**FY 2023 Comprehensive**

**Federal Annual Monitoring Evaluation (FAME) Report**

**TENNESSEE**

**DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,**

**DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**

Tennessee OSHA logo 

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**Prepared by:**

**U. S. Department of Labor**

**Occupational Safety and Health Administration**

**Region IV**

**Atlanta, Georgia**



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1. **Executive Summary**

The purpose of this report is to assess the Tennessee OSHA’s (TOSHA’s) performance for Fiscal Year (FY) 2023. This report assesses the State Plan’s progress in resolving outstanding findings from its previous FAME report. This report also reviews the effectiveness of programmatic areas related to enforcement activities, including a summary of an onsite evaluation.

The Tennessee Occupational Safety and Health Strategic Management Plan for FY 2019 to FY 2023 established three primary outcome goals: 1) Improve workplace safety and health for all employees as evidenced by eliminating hazards, reducing exposures, injuries, illnesses, and fatalities; 2) Increase employer and employee awareness of, commitment to, and involvement in occupational safety and health; and 3) Maximize effectiveness by striving for continuous improvement in the area of service delivery. TOSHA establishes the framework in an annual performance plan to accomplish the goals in its Strategic Management Plan. Fatalities rose in Tennessee from 39 in FY 2022 to 43 in FY 2023. Construction fatalities increased slightly, and manufacturing fatalities decreased significantly, as compared to the same period last year.

A detailed explanation of the findings and recommendations of TOSHA’s performance evaluation is found in Section III, Assessment of State Plan Progress and Performance. In FY 2023, TOSHA had no new findings. The FY 2022 Follow-up FAME identified two continued findings, two continued observations and one new observation. In this report, two observations from FY 2022 have been closed and one observation was continued in FY 2023. Appendix A describes the new and continued findings and recommendations. Appendix B describes the observations and the related federal monitoring plans. Appendix C describes the status of all FY 2022 recommendations in detail.

Tennessee’s Total Recordable Case (TRC) rate for Calendar Year (CY) 2022 dropped slightly from (CY) 2021. The private sector TRC rate was 2.4 and the Days Away, Restricted, or Transferred (DART) rate was 1.4. These rates are lower than the respective national average. When the state and local government sector numbers are included, the overall TRC rate was 2.6 and the DART rate was 1.5.

**II. State Plan Background**

1. **Background**

The Tennessee Department of Labor and Workforce Development has been administering the Tennessee Occupational Safety and Health Administration (TOSHA) since July 5, 1973. The Commissioner of Labor and Workforce Development is the State Plan designee, and TOSHA’s headquarters is in Nashville, Tennessee.

TOSHA’s statutory authority is contained in Title 50 of the Tennessee Code Annotated TCA §§50-3-101 through 50-3-919, the Tennessee Occupational Safety and Health Act of 1972. Under these statutes, TOSHA conducts workplace inspections, issues citations and penalties, and provides administrative and judicial review processes for employers seeking to contest citations and/or penalties. Title 50-3-409 prohibits employers from retaliating against workers who exercise their rights under TOSHA’s occupational safety and health statutes and authorizes the investigation and prosecution of complaints of workplace retaliation.

In 1978, the U.S. Court of Appeals, in AFL-CIO v. Marshall, ordered OSHA to create a formula to set enforcement staffing benchmark levels for each State Plan. Meeting these staffing benchmark levels is a requirement for a State Plan to attain final approval status. TOSHA received final approval under Section 18(e) of the OSH Act on July 22, 1985. Currently, there are 98 positions funded under the 23(g) grant.

The State Plan designee is responsible for administering the program, under the Tennessee Occupational Safety and Health Act of 1972. The Commissioner of Labor, currently and during the period covered by this evaluation, is Deniece Thomas. Wendylee Fisher serves as the Assistant Commissioner and the TOSHA Administrator. TOSHA is comprised of three sections: the Compliance Section, the Consultative Section, and the Training and Education Section. The central office is in Nashville, with seven additional field offices strategically located throughout the State in Knoxville, Memphis, Chattanooga, Gray, and Jackson, as well as two in Nashville. The program managers and compliance supervisors are TOSHA’s first-line supervisors. At full staffing, TOSHA has 26 safety compliance officers and 17 health compliance officers assigned to field offices throughout the State. TOSHA’s state and local government consultation program consists of two safety and health consultants who commit a portion of their time to providing on-site consultation services to state and local government workplaces. In FY 2023, TOSHA covered approximately 3,279,300 workers and 139,819 private sector establishments in the state.

TOSHA has a specific program for the coverage of state and local government workers. All state and local government sector entities are required to be inspected at least every two years. TOSHA also administers the Volunteer Star Recognition Program (VPP) and Safety and Health Achievement and Recognition Program (SHARP).

In FY 2023, TOSHA’s base level funding award was $4,341,400. In addition to matching the federal funding amount of $4,341,400, TOSHA also contributed $919,578. Thus, TOSHA’s final FY 2023 funding amount was $9,602,378, consisting of $4,341,400 in federal funds and $5,260,978 in state funds.

During FY 2023, TOSHA faced the challenge of meeting their goals, despite staffing concerns. Twenty percent of the State Plan’s compliance officers have less than one year of experience, which means that they are not performing independent inspections. Thirty-nine percent have less than three years of experience.

