district office only.

NY PESH made progress to address the previous nine findings and eight observations from the FY 2021 Comprehensive FAME Report. There were no findings or observations that were documented as completed because a case file review was not conducted to determine if appropriate corrective actions were taken. There was one observation converted to a finding and two new observations added. In summary, this report contains a total of 10 findings and eight observations.

# State Plan Background

The New York Department of Labor administers the New York State Plan. Roberta Reardon, Commissioner of Labor, has full authority to enforce and administer all laws and rules protecting the safety and health of all SLG workers in the state and its political subdivisions. In addition to the State Plan’s enforcement responsibilities, NY PESH provides free on-site consultation and training services to SLG agencies, upon request.

NY PESH consists of one central office in Albany, New York, and eight district offices located in Binghamton, Syracuse, Utica, Rochester, Buffalo, White Plains, Garden City, and New York City (Manhattan). The NY State Plan applies to all SLG employers in the state, including state, county, town, and village governments, as well as public authorities, school districts, and paid and volunteer fire departments.

Private sector enforcement is retained under federal jurisdiction while private sector consultative services are provided by the New York State Department of Labor-Division of Safety and Health (NYSDOL-DOSH) Consultation Services Bureau under Section 21(d) of the OSH Act. NY PESH did not adopt the adjustments to OSHA Penalties in 2022 because the PESH ACT does not allow for the issuance of “first instance” monetary penalties for SLG employers found in violation of NY PESH standards. Per diem penalties can be assessed when failure-to-abate (FTA) notices are issued.

There were 14 contested cases in FY 2022 and 13 in FY 2021. In FY 2020, there were no contested cases. During FY 2022 seven informal conferences were conducted. During FY 2022, the State Plan billed a total of $704,325 in penalties. Penalty collection for the year totaled $76,548 (FY 2022 NY SOAR).

The State Plan operated with a federal award of $4,079,500 with state matching funds of

### $4,079,500 to total an operating budget of $8,159,00 in FY 2022. NY PESH deobligated $150,000 due to a reduced salary budget resulting from staff vacancies. NY PESH was awarded $1,625,000 in funding on August 6, 2021, under the American Rescue Plan (ARP). As of the end of the fourth quarter of FY 2022, the State Plan had obligated $313,863 of this ARP funding to support work directly related to COVID-19. These funds were used to purchase new Portacounts and associated fit testing supplies. The State Plan anticipates not fully obligating and spending the ARP grant monies by September 30, 2023. As a result, NY PESH is anticipating returning approximately one million dollars in funding back to the federal government in FY 2023 (FY 2022 NY SOAR and ARP Reports).

### New Issues

Complaint About State Program Administration (CASPA)

The number of CASPAs that Region II received significantly increased in FY 2022.Prior to 2020, the last NY PESH-related CASPA was received by Region II on April 17, 2015. In FY 2020, Region II received four CASPAs. In FY 2021, Region II received four more CASPAs from stakeholders. All CASPAs were investigated by the Region and NY PESH responded to the investigations in a timely manner.

In FY 2022, Region II received 20 CASPAs – of these, five were accepted for processing as an investigation. The remaining 15 were not accepted for a variety of reasons, including: being a duplicate of an issue under review already, raised issues concerning an open inspection or whistleblower file, or allegations in which all remedies were not exhausted before requesting a CASPA investigation. One of the five CASPAs that was processed for investigation was considered a Significant CASPA because it was related to fatality inspection procedures, had received media attention, and was the subject of civil and criminal proceedings. NY PESH responded timely to these CASPAs and formulated corrective actions as appropriate.

# Assessment of State Plan Progress and Performance

## Data and Methodology

OSHA has established a two-year cycle for the FAME process. This is the follow-up year, and as such, OSHA did not perform an on-site case file review associated with a comprehensive FAME. This strategy allows the State Plan to focus on correcting deficiencies identified in the most recent comprehensive FAME. The analyses and conclusions described in this report are based on information obtained from a variety of monitoring sources, including:

* State Activity Mandated Measures (SAMM) Report
* State Information Report (SIR)
* Mandated Activities Report for Consultation (MARC)
* State OSHA Annual Report (SOAR)
* OSHA Information System (OIS)
* State Plan Annual Performance Plan (APP)
* State Plan Grant Application
* Quarterly monitoring meetings between OSHA and the State Plan NY Special Study of NYC District Office

The State Plan Policies and Procedures Manual permits special studies to be conducted as a monitoring tool to address specific State Plan issues. In response to the significant increase of CASPAs received from stakeholders in New York since 2020, regarding the handling of complaints and inspections alleged against the Metropolitan Transit Authority (MTA) in the New York City office, Region II conducted a NY Special Study in September 2022. This special study focused on the activities of the New York City district office with the main goals being to determine if the allegations being raised in the CASPAs had merit or not, why complaints were being filed, and to gather a better understanding of how this office functions daily.

