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**Michael L. Dixon**  
Commissioner

November 28, 2011

Ms. Cindy Coe  
Regional Administrator  
Occupational Safety and Health Administration  
61 Forsyth Street, SW, Room 6T50  
Atlanta, Georgia 30303

Dear Ms. Coe:

Enclosed is Kentucky's response to the FY 2010 Enhanced FAME Follow-Up Report. I am pleased that OSHA did not find serious deficiencies in Kentucky's Occupational Safety and Health (OSH) Program. None of OSHA's recommendations directly affect employee safety, health, discrimination protection, or employer compliance in Kentucky.

Kentucky agrees with the Enhanced FAME concept and welcomes the opportunity to have its OSH program evaluated by OSHA. We are always willing and eager to implement changes that will enable us to better protect and deliver services to employers and employees of the Commonwealth. However, Kentucky respectfully suggests that OSHA's Enhanced FAME process can be improved. There are several areas where improvements in the Enhanced FAME process can be realized and Kentucky requests an opportunity to discuss this issue with OSHA.

Please contact me at (502) 564-0977 to discuss if you have any questions or need additional information.

Sincerely,

Michael L. Dixon

Enclosure

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# Kentucky Labor Cabinet Occupational Safety and Health Program

**RESPONSE**

**to**

**ENHANCED FEDERAL ANNUAL MONITORING  
EVALUATION (FAME) FOLLOW-UP REPORT**

**for**

**FEDERAL FISCAL YEAR 2010**

## **I. GENERAL REPLY**

Kentucky's Occupational Safety and Health (OSH) Program has long prided itself on its dedication to employee safety, health, and protection against discrimination. The Kentucky OSH Program agrees with the Occupational Safety and Health Administration's (OSHA) approach to workplace safety and health and is an active partner with OSHA.

OSHA's FY 2010 Enhanced FAME Follow-Up Report recommendations are primarily administrative or procedural in nature. Kentucky is pleased and not at all surprised that OSHA did not find serious deficiencies in Kentucky's OSH Program. None of OSHA's recommendations directly affects employee safety, health, discrimination protections, or employer compliance in Kentucky.

Kentucky agrees with the Enhanced FAME concept and welcomes the opportunity to have its OSH program evaluated by OSHA. Kentucky is willing and eager to implement changes that will enable it to better protect and deliver services to employers and employees of the Commonwealth.

Kentucky respectfully suggests that OSHA's Enhanced FAME process can be improved. There are several areas where improvements in the Enhanced FAME process can be realized and Kentucky requests an opportunity to discuss this issue with OSHA. In the interim, Kentucky believes OSHA and Kentucky can achieve significant improvement simply by implementing a change in the period of the Enhanced FAME Follow-Up audit. (Kentucky believes other state plan programs would also benefit.) Kentucky respectfully suggests that performing an Enhanced FAME Follow-Up in the timeframe and manner the FY 2010 Enhanced FAME Follow-Up was conducted is counterproductive. Kentucky respectfully suggests that OSHA extend the period for the Enhanced FAME Follow-Up audit and report.

OSHA's FY 2010 Enhanced FAME Follow-Up effort simply did not allow sufficient time for the process to unfold in a manner that permitted FY 2009 Enhanced FAME recommendations to be implemented and subsequently seen by OSHA. Thus, OSHA's FY 2010 Enhanced FAME Follow-Up report contains duplicative recommendations from the FY 2009 Enhanced FAME report.

It is also important to note that the timeframe utilized for the FY 2010 Enhanced FAME Follow-Up audit and report does not allow any time, or make any effort, to evaluate the effectiveness of implemented recommendations.

As previously stated, Kentucky welcomes the opportunity to discuss this issue with OSHA so that a better time-line can be established that would be beneficial for all concerned and would lead to greater effectiveness of the Enhanced FAME process.

## II. SPECIFIC FINDINGS, RECOMMENDATIONS and KENTUCKY RESPONSE

**OSHA Finding 10-1 (New):** Of the 496 programmed construction inspections conducted, 85% were issued as in-compliance.

**OSHA Recommendation 10-1 (New):** It is recommended that the state evaluate, analyze, and determine the cause of the high in-compliance rate for programmed construction inspections and implement strategies to reduce the rate.

Eighty-five percent (85%) of the programmed construction inspections were in-compliance compared to 44.1% of the programmed construction inspections in FY 2009. The in-compliance rate for construction inspections has increased significantly and is extremely high compared to the federal rate of 23%. It is recommended that state evaluate and determine the causes of the high in-compliance rate for construction inspections and implement strategies to reduce the rate.