1. **New Issues**

None

**III. Assessment of State Plan Progress and Performance**

1. **Data and Methodology**

OSHA established a two-year cycle for the FAME process. FY 2023 is a comprehensive year and as such, OSHA was required to conduct an on-site evaluation and case file review. A nine-person OSHA team was assembled to conduct a full on-site case file review. The case file review was conducted at TOSHA’s headquarters in Nashville during the timeframe of November 27 through December 1, 2023. A total of 152 safety and health files and 18 whistleblower inspection case files were reviewed. The safety and health inspection files were randomly selected from closed inspections conducted during FY 2023.

OSHA conducted informal interviews with the Administrator, Assistant Administrator, program managers, and compliance supervisors to discuss topics related to the operation of the State Plan, such as progress in resolving findings and observations from the FY 2022 Follow-up FAME Report, cases filed with the review board, standard and federal program change (FPC) adoptions, complaint processing, compliance assistance, and abatement tracking, etc.

**Monitoring Sources**

The analyses and conclusions described in this report are based on information obtained from a variety of monitoring sources, including the:

* State Activity Mandated Measures (SAMM) Report (Appendix D)
* State Information Report (SIR)
* Mandated Activities Report for Consultation (MARC)
* State OSHA Annual Report (SOAR)
* State Plan Annual Performance Plan
* State Plan Grant Application
* OSHA Information System (OIS) Reports (Abatement Tracking, Fatality/Catastrophe, Inspection Summary, Open Inspection, and Scan Summary)
* OSHA IT Support System Reports (Case Summary, Activity Measures, Investigation Data and Length of Investigation)
* Quarterly monitoring meetings between OSHA and the State Plan
* Full case file review
* Staff interviews

SAMMs are enforcement data points that OSHA and the State Plans have agreed are important in monitoring State Plan performance. Each SAMM has an agreed-upon further review level (FRL) that 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 2023 SAMM Report and includes the FRL for each measure.

1. **Review of State Plan Performance**

**1. PROGRAM Administration**

1. Training

The State Plan continues to operate a training and education program, which is like the federal and education directive 01-00-018, “Training Program for OSHA Compliance Personnel,” with minimal differences. For example, the State Plan does not offer a construction specialist career path, and the State utilizes its own form to document the completion of on-the-job training (OJT). TOSHA immediately registers newly hired compliance officers in Blackboard for participation in the initial training courses conducted at the OSHA Training Institute (OTI). At the end of the first year, TOSHA continues to administer an in-house test to evaluate the standards and procedural knowledge of their compliance officer. TOSHA also maintains a training database, which enables the State Plan to effectively track the training of all its personnel throughout their career. The database also allows the State Plan to compile several training-related reports. TOSHA also continues to offer career development opportunities for its staff, by providing fall protection, construction, and trenching training courses.

b) OSHA Information System (OIS)

TOSHA continues to use the OIS directly, without the use of an interface systems like the other State Plans in Region IV. Tennessee has consistently utilized OIS reports and other data to manage its program, and to track OSH program activities. The OIS reports are also used by all levels of management including first level supervisors.

c) State Internal Evaluation Program Report

The COVID-19 pandemic disrupted the State internal auditing scheduled; however, TOSHA has now resumed the ADM-TN 03-00-011, Audit Program for the Central and Area Offices. The Gray Area Office was evaluated in April 2022, the Nashville – North Area Office was evaluated in April 2023 and the Nashville – South Area Office was evaluated in March 2023. The Audit Program provides guidance regarding the internal evaluation, and it meets the criteria outlined in the State Plan Policies and Procedures Manual. Additionally, the document was recently expanded to include the State’s Public Sector Program.

d) Staffing

During this period, TOSHA’s staffing levels met or exceeded the established benchmarks for the program, based on the benchmark criteria. The State Plan remains committed to staffing its program at the appropriate level, within the current budgetary constraints. As of November 27, 2023, there were five vacant compliance officer positions.

**2. ENFORCEMENT**

a) Complaints

TOSHA’s procedures for handling complaints are detailed in Chapter 9: Complaint and Referral

Processing in the TOSHA Field Operations Manual (FOM), which are very similar to OSHA’s

FOM in this regard. SAMMs 1 through 3 assess the program’s efficiency in handling complaints. In FY 2023, TOSHA received 1,529 complaints, including 332 that resulted in inspections and 1,197 that were handled informally by letter. In addition, the State Plan received 614 employer reported referrals involving reports of serious injuries, including 477 hospitalizations, 147 amputations, and three losses of an eye.

**SAMM 1a - Average number of workdays to initiate complaint inspections (state formula)**

Discussion of State Plan Data and FRL: The negotiated FRL for this measure is fifteen days.

TOSHA’s FY 2023 average was 8.60 workdays.

Explanation: TOSHA met the FRL in FY 2023.

**SAMM 2a - Average number of workdays to initiate complaint investigations (state**

**formula)**

Discussion of State Plan Data and FRL: The negotiated FRL is five workdays. TOSHA’s

average in FY 2023 was 3.72 workdays, which was below the FRL.