The CASPAs received since 2020 contained similar allegations, including; failure of NY PESH to adequately address complaints, process complaints timely, involve union representatives in the inspection process, not addressing workplace violence complaints, failing to document all hazards found during inspections, providing advance notice to MTA employer representatives, not obtaining adequate abatement for all hazards cited before closing the file, not issuing appropriate citations, and failing to close inspections timely. Based on these allegations, the special study included an opening conference, on-site MTA complaint inspection accompaniment visit with NY PESH with OSHA staff present, a case file review of selected case files related to allegations raised by stakeholders to OSHA, review of OSHA Information System (OIS) reports, in-person staff interviews, and a closing conference.

The conclusions reached at the end of this special study were that there is validity to the allegations raised in the CASPAs concerning the enforcement procedures and activities conducted by the NYC district office. NY PESH is not following their Field Operations Manual (FOM) in all situations when processing complaints, issuing complaint letters, completing case contact sheets, ensuring adequate abatement of citations, conducting timely follow-up inspections, addressing additional hazards found during inspections, processing Petition for Modification of Abatement (PMAs) correctly, and providing advanced notice of inspections when this notification is not permitted. These deviations appear to be due to inexperienced staff, low morale among staff, vacancies in administrative staff that have existed for years, huge volume of complaints being received from MTA facilities – due in large part to complaint items not being addressed effectively initially – and a lack of effective management oversight. Additionally, this office has a consultation program that is not servicing the needs of the state and local government employer.

The NY Special Study Report identified 16 findings and six observations related to the NYC district office. NY PESH provided an initial response to the draft report on March 3, 2023. Region II will address this response as appropriate. Region II will work with NY PESH to develop a corrective action plan to address the findings and observations regarding the NYC district office.

## Findings and Observations

### Findings (Status of Previous and New Items)

The State Plan made progress to address the previous nine findings and eight observations from the FY 2021 Comprehensive FAME Report. This follow-up FAME report contains 10 findings (nine continued, one new) and nine observations (seven continued, two new). There were no closed findings or observations, and one observation was converted to a finding. 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 each FY 2021 finding and recommendation in detail.

### Completed Findings

There were no completed findings.

### Continued 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.

**Status:** For the FY 2022 evaluation period, the average safety lapse time (SAMM 11) for citations was 85.06 days which was above the FRL range of 41.94 to 62.90 days. The average safety lapse time decreased significantly in FY 2022 but is still statistically above the FRL. The State Plan did make progress in reducing the average safety lapse time through better case file management and training of staff. This finding is continued as Finding FY 2022-01, but it will be amended to reflect the new SAMM data from FY 2022. This finding remains open.

**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 for health.

**Status:** For the FY 2022 evaluation period, the average health lapse time (SAMM 11) for citations was 111.52 days which was above the FRL range of 52.88 to 79.32 days. The average health lapse time decreased significantly in FY 2022 but is still statistically above the FRL. The State Plan did make progress in reducing the average health lapse time through better case file management and training of staff. This finding is continued as Finding FY 2022-02, but it will be amended to reflect the new SAMM data from FY 2022. This finding remains open.

**Finding FY 2021-03:** *OIS Open Inspection Report and SIR*

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.

**Status:** The OIS Open Inspection report run on February 8, 2023, showed that PESH had 57 files that were opened prior to FY 2023 with uncorrected hazards. There were files with overdue abatement from 2020, 2021 and 2022. SIR measure 3b noted 36 inspection files at the end of the year with abatement overdue more than 60 calendar days. This finding is continued as Finding 2022-03 but will be amended to reflect the new OIS and SIR data from FY 2022. This finding remains open.

### Finding FY 2022-04 (FY 2021-04, FY 2020-03): *Staffing*

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

**Status:** NY PESH hired staff during FY 2022. A total of 38 CSHOs were employed with the program in FY 2022. According to the FY 23 grant application, NY PESH intends to fill 15 positions in FY 2023. These positions include administrative/clerical, enforcement staff and consultants. Progress has been made in the hiring and recruitment of staff, but the plan shall have a number of staff vacancies that need to be filled to ensure that the annual performance plan goals are met. This finding remains open.

**Finding FY 2022-05 (FY 2021-5):** *Case File Documentation*

In FY 2021, 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.

**Status:** A case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

**Finding FY 2021-06:** *Responding to Fatalities*

In 10 of 12 (83%) of the COVID-19 fatality inspections in FY 2021, the inspection was not initiated within one working day of the report.