### **State Response**

The Division of OSH Compliance utilizes the University of Tennessee for scheduling construction inspections. It is Kentucky's understanding that this is the same construction scheduling procedure OSHA utilizes. OSHA did not indicate that Kentucky was not finding violations that were present or not recognizing hazards. If violations are not present, Kentucky cannot manufacture them just to lower its "in-compliance" rate. Kentucky would be interested to learn about assistance OSHA can offer regarding construction inspection scheduling.

**OSHA Finding 10-2 (New):** The State has not adopted or completed the revision/implementation of the Federal OSHA Field Operations Manual (FOM), to include a side by side comparison.

**OSHA Recommendation 10-2 (New):** It is recommended that the state adopt the Federal FOM or complete the revision/development and implementation of the Kentucky FOM and submit the side-by-side comparison to the Regional Office.

### **State Response**

Kentucky previously informed OSHA that the Division of OSH Compliance is working on the side-by-side comparison. Kentucky plans to have it completed in the near future.

**OSHA Finding 10-3 (09-1):** The state conducts inspections for all formalized complaints regardless of the nature of the hazard(s). 49% of the 245 complaint inspections were in-compliance.

**OSHA Recommendation 10-3 (09-1):** Management should evaluate all complaints including formal complaints to determine when an investigation, rather than an inspection, would be more appropriate to allow a more effective use of their resources.

### **State Response**

This recommendation is the same as the one that OSHA made to Kentucky in the 2009 Enhanced FAME. Kentucky's response was:

“Kentucky takes issue with this recommendation. This recommendation has no basis, is misleading, and implies that Kentucky does not evaluate all complaints. However, nothing could be further from the truth. OSHA’s narrative on page fourteen (14) of the Enhanced FAME report contradicts this recommendation and clearly indicates the Kentucky Division of OSH Compliance does indeed evaluate all complaints. OSHA states, “**All** valid, formal complaints are scheduled for workplace inspections. **Complaints are evaluated** by the Compliance Program managers, prioritized, and inspected or investigated based upon classification and gravity of the alleged hazard.” **[Emphasis added.]**

The Division of OSH Compliance Program Managers have always evaluated **every** complaint, formal (written and signed) or non-formal, and categorized them according to severity.

Kentucky law requires complaints be written and signed by an employee or representative of the employee(s). Therefore, Kentucky does not inspect electronic complaints unless they allege imminent dangers, fatalities, catastrophes, hospitalizations, amputations, or the complainant submits a signed complaint. The Division of OSH Compliance attempts to contact the complainant when an electronic complaint is received and asks the individual to submit a written signed complaint pursuant to Kentucky law. Anonymous electronic complaints, or electronic complaints received by an individual who is not an employee or representative of the employee(s), are processed as a non-formal complaint and a letter is sent to the employer.

On page fifteen (15) of the Enhanced FAME report, OSHA states:

“It was determined that the state was conducting inspections of signed formal complaints where it was questionable of a serious hazard existed.....”

Kentucky law establishes that inspections will be conducted upon receipt of notification and when reasonable grounds exist for such violation or danger. Kentucky believes an employee, or representative of employees, who takes the time to memorialize a workplace concern(s) in the form of a written and signed complaint has a concern that warrants an onsite evaluation by the Division of OSH Compliance. Kentucky believes onsite observation is the surest method to determine if a “questionable” serious hazard exists. Kentucky believes employees are better protected and served when alleged hazard determination is made through direct onsite observation rather than attempting a determination via indirect observation methods. Additionally, experience establishes that other serious hazards not alleged in a complaint may be discovered during inspection of the complaint items.

OSHA states on page fourteen (14), “The state places emphasis on customer service and assuring that each complaint is given attention consistent with the complaint directive and the severity of the alleged hazards.” The Division of OSH Compliance is proud of its attention to customer service. As OSHA states on page fourteen (14), complaint investigations were initiated within an average of 2.65 days from the time of receipt and

complaint inspections were initiated within an average of 6.63 days from the time of receipt. OSHA states that only a “few complaints were responded to late because of a lack of available resources.” To be more precise, as OSHA states on page fourteen (14), of the 522 complaints Kentucky handled and 245 complaint inspections Kentucky conducted, “Three (3) serious complaints inspections were opened later than 30 days after assignment in FY 2009.” OSHA does not indicate if the three (3) “serious complaint inspections” that were opened later than thirty (30) days resulted in citations issued; and if so, OSHA does not indicate if the citations were related to the alleged complaint hazards or other hazards observed during the inspection.

