

**FY 2012 Abridged Federal Annual Monitoring and Evaluation (FAME)
Report**

**Maryland Occupational Safety and Health Program
(MOSH)**



Evaluation Period: October 1, 2011 – September 30, 2012

**Initial Approval Date: June 28, 1973
Program Certification Date: February 15, 1980
Final Approval Date: July 18, 1985**

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I. Executive Summary

The Fiscal Year (FY) 2012 Abridged Federal Annual Monitoring and Evaluation (FAME) Report focuses on the responses to the FY 2011 FAME Report, and the Corrective Action Plan (CAP) implemented by the Maryland Occupational Safety and Health (MOSH). MOSH's progress in achieving the actions as specified in their approved CAP was evaluated throughout the year. This included reviews of the State Activity Mandated Measures (SAMM) Report, the State Indicator Report and through monitoring meetings held with the state.

This report also addresses MOSH's progress in achieving their annual performance plan goals, and covers state mandated activity measures during FY 2012 (October 1, 2011 to September 30, 2012). An assessment of the state's progress toward their 5 year Strategic Plan (2008-2012) is also addressed. The annual program activities that were conducted over the five year period have greatly contributed to MOSH's long term goals to improve workplace safety and health through: compliance assistance and enforcement of occupational safety and health regulations, to promote a safety and health culture within Maryland, and to secure public confidence through excellence in the development and delivery of MOSH programs and services. Their efforts have contributed to a significant reduction of occupational injuries, illnesses and fatalities within Maryland. This included a 50 percent reduction of occupational safety and health fatalities that occurred under their jurisdiction since 2006, and a reduction of significant injuries and illnesses that resulted in days away, job transfer or restriction by 20 percent since 2007. Fatalities under MOSH's jurisdiction did increase by one last year; however, the number of fatalities in FY 2011 was the lowest in more than five years.

The Maryland plan was certified on February 15, 1980, and was granted final State plan approval on July 18, 1985. The MOSH program operates under the authority of the MOSH Act, Labor and Employment Article, Section 5-101 through 5-901. The MOSH program is administered by Maryland's Department of Labor, Licensing and Regulation (DLLR), Division of Labor and Industry (DLI). In Fiscal Year 2012, the MOSH program was operated under the guidance of the outgoing Secretary of DLLR, Alex Sanchez; the current Secretary of DLLR, Leonard J. Howie III; J. Ronald DeJuliis, Commissioner of DLI/OSHA State Plan Designee; and Eric Uttenreither, Assistant Commissioner of the MOSH Administration.

The MOSH program consists of a Compliance Services Unit that conducts occupational safety and health inspections for all public and private sector places of employment in the State of Maryland, with the exception of private sector maritime activities (shipyard employment, marine terminals, and long shoring), federal government employers and employees, the United States Postal Service, and employment on U.S. military bases, which come under federal OSHA's jurisdiction. Additionally, MOSH has an Outreach Unit which provides free consultation services (Consultation Program), training and education, and manages cooperative programs. MOSH also administers a Discrimination Investigation Unit. Lastly, the Research and Statistic Unit provides MOSH with statistical data on occupational fatal and nonfatal workplace injuries and illnesses.