**Status:** For the FY 2022 evaluation period, NY PESH responded 88.89% of the time to work- related fatalities within one workday as noted in SAMM 11. The FRL is 100%. This finding is continued as Finding FY 2022-06, but it will be amended to reflect the new SAMM data from FY 2022. This finding remains open.

**Finding FY 2022-07 (FY 2021-07):** *Next-of-Kin Letters*

In 10 of 12 (83%) of the COVID-19 fatality inspections in FY 2021, 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 ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only.

**Status:** A case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

**Finding FY 2022-08 (FY 2021-08, FY 2020-05):** *Adoption of Federal Standards*

NY PESH has not adopted 29 CFR 1904, Recording and Reporting Occupational Injuries and Illnesses.

**Status:** The FY 2017 Final Rule on Walking- Working Surfaces and Personal Protective Equipment was adopted by PESH. The notice of adoption appeared in the State Register on March 8, 2023. The FY 2015 Federal Standard Number 1904 has not been adopted yet. It is on the state’s rulemaking schedule for calendar year 2023. This finding remains open.

**Finding FY 2022-09 (FY 2021-09)**: *Responding to Worker Retaliation Cases Timely*

At the conclusion of FY 2022, NY PESH had 48 pending whistleblower retaliation investigations with an average 453 days pending. The oldest case was filed on November 6, 2017. NY PESH’s whistleblower program cannot be at least as effective as OSHA’s if it is unable to complete complaint investigations or litigate meritorious complaints.

**Status:** A whistleblower case file review is necessary to gather the facts needed to evaluate progress on this finding. This finding will be a focus of next year’s on-site case file review during the FY 2023 comprehensive FAME and remains open.

### New FY 2022 Finding

**Finding FY 2022-10 (FY 2021-OB-08, FY 2020-OB-04, FY 2019-OB-04, FY 2018-OB-07):** *Consultation*

*Policies and Procedures Manual (CPPM)*

Specific elements must be implemented into NY PESH’s consultation manual of October 2021 to be at least as effective (ALAE) as OSHA’s federal CPPM. These elements include union/employee participation on all visits, posting and sharing the list of hazards onsite with both the employer and any union representatives, revising the deadline for submitting the report to the employer, and utilizing a tool/procedure that is equivalent to the Form 33.

**Recommendation:** NY PESH should implement these elements into its consultation manual to be ALAE as federal OSHA’s CPPM.

### Observations

**Closed FY 2021 Observations** There are no closed observations. **Continued FY 2021 Observations**

**Observation FY 2022-OB-01 (FY 2021-OB-01):** *Processing of UPAs*

Eight of the 20 UPAs (40%) reviewed had either incomplete or incorrect entries in OIS. Six UPAs were missing entries in the response section showing the date that the employer provided evidence of a satisfactory response to the complaint allegations. One complaint was marked invalid in OIS, but an investigation was conducted, and another was marked valid, and an investigation was not conducted.

**Status:** During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend.

**Observation FY 2021-OB-02:** *Timeliness of State Plan Response*

In 2021, NY PESH did not respond to complaint investigations within the FRL of one day. SAMM #2a reported a response time of 4.25 days for FY 2021. SAMM #2b reported a response time of

3.25 days for FY 2021 (federal formula).

**Status:** For the FY 2022 evaluation period, SAMM #2a was 7.18 days to respond to complaint investigations. The FRL negotiated is one day. With the current FOM procedures for complaints that require a signed complaint before the complaint is considered valid, meeting the one-day standard is difficult under the state formula. The state formula only counts days from the date of receipt until the employer is contacted.

SAMM #2b was reported at 3.0 days which is the federal formula calculation. The federal formula tracks the one day of response to the employer based on several dates including the date of signature receipt. Therefore, the federal formula considers a delay caused by the need to obtain a signature before contacting the employer in the response date. State Plans have agreed to use the state formula rather than the federal formula for measurement of response time. However, comparing NY PESH to SAMM #2b takes into count the days required to secure a signature and is a fairer assessment of response time. SAMM #2b still exceeds the FRL.

NY PESH submitted a formal request to OSHA on January 10, 2023 to re-negotiate the FRL for SAMM #2a. OSHA informed NY PESH that a final decision on re-negotiating this FRL will be made when the federal workgroup completes their review of the SAMMs and makes any recommended changes. Additionally, NY PESH is in the process of changing the FOM regarding the processing of complaints. OSHA would like to review those changes before changing the negotiated federal review level for this SAMMs. This observation is continued as Observation FY 2022-OB-05 but will be amended to reflect the new SAMM data.

