# **South Carolina Occupational Safety and Health Administration’s**

# **Formal Response to FY 2023 Comprehensive FAME Report**

**I. GENERAL COMMENT REGARDING FAME REPORT**

OSHA’s 2023 Federal Annual Monitoring Evaluation (FAME) Report contains findings and observations that are misleading and devoid of meaningful information to assist or otherwise collaborate with the South Carolina State Plan (the State Plan) so that they may be properly remedied. Most of the findings and observations in the FAME are subjective generalizations without any supporting documentation or metrics from which the State Plan can make a meaningful review, response, and/or change to its plan. While several items have been identified during this FAME year and previous years that are outside of the Further Review Level (FRL), no further review has ever taken place to determine the accuracy of the FRL or to provide an opportunity for the State Plan to ultimately resolve the finding or observation. Even though the State Plan has requested access to auditor notes for further clarity on noted items, and even though the Directorate of Cooperative and State Programs notes it is a best practice to share case file review notes with state plans, the State Plan has never been afforded that opportunity. Despite its best efforts to obtain information from OSHA that would help clarify the issues in the FAME, the State Plan has no option but to address the FAME based on what it assumes OSHA may be referring to in its findings.

**II.** **OSHA FINDINGS and SOUTH CAROLINA RESPONSES**

**Finding FY 2023-01**: The SAMM data (SAMM 1a) shows the average number of working days to initiate formal complaint inspections was 29.58 days, which was outside the FRL of seven (7) days.

**SC OSHA Response:**

This finding is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than a finding, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being a finding.

**Finding FY 2023-02**: The SAMM data (SAMM 2a) shows the average number of working days to initiate formal complaint inspections was 42.60 days, which was outside the FRL of five (5) days.

**SC OSHA Response:**

This finding is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than a finding, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being a finding.

**Finding FY 2023-03 (previous Findings FY 2022-02, FY 2021-02 FY 2020-02, FY 2019-02):** The percentage of health (59.57%) inspections that were in-compliance was higher than the FRL of 32.06% to 52.58% (SAMM 9b).

**SC OSHA Response:**

This finding is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than a finding, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being a finding.

**Finding FY 2023-04:** Six case files had OTS violations that were not cited.

**SC OSHA Response:**

The State Plan disagrees with this finding. From the limited information OSHA has been willing to share with the State Plan, each one of the files noted was classified as immediately abated in full compliance with the State Plan’s Field Operations Manual (FOM), thus negating the need for a citation. The FOM and the procedures that led to that classification were already reviewed and approved by OSHA. If OSHA no longer agrees with its approval of the FOM and the State Plan’s longstanding policy related to immediate abatements, then a finding in the FAME is not the appropriate or effective way to address that concern.

**Finding- FY-2023-05 (Previous Finding- FY-2022-02, Finding- FY-2021-02):** SC OSHA has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.

**SC OSHA Response:**

On multiple occasions over the last seven years, SC OSHA has reiterated verbally and in writing that it does not have independent authority to increase its maximum penalties annually based on the Consumer Price Index. South Carolina OSHA penalties are established by state statute and can only be changed by legislative action. Specifically, a bill would need to be sponsored, introduced and passed by the State’s General Assembly.

The State of South Carolina has legally challenged the validity of OSHA’s mandate regarding penalty levels, and the lawsuit is currently pending in United States District Court. OSHA is aware that the State Plan cannot act further until this court case has been resolved and/or legislation is passed.

**III. OSHA OBSERVATIONS and SOUTH CAROLINA RESPONSES**

**Observation FY 2023-OB-0****1**:

SC OSHA did not validate and process at least three (3) of 17 complaints from former employees and other complainants alleging serious hazards. SC OSHA should adhere to the informal complaint processing procedures and requirements and develop a strategy to ensure that all complaints alleging serious hazards are addressed.

**SC OSHA Response:**

SC OSHA disagrees that complaints were not validated and processed appropriately. First, SC OSHA would note that it understands from OSHA that there were four (not three) complaints that served the basis of this observation. Because OSHA will not share the auditor’s notes or backup documentation, it is difficult for SC OSHA to understand why the observation was made. Of the four complaints SC OSHA believes this observation was based upon, one had no jurisdiction for SC OSHA to investigate and the other three cases all had to be administratively closed after no response or follow-up information was provided by the complainant. It is purely guesswork for the State Plan to know the basis for the observation and remedy the problem. Is it looking at the same complaints as OSHA? Does OSHA now have problems with an administrative closure if a complainant is no longer cooperative? Was the jurisdiction determination incorrect? These questions demonstrate why access to auditor notes would be beneficial to a state plan and enable it to address areas of alleged concern on the part of OSHA.

**Observation FY 2023-OB-02**:

In three of 17 informal (phone/fax) complaints reviewed, complaint items were not adequately addressed prior to closing the case files. The complaint allegations not addressed were in relation to potential health hazards.

**SC OSHA Response:**

SC OSHA objects to this observation and does not know what was “not adequately addressed.” From the limited information OSHA was willing to provide the State Plan, the State Plan did, in fact, provide the auditors with information about the alleged hazards and their resolution. In at least one of the identified cases, the State Plan provided OSHA a video demonstrating the resolution of those hazards. This again highlights the importance of understanding the basis of an observation so meaningful changes, if needed, can be made.