PROFILE OF THE MARYLAND STATE PLAN (FY 2012)				
Designee	J. Ronald DeJuliis, Commissioner Maryland Division of Labor and Industry Department of Labor, Licensing and Regulation 1100 N. Eutaw Street – Room 606 Baltimore, Maryland 21201-2206			
Initial Plan Approval	June 28, 1973			
Plan Certified	February 15, 1980			
Final Approval	July 18, 1985			
FY 2012 Funding	<i>Federal</i>	\$4,130,800		
	<i>State</i>	\$4,774,956		
	TOTAL	\$8,905,756		
Source of State Funding	<i>Special Funds through Workers' Compensation Commission</i>			
Compliance Officers	<i>38.5 safety/16 health (allocated as of 9/30/2012)</i>			
	<i>34.5 safety/11 health (on-board as of 9/30/2012)</i>			
Public Sector Consultants	<i>1.1 (allocated)</i>			
	<i>Supervisor .1/ 1.0 health (on board as of 9/30/2012)</i>			
FY 2012 Enforcement Inspections Private and Public Sector		<i>Goal</i>	<i>Actual</i>	<i>Percent Complete</i>
	<i>Safety</i>	1,108	1,349	122%
	<i>Health</i>	271	239	88%
	TOTAL	1,379	1,588	115%
FY 2012 Public Sector Consultation Visits		<i>Goal</i>	<i>Actual</i>	<i>Percent Complete</i>
	<i>Safety</i>	3	1	33%
	<i>Health</i>	22	25	114%
	TOTAL	25	26	104%
Covered workers	2.3 million			
Covered Establishments	163,239			
Coverage	<i>Public and private sector places of employment in the state, with the exception of federal employees, the United States Postal Service, private sector maritime, federal military facilities, and other federal enclaves where the state has ceded jurisdiction to the federal government</i>			

MOSH's mission is to promote and assure workplace safety and health in the State while reducing workplace fatalities, injuries, and illnesses. As in prior fiscal years, MOSH's FY 2012 Annual Performance Plan fully supports Maryland's long-term strategic goals and addresses state-specific issues and concerns. MOSH is achieving their goals by promoting a safe and healthful workplace culture.

According to the FY 2012 23(g) Grant Application, the MOSH program had approximately 80.10 full-time employees (FTEs) which were assigned to the Compliance Services Unit, the Outreach Unit, and the Discrimination Investigation Unit. At the end of the year this number dropped to 76.35 on-board positions FTEs, a reduction of 3.75 positions. The reductions included 1.0 safety and 2.9 health compliance officers.

Status of corrective actions in response to FY 2011 FAME Report Recommendations

The FY 2011 Maryland (MD) FAME report contained eight findings and recommendations. These findings included: a policy which limits MOSH's ability to assess penalties for first instance other than serious violations; the timely adoption of Federal Program Changes, and four findings which related to MOSH's discrimination program. Three of the identified items have been closed. MOSH needs to take swift action to implement corrective actions to close out the remaining findings in FY 2013.

II. Major New Issues

Significant changes –

In October of 2012, Leonard J. Howie III was appointed Secretary of the Maryland Department of Labor, Licensing and Regulation (DLLR) by Governor Martin O'Malley, replacing the outgoing Secretary Alex Sanchez.

On September 3, 2012 Maryland's Tree Care and removal standard become a final rule. MOSH adopted this standard to address the increase of fatalities that have been seen in recent years. MOSH has taken action to educate the public, stakeholders and the industries on these new regulations.

III. State Progress in Addressing FY 2011 FAME Report Recommendations

During FY 2012, MOSH submitted a Corrective Action Plan (CAP) to address findings detailed in the FY 2011 FAME Report. Appendix B provides summary information regarding verification of MOSH's status in correcting these issues. Detailed information on each of these findings is addressed below.

Finding #11-01: Case file review revealed that next-of-kin letters were not sent on all fatality inspections (where required).

Recommendation #11-01: At the start of all fatality inspections/ investigations, send condolence letters to next-of-kin. Families of fatality victims also must be kept up-to-date about investigations and informed of the outcome of MOSH investigations.

Action to date: Although MOSH did dispute whether the issuance of next of kin letters was mandatory when identified in FY 2009; they began a pilot procedure to implement this practice. In April of 2012, OSHA adopted CPL 02-00-153, Communicating OSHA Fatality Inspection Procedures to a Victim's Family to provide agency guidance to ensure families are provided information on fatality procedures and provide them the opportunity to receive updates throughout the inspection and settlement process. State adoption of this policy, which includes information on sending next of kin letters, was encouraged; however, it was not mandatory. MOSH has notified OSHA of their intent to adopt a policy; however, it will not be adopted identical. MOSH's adoption will adhere to the state's notification system and ensure it coincides with the Maryland FOIA rules. MOSH's policy is still pending and will be evaluated upon submission; however, as state adoption is not mandatory, the Region has closed this finding.