**Observation FY 2022-OB-03 (FY 2021-OB-03):** *Complaint Investigation Documentation*

Complaint investigation documentation was lacking. It was noted that six of 20 (30%) FY 2021 case files were missing a diary sheet.

**Status:** During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend.

**Observation FY 2022-OB-04 (FY 2021-OB-04):** *Complaint Letters*

Complaint inspection files lacked evidence that either the complainant was provided a complainant letter or that the complainant letter provided an explanation of the evaluation of each alleged hazard or a copy of the report to supplement the complaint letter.

**Status:** During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend.

**Observation FY 2021-OB-05:** *Percent of In-compliance*

The percent of in-compliance inspections for both safety and health exceeded the FRL.

**Status:** For the FY 2022 evaluation period, the FRL for percent in-compliance for health inspections was +/- 20% of the three-year national average of 44.42% which equals a range of 35.54% to 53.30%. NY PESH’s percent in-compliance for health inspections was 53.17% which is above the FRL. The FRL for percent in-compliance for safety inspections was +/- 20% of the three-year national average of 31.65% which equals a range of 25.32% to 37.98%. NY PESH’s percent in-compliance for safety inspections was 23.46% which is below the FRL.

This observation is being continued as Observation FY 2022-OB-05 and will be amended to reflect the new SAMM data showing that the FRL for health percent in-compliance only is exceeded. This observation will remain open and be monitored quarterly using the SAMM Report.

### Observation FY 2022-OB-06 (FY 2021-OB-06, FY 2020-OB-03, FY 2019-OB-03): *Worker*

*Retaliation Cases*

Worker retaliation case files did not accurately reflect the case determination or document threshold requirements for docketing complaints had been met. Case files did not document that PESH obtained or reviewed third party settlements in accordance with Chapter X of the Field Operations Manual.

**Status:** During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend.

**Observation FY 2022-OB-07 (FY 2021-OB-07):** *Consultation Case File Documentation*

Consultation case file documentation was lacking.

**Status:** During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend.

### New FY 2022 Observations

**Observation FY 2022-OB-08:** *Initiating Complaint Inspections*

NY PESH’s average number of workdays to initiate a complaint inspection is 14.16 days for SAMM 1a which is above the negotiated review level of 10 days. The large volume of complaints being received and the lack of experienced CSHOs are contributing factors to why the number of days to initiate an inspection based on a complaint has risen from FY 2021.

**Federal Monitoring Plan:** OSHA will monitor NY PESH during FY 2023 to identify possible causes of this disparity to ensure that complaint inspections are initiated within the negotiated review level.

**Observation FY 2022-OB-09:** *Worker Involvement*

The NY PESH’s percent of initial inspections with worker walkaround representation or worker interview is 96.55% for SAMM 13 which is below the FRL of 100%.

**Federal Monitoring Plan:** OSHA will monitor NY PESH during FY 2023 to identify possible causes of this disparity to ensure that employees are participating in the inspection process through either the walkaround or interview process. OSHA will work with NY PESH to determine if this disparity represents an OIS coding entry issue or an actual field error.

### State Activity Mandated Measures (SAMM) Highlights

Each SAMM has an agreed upon 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 FRL triggers a closer look at the underlying performance of the mandatory activity. Appendix D presents the State Plan’s FY 2022 State Activity Mandated Measures (SAMM) Report and includes the FRLs for each measure.

It should be noted that OSHA is in the final stages of transitioning from the Whistleblower Application in the OSHA IT Support System (OITSS), a legacy data system, to the Whistleblower module in OIS, a modern data system. For FY 2022, a portion of the State Plan whistleblower data was recorded OITSS, and a portion was captured in OIS. OSHA encountered challenges in combining the report that generates SAMM 14, 15, and 16 from both systems. As such, OSHA will not be relying on SAMMs 14, 15, or 16 in their evaluation of the State Plans whistleblower programs for FY 2022.

NY PESH was outside the FRL on the following SAMMs:

### SAMM 5-Average Number of Violations Per Inspection with Violations by Violation Type SWRU

**Discussion of the State Plan Data and FRL:** The FRL for the average number of SWRU violations issued per inspection is +/- 5% of 1.78 which equals a range of 1.42 to 2.14. PESH issued 3.77 SWRU violations per inspection which significantly exceeded the FRL.

**Explanation:** CSHOs conducting enforcement inspections for PESH are writing more serious, willful and repeat violations than the FRL. Exceeding the FRL is positive for SAMM 5a and not negative.

### SAMM 7-Planned v. Actual Inspections-Safety/Health:

**Discussion of the State Plan Data and FRL:** The FRL for planned vs actual inspections is +/- 5% of the negotiated number of 700 safety inspections, which equals a range of 665 to 735 for safety and 450 health inspections which equals a range of 427.50 to 472.50 for health. The New York State Plan’s safety staff conducted 408 inspections and the health staff conducted 259 inspections, both substantially lower than the FRL.

