

Kentucky Education and Labor Cabinet

Occupational Safety and Health Program

RESPONSE

to

FEDERAL ANNUAL MONITORING EVALUATION REPORT

for

FEDERAL FISCAL YEAR 2023



**I. COMMENT REGARDING FAME REPORT**

From January 8 through January 11, 2024, the Occupational Safety and Health Administration (“OSHA”) conducted an evaluation of Kentucky’s enforcement and consultation program. OSHA’s evaluation team consisted of twelve (12) OSHA individuals who reviewed 103 safety and health inspection casefiles, twenty-six (26) whistleblower investigation casefiles, and thirty-three (33) consultation casefiles. The casefiles were randomly selected from 846 enforcement inspections, 142 whistleblower investigations, and 366 consultation visits Kentucky opened and closed during Federal Fiscal Year (FFY) 2023. OSHA reviewed the casefiles in Frankfort and all casefiles were provided to OSHA in electronic format.

OSHA did not provide Kentucky feedback, briefings, questions, etc. regarding Kentucky casefiles during their five (5) day in person onsite evaluation. After OSHA completed their review of Kentucky casefiles, OSHA provided Kentucky casefile review comments compiled by the various OSHA reviewers. Every casefile comment provided to Kentucky was reviewed by Kentucky. It was apparent after reviewing OSHA’s casefile comments that OSHA reviewers overlooked pertinent Kentucky casefile documentation. In one (1) instance, an OSHA reviewer overlooked a 500+ page appendix. The appendix was provided with the casefile, yet the reviewer overlooked it. There were several other instances where OSHA casefile reviewers overlooked pertinent Kentucky casefile documentation.

It was also apparent that OSHA reviewers evaluated Kentucky casefiles as if they were federal casefiles. (That may explain some reviewers’ inability to find pertinent casefile documentation; however, it does not explain why OSHA did not communicate their inability to locate pertinent documentation or request assistance.) For instance, there were several instances of an OSHA reviewer(s) commenting that a Kentucky casefile(s) did not meet legal sufficiency. The OSHA reviewer was neither an attorney nor versed in Kentucky case law. The OSHA reviewer comments were evidently based on federal legal criteria. Kentucky casefiles are not constructed to meet OSHA legal requirements; they are constructed to meet Kentucky legal requirements. There were several other instances of OSHA’s “federal lens” evaluation of Kentucky casefiles.

Kentucky learned during OSHA’s onsite evaluation that most of OSHA’s reviewers had not taken any FAME training that OSHA specifically developed for OSHA reviewers.

OSHA’s (FFY 2023 Federal Annual Monitoring Evaluation (FAME) Report acknowledged Kentucky was successful meeting or exceeding all state performance plan goals. The FAME Report identified two (2) continued findings from the FFY 2022 Follow-up FAME Report and two (2) observations, one (1) new observation and one (1) observation continued from FFY 2022.

One (1) FFY 2023 finding and one (1) FFY 2023 observation are based on Kentucky data that are outside OSHA’s further review level (FRL) for two (2) different performance guides, referred to as State Activity Mandated Measures (SAMM).

OSHA conducted **no** further review during the FFY 2023 FAME to evaluate Kentucky metrics outside the FRL. In fact, during discussion regarding the FFY 2023 FAME Report, OSHA informed Kentucky that OSHA does not have time to conduct further review.

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

**OSHA Finding FY 2023-01**

“In FY 2023, KY OSH had a significantly high average citation issuance lapse time for safety and health inspections, which were outside the FRLs.”

**OSHA Recommendation**

“KY OSH should develop and implement a process to reduce the average lapse time for safety and health inspections to within the FRL range.”

**State Response**

Kentucky received 22+% more complaints in FFY 2023 than FFY 2022. That is in addition to the 55+% increase of complaints received in FFY 2022 from FFY 2021. Since FFY 2021, Kentucky has experienced an 89.5% increase in complaints received. The extreme increase has tremendously impacted resources and Kentucky’s ability to positively impact average lapse time.

Kentucky acknowledged in its FFY 2022 Follow-up Fame Report response that decreased enforcement staffing had a direct, negative impact on lapse time in FFY 2022; and, that it would most likely continue in FFY 2023. It did.

OSHA acknowledges in the FFY 2023 FAME Report that Kentucky made progress reducing lapse time. Furthermore, OSHA is aware that Kentucky indeed developed and implemented a process to reduce average lapse time for safety and health inspections. The reduction has unfortunately not been achieved due to the extreme increase in complaints received coupled with staffing.