Explanation: TOSHA met the FRL in FY 2023.

**SAMM 3 - Percent of complaints and referrals responded to within one workday**

**(imminent danger)**

Discussion of State Plan Data and FRL: The FRL of 100 percent is fixed for all State Plans. In

FY 2023, TOSHA received and responded to 17 imminent danger complaints or referrals within

one day.

Explanation: TOSHA met the FRL in FY 2023.

**SAMM 4 - Number of denials where entry not obtained**

Discussion of State Plan Data and FRL: The FRL of zero is fixed for all State Plans. In FY

2023, TOSHA’s result was zero.

Explanation: TOSHA did not have any denials of entry in FY 2023.

b) Fatalities

There were 43 work-related fatalities in FY 2023. OSHA reviewed eleven fatality inspections, three of which were in-compliance. For the inspections that were not in compliance, OSHA noted the investigations lacked prima fascia evidence and supporting documentation. All the fatality files were missing field notes. Four case files had violations, which did not sufficiently establish employer knowledge.

TOSHA should ensure that all fatalities and catastrophes are thoroughly investigated to determine the cause of the event, whether there is a violation of TOSHA safety and health standards, regulations, or whether the general duty clause was applied. Additionally, the Area Supervisor should ensure that the case has been properly developed and documented in accordance with the procedures outlined in Chapter 11 – Imminent Danger, Fatality, Catastrophe, and Emergency Response of the Tennessee Field Operations Manual.

**SAMM 10 - Percent of work-related fatalities responded to in one workday**

Discussion of State Plan Data and FRL: The FRL of 100 percent is fixed for all State Plans. In

FY 2021, TOSHA’s result was 100 percent.

Explanation: TOSHA responded to all work-related fatalities in one workday.

c) Targeting and Programmed Inspections

According to inspection statistics reviewed, TOSHA conducted 1,528 inspections in FY 2023, of which 940 were programmed. The Public Sector accounted for 566 of the total programmed inspections. [SIR Measure 1A and 1B]. According to the SIR, 93.83% of private sector programmed safety inspections and 94.83% of private sector programmed health inspections had violations, and of those, 78.62% of safety inspections and 78.18% of health inspections currently had a serious, repeat, and/or willful violation (SRW) [SIR Measure 2A and 2c].

For programmed inspections in construction, TOSHA uses OSHA’s Construction Inspection Targeting Application (C-Targeting Application). The State Plan also conducts programmed inspections, under their Fall Special Emphasis Program (SEP), and the Trenching and Excavations National Emphasis Program (NEP). For programmed inspections in General Industry, TOSHA has a variety of Special Emphasis Programs (SEPs), including their General Schedule Program, which uses data provided by OSHA’s National Office to a general schedule inspection list that is made up of the top 200 high-hazard NAICS codes. These NAICS codes are run through a database to generate the list of sites for inspection. The State utilizes Special Emphasis Programs (SEPs) for targeting/programmed inspections, including the Site-Specific Targeting directive, Amputations NEP, Carbon Monoxide LEP, Hexavalent Chromium NEP, Noise LEP, Dental Offices LEP, and Respirable Crystalline Silica NEP.

TOSHA also participates in the following federal NEP’s: Combustible Dust, Coronavirus (COVID-19), Fall Prevention/Protection, Hazardous Machinery (Amputations), Hexavalent Chromium; PSM Covered Facilities; Primary Metal Industries; Combustible Dust; Lead, Silica, and Warehousing and Distribution Center Operations.

**SAMM 7 - Planned v. actual inspections – safety/health**

Discussion of State Plan Data and FRL: The FRL is based on a number negotiated by OSHA and the State Plan through the grant application. In FY 2023, TOSHA planned to conduct 1,100 safety inspections and 390 health inspections. The FRL range was from 1,045 to 1,155 for safety inspections and from 370.5 to 409.5 for health inspections. In FY 2023, TOSHA conducted 1,128 safety inspections and 400 health inspections.

Explanation: TOSHA met the FRL in FY 2023.

d) Citations and Penalties

TOSHA has attempted to improve the documentation of knowledge through training since 2009; however, this deficiency remains. As a result of the FY21 FAME audit, TOSHA conducted additional training on documenting employer knowledge. The CSHO training was completed at the end of FY 2022. Unfortunately, the training provided to the compliance staff has not resulted in the desired outcome. During this review, employer knowledge was not adequately documented in 34 of 68 (50%) files that had violations. Therefore, this finding is being continued.

Except for the fatality files and a few others, the case files reviewed did not contain written witness or management statements. Interviews and photographs were referenced in the file, but there was no documentation, including field notes or other documentation containing interview notes. In some cases, the only evidence that employees were interviewed was through the documentation stating they were interviewed, and/or their names and addresses being in the case file. According to the State Plan’s FOM - Chapter three Inspections Procedures – VII. Walk-around Inspection – I. Interviews – 5. Conducting Employee Interviews – b. Interview Statements states, “Interview statements of employees or other persons shall be obtained, whenever CSHOs determine that such statements would be useful in documenting potential violations.” Additionally, the State Plan’s FOM – Chapter 5 - Case File Preparation and Documentation – VII. Interview Statements – “A. During Management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes, whenever possible, as these tend to be more credible than later general recollections.” This observation is being converted to a finding.