Status: Closed

Finding #11-02: MOSH does not assess penalties for first instance other-than-serious violations (in manufacturing, and in construction when less than 10 total violations are issued).

Recommendation #11-02: Revise MOSH Instruction 98-3 dated September 28, 1998 to eliminate Section C.3 that does not permit penalty assessment for first instance other than serious violations.

Action to date: MOSH reported that they would take OSHA's request under advisement and discuss it with the legal staff during FY 2012, however, no action was taken to revise this policy in FY 2012. State plans are required by 29 CFR 1902.37(b)(12) to propose penalties in a manner at least as effective as the federal program, including the proposing of penalties for first instance violations. Although the federal policy does not require penalties for other than serious safety and health violations when there is minimal severity, it does allow the agency to administer a penalty if it is determined appropriate to achieve the necessary deterrent effect. As this policy prevents the Commissioner from applying penalties in a manner which is at least as effective as federal OSHA, MOSH must take action to revise their policy to allow the Commissioner to apply penalties when appropriate.

Status: Open, Continue to monitor as Finding 12-01.

Findings #11-03: MOSH offers penalty reductions in excess of what is offered by federal OSHA.

Recommendation #11-03: Rescind Memorandum 01-2 dated April 9, 2001 titled "Employer Incentive 50% Penalty Reduction."

Action to date: MOSH maintained that their policy removes employees from risk faster than the federal counterpart by providing an additional incentive for employers to correct hazards immediately. The Region reviewed this finding and has agreed to close.

Status: Closed.

Finding #11-04: Not all Federal Program Changes (FPCs) are adopted within the six month period.

Recommendation #11-04: Recommend MOSH develop strategies to adopt Federal Program Changes within the six month period.

Action to date: MOSH committed to work hard to address this issue during FY 2012, however, they cited inherent obstacles which prevent timely adoption. Of the nine FPCs (six directives and three standards) that had adoption due dates in FY 2012, only one was adopted within 6 months.

Status: Open, Continue to monitor as Finding 12-02.

Finding #11-05: Whistleblower investigations were not completed in accordance with MOSH FOM, Chapter X, A 3 (b), which requires investigations to be completed within 90 days of filing. Section 5-604(d) (3) of the MOSH Act requires that “within 90 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection.”

Recommendation #11-05: Whistleblower investigations must be completed within 90 days in accordance with MOSH FOM and the MOSH Act. MOSH should provide a plan to the Region to detail what steps are to be taken to increase the percentage of investigations completed within 90 days, including those dismissed due to lack of cooperation.

Action to date: During FY 2012, MOSH completed 4.55 percent (one out of twenty-two) of discrimination investigations within 90 days. However, this measure is one that is a challenge for many programs, as a proper investigation of complaints may involve complex activities which take longer than 90 days to complete. Therefore, this item was closed.

Status: Closed

Finding #11-06: Staff, designated as benchmark positions, are not performing enforcement activities.

Recommendation #11-06: MOSH must ensure that personnel designated as fulfilling its benchmark requirements pursuant to 29 CFR §1952.213 are performing enforcement activities and conducting enforcement inspections. Clarification of staffing and the breakdown assigned to each unit/program including the separation of enforcement and compliance assistance activities must be provided.

Action to date: MOSH provided a staffing breakdown of their benchmark positions. It was noted that three positions in the outreach unit, who do not conduct enforcement inspections, are still being counted towards benchmarks. The state needs to remove these positions from the benchmarks and allocate an appropriate number of safety and health compliance officers to meet the requirements of the grant.

Status: Open. Continue to monitor as Finding 12-05.