OSHA’s recommendation is not constructive. Nevertheless, improved lapse time is one (1) of Kentucky’s top goals.

**OSHA Finding FY 2023-02**

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

**OSHA Recommendation**

“KY OSH 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 OSHA’s penalty levels.”

**State Response**

Once again, OSHA’s finding is incorrect just as it was in the FFY 2022 Follow-up FAME Report. The Kentucky State Plan did not fail to adopt OSHA’s annual penalty inflationary adjustment and subsequent annual adjustments. The Kentucky State Plan has no authority to increase any penalty or implement an annual penalty adjustment. Kentucky penalties are established by statute, specifically Kentucky Revised Statute 338.991. Adjustment to Kentucky penalties and/or annual adjustments requires legislative action. OSHA is well aware of that fact.

OSHA is fully aware that Kentucky worked with state authorities and legislation was proposed in the legislative General Session to increase and annually adjust Kentucky’s occupational safety and health civil penalties. The legislation did not pass. OSHA was informed and briefed during the entire process.

Chapter 7, “Federal Annual Monitoring Evaluation and Annual Reports”, Section II. Annual Reports., B. FAME Report., 5. FAME Report Findings, Recommendations, and Observations, of OSHA’s *State Plan Policies and Procedures Manual* (SPPPM), page seventy-four (74), states:

“Report findings shall be limited to those issues that warrant corrective action by the State Plan to ensure it is ALAE.”

Note: ALAE is at least as effective. Meaning, at least as effective as OSHA.

Page ten (10) of the FAME acknowledges Kentucky’s average serious penalty in private sector was within the FRL in all but one (1) category. Specifically, Kentucky’s lone category below the FRL (greater than 250 workers) was only $190.95 below the FRL. It is important to note that Kentucky’s percent penalty retained (State Activity Mandated Measure (SAMM) 12) is above average at 82.75. It is evident that when SAMM 8-8d and SAMM 12 are considered together, Kentucky’s penalty structure is at least as effective.

OSHA has not demonstrated or articulated how Kentucky’s penalty structure is not at least as effective; therefore, Kentucky rejects the finding. However, Kentucky will continue to work with state authorities to amend Kentucky’s occupational safety and health civil penalties. OSHA was informed such during and subsequent the FFY 2023 on-site FAME.

**OSHA Observation FY 2023-OB-1**

“In FY 2023, the total in-compliance rate (SAMM 9) for all safety inspections was 46.65% and 71.68% for health inspections. The percentages for safety and health were well above the FRLs.”

**OSHA Recommendation**

“The OSHA Area Office will closely monitor and review the SAMM, SIR, and other available data with the State Plan on a quarterly basis to ensure in-compliance rates are within the acceptable FRL range.”

**State Response**

OSHA articulated an explanation for Kentucky’s in-compliance rates on page nine (9) of the FFY 2023 FAME Report. The report states:

“It was determined that the high in-compliance rate is attributed to the significant number of formal complaints that KY OSH is required to inspect.”

OSHA’s explanation of Kentucky’s high in-compliance rate is accurate, yet OSHA inexpiably continues the observation. OSHA has neither demonstrated nor articulated how Kentucky’s in-compliance rate negatively impacts the effectiveness of the state plan. OSHA provides no basis for the observation. In fact, OSHA contradicts the observation in its own explanation.

Additionally, OSHA’s continuance of the observation clearly demonstrates OSHA’s fundamental lack of understanding of the FAME process pursuant to Chapter 7 of OSHA’s SPPPM.

Kentucky rejects this observation.

**OSHA Observation FY 2023-OB-2**

“18 out of 33 consultation files reviewed did not have copies of the OSHA 300 logs.”

**OSHA Recommendation**

“The OSHA Area Office will closely monitor and review a sample of consultation files to verify the OSHA 300 logs are included in the files.”

**State Response**

CSP 02-00-004, *Consultation Policies and Procedures Manual* (CPPM), 3/19/2021, Chapter 4., “Consultation Visit-Related Requirements”, Section III., Required Structure of a Consultation Visit, 7. Evaluating Employer’s Injury and Illness Rates, page fifty-three (53), states:

“If the employer did not provide the Log and Summary of Work-Related Injuries and Illnesses (i.e., OSHA Forms 300 and 300A) before the consultation visit, the consultant must review them at the opening conference and determine the employer's injury and illness rates. The consultant must review the employer's current and previous three (3) years’ OSHA Forms 300 and 300A (or review the logs for the period that the establishment has been in operation, if less than 3 years). The consultant must calculate the injury and illness rates, compare them to the BLS rates for the employer's NAICS code, and inform the employer of the results. Consultants will also assess rates for employers that fall below the threshold for keeping injury and illness records and/or are in an industry exempt from keeping these logs. In these cases, the consultant must make an effort to determine the previous years' injury and illness rates using available employer information and data, and record the data in OIS. Consultants shall encourage employers that are not required to maintain OSHA Forms 300 and 300A to use these logs as tools for evaluating their safety and health programs.”