**SAMM 5 - Average number of violations per inspection with violations by violation type**

Discussion of State Plan Data and FRL: The FRL is based on a three-year national average. TOSHA’s FY 2023 average of 2.62 was outside (above) the FRL range of 1.4 to 2.10 for serious, willful, repeat, or unclassified (SWRU) violations. For other-than-serious (OTS) violations, the State Plan’s average of 0.72 is within the FRL range of 0.71 to 1.07.

Explanation: High serious violation per inspection rates indicate CSHOs are identifying and citing serious hazards.

**SAMM 9 – Percent in compliance**

Discussion of State Plan Data and FRL: The FRL is based on a three-year national average. In FY 2023, the FRL range was from 25.38 percent to 38.08 percent for safety inspections, and from 35.06 percent to 52.58 percent for health inspections. TOSHA’s in-compliance rate of 11.48 percent for safety and 24.44 for health inspections was outside (below) the FRL range; both results were positive.

Explanation: Low in-compliance rates indicate CSHOs are adept at identifying and citing violations.

**SAMM 11 - Average lapse time**

Discussion of State Plan Data and FRL: The FRL is based on a three-year national average. In FY 2023, the FRL range was from 44.18 workdays to 66.28 workdays for safety, and from 55.78 workdays to 83.66 workdays for health. TOSHA’s averages were 32.14 workdays for safety, which is outside (below) the FRL range, and 47.25 workdays for health, which is within the acceptable range.

Explanation: TOSHA met the FRL in FY 2023.

**SAMM 8 - Average current serious penalty in private sector**

Discussion of State Plan data and FRL: Each FRL in SAMM 8 is the total average current penalty per serious violation for the specific worker range, as shown below. These FRLs are based on three-year national averages.

(1 to greater than 250 workers): The FRL is +/-25% of $3,625.21. The range of acceptable data not requiring further review is from $2,718.91 to $4,531.51. TOSHA’s total average current penalty per serious violation is $1,781.46, which is substantially lower than the FRL.

**a.** (1-25 workers): The FRL is +/-25% of $2,348.03. The range of acceptable data not requiring further review is from $1,761.02 to $2,935.04. The Tennessee State Plan’s total average current penalty per serious violation (1 - 25 workers) is $1,328.00, which is lower than the FRL.

**b.** (26-100 workers): The FRL is +/-25% of $4,167.28. The range of acceptable data not requiring further review is from $3,125.46 to $5,209.10. The Tennessee State Plan’s total average current penalty per serious violation is $1,587.89, which is substantially lower than the FRL and lower than the FRL.

**c.** (101-250 workers). The FRL is +/-25% of $6,052.04. The range of acceptable data not requiring further review is from $4,539.03 to $7,565.05. The Tennessee State Plan’s total average current penalty per serious violation (101 – 250 workers) is $2,129.32, which is substantially lower than the FRL.

**d.** (Greater than 250 workers): The FRL is +/-25% of $7,331.41. The range of acceptable data not requiring further review is from $5,498.56 to $9,164.26. The Tennessee State Plan’s total average current penalty per serious violation is $3,414.44, which is substantially lower than the FRL.

Explanation: The Tennessee State Plan’s low penalties are attributed to the significant increase in the federal penalties, as a result of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on November 2, 2015, OSHA published a rule on July 1, 2016, raising its maximum and minimum penalties. See 81 FR 43429. OSHA then increased penalties annually, most recently on January 17, 2023, according to the Consumer Price Index (CPI). Tennessee has not yet adopted the corresponding increase to maximum penalty amounts.

**Finding FY 2023-01 (Formerly FY 2022-01 and FY 2021-01):** In 34 of 68 (53%) files reviewed that had violations, employer knowledge was not adequately documented.

**Recommendation:** TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles, as required by the FOM.

**Observation FY 2023-01 (Formerly FY 2022-OB-1, FY 2021-OB-1, and FY 2020-OB-1):** Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form and the notes are destroyed in accordance with the Tennessee Public Records Act, specifically T.C.A. § 10-7-301(14), which is contrary to Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records.

**Federal Monitoring Plan:** The OSHA Area Office will closely monitor to ensure TOSHA implements strategies to ensure field notes, including interview notes, are included in all inspection casefiles as required by the Tennessee FOM.

e) Abatement

During the on-site case file review, OSHA determined case files contained adequate documentation of abatement. OSHA did not identify any issues with abatement periods, use of extensions, and overall timeliness.

f) Worker and Union Involvement

**SAMM 13 – Percent of initial inspections with worker walk around representation or worker interview**

Discussion of State Plan Data and FRL: The FRL of 100 percent for SAMM 13 is fixed for all State Plans. In FY 2023, TOSHA’s result was 99.28 percent.

Explanation: TOSHA has procedures for employee and union involvement that are identical to those of OSHA.

***SPECIAL STUDY***

A Special Study focused on the State Plan’s enforcement activity in FY 2023 for establishments under NAICS Code 452990 – All Other General Merchandise (Reference 2012 NAICS Manual) was conducted. The study included a comprehensive review of all inspection and complaint files from October 1, 2022, through September 29, 2023, to determine if the State’s enforcement within this NAICS Code is consistent with OSHA.