Findings #11-07: Investigative reports did not include the required elements under the Whistleblower Investigations Manual”, including: rights to an appeal, case identifiers, back pay calculations and mitigation of damages for settlements, or references to tabbed evidence. Three of the eight investigative reports reviewed that should have had an analysis did not address the elements of a prima facie case (protected activity, respondent knowledge, adverse action, and nexus).

Recommendation #11-07: Review the Whistleblower Investigations Manual and revise the investigative reports to include all required components.

Action to date: MOSH did not report any progress in this category during FY 2012.

Status: Open, Continue to monitor as Finding 12-03.

Findings #11-08: Closing letters did not include all information required by the Whistleblower Manual.

Recommendation #11-08: In closing letters and conferences, inform complainants of their right to appeal a dismissal. Include the case identifier on all correspondence.

Action to date: MOSH did not report any progress in this category during FY 2012.

Status: Open, Continue to monitor as Finding 12-04.

IV. Assessment of FY 2012 State Enforcement Measures

A. Enforcement

A review of MOSH’s enforcement activity measures was conducted for this abbreviated report. This review was performed through evaluation of data in the State Activity Mandated Measures (SAMM) Report, which is available in Appendix D of this report. Any discrepancies were evaluated and the conclusions located below. A review of the State Indicator Report, and IMIS database were also utilized for this report.

During the evaluation period of FY 2012 (October 1, 2011 through September 30, 2012) the MOSH program conducted 1,546 private and public sector inspections exceeding their projected goal of 1,379 inspections. Of the 1,546 inspections conducted by Maryland during FY 2012, approximately 86% were Safety related while 14% were health related.

Complaints

MOSH performed 143 inspections to address employee complaints in FY 2012. On average, these inspections were initiated within 2.54 days, which was within the agreed upon goal of 5 days. Complainants are required to be notified within 20 days of an inspection when there are citations issued, or within 30 days after an inspection where there were no violations cited. MOSH notified complainants in a timely manner 87.16 percent of the time.

MOSH investigated 132 complaints during the year. On average, MOSH took 2.60 days to initiate investigations for these complaints, which is below the negotiated timeframe of 3 days.

MOSH received 7 complaints or referrals which involved complaints of imminent danger. MOSH responded to all of these complaints within one day, as required.

Fatalities

According to IMIS, Maryland investigated 19 workplace fatalities in FY 2012, compared to 18 in 2011. There were 8 construction related fatalities, which was 1 more than last year. Nine fatalities occurred in General Industry, and two fatalities were in the public sector. Falls were the largest cause, accounting for 8 of the fatalities, or 42 percent of the total. Maryland's procedures for investigation of occupational fatalities are effectively the same as those of federal OSHA. Investigations are initiated within one day of notification of the fatality.

Targeting and Programmed Inspections

MOSH utilizes a number of targeting programs to identify and schedule programmed inspections. These include use of federal OSHA's National Emphasis Programs (NEPs), their Site Specific Targeting Program, and Maryland specific Local Emphasis Programs (LEPs) which address special emphasis hazards and industries in Maryland. The following LEPs were active in FY 2012:

- MOSH Instruction 11-4 – LEP – Accident Report
- MOSH Instruction 11-5 – LEP – Fall Hazards in Construction
- MOSH Instruction 11-6 – LEP – Electrical Hazards in Construction
- MOSH Instruction 11-7 – LEP – Crushed-by/Struck-By Hazards in Construction
- MOSH Instruction 11-9 – LEP – Public Sector
- MOSH Instruction 11-11 – LEP – Maryland High Hazard Industries

MOSH conducted 1,141 programmed inspections throughout the year, which accounted for 73 percent of the total inspections conducted. Sixty-seven percent of these inspections had serious, willful and/or repeat violations identified. This was approximately 10 percent higher than the 3 year national average.

The SAMM report identified one case where MOSH was denied entry, where entry was not obtained. After reviewing this inspection in IMIS, MOSH was not denied entry. The inspection was not conducted as the company was originally identified for a programmed inspection for which they were not covered.