**Explanation:** PESH’s low number of inspections can be attributed to high staff turnover and limited experienced enforcement staff available to conduct inspections. OSHA will monitor inspection goals during quarterly meetings in FY 2023.

### Appendix A – New and Continued Findings and Recommendations

FY 2022 NY PESH Follow-up FAME Report

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| --- | --- | --- | --- |
| **FY 2022-#** | **Finding** | **Recommendation** | **FY 2021-# or** **FY 2021-OB-#** |
|  FY 2022-01  | *Safety Lapse Time*In FY 2022, the average safety lapse time (SAMM #11) for citations was calculated at 85.06 days which is above the FRL range of 43.66 days to 65.50 days for safety. |  NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and manage the program to minimize this metric. | FY 2021-01FY 2020-OB-01 FY 2019-OB-01 FY 2018-OB-08 |
|  FY 2022-02 |  *Health Lapse Time*In FY 2022, the average health lapse time (SAMM11) for citations was calculated at111.52 days which is above the FRL range of52.88 days to 79.32 days. |  NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and manage the program to minimize this metric. | FY 2021-01FY 2020-OB-02FY 2019-OB-02FY 2018-OB-09 |
|  FY 2022-03  | *OIS Open Inspection Report and SIR*The OIS Open Inspection report run on February 8, 2023, showed that PESH had 57 files that were opened prior to FY 2023 with uncorrected hazards. There were files with overdue abatement from 2020, 2021 and 2022. SIR measure 3b noted 36 inspection files at the end of the year with abatement overdue more than 60 calendar days. | NY PESH needs to develop a written procedure to address how OIS reports will be used to ensure timely abatement of all hazards. | FY 2021-03  |
| FY 2022-04 | *Staffing*There are vacant administrative/clerical positions, enforcement, and consultation positions. | NY PESH should fill current staffing vacancies with qualified staff specifically in the NYC office where this problem seems to be the most severe.  | FY 2021-04FY 2020-03 |
| FY 2022-05 | *Case File Documentation*In six of 10 (60%) FY 2021 case files, documentation was lacking for COVID-19 fatality inspections, and four of 10 (40%) were lacking evidence of interviews with non-managerial employees. | NY PESH should consider developing a quality control procedure to ensure that adequate documentation is obtained for fatality inspections. NY PESH needs to follow their FOM regarding required case file documentation. Corrective action complete, awaiting verification. | FY 2021-05 |
| FY 2022-06 | *Responding to Fatalities Within One Day*In FY 2022, the State Plan responded to fatalities within one day 88.89% as reported by SAMM #10. The FRL is 100%. | NY PESH should respond to worker fatalities within one workday which is the SAMM reference agreed upon measure and federal OSHA requirement. | FY 2021-06 |
| FY 2022-07 | *Next-of-Kin Letters (NOK)*In 10 of 12 (83%) of the COVID-19 fatality inspections in FY 2021, both the initial notification of inspection and results of the inspection NOK letters were not sent to the families of the victims. The practice of sending NOK letters ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only. | NY PESH needs to follow their FOM regarding issuing letters to the families of victims. NY PESH will report quarterly to OSHA on the percentage of NOK letters sent to families. Corrective action complete, awaiting verification. | FY 2021-07 |
| FY 2022-08 | *Adoption of Federal Standards*NY PESH has not adopted 29 CFR 1904, Recording and Reporting Occupational Injuries and Illnesses*.* | NY PESH should adopt OSHA’s recordkeeping and reporting requirements in a substantially identical manner to include recent updates and revisions. | FY 2021-08FY 2020-05 |
| FY 2022-09 | *Responding to Worker Retaliation Cases Timely* At the conclusion of FY 2022, NY PESH had 48 pending whistleblower retaliation investigations with an average of 453 days pending. | NY PESH needs to work with their counsel’s office to close worker retaliation cases timely. | FY 2021-09 |
| FY 2022-10 | *Consultation Policies and Procedures Manual*Specific elements must be implemented into NY PESH’s consultation manual of October 2021 to be at least as effective (ALAE) as OSHA’s federal CPPM. These elements include union/employee participation on all visits, posting and sharing the list of hazards onsite with both the employer and any union representatives, revising the deadline for submitting the report to the employer, and utilizing a tool/procedure that is equivalent to the Form 33. | NY PESH should implement these elements into its consultation manual to be ALAE as federal OSHA’s CPPM.  | FY 2021-OB-08 FY 2020-OB-04 FY 2019-OB-04 FY 2018-OB-07 FY 2017-OB-07 |