No major deficiencies were noted from the review of the eleven inspections, other than the identification of two inspections, where repeat-serious violations were issued. In the first case, a third-repeat violation with a penalty of $25,000 was issued, which was lower than the previous citation of $30,000. The presence of potential willfulness could not be assessed or determined, due to the absence of field notes, interview notes, or statements. In the second case, a repeat-serious was issued with a penalty of $25,000, which was lower than the repeat violations of $30,000, that was the repeat basis. Issuing repeat citations with lower penalties than the previous inspections are not a deterrent for the employer. Again, there were no field notes, interview notes, or statements to assess the potential for a willful classification.

A review of the 21 unprogrammed activity files (complaints) identified 12 complaint files alleging hazards related to blocked exits, unstable storage, and fire extinguisher deficiencies and no inspection was opened. There were 11 instances of allegations related to worker exposure to aisles, emergency exits, passageways, walkways, and work areas being blocked by merchandise and overcrowding of storerooms with freight. There were also two allegations of boxes that were not securely stacked in the back storeroom. Additionally, there were five complaints alleging worker exposure to extreme heat, including two alleging workers, who were showing signs of heat illness and becoming sick; however, all the complaints were handled by a letter investigation. The OSHA Area Office will closely monitor to ensure TOSHA implements strategies to ensure inspections are conducted for complaints alleging hazards related to access and egress, storage, and fire hazards.

**3. REVIEW PROCEDURES**

1. Informal Conferences

**SAMM 12 - Percent penalty retained**

Discussion of State Plan Data and FRL: The FRL is based on a three-year national average. In FY 2023, TOSHA’s percent penalty retained of 92.67% was outside the FRL range of 61.06 percent to 82.62 percent.

Explanation: A high percent penalty retained is normally a positive indication that citations are being settled with penalty being maintained. However, TOSHA’s penalties are very low. Although TOSHA met the FRL for SAMM 12, the penalties are significantly lower than the national average and declined from FY 2022.

b) Formal Review of Citations

The Tennessee Occupational Safety and Health Review Commission is an independent body appointed to the part-time positions by the governor, and generally serves a three-year term. The Review Commission hears and issues decisions on appeals, relating to the issuance of citations and assessment of penalties by TOSHA.

OSHA reviewed eight cases that had citations appealed to the review board over the past five fiscal years (one from FY 2023, four from FY 2022, one from FY 2021, one from FY 2020, and one from FY 2019). All eight cases were sent to the TOSHA Review Commission in a timely manner. In four (50 percent) of the cases, a settlement was reached before a hearing was held. During FY 2023, the State Plan received negative decisions vacating all violations in all four cases decided by the Tennessee Occupational Safety and Health Review Commission. All decisions are reviewed by the TOSHA Administrator and senior management staff to determine if changes in policies and procedures need to be made.

**4. Standards and Federal Program Change (FPC) Adoption**

In accordance with 29 CFR 1902, State Plans are required to adopt standards and federal program changes (FPCs) within a six-month timeframe. State Plans that do not adopt identical standards and procedures must establish requirements that are at least effective (ALAE) as the federal rules. State Plans also have the option to promulgate standards covering hazards not addressed by federal standards. During this period, TOSHA’s adoption of the FPCs were all conducted in a timely manner. The Emergency Temporary Standard for COVID-19 Vaccination and Testing was withdrawn and does not impact standards not adopted timely. OSHA is still awaiting the adoption of the Final Rule on the Department of Labor Civil penalties for Inflation Adjustment Act – Annual Adjustment for 2023 by Tennessee. The table below provides a complete list of the federal directives and standards, which required during this period:

**Table A**

**Status of FY 2022 and FY 2023 Federal Standards Where Adoption Was Required**

*(May include any delinquent standards from earlier fiscal years)*

| **Standard** | **Response Due Date** | **State Plan Response Date** | **Intent to Adopt** | **Adopt Identical** | **Adoption Due Date** | **State Plan Adoption Date** |
| --- | --- | --- | --- | --- | --- | --- |
| Occupational Exposure to COVID-19; Healthcare Emergency Temporary Standard: COVID-19 Log and Reporting Provisions  29 CFR 1910.502(q)(2)  (4/14/2022) | 4/14/2022 | 4/14/2022 | Yes | Yes | 10/14/2022 | 5/18/2023 |
| Updated COVID-19 Vaccination and Testing; Emergency Temporary Standard  29 CFR 1910  (11/5/2021) | 1/7/2022 | 11/29/2023 |  |  | 1/24/2022 |  |
| Final Rule on the Department of Labor Civil penalties for Inflation Adjustment Act – Annual Adjustment for 2023  29 CFR Part 1903  (1/13/2022) | 3/15/2022 | 1/25/2022 | No | No | 7/14/2022 | -- |
| Occupational Exposure to COVID-19; Healthcare Emergency Temporary Standard: COVID-19 Log and Reporting Provisions  29 CFR 1910.502(q)(2)(ii), (q)(3)(ii)-(iv) and (r)  (2/14/2022) | 4/14/2022 | 4/14/2022 | Yes | Yes No | 8/14/2022 | 5/18/2023 |
| Final Rule on the Department of Labor Civil Penalties for Inflation Adjustment Act – Annual Adjustment for 2023  29 CFR 1903  (1/15/2023) | 3/15/2023 | 3/11/2023 | No | No | 7/15/2023 | -- |
| Final Rule to Improve Tracking of Workplace Injuries and Illnesses  29 CFR 1904  (7/21/2023) | 9/21/2023 | 9/19/2023 | Yes | Yes | 1/21/2024 | 9/19/2023 |