**Observation FY 2023-OB-03** **(previous FY 2022-OB-01, FY 2021-OB-01)**: Three of 15 fatality investigations reviewed lacked documentation to ascertain why an SC OSHA standard was not cited.

**SC OSHA Response:**

SC OSHA objects to this observation because it lacks specificity and provides no useful information for improvement. There is no source document or metric used here to identify what documentation was missing to warrant an observation that any investigation “lacked documentation.” The use of this phrase is simply a generalization of the auditor’s subjective impression, rather than objective facts or information. On the contrary, SC OSHA maintains that all fatality investigation case files are reviewed by SC OSHA personnel throughout the investigative process. In these three case files, no violations of OSHA standards were noted and no citations were issued.

**Observation FY 2023-OB-04**: Four out of 21 fatality and severe injury investigations reviewed identified a delay in conducting interviews.

**SC OSHA Response:**

SC OSHA objects to this observation because it lacks specificity and provides no useful information for improvement. There is no source document or metric used here to identify the timeframe expected for conducting interviews. “A delay” is not defined and thus is just a generalization from the auditor’s subjective interpretation of what he/she reviewed. There are many factors that can affect access to witnesses, especially following a fatality. The State Plan is unable to address any such factors that may be present here, or try to rectify them in the future, since OSHA has failed to provide the Plan with a useful measure or data point.

**Observation FY 2023-OB-05**: In FY 2023, SC OSHA did not effectively assign targeting inspections in FY 2023. For example, SC OSHA conducted only two programmed health inspections in private industry, and one programmed inspection in the public sector.

**SC OSHA Response:**

SC OSHA objects to this observation because OSHA has never provided it with information about what it considers an “effective[] assign[ment] targeting inspections.” The State Plan provides OSHA with annual projections for types of inspections, but there is no mandate or threshold requirement for what those projections should be, and thus no measurable or data point for reference. There is no source document that identifies what the “effective” assignment of targeting inspections should look like. The State Plan is, once again, being asked to make improvements based on the auditor’s subjective interpretations for which it is difficult for the State Plan to ascertain because it does not have access to his/her notes to determine the actual concerns.

**Observation FY 2023-OB-06 (previous FY 2022-OB-01, FY 2021-OB-01)**: In at least five (5) inspections, it was identified that using the Gravity Based Penalty (GBP) of $7,000 was appropriate to achieve the necessary deterrent effect.

**SC OSHA Response:**

This observation lacks specificity and provides no useful information for improvement. From the limited information provided to the State Plan, items were listed for eight cases, not five, so the State Plan is not certain which five are even being referenced in this observation. Despite this, of the eight cases known to the State Plan, its FOM procedures were followed to determine whether the Gravity Based Penalty should be used. These same procedures used to make the determination had already been reviewed and approved by OSHA.

Further, the fact that the observation uses the word “appropriate” to note what is wrong with the files is yet another subjective generalization of the auditor. There is nothing meaningful provided to the State Plan of what would make it “appropriate.” The FOM does not require a GBP to be used in certain circumstances, so a determination of when it is “appropriate” is even more vague and ambiguous.

**Observation FY 2023-OB-07**: In FY 2023, the average safety lapse time (SAMM 11a) for citations was calculated at 91.18 days, which is above the FRL range of 44.18 to 66.28 days.

**SC OSHA Response:**

This observation is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than an observation, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being an observation.

**Observation FY 2023-OB-08**: In FY 2023, the average health lapse time (SAMM 11b) for citations was calculated at 95.11 days which is above the FRL range of 55.78 to 83.66 days.

**SC OSHA Response:**

This observation is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than an observation, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being an observation.

**Observation FY 2023-OB-09**: SC OSHA conducted 76 health inspections, which was 10.6% below their goal of 85. The range of acceptable data not requiring further review is from 80.75 to 89.25 for health (SAMM 7b).

**SC OSHA Response:**

This observation is based solely on a SAMM measure, which is simply a range and not a threshold that signifies non-compliance or failure if not met. This is evident by the fact that many states throughout the years have been allowed to renegotiate these measures – something South Carolina has not been given the opportunity to do. Items that fall outside the FRL should be only an indication that further review should occur to determine the issue and the cause. Rather than an observation, this item should be noted for further review as stated in the State Policies and Procedures Manual, a Manual that OSHA drafted and published to provide its offices and state plans with the policies and procedures for establishing, monitoring, supporting and withdrawing state plans. The Manual indicates that, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. Because OSHA has never conducted a further review to make a determination of the cause and whether this is truly an indication of a failure, the State Plan disagrees with this being an observation.

**Observation FY 2023-OB-10:** There was no evidence in the retaliation case files reviewed that SC OSHA was advising complainants of their right to dually file with OSHA.

**SC OSHA Response:**

This is an observation that has never been raised by OSHA before. The State Plan’s Whistleblower Manual, which OSHA reviewed *and approved*, does not include this requirement. In accordance with the State Policies and Procedure Manual, when deficiencies or concerns are found, the underlying causes should be identified, including whether the issue is caused by a current policy. OSHA has not done this here, giving the State Plan no direction on resolution of this matter.