### Appendix B – Observations Subject to Continued Monitoring

FY 2022 NY PESH Follow-up FAME Report

| **Observation #****FY 2022-OB-#** | **Observation#****FY 2021-OB-# *or* FY 20XX-#** | **Observation** | **Federal Monitoring Plan** | **Current Status** |
| --- | --- | --- | --- | --- |
| FY 2022-OB-01  | FY 2021-OB-01  | *Processing of UPAs*In FY 2021, eight of the 20 UPAs (40%) reviewed had either incomplete or incorrect entries in OIS. Six UPAs were missing entries in the response section showing the date that the employer provided evidence of a satisfactory response to the complaint allegations. One complaint was marked invalid in OIS, but an investigation was conducted, and another was marked valid, and an investigation was notconducted. | During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend. | Continued |
| FY 2022-OB-02 | FY 2021-OB-02  | *Timeliness of State Plan Response*In FY 2022, NY PESHresponded to complaint investigations within 7.18 days for SAMM #2a (state formula) and 3.0 days for SAMM #2b (federal formula). The FRL is 1.0 days. | OSHA will monitor quarterly utilizing the SAMM Report.  | Continued |
| FY 2022-OB-03 | FY 2021-OB-03 | *Complaint Investigation Documentation*Complaint investigation documentation was lacking. It was noted that in six of 20 (30%) case files in FY 2021 were missing a diary sheet. | During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend. | Continued |
| FY 2022-OB-04 | FY 2021-OB-04 | *Complaint Letters* Complaint inspection files lacked evidence that either the complainant was provided a complainant letter or that the complainant letter provided an explanation of the evaluation of each alleged hazard or a copy of the report to supplement the complaint letter. | During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend. | Continued |
| FY 2022-OB-05 | FY 2021-OB-05 | *Percent In-Compliance Health*The FRL for percent in-compliance for health inspections is +/- 20% of the three-year national average of 44.42% which equals a range of 35.54% to 53.30%. NY PESH’s percent in-compliance for health inspections is 53.17%which is above the FRL. | OSHA will monitor quarterly utilizing the SAMM Report. | Continued |
| FY 2022-OB-06 | FY 2021-OB-06 FY 2020-OB-03FY 2019-OB-03 | *Worker Retaliation Case File Documentation and Organization* Worker retaliation case files did not accurately reflect the case determination or document threshold requirements for docketing complaints had been met. Case files did not document that PESH reviewed third party settlements. | During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend. | Continued |
| FY 2022-OB-07 | FY 2021-OB-07 | *Consultation Case File Documentation*Consultation case file documentation was lacking. | During next year’s FAME, a limited scope review of selected case files will be reviewed to determine if this reflects the data trend. | Continued |
| FY 2022-OB-08 |  | *Initiating Complaint Inspections*NY PESH’s average number of workdays to initiate a complaint inspection is 14.16 daysfor SAMM 1a which is above the negotiated review level of 10 days. The large volume of complaints being received and the lack of experienced CSHOs are contributing factors as to why the number of days to initiate an inspection based on a complaint has increased. | OSHA will monitor quarterly utilizing the SAMM Report. | New |
| FY 2022-OB-09 |  | *Worker Involvement* NY PESH’s percent of initial inspections with worker walkaround representation or worker interview is 96.55% for SAMM 13 which is below the FRL of 100%. | OSHA will monitor quarterly utilizing the SAMM Report. | New |