**For Vaccination and Testing standards:**

* Write “N/A” in the chart for State Plan response date if the State Plan did not adopt.
* In the written narrative, if describing this standard, state that “the Emergency Temporary Standard for COVID-19 Vaccination and Testing was withdrawn” and do not count it towards any total for standards not adopted timely.

**Table B**

**Status of FY 2022 and FY 2023 Federal Program Change (FPC) Where Adoption Was**

**Required**

*(May include any delinquent FPCs from earlier fiscal years)*

| **FPC Directive/Subject** | **Response Due Date** | **State Plan Response Date** | **Intent to Adopt** | **Adopt Identical** | **Adoption Due Date** | **State Plan Adoption Date** |
| --- | --- | --- | --- | --- | --- | --- |
| Revised Combustible Dust NEP  CPL 03-00-008  (1/30/2023) | 3/31/2023 | 3/22/2023 | Yes | Yes | 7/30/2023 | 3/23/2023 |
| Warehousing and Distribution Center Operation NEP  CPL 03-00-026  (7/13/2023) | 9/11/2023 | 9/8/2023 | Yes | No | 1/13/2024 | 9/8/2023 |

**Table C**

**Status of FY 2022 and FY 2023 Federal Program Change (FPC) Where Equivalency**

**Was Required**

*(May include any delinquent FPCs from earlier fiscal years)*

| **FPC Directive/Subject** | **Response Due Date** | **State Plan Response Date** | **Intent to Adopt** | **Adopt Identical** | **Adoption Due Date** | **State Plan Adoption Date** |
| --- | --- | --- | --- | --- | --- | --- |
| Cranes and Derricks in Construction Standard  CPL 02-01-2022  (2/11/2022) | 7/3/2022 | 6/21/2022 | Yes | Yes | 8//11/2022 | 7/3/2022 |
| OSHA Whistleblower Investigations Manual  CPL 02-03-011  (4/29/2022) | 10/11/2022 | 9/15/2022 | Yes | Yes | 10/29/2022 | 9/15/2022 |

**Table D**

**Status of FY 2022 and FY 2023 Federal Program Change (FPC) Where Adoption**

**Was Encouraged**

*(May include any delinquent FPCs from earlier fiscal years)*

| **FPC Directive/Subject** | **Response Due Date** | **State Plan Response Date** | **Intent to Adopt** | **Adopt Identical** | **Adoption Due Date** | **State Plan Adoption Date** |
| --- | --- | --- | --- | --- | --- | --- |
| OSHA’s Use of Small Unmanned Aircraft Systems  CPL 03-00-022  (12/22/2021) | 2/22/2022 | 2/23/2022 | No | N/A | n/a adoption not required | N/A |
| Outdoor and Indoor Heat-related Hazards NEP  CPL 03-00-024  (4/8/2022) | 6/8/2022 | 4/26/2022 | No | N/A | 10/8/2022 | N/A |

**Table E**

**FY 2022 and FY 2023 State****-Initiated Changes**

| **State-Initiated Change** | **Adoption Date** | **Effective Date** |
| --- | --- | --- |
| N/A |  |  |

**Adoption of Maximum and Minimum Penalty Increases**

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on November 2, 2015, OSHA published a rule on July 1, 2016, raising its maximum and minimum penalties. See [81 FR 43429](https://www.federalregister.gov/d/2016-15378). As required by law, OSHA then increased penalties annually, most recently on January 14, 2022, according to the Consumer Price Index (CPI). See 2022 Annual Adjustments to OSHA Civil Penalties, available at <https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osha-civil-penalties>; [87 FR 2328](https://www.federalregister.gov/d/2022-00144) (Jan. 14, 2022).

OSHA-approved State Plans must have penalty levels that are at least as effective as

OSHA’s per Section 18(c)(2) of the Occupational Safety and Health Act; 29 CFR 1902.37(b)(12). State Plans were required to adopt the initial maximum penalty level increase and the subsequent annual increases. State Plans were required to submit their initial intent to adopt by September 1, 2016. The first deadline for adoption of an annual increase was January 1, 2017. A letter sent to TOSHA indicated that failure to adopt these increases would very likely result in a FAME finding was sent on September 2, 2021. The TOSHA is required to adopt maximum and minimum penalty increases that are at least as effective as the Agency’s increase issued in January 2023, without further delay.

**Finding FY 2023-02 (Formerly FY 2022-02 and FY 2021-03):** The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.

**Recommendation:** TOSHAshould 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’s penalty levels.

**5. Variances**

No variances were requested from TOSHA during this period.