Citations and Penalties

When violations were cited in an inspection, on average 2.13 serious/willful/repeat and 2.25 other than serious violations were identified. The 3 year national average was 2.1 and 1.2 respectively. On average, the state issued citations within 43.65 days from the opening conference for safety inspections and 65.48 days for health inspections. Nationally, safety citations were issued within 55.9 days of the opening conference, and health citations within 67.9 days of the opening conference.

Assessment of civil penalties are covered under Sections 5-809 and 5-810 of the MOSH Act, as well as Chapter VI of MOSH's Field Operations Manual. In the private sector, the average penalty per serious violation was \$1,139.50, which was less than the 3 year national average of \$1,990.50. Part of the penalty disparity is due to the fact that a greater percentage of total inspections were conducted in smaller businesses in FY 2012, and these businesses receive a greater reduction in penalties due to size. In FY 2013, the SAMM measure for penalties has been amended to provide comparisons for size of businesses for a better comparison.

As noted in previous FAME reports, MOSH Instruction 98-3 prohibit the Commissioner from assessing penalties for first instance other-than-serious violations in manufacturing and construction, (when there are 10 or less total violations). 29 CFR 1902.37(b)(12) requires the Assistant Secretary to ensure "The State propose penalties in a manner at least as effective as under the federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the federal program".

Although, in most cases federal OSHA does not assess penalties for first instance other-than-serious violations, OSHA's Field Operations Manual allows OSHA Area Directors to assess penalties for other-than-serious violations when appropriate to achieve the necessary deterrent effect.

Finding #12-01 (11-02): MOSH Instruction 98-3 prevents the Commissioner from assessing penalties for other-than-serious violations (in manufacturing and construction when less than 10 total violations are cited).

Recommendation #12-01: MOSH Instruction 98-3 must be revised to allow the Commissioner the ability to assess penalties for instances when it is appropriate to achieve the necessary deterrent effect.

Abatement

In the Private sector in FY 2012, MOSH verified abatement of approximately 84 percent of serious, willful and repeat violations within the abatement timeframe, plus 30 calendar days. In the public sector MOSH verified approximately 72 percent of these violations within 30 days of the abatement date. This measure excludes contested cases. MOSH's performance in this category has improved in the private sector since FY 2011. In FY 2011, MOSH verified abatement of 77 percent of serious, willful and repeat violations of in a timely manner in the private sector, and 76 percent of these violations in the public sector.

Data shows that MOSH had approximately 25.1 percent of their safety cases with serious violations that had an abatement period of greater than 30 days from issuance. One hundred percent of serious health violations were verified as abated within 60 days of the issuance date.

Employee and Union Involvement

MOSH actively ensures that employees are interviewed and unions are given the opportunity to participate in opening and closing conferences, as well as the walkthrough. Data showed that employees/union involvement was achieved in 100 percent of their inspections.

B. Review Procedures

Informal Conferences

A review of the State Indicator Report showed that only 1.1 percent of initial violations were vacated in the private sector, and only 1.3 percent of violations were reclassified at Informal Conferences. This was much better than the federal comparison data which showed federal sites vacated 7.1 percent of initial violations, and reclassified 4.9 percent of violations during these conferences.

MOSH retained approximately 52.2 percent of penalties issued during informal conferences, while federal OSHA retained 59.1 percent of penalties.

Formal Review of Citations

MOSH was more effective at retaining violations and classification than federal comparison data. When cases were contested, 12.6 percent of violations were vacated, and 10.4 percent of

violations were reclassified. Federal OSHA had 22.5 percent of violations vacated, and 12.4 percent of the violations reclassified when the cases were contested. The average lapse time length from receipt of contest to first level decision was 219.2 days. This was longer than the 3 year national average of 187.0 days.

C. Standards and Federal Program Changes Adoption

Standards Adoption

Federal OSHA identified two standards which Maryland was required to adopt in FY 2012. Maryland has typically adopted required standards in a timely manner, however there were two cases where MOSH was unable to adopt within 6 months of the Federal Register Issuance date in 2012.