**Appendix C - Status of FY 2021 Findings and Recommendations**

FY 2022 NY PESH Follow-up FAME Report

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **FY 2021-#** | **Finding** | **Recommendation** | **State Plan Corrective Action** | **Completion Date** | **Current Status** **and Date** |
| FY 2021-01  | *Safety Lapse Time*In FY 2021, the average safety lapse time (SAMM #11) for citations was calculated at123.86 days which is above the FRL range of 41.94 days to 62.90 days for safety. | NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources. | Weekly action reports and open case reports were distributed to supervisors/management. Open cases pending issuance over four months were highlighted for focused attention. NY PESH worked with staff to ensure a reduction in lapse time, including assessing report writing and the review process to identify and mitigate causes of most significant delays. Management/Supervisory meetings were held on a more frequent basis. NY PESH continued hiring and training of additional inspectors, exploring process enhancements. In the short-term, staff from outside districts will be allocated as needed to address districts needing immediate resources. NY PESH will also focus on identifying andimplementing staff retention strategies.  | Not Completed | Open (As of March 15, 2023) |
| FY 2021-02 | *Health Lapse Time*In FY 2021, the average health lapse time (SAMM11) forcitations was calculated at164.93 days whichis above the FRL range of 52.88 days to 79.32 days. | NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources. | Weekly action reports and open case reports were distributed to supervisors/management. Open cases pending issuance over four months were highlighted for focused attention. NY PESH worked with staff to ensure a reduction in lapse time, including assessing report writing and the review process to identify and mitigate causes of most significant delays. Management/Supervisory meetings were held on a more frequent basis. PESH continued hiring and training of additional inspectors, exploring process enhancements. In the short- term, staff from outside districts will be allocated as needed to address districts needing immediate resources. NY PESH will also focus on identifying and implementing staffretention strategies. | Not Completed | Open(As of March 15, 2023) |
| 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. | NY PESH needs to develop a written procedure to address how OIS reports will be used to ensure timely abatement of all hazards. | Weekly Action Reports were used to flag lapsing cases. The program worked with staff, who have lagging cases, to implement tools to track individual cases and violations, such as outlook reminders, a standardized contact log, and other means used by staff with reduced lapse times. Open inspection reports were used to ensure staff completion of OIS data entry, including order received dates, and follow up inspections. Improved and existing tracking procedures were reviewed and reinforced through staff training and meetings. These actions were taken but NY PESH still has outstanding abatement for inspections with citations issued in 2020, 2021, and 2022. | Not Completed | Open (As of March 15, 2023) |
| FY 2021-04 | *Staffing*PESH staffing level is allocated for 43 CSHOs, but currently there are only 30 onboard as of FY 2021. | NY PESH should fill current staffing vacancies with qualified staff, specifically in the NYC office. | NY PESH hired staff during FY 2022. A total of 38 CSHOs were employed with the program in FY 2022. According to the FY 23 grant application, NY PESH intends to fill 15 positions in FY 2023. These positions include administrative/clerical, enforcement staff and consultants. Progress has been made in the hiring and recruitment of staff, but there are still vacancies that need to be filled. | Not Completed | Open (As of March 15, 2023) |
| FY 2021-05 | *Case File Documentation*In six of 10 (60%) FY 2021 case files,documentation was lacking for COVID-19 fatality inspections, and four of 10 (40%) were lacking evidence of interviews with non- managerial employees. | NY 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. | The majority of noted deviations from the FOM were reflective of the NY PESH Interim Enforcement COVID-19 Response Plan which was developed out of adaptive necessity. Nonetheless, other noted deficiencies show that opportunities for improvement exist.PESH management met with all levels of staff to review lessons learned, discuss areas of possible improvement, revise existing and develop new procedures as needed, and implement and reinforce the procedures with training. | September 30, 2022 | Awaiting Verification |
| FY 2021-06 | *Responding to Fatalities*In 10 of 12 (83%) of the COVID-19fatality inspections in FY 2021, the inspection was not initiated within one working day of the report. | NY PESH should respond to worker fatalities within one workday which is the SAMM reference agreed upon measure and federal requirement. | While the pandemic presented abnormal conditions, it is recognized that response time to fatalities under typical conditions can be improved with increased oversight and attention to accurate data entry.Management worked with supervisors to ensure proper OIS documentation of responses, reducing reporting discrepancies of initial contact and onsite activity. Response times were monitoredas part of internal weekly action reports. | Not Completed | Open (As of March 15, 2023) |
| FY 2021-07 | *Next-of-Kin Letters* In 10 of 12 (83%) of the COVID-19Fatality inspections in FY 2021, 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 ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only. | NY PESH needs to follow their FOM regarding issuingletters to the families of victims. | Following the departure from standard FOM procedures during the pandemic, standard NOK letter procedures werereviewed and reinforced during staff training. | September 30, 2023 | Awaiting Verification |
| FY 2021-08 | *Federal Program Changes (FPCs)*NY PESH has not adopted the FY 2015 Federal Standard Number 1904 – Occupational Injury and Illness Recordingand Reporting Requirement as it is a requirement for all State Plans. Additionally, NY PESH has not adopted the FY 2017 Final Rule on Walking-Working Surfaces and Personal Protective Equipment. | NY PESH should take action to adopt both federal program changes by obtaining approval from the NY Counsels Office to allow publication in the NY Register no later than September 30, 2022. | The FY 2017 Final Rule on Walking- Working Surfaces and Personal Protective Equipment was adopted by PESH. The notice of adoption appeared in the State Register on March 8, 2023. The FY 2015 Federal Standard Number 1904 has not been adopted yet. It is on the state’s rulemaking schedule for calendar year 2023. | Not Completed | Open (As of March 15, 2023) |
| FY 2021-09 | *Responding to Worker Retaliation Cases Timely* At the conclusion of FY 21, NY PESH had 48 pending whistleblower retaliation investigations with an average 453 days pending. The oldest case was filed on November 6, 2017. NY 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. | NY PESH needs to work with their counsel’s office to close worker retaliation cases timely | NY PESH is having bi-weekly meetings with the counsel’s office. The counsel’s office is assisting with screening new complaints and focusing investigation efforts during the initial phases of investigations. Additional staff have been received whistleblower training and several staff are phasing into taking cases under the guidance of experienced investigators. Case review and determination backlogs are being cleared. | Not Completed | Open (As of March 15, 2023) |