As noted above, Kentucky clearly evaluates all complaints and assigns investigations or inspections based upon classification and gravity of alleged hazards and believes this is a very responsible, sound practice. The Division of OSH Compliance will continue its present method. The Division of OSH Compliance believes this is a very appropriate, very efficient, and very effective use of resources.”

Kentucky’s position has not changed. The Division of OSH Compliance believes its practice is very appropriate, very efficient, and a very effective use of resources and will continue. This is a non-issue that Kentucky considers settled.

**OSHA Finding 10-4 (09-8):** Settlement agreements did not contain employer commitments or justifications for changes or penalty reductions other than “for settlement purposes only.”

**OSHA Recommendation 10-4 (09-8):** Settlement agreements need to include employer commitments and justification for penalty reductions and/or modifications documented in the case file.

#### **State Response**

This recommendation is the exact same that OSHA presented in the 2009 Enhanced FAME. In Kentucky’s response, Kentucky informed OSHA that the Division of OSH Compliance will include “employer commitments” in informal conference documentation. Kentucky also informed OSHA that the Division of OSH Compliance was working with the Labor Cabinet’s Office of General Counsel to develop a procedure that will address this recommendation for formal settlement agreements.

Subsequently, the Division of OSH Compliance has developed and implemented use of an informal settlement agreement form that demonstrates employer commitments. The Director of the Division of OSH Compliance signs the form.

Kentucky questions OSHA’s basis for this finding and recommendation since OSHA did not review any case files for the FY 2010 Enhanced FAME. The issue was addressed and OSHA’s recommendation implemented.

**OSHA Finding 10-5 (09-9):** Of the 50 programmed inspection case files in general industry, 48% were in compliance.

**OSHA Recommendation 10-5 (09-9):** It is recommended that the state evaluate and determine the cause of the high in-compliance rate for programmed inspections. It is unclear from the State's response how the identified problem with the targeting program has been addressed.

The areas of concern are that hazards were identified during only 34.0% of programmed safety inspections (Federal data 65.1%); serious classification of safety violations 65.9% (Federal data 81.0) and of health violations 45.2% (Federal data 70.2); lapse time for safety was 77.64 (Federal data 47.3 days) and health was 93.45 (Federal Data 61.9 days). These areas will continue to be an area of focus in FY 2011.

### **State Response**

The first sentence of this recommendation is exactly the same that OSHA presented in the 2009 Enhanced FAME report. Kentucky's reply was thorough and addressed OSHA's recommendation in detail. Kentucky stated:

"Kentucky believes the term "in-compliance," though useful as a classification tool, is rather ambiguous when used as a simple reporting mechanism instead of viewing an inspection as a process which has fully assessed the conditions found in a Kentucky workplace. Kentucky views "in-compliance" inspections as those where "no hazards were observed at the time of the inspection and no citations were recommended." This is a subtle difference, but it does exist. OSHA makes a statement on page eighteen (18) of the Enhanced FAME report that supports Kentucky's point of view. OSHA states:

"The case file reviews did not reveal any instances of photos that showed hazards, a failure to sample where exposure might be expected or any other hazards or program deficiencies that were not addressed."

In other words, the "in-compliance" reports obviously reflected that at the time of the inspections, no hazards were observed.

OSHA's perception of "high in-compliance rate for programmed inspections" may lie in the type of industries selected through Kentucky's Targeting Outreach Program (TOP), a process in which the Division of OSH Compliance has no input. The Division of OSH Education and Training's Statistical Services Branch collects data through the OSHA Data Initiative. After analysis of the most current calendar year, the top ten (10) high hazard industries in Kentucky are identified using four (4) digit North American Industry Classification System codes. Following that identification, the Division of OSH Education and Training sends a TOP letter to each employer in each industry offering free consultation services in an effort to reduce employee injuries and illnesses. Each employer is asked to respond to the offer by completing and returning an enclosed form by a pre-determined date. Employers who fail to respond are compiled into a list and turned over to the Division of OSH Compliance. The Division of OSH Compliance schedules either a complete safety or a health inspection from the aforementioned list.