**6. STATE AND LOCAL government WORKER Program**

**SAMM 6 - Percent of total inspections in state and local government workplaces**

Discussion of State Plan Data and FRL: The FRL is based on a number negotiated by OSHA and the State Plan through the grant application. In FY 2023, the FRL range was from 36.34 percent to 40.17 percent. TOSHA’s 38.81 percent was within the FRL range.

Explanation: TOSHA met the FRL in FY 2023.

**7. WHISTLEBLOWER Program**

The Tennessee Occupational Safety and Health Act of 1972 (T.C.A. 50-3-409) prohibits retaliation against workers, who engage in protected activities as outlined in the Act. This provision aligns with the protection from retaliation afforded by Section 11(c) of the OSH Act. TOSHA has allocated resources for a dedicated discrimination case manager and leverages supervisory compliance safety and health officers to investigate alleged instances of retaliation.

TOSHA’s process for investigating whistleblower complaints closely resembles that of OSHA, and the agency relies on OSHA’s most recent Whistleblower Investigations Manual (WIM) as a primary resource and guide for investigative protocols.

|  |  |  |  |
| --- | --- | --- | --- |
| Meritorious Complaints | Percentage | Merit Settled Cases | Percentage |
| FY 2023 | 16% | FY 2023 | 100% |
| FY 2022 | 26% | FY 2022 | 100% |
| FY 2021 | 27% | FY 2021 | 100% |
| FY 2020 | 13% | FY 2020 | 86% |

In FY 2023, TOSHA received a total of 154 complaints. This is an 86% increase, when compared to the number of complaints received in FY 2021. Out of these, 40 complaints were docketed and 114 were administratively closed. The data indicates that 65% of the docketed cases were completed within 90 days, consistent with the 66% completion rate in FY 2021. The average duration for resolving retaliation cases was 77 days, showing an improvement from the 95-day average in FY 2021. TOSHA has demonstrated ongoing success in enhancing the efficiency of their retaliation investigations. [Reference: OSHA Information System]

An assessment of 18 electronic files revealed that the case files are thoroughly organized and align with relevant policies. TOSHA effectively utilizes the OSHA Information System (OIS) to monitor case progress and record final outcomes. TOSHA’s investigators possess a comprehensive understanding of the investigative process and the evidentiary standards pertinent to a retaliation claim. The investigative findings are appropriately documented in the case files and were found to support the conclusions. If the involved parties file an appeal, TOSHA’s appeals process ensures that the Commissioner takes appropriate action to assess the case.

**8. Complaint About State Program Administration (CASPA)**

No CASPAs were filed during this evaluation period.

**9. Voluntary Compliance Program**

TOSHA’s only cooperative program is the Tennessee Volunteer Star Program, which was established in 1997 and is very similar to the OSHA Voluntary Protection Program (VPP). However, unlike federal OSHA, TOSHA does not offer a Strategic Partnership Program or an Alliance Program. TOSHA has managed the growth of the Volunteer Star Program by limiting participation to employers in manufacturing and offering only Star level program status. However, employers outside the manufacturing NAICS codes are considered for participation in the program on a case-by-case basis. Since the last evaluation, the number of active participants in the Volunteer Star Program has declined from 36 sites to 32 sites. This reduction in the number of sites resulted from several factors, including rates increase, plant closures, and withdrawal from the program. TOSHA continues to effectively manage all aspects of the program under directive, CSP – TN 03-01-003. According to the program manager for the Volunteer Star Program, all required documents are maintained including applications, as well as acceptance and deferral letters.

**10. STATE AND LOCAL GOVERNMENT 23(g) On-site CONSULTATION PROGRAM**

TOSHA continues to operate a State and Local Government Program, which enforces workplace safety and health rules among most public sector employers. Participants in TOSHA’s state and local government program are not penalized for safety and health infractions; however, they are responsible for adhering to all the State’s established safety and health rules. During FY 2023, the State conducted four (4) public sector consultation visits. The visits included two full-service visits, one limited service visit, and a follow-up visit. All the visits were well documented, and corrective actions were properly tracked by the State Plan.

| **FY 2023-#** | **Finding** | **Recommendation** | **FY 20XX-# or**  **FY 20XX-OB-#** |
| --- | --- | --- | --- |
| FY 2023-01 | In 34 of 68 (50%) files reviewed that had violations, employer knowledge was not adequately documented. | TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles as required by the FOM. | FY 2022-01  FY 2021-01  FY 2019-OB-01  Also see 2019-OB-02 |
| FY 2023-02 | The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases. | TOSHA should 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 federal OSHA penalty levels. | FY 2022-02  FY 2021-03 |

| **Observation #**  **FY 2023-OB-#** | **Observation#**  **FY 20XX-OB-# *or* FY 20XX-#** | **Observation** | **Federal Monitoring Plan** | **Current Status** |
| --- | --- | --- | --- | --- |
| FY 2023-OB-1 | FY 2022-OB-1  FY 2021-OB-1  FY 2020-OB-2 | Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form and the notes are destroyed in accordance with the Tennessee Public Records act, specifically n T.C.A. § 10-7-301(14) which is contrary to Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records. | The OSHA Area Office will closely monitor to ensure TOSHA implements strategies to ensure field notes, including interview notes, are included in all inspection casefiles as required by the Tennessee FOM. | Continued |
|  | FY 2022-OB-2  FY 2021-OB-3 | TOSHA incorrectly and inconsistently uses administrative closure and case withdrawal procedures. Specifically, certain cases were listed as agency withdrawals but dismissed because of a lack of cooperation by the complainant. |  | Closed |
|  | FY 2022-OB-3 | In FY 2022, planned versus actual inspections (SAMM 7b), TOSHA conducted 324 (actual) health inspections, which was significantly short of the planned 390 health inspections as well as the minimum FRL. |  | Closed |