### Appendix D – FY 2022 State Activity Mandated Measures (SAMM) Report

FY 2022 NY PESH Follow-up FAME Report

| SAMM Number | SAMM Name | State Plan Data | Further Review Level | Notes |
| --- | --- | --- | --- | --- |
| 1a | Average number of work days to initiate complaint inspections (state formula) | 14.16 | 10 | The further review level is negotiated by OSHA and the State Plan. |
| 1b | Average number of work days to initiate complaint inspections (federal formula) | 10.48 | N/A | This measure is for informational purposes only and is not a mandated measure. |
| 2a | Average number of work days to initiate complaint investigations (state formula) | 7.18 | 1 | The further review level is negotiated by OSHA and the State Plan. |
| 2b | Average number of work days to initiate complaint investigations (federal formula) | 3.0 | 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. |
| 5a | Average number of violations per inspection with violations by violation type (SWRU) | 3.77 | +/- 20% of1.78 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 1.42 to 2.14 for SWRU.  |
| 5b | Average number of violations per inspection with violations by violation type (other) | 1.04 | +/- 20% of0.91 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.73 to 1.09 for OTS. |
| 6 | Percent of total inspections in state and local government workplaces | 100% | +/- 5% ofGrant% | This is a State and Local Government State Plan. |
| 7a | Planned v. actual inspections (safety) | 408 | +/- 5% of 700 | 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 665 to 735 for safety. |
| 7b | Planned v. actual inspections (health) | 259 | +/- 5% of 450 | 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 427.50 to 472.50 for health. |
| 8 | Average current serious penalty in private sector - total (1 to greater than 250 workers) | N/A | +/- 25% of $3,100.37 | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
|  | **a**. Average current serious penalty in private sector (1-25 workers) | N/A | +/- 25% of $2,030.66 | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
|  | **b**. Average current serious penalty in private sector (26-100 workers**)** | N/A | +/- 25% of $3,632.26 | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
|  | **c**. Average current serious penalty in private sector(101-250 workers) | N/A | +/- 25% of $5,320.16 | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
|  | **d**. Average current serious penalty in private sector(greater than 250 workers) | N/A | +/- 25% of $6,575.70 | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
| 9a | Percent incompliance (safety) | 23.46% | +/- 20% of31.65% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 25.32% to 37.98% for safety. |
| 9b | Percent in- compliance (health) | 53.17% | +/- 20% of40.64% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 32.51% to 48.77% for health. |
| 10 | Percent of work-related fatalities responded to in one workday | 88.89% | 100% | The further review level is fixed for all State Plans. |
| 11a | Average lapse time (safety) | 85.06 | +/- 20% of 52.42 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 41.94 to 62.90 for safety. |
| 11b | Average lapse time (health) | 111.52 | +/- 20% of 66.10 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 52.88 to 79.32 for health. |
| 12 | Percent penalty retained | N/A | +/- 15% of69.08% | N/A – This is a State and Local Government State Plan.The further review level is based on a three-year national average. |
| 13 | Percent of initial inspections with worker walk-around representation or worker interview | 96.55% | 100% | The further review level is fixed for all State Plans. |
| 14 | Percent of 11(c) investigations completed within 90 days | N/A\* | N/A | This measure is not being reported for FY 2022. Please see note below. |
| 15 | Percent of 11(c) complaints that are meritorious | N/A\* | N/A | This measure is not being reported for FY 2022. Please see note below. |
| 16 | Average number of calendar days to complete an 11(c) investigation | N/A\* | 90 | This measure is not being reported for FY 2022. Please see note below. |
| 17 | Percent of enforcement presence | N/A | +/- 25% of0.99% | NA – This is a State and Local Government State Plan and is not held to this SAMM.The further review level is based on a three-year national average. |

NOTE: The national averages in this report are three-year rolling averages. Unless otherwise noted, the data contained in this Appendix D is pulled from the State Activity Mandated Measures (SAMM) Report in OIS on November 14, 2022, as part of OSHA’s official end-of-year data run.

\*Due to the transition of 11(c) data from IMIS to OIS, SAMMs 14, 15, and 16 are not being reported for FY 2022.