Employers who do not request Division of OSH Education and Training assistance in response to a TOP letter may have strong OSH programs and do not need Division of

OSH Education and Training's assistance. However, those employers are still turned over to the Division of OSH Compliance since they failed to respond to the Division of OSH Education and Training. Subsequent Division of OSH Compliance inspection(s) may verify the strength of the employer's OSH program thus resulting in no citations being recommended. This may be one (1) of the main reasons for the high "in-compliance" rate for programmed inspections.

Another probable reason for Kentucky's rate of programmed inspections that resulted in no citations being recommended is the frequency of programmed inspections that many of Kentucky's employers receive from the Division of OSH Compliance. Unlike OSHA, Kentucky's Division of OSH Compliance often inspects many of the same employers for programmed inspections. It is very logical that such employers would be "in-compliance." For instance, a compliance officer who inspects an employer who has experienced three (3) programmed inspections in the past six (6) or seven (7) years would be more likely to find an absence of hazards and thus no citations would be recommended or issued.

Closely related to this is the fact that the Division of OSH Compliance often conducts programmed inspections at workplaces that have taken advantage of Kentucky's strong consultation program. Although employers who experienced a comprehensive audit by Kentucky's Division of OSH Education and Training are still subject to subsequent programmed inspections, experience shows that those employers have worked diligently to create a workplace that is free from safety and health hazards. It is not uncommon that a compliance officer who inspects those worksites is likely to find an absence of hazards and thus no citations would be recommended or issued.

Regardless of the reason(s), OSHA clearly makes the most important point on page eighteen (18) of the Enhanced FAME report. To reiterate, OSHA states:

"During the review of the 50 programmed inspection case files in general industry (private sector), 48% were in-compliance overall, 56.3% of the programmed construction inspections files reviewed and 44.1% of the programmed general industry (46.7%-safety and 42.1%-health) files reviewed were in-compliance. The case file reviews **did not** reveal any instances of photos that showed hazards, a failure to sample where exposure might be expected or any other hazards or program deficiencies that were not addressed." **[Emphasis added.]**

Kentucky would be very concerned if OSHA found instances of photos that showed hazards; or if OSHA found that Kentucky failed to sample where exposure might be expected; or if OSHA found the presence of other hazards or program deficiencies that Kentucky failed to recognize and cite. However, that is clearly not the case as demonstrated in the aforementioned quote. OSHA validates that Kentucky's "in-compliance" programmed inspection results are accurate.

Kentucky believes "the high in-compliance rate" is more relative to its programmed inspection targeting. Kentucky is working on developing an additional method to identify workplaces that warrant Division of OSH Compliance programmed inspections."

Kentucky's response clearly establishes that Kentucky evaluated and determined the cause of the high "in-compliance" rate for programmed inspections. Contrary to OSHA's statement in Recommendation 10-5, Kentucky believes its response was very clear and completely addressed OSHA's 2009 Enhanced FAME recommendation.

Again, in Recommendation 10-5, OSHA recommends verbatim "the state evaluate and determine the cause of the high in-compliance rate for programmed inspections." Kentucky's response has not changed. Kentucky believes its response is very clear and fully addresses the recommendation.

OSHA addresses Kentucky's lapse time in the next finding and recommendation. Kentucky questions why that issue is duplicated in this recommendation and its relevance to this recommendation.

**OSHA Finding 10-6 (09-11):** The average lapse time from opening conference to citation issuance was 57.13 days for safety and 98 days for health, which is much higher than the national rate of 43.8 days for safety and 57.4 days for health.

**OSHA Recommendation 10-6 (09-11):** Evaluate and determine the cause of the high citation lapse time for safety and health. OSHA suggests that staff training and use of administrative tracking tools may be helpful in addressing this problem. The lapse time in FY 2010 was 58.8 for safety and 68.7 for health, lower than the lapse time during the 2009 enhanced fame study. However, this is still much higher than the national averages.

#### **State Response**

OSHA and Kentucky addressed this finding and recommendation in the 2009 Enhanced FAME. Kentucky's response for the FY 2010 Enhanced FAME is primarily the same as it was for FY 2009 Enhanced FAME. Kentucky experienced essentially the same issues during FY 2010 that it did in FY 2009. Kentucky informed OSHA that the Division of OSH Compliance implemented administrative tracking tools to address the issue and as OSHA notes in this recommendation, Kentucky's lapse time for FY 2010 has improved.

Kentucky believes the comparison to the national average is somewhat skewed in light of the current fiscal challenges. Kentucky also believes that because of present fiscal challenges, and several other factors, progress in this area will be measured. Nevertheless, Kentucky continues to work towards improvement.

