

Kentucky Education and Labor Cabinet

Occupational Safety and Health Program

RESPONSE

to

FEDERAL ANNUAL MONITORING EVALUATION

for

FEDERAL FISCAL YEAR 2022



**I. COMMENT REGARDING FAME REPORT**

OSHA’s Federal Fiscal Year (FFY) 2022 Follow-up Federal Annual Monitoring Evaluation (FAME) Report continued five (5) findings and two (2) observations from the FFY 2021 FAME. Two (2) of the findings should have been closed during the FFY 2022 Follow-up FAME and both observations are not acceptable.

**II. OSHA FINDINGS, OBSERVATIONS, STATUS, and KENTUCKY RESPONSES**

**OSHA Finding FY 2021-1**

“In FY 2021, KY OSH conducted a total of six (1.9%) programmed health inspections out of 315 health inspections conducted, during that period.”

**OSHA Status**

“During FY 2022, KY OSH conducted a total of six (1.83%) programmed health inspections out of 327 health inspections conducted, during this period. This finding remains open.”

**OSHA Finding FY 2021-2**

“In FY 2021, KY OSH conducted a total of 30 (5.5%) programmed safety inspections out of 549 safety inspections conducted, during that period.”

**OSHA Status**

“In FY 2022, KY OSH conducted 21 (3.14%) programmed safety inspections out of 669 planned safety inspections, during this period. This finding remains open.

Kentucky provided that the SARS-CoV-2 pandemic continued to have a significant impact on the Kentucky OSH Program and adversely impacted their ability to conduct programmed inspections. Additionally, 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. OSHA is currently working with KY OSH to establish a new goal for programmed inspections.”

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

As OSHA notes, Kentucky inspections are conducted in the order of priority established in Kentucky’s Field Operations Manual. Imminent dangers, fatality, hospitalization, amputation, loss of eye, and complaint inspections are prioritized over programmed inspections. OSHA is aware Kentucky is bound to conduct inspections based on the order of priority established in Kentucky’s Field Operations Manual.

In the FFY 2021 FAME, OSHA recommended “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.” Since the FFY 2021 FAME, Kentucky worked with OSHA and successfully negotiated a benchmark for programmed inspections. Kentucky also, as OSHA is aware, implemented a strategy to ensure a more representative number of programmed (planned) safety inspections are conducted. Kentucky did *exactly* as OSHA recommend. Kentucky *fulfilled* OSHA’s recommendation yet OSHA continued the finding. This finding is disingenuous and and should be closed.

**OSHA Finding FY 2021-3**

“In FY 2021, KY OSH had a significantly high average citation issuance lapse time for safety and health inspections (SAMM 11a and 11b), which were outside the FRLs.”

**OSHA Status**

“In FY 2022, KY OSH’s lapse time for safety inspections was 80.54 days and 100.61 for health inspections. Even though the average citation issuance lapse times showed improvement, the lapse times remain significantly higher than the three-year national averages (54.68 days for safety and 67.14 days for health) and the averages for all State Plans (49.37 days for safety and 63.77 days for health). [Reference: SAMM 11a and 11b] Kentucky provided that the SARS-CoV-2 pandemic continued to have a profound effect on the Kentucky OSH Program and adversely impacted citation issuance lapse time for safety and health inspections during this period. Improved lapse time is one of KY OSH’s top goals, and the State Plan is placing much attention and emphasis on decreasing lapse times.”

**State Response**

Kentucky received 54%+ more complaints in FFY 2022 than FFY 2021, conducted 28%+ more complaint inspections in FFY 2022 than in FFY 2021, and conducted 15%+ more total inspections in FFY 2022 than FFY 2021. It is important to note that Kentucky’s increased activity in FFY 2022 was accomplished with less enforcement staff than in FFY 2021. Like OSHA and other State Plans, enforcement staff retention and recruitment is a significant challenge. The increased workload carried by decreased enforcement staff had a direct, negative impact on lapse time. That impact will most likely continue in FFY 2023. Nonetheless, improved lapse time is one (1) of Kentucky’s top goals.