Final Rule, Hazard Communication-Globally Harmonized System of Classification, FR Notice, March 26, 2012.

Maryland is has not yet been able to adopt this standard. MOSH notified federal OSHA that they expected this standard would take longer than 6 months to complete the adoption process as parts of Maryland law has to be rescinded in order to adopt this final rule. The original targeted adoption date was 10/1/2012, however, due to legislative delays the expected adoption date is now mid-May, 2013.

Final Rule, Revising Standard Referenced in the Acetylene Standard #97 FR March 28, 2012 (Adoption was not required).

Maryland adopted this non mandatory Direct Final Rule (DFR) revising consensus standards referenced in the Acetylene Standards on May 11, 2012, in a timely manner.

Final Rule, Standards Improvement Project, Phase III #43 FR June 8, 2011 (Due December 8, 2011).

Maryland adopted this mandatory standard on March 12, 2012, past the 6 month due date.

Final Rule, Working Conditions in Shipyards, #42, May 2, 2011 (Due November 2, 2011).

Maryland did not adopt this standard as they do not have jurisdiction for shipyards.

Federal Program/State Initiated Changes

When a significant change in the federal program would have an adverse impact on the "at least as effective" status of the State program, federal OSHA requires states to adopt the federal change within six months of notification. There were six Federal Program Changes that were designated as requiring adoption that had due dates in FY 2012. During this timeframe, MOSH took action to adopt four of the six, however, only one was adopted within the six month timeframe.

The following program changes are still outstanding that were due in FY 2012:

Whistleblower Investigations Manual, CPL-02-03-003 20011, ATS #463, September 20, 2011 (Required to be adopted by March 20, 2012)

Revisions to the Field Operations Manual – April 22, 2011 (Required to be adopted by October 22, 2011)

Timely adoption of Federal Program Changes continues to be a challenge for MOSH.

Finding #12-02 (11-04): Federal Program Changes (FPCs) are not being adopted within a timely manner.

Recommendation #12-02: MOSH must take action to adopt FPC's within six months of notification.

D. Variances

No variances were requested in Maryland during FY 2012.

E. Public Employee Program

According to DLLR's third quarter employment and payrolls chart, located at <http://www.dllr.state.md.us/lmi/emppay/tab1md.shtml>, Maryland's public employee program covers approximately 316,300 state and local governmental employees, which is approximately 13 percent of the 2.3 million workers in Maryland (excluding federal employees). This year MOSH conducted 67 safety and health inspections in the public sector. This represented 4.33 percent of total inspection activity in FY 2012. This was a decrease from FY 2011, where 89 inspections were conducted accounting for 6.96 percent of the total inspections. There were serious violation citations issued in 60.0% of the safety inspections and 56.8% of the health inspections conducted. This is an increase in the serious rate over the FY 2011 public sector inspection activity which was 57.8% for safety and 47.0% for health.

Although no penalties are assessed against public sector employers, MOSH has worked successfully with these agencies to bring them into compliance with current safety and health

standards. The most recent injury and illness data, from FY 2011, shows that injury and illness rates continue to trend downward in the public sector. FY 2011 was tied for the lowest Nonfatal Incidence Total Recordable Case rates since 2003, which was 5.8 total recordable injuries per 100 workers. Nonfatal injury incidence rates for cases with days away, restriction, or transfer (DART) rate from a job due to injury was also tied for the lowest rate, which was 2.9 per 100 workers. Although the overall rates have declined this year, the MOSH's Research and Statistics Unit, through the BLS Survey of Occupational Injuries and Illnesses (SOII) Program, did note that state hospitals, nursing and residential care facilities, state correctional institutions, and local government did show increases in their total injury case rates.