**OSHA Finding 10-7 (09-18):** Discrimination case files lacked copies of the Settlement Agreements, back pay amounts, and explanations of the settlements in the FIR. In addition, Kentucky is not reviewing the settlement provisions to ensure the complainant's rights are protected and it does not have any guidelines related to cases settled between the two parties.

**OSHA Recommendation 10-7 (09-18):** When a Whistleblower case is settled between the parties and a Kentucky OSH settlement agreement is not used, the investigator should obtain a copy of the agreement for the file. In addition, the state should develop guidelines to review and

approve all settlement agreements to ensure that the complainant's rights are protected. This recommendation has been partially implemented.

**State Response**

Kentucky informed OSHA that Kentucky implemented the first portion of this recommendation, which OSHA acknowledges. Kentucky questions why it is a part of this recommendation.

The Division of OSH Compliance implemented a procedure with the Cabinet's Office of General Counsel to review all settlement agreements to ensure the overall purpose of the anti-retaliation provision is served and any chilling effect of the alleged retaliation is addressed.

Kentucky questions OSHA's basis for this finding and recommendation since OSHA did not review any case files for the FY 2010 Enhanced FAME. The issue was addressed and OSHA's recommendation implemented.

**OSHA Finding 10-8 (09-20):** Kentucky does not have an internal evaluation program, as required by the State-Plan Policies and Procedures Manual.

**OSHA Recommendation 10-8 (09-20):** Kentucky should develop and implement a formal program for conducting periodic internal evaluations. The procedure should assure that internal evaluations possess integrity and independence. Reports resulting from internal evaluations will be made available to federal OSHA.

**State Response**

This is another recommendation taken verbatim from the 2009 Enhanced FAME report. Kentucky's response to the recommendation was:

“This is another recommendation that puzzles Kentucky. OSHA's “State Plan Policies and Procedures Manual,” CSP 01-00-002, Chapter 7, F. The State Internal Evaluation Program states in its entirety:

“A State's program for comprehensive evaluation of its internal operations is a critical component of the monitoring system. Providing that mandates are met, States have the flexibility to design and implement programs that will fit each individual State's needs and personnel resources.

1. Each State must periodically conduct reviews of its activities under the plan, focusing on key issues and areas of concern to the State.
2. The program must provide for integrity and independence in conducting evaluations.
3. States must maintain documentation of their internal evaluations and make it available for review by Federal monitors. Requests for materials that are not in Federal OSHA files will be referred to the individual State for a decision on releasability based on the State's own laws.”

Kentucky believes it had internal evaluation procedures in place at the time of the Enhanced FAME audit. It appears that OSHA believes Kentucky's procedures need to be written into a single document. Kentucky notes that a written, single document, internal evaluation program is not required by the CPL. In fact, a written internal evaluation program is not even required by the CPL. The CPL requires documentation of internal evaluations and that is very different from a written program. During the Enhanced FAME audit, OSHA's audit team interviewed Kentucky staff about Kentucky's internal evaluation process. The audit team was advised of Kentucky's internal evaluation policies and procedures. Although Kentucky **maintains** documentation associated with internal evaluations, OSHA's audit team did not request any documentation associated with the evaluations. *The audit team could have been provided with documentation if it had been requested.*

The Division of OSH Compliance and the Division of OSH Education and Training have always approached and conducted internal evaluations on several fronts, such as internal fiscal checks and balances, employee on the job evaluations, and review of employee work product, to complement a host of other internal policies and procedures. Kentucky's internal evaluation process had been in place for decades prior to, and during, OSHA's Enhanced FAME audit. Kentucky's internal evaluation process was never brought to Kentucky's attention during any state program audit prior to the Enhanced FAME audit.

Kentucky believes the aforementioned Chapter 7 information does not offer any meaningful substance regarding the specific content of an internal evaluation program.”

Kentucky informed OSHA that the Division of OSH Education and Training developed a written “Internal Quality Assurance Program” which was submitted to Region 4 in April 2010. Yet, neither OSHA's finding nor its recommendation for the 2010 Enhanced Fame report makes that distinction and Kentucky questions why that is the case. Kentucky also informed OSHA that the Division of OSH Compliance was developing a written program. Once again, neither OSHA's finding nor its recommendation makes that distinction and Kentucky questions why that is the case.

The Division of OSH Compliance continues work on developing a written program.