**OSHA Finding FY 2021-4**

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

**OSHA Status**

“The Kentucky State Plan does not have the independent 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. House Bill (HB) 749 of the 2022 Regular Session was introduced March 1, 2022. HB 749 sought to increase OSH civil penalties and require the Secretary to annually adjust the penalties based on the BLS Consumer Price Index for All Urban Customers. HB 749 did not advance. Kentucky will continue work to seek legislative action to amend Kentucky’s OSH penalties.”

**State Response**

OSHA’s finding is incorrect; the Kentucky State Plan did not fail to adopt OSHA’s annual penalty inflationary adjustment and subsequent annual adjustments. As OSHA notes, the Kentucky State Plan has no authority to increase any penalty or implement an annual penalty inflationary 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. OSHA is aware that Kentucky will continue work to seek legislative action to amend Kentucky’s penalties.

**OSHA Finding FY 2021-5**

“In FY 2021, 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 the complainant (CP) and Investigator was not present in the majority of files reviewed), and (3) erroneous IMIS entries.”

**OSHA Status**

“KY OSH provided it will improve acquiring necessary documentation, as well as IMIS data entry accuracy. 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 pending verification.”

**State Response**

OSHA is aware Kentucky improved acquiring documentation as well as IMIS data entry accuracy. However, OSHA chose to not verify the improvements during the FFY 2022 Follow-up FAME, a task that could have been easily accomplished. This finding should be closed.

**OSHA Observation FY 2021-OB-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 Status**

“Kentucky’s internal evaluations are legally privileged and cannot be released.”

**State Response**

This is not a new issue and OSHA is acutely aware why Kentucky cannot make the state internal evaluation audit available for OSHA review, the documentation is legally privileged and cannot be released.

Kentucky engaged OSHA to address the issue of privilege and develop a resolution so that OSHA can review Kentucky’s internal evaluations. Kentucky’s inquiry was made with OSHA at the area office, region, and national levels. OSHA informed Kentucky there is no apparent remedy. Although this is a legal issue beyond the control of the KY Occupational Safety and Health Program and OSHA cannot offer Kentucky a remedy, OSHA now chooses to issue an observation. OSHA’s observation is misleading and setting Kentucky up to receive a finding. Kentucky rejects this observation.

**OSHA FY 2021 Observation 2**

“In FY 2021, the total in-compliance rates (SAMM 9) for all safety inspections was 48.03% and 67.35% for health inspections (SAMM 9b). The in-compliance rates for safety and health were well above the FRL. This observation is being continued.”

**OSHA Status**

“In FY 2022, the total in-compliance rates (Reference: SAMM 9) for all safety inspections were 44.51% and 75% for health inspections and remain well above the FRLs. In FY 2021, OSHA did not identify that Kentucky missed a hazard(s) and/or failed to issue a citation(s) in any case files. OSHA’s position is that Kentucky’s high in-compliance rate is related to the low number of targeted inspections and high number of in-compliance complaints inspections.”

**State Response**

OSHA articulated an explanation for Kentucky’s in-compliance rates on page twelve (12) of the FFY 2021 FAME and OSHA articulates data regarding Kentucky’s in-compliance rates on page nine (9) of the FFY 2022 Follow-up FAME. More importantly, at no time during the FFY 2021 FAME or the FFY 2022 Follow-up FAME did OSHA identify *any* casefile that Kentucky missed a hazard(s) and/or failed to issue an appropriate citation(s).

Kentucky’s in-compliance rate is simply outside of the Further Review Level. Regrettably, OSHA conducted **no** further review during the FFY 2021 FAME or the FFY 2022 Follow-up FAME to evaluate the issue. OSHA has neither demonstrated nor articulated how Kentucky’s in-compliance rate warrants an observation. OSHA’s observation has no basis and is setting Kentucky up to receive a finding despite the fact OSHA failed to conduct any further review. Kentucky rejects this observation.