F. Discrimination Program

Maryland's Discrimination Program is responsible for enforcement of section 11(c) of the OSH Act. MOSH currently employs three investigators, one full time and two part-time, who investigate allegations of discrimination after raising safety and health concerns in their workplace. Maryland's Program is a required component of their state plan, in accordance with 29 CFR 1952, and is included in Section 406 of the MOSH Act. This program is based on the premise that employees must be protected from discrimination after raising safety and health concerns in the workplace. Without effective enforcement of an employee's right to raise health and safety concerns, many workers may not bring forward safety and health concerns to their employer, or file a complaint with MOSH. This ultimately can lead to the prevalence of uncorrected serious hazards in the workplace, and lead to many serious injuries or even fatalities that occur that are otherwise preventable.

State plans discrimination programs are one of the only programs where federal jurisdiction cannot be fully transferred to the state. Workers should also know that they may file with federal OSHA in addition to filing with the state, called "dual filing". If an employee would like to dual file, they should contact their local federal OSHA office to be transferred to the appropriate investigator.

According to the SAMM Report, MOSH investigated 23 discrimination complaints in FY 2012. Only one of these complaints was completed within 90 days. Ten of the 23, or 45.45 percent of discrimination complaints were found meritorious during the year. This was above the 3 year national average of 23.4 percent and above the percentage of the complaints that MOSH found meritorious in FY 2011. Nine of the complaints that were found to be meritorious were settled. This was also an increase from 50 percent of the cases that were settled in FY 2011.

The FY 2011 FAME found three findings in the Discrimination Program that need to be addressed. These include three findings from last year which no resolution was reported. They are ensuring that investigations are completed within 90 days of filing, and that both investigative reports and closing letters include all required elements. OSHA closed the finding regarding ensuring investigations are completed within 90 days of filing as some complaint investigations may involve complex activities which take longer than 90 days to complete. MOSH has not reported any significant resolution for the other two findings in FY 2012, however, MOSH is aware of the challenges presented by their Discrimination Program. MOSH

and federal OSHA have committed to working jointly to evaluate and address these issues during FY 2013.

Findings #12-03 (11-07): Investigative reports must include the required elements under the Whistleblower Investigations Manual”, including: rights to an appeal, case identifiers, back pay calculations and mitigation of damages for settlements, references to tabbed evidence, and address the elements of a prima facie case (protected activity, respondent knowledge, adverse action, and nexus).

Recommendation #12-03: Review the Whistleblower Investigations Manual and revise the investigative reports to include all required components. MOSH and federal OSHA will work jointly to evaluate and address this issue in FY 2013.

Findings #12-04 (11-08): Closing letters must include all information required by the Whistleblower Manual.

Recommendation #12-04: In closing letters and conferences, inform complainants of their right to appeal a dismissal. Include the case identifier on all correspondence. MOSH and federal OSHA will work jointly to evaluate and address this issue in FY 2013.

As noted in the Section C. of this report, MOSH has not yet finalized their adoption of the Federal Program Change for the Whistleblower Investigations Manual. MOSH needs to ensure all items are addressed in its response to this change, including the establishment of an internal appeals process is in place for workers who disagree with the determination of their case.

G. Voluntary Compliance Program

The state continued to have very active voluntary compliance programs throughout the year.

Cooperative Compliance Partnerships (CCP)

MOSH’s CCP program reaches out to solicit a joint cooperative relationship with private sector companies to reduce injuries and illnesses and build safety and health culture. This program is mostly focused towards the construction sector. The program performed 21 visits to these sites throughout the year, identifying 188 hazards and removing 2,607 employees from risk. MOSH signed two Cooperative Compliance Partnership agreements in FY 2012, bringing the total number of partnerships to nine. These new CCP sites include:

- The Whiting Turner Contracting Company project in Kaiser Permanente – South Baltimore Medical Center Project, which was signed in April of 2012.

- Clark Builders Group, LLC for a Project at The Elms at Clarksburg Village signed September 14, 2012.