Appendix H, Consultation Visit Case File Organization, Section I., Introduction, page 131, states:

“Introduction. Case files must be maintained in a defined, uniform format, whether in a

format acceptable to the Regional Administrator (RA), or in accordance with the requirements outlined in this appendix. This appendix provides a description of the filing structure for a case file. A Consultation program may organize its case files differently as long as all the required contents of a case file listed in this appendix are included in a consistent and organized manner. Consultation programs may maintain case files using printed and/or electronic medium. Consultation programs are responsible for providing printed copies of these records upon request by the Occupational Safety and Health Administration (OSHA). Consultation program are also responsible for meeting the National Archives and Records Administration’s (NARA) electronic recordkeeping requirements (see Section VIII of this appendix)”

Section V., Filing Arrangement - Consultation Visit Case File Contents., A., Forms and Related Documentation., page 133, states:

“The following is a list of the documents that appear on the RIGHT side of the case file. File amendments and any official notes with the forms to which they relate. File these forms in this order, FROM TOP TO BOTTOM:”

Section V.A. Item 5., page 133, continues:

 “OSHA Form 300 **or** data obtained to support injury and illness rates” [Emphasis added.]

The CPPM language does not require consultants acquire copies of an employer’s OSHA 300 logs. Kentucky follows the CCPM and either acquires copies of an employer’s OSHA 300 log or obtains the data. That was plainly acknowledged by OSHA on page twenty (20) of the FFY 2023 FAME Report. It states:

“OSHA 300 logs and programs were reviewed as indicated by DART/TRC rate calculations and transcription into the file the information contained on the OSHA 300A, as well as the completion of OSHA Form 33. However, most files did not contain copies of the OSHA 300 logs or programs. The program management was advised of the information contained in the CPPM (Appendix H, Section V.A.5), in reference to collecting OSHA 300 logs.”

**All** Kentucky consultation casefiles that did not have copies of the employers OSHA Form 33 obtained the data to support injury and illness rates and were documented in the casefile in accordance with the CPPM.

OSHA cites CPPM Appendix H, Section V.A.5 in reference to collecting OSHA 300 logs. OSHA’s reference is unquestionably incorrect (see Appendix H, Section V.A.5 language quoted above). Although not applicable to the FFY 2023 FAME review period, Kentucky examined the September 29, 2023 edition of CSP 02-00-004 to determine if OSHA’s reference to Appendix H, Section V.A.5 stemmed from the 2023 edition. Kentucky determined the language in the 2023 edition is identical to the language in the 2021 edition.

Kentucky called OSHA’s attention to the CPPM language during the onsite FFY 2023 FAME debriefing with OSHA’s consultation reviewer. Kentucky also pointed out the CPPM language in a Tuesday, May 7, 2024, Teams meeting that included OSHA’s Directorate of Cooperative and State Programs (DCSP), regional office, and Kentucky Department of Workplace Standards leadership. During all conservations with OSHA, OSHA acknowledged the CPPM was not clear. Yet on Monday, June 3, 2024, OSHA informed Kentucky:

“For the second issue regarding the requirement to collect 300 Logs and keep them in the casefile, we are not changing this observation.  While we appreciate that the CPPM could be clearer with this requirement, it is the intent that 300 Logs be maintained in the file.”

OSHA continued:

“DCSP defers to regional decision on this point. This response constitutes a final decision in the FAME request for review process.”

Kentucky is mystified by OSHA’s decision to issue this observation. Kentucky does not require consultants to acquire copies of an employer’s OSHA 300 logs because there is no such requirement.

OSHA openly admits the observation is based upon OSHA’s “intent that 300 Logs be maintained in the file”. Kentucky’s collection of an employer’s OSHA 300 log or data supporting injury and illness rates has been practiced for many years and unquestioned by OSHA. However, during the FFY 2023 FAME process, OSHA “moved the goalpost” and although Kentucky fully followed OSHA’s CPPM, issued Kentucky an observation for not being cognizant of OSHA’s intent.

The observation is ludicrous. The observation illustrates OSHA’s refusal to acknowledge its own CPPM and, once again, clearly demonstrates OSHA’s fundamental lack of understanding of the FAME process.

Kentucky rejects the observation.