| **FY 2022-#** | **Finding** | **Recommendation** | **State Plan Corrective Action** | **Completion Date (if Applicable)** | **Current Status**  **(and Date if Item is**  **Not Completed)** |
| --- | --- | --- | --- | --- | --- |
| FY 2022-01 | Case files reviewed that had violations, employer knowledge was not adequately documented. | TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles as required by the Tennessee FOM. | TOSHA will make an effort to divert resources to conduct even more training on documenting employer knowledge. |  | Open |
| FY 2022-02 | The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases. | TOSHA should continue to work with their state authorities to complete the legislative changes necessary to enable it to adopt maximum and minimum penalty amounts that are at least as effective as OSHA’s maximum and minimum penalty levels. | TOSHA has briefed executive leadership on OSHA’s position that increasing penalties, while it may or may not have a secondary effect of decreasing the number of workplace injuries and deaths, is considered necessary for TOSHA to have a program that is “at least as effective as” Federal OSHA. Correcting this finding requires the state legislature to amend the TOSH Act. Department leadership is working with state leadership to move toward resolution. |  | Open |

| SAMM Number | SAMM Name | State Plan Data | Further Review Level | Notes |
| --- | --- | --- | --- | --- |
| 1a | Average number of work days to initiate complaint inspections (state formula) | 8.60 | 15 | The further review level is negotiated by OSHA and the State Plan. |
| 1b | Average number of work days to initiate complaint inspections (federal formula) | 2.82 | 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) | 3.72 | 5 | The further review level is negotiated by OSHA and the State Plan. |
| 2b | Average number of work days to initiate complaint investigations (federal formula) | 1.44 | 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) | 2.62 | +/- 20% of 1.75 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 1.40 to 2.10 for SWRU. |
| 5b | Average number of violations per inspection with violations by violation type (other) | 0.72 | +/- 20% of 0.89 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.71 to 1.07 for OTS. |
| 6 | Percent of total inspections in state and local government workplaces | 38.81% | +/- 5% of  38.26% | 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 36.34% to 40.17%. |
| 7a | Planned v. actual inspections (safety) | 1,128 | +/- 5% of  1,100 | 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 1,045 to 1,155 for safety. |
| 7b | Planned v. actual inspections (health) | 400 | +/- 5% of  390 | 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 370.50 to 409.50 for health. |
| 8 | Average current serious penalty in private sector - total (1 to greater than 250 workers) | $1,781.46 | +/- 25% of  $3,625.21 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $2,718.91 to $4,531.51. |
| 8a | Average current serious penalty in private sector  (1-25 workers) | $1,328.00 | +/- 25% of  $2,348.03 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $1,761.02 to $2,935.04. |
| 8b | Average current serious penalty in private sector  (26-100 workers**)** | $1,587.89 | +/- 25% of  $4,167.28 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $3,125.46 to $5,209.10. |
| 8c | Average current serious penalty in private sector  (101-250 workers) | $2,129.32 | +/- 25% of  $6,052.04 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $4,539.03 to $7,565.05. |
| 8d | Average current serious penalty in private sector  (greater than 250 workers) | $3,414.44 | +/- 25% of  $7,331.41 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $5,498.56 to $9,164.26. |
| 9a | Percent in compliance (safety) | 11.48% | +/- 20% of  31.73% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 25.38% to 38.08% for safety. |
| 9b | Percent in compliance (health) | 24.44% | +/- 20% of  43.82% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 35.06% to 52.58% for health. |
| 10 | Percent of work-related fatalities responded to in one workday | 100% | 100% | The further review level is fixed for all State Plans. |
| 11a | Average lapse time (safety) | 32.14 | +/- 20% of 55.23 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 44.18 to 66.28 for safety. |
| 11b | Average lapse time (health) | 47.25 | +/- 20% of 69.72 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 55.78 to 83.66 for health. |
| 12 | Percent penalty retained | 92.67% | +/- 15% of  71.84% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 61.06% to 82.62%. |
| 13 | Percent of initial inspections with worker walk-around representation or worker interview | 99.28% | 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 2023 due to the transition of 11(c) data from IMIS to OIS. |
| 15 | Percent of 11(c) complaints that are meritorious | N/A\* | N/A\* | This measure is not being reported for FY 2023 due to the transition of 11(c) data from IMIS to OIS. |
| 16 | Average number of calendar days to complete an 11(c) investigation | N/A\* | N/A\* | This measure is not being reported for FY 2023 due to the transition of 11(c) data from IMIS to OIS. |
| 17 | Percent of enforcement presence | 0.80% | +/- 25% of  0.93% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.70% to 1.17%. |

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 and the State Plan WebIMIS report run on November 14, 2023, as part of OSHA’s official end-of-year data run.