Voluntary Protection Programs

Maryland's VPP is modeled after OSHA's program, which encourages mid to large size employers to develop a comprehensive safety and health management system to protect their workers from harm, and that have injury and illness rates at or below their industry average. These workplaces are recognized for their efforts in achieving an exceptional, progressive program that has management commitment and employee involvement, employs routine hazard identification, hazard control and safety and health training. Maryland's program mirrors the federal program, with the exception that the state only accepts employers who meet the STAR status, where the federal program also employs another designation for employers who have not met the full criteria of the program. The state also does not extend the program to mobile worksites.

MOSH certified three new sites into the VPP during the year, bringing the total number of active MOSH VPP sites to 17. The three new companies include:

- GE Healthcare, located in Laurel, Maryland
- Sherman Williams, located in Beltsville, Maryland
- Solipsys Corporation, a division of Raytheon, located in Fulton, Maryland

Education Unit

MOSH is very committed to educating both employees and employers in a wide variety of safety and health topics. These include an offering of 35 topics, which are frequently taught by MOSH compliance officers. These seminars are provided throughout the state, and at no cost to the attendees. During FY 2012, MOSH offered 92 educational seminars which educated over 1,800 employees.

H. Program Administration

During FY 2012, MOSH's program consisted of approximately 80.10 full-time employees (FTEs) who were assigned to the Compliance Services Unit, the Outreach Unit, the Research and Statistics Unit, and the Discrimination Unit. Compliance benchmarks include thirty-six (36) safety specialists and eighteen (18) industrial hygienist positions. Currently, MOSH reports that 36.5 safety positions and 18 health positions are allocated, however, there are still three positions in the Outreach Unit that MOSH still reports as counting towards the benchmarks which need to be removed. These positions comprise of 1.5 FTEs in Safety and .85 FTE in health that do not support general enforcement inspection activities to help "realize a fully effective enforcement effort".

Under the December 5, 1978 AFL-CIO v. Marshall Court Order, an inspector is defined as a safety specialist, safety engineer, or industrial hygienist performing inspections in the field. These inspections are to include accident and complaint inspections, fixed general schedule inspections, mobile general schedule inspections, and follow-up inspections.

Finding #12-06 (11-06): Staff who do not perform enforcement inspections are being counted towards enforcement benchmarks.

Recommendation #12-06: MOSH must ensure that only staff who perform general enforcement inspections are designated as fulfilling its benchmark requirements pursuant to 29 CFR §1952.213. MOSH should revise their FY 2013 grant to remove positions from the benchmarks that do not conduct these activities and reallocate additional positions to meet the benchmark requirements.

V. State Progress in Achieving Annual Performance Goals

FY 2012 was the final year of MOSH's five year strategic plan, which encompassed 2008-2012. MOSH's annual performance plan supplements the overall five year strategic plan. Each of the strategic goals, and supplemental performance goals and indicators are listed in detail in MOSH's State OSHA Annual Report (SOAR).

Overall MOSH had made significant progress in their annual performance plan, and had already exceeded a number of the five year strategic goals prior to FY 2012. As a number of these performance goals were previously achieved, MOSH adjusted these to further improve upon these goals.

MOSH's first strategic goal was to improve workplace safety and health through compliance assistance and enforcement of occupational safety and health regulations. The supporting performance goals were to decrease fatality rate by one percent yearly (for a five year reduction of 5 percent) and maintain or reduce their serious injury DART rate of 2.1. As MOSH exceeded this target in 2008, this was further adjusted to reduce the rate at or below 1.9.

MOSH's fatality performance goal was based on the number of fatalities in Maryland that were investigated. It is important to note that these numbers exclude occupational fatalities which are outside of MOSH's jurisdiction, including car accidents and heart attacks that are not directly attributed to working conditions. According to OSHA's Integrated Management Information System (IMIS) Database, there were 45 fatalities that MOSH investigated in CY 2006, yielding a baseline rate of 1.8 fatalities per 100,000 workers. According to IMIS, MOSH investigated 19

fatalities in FY 2012, yielding an estimated rate of 0.80 fatalities per 100,000 workers¹. MOSH reduced their occupational fatality rate for workers under their jurisdiction by over 50 percent over the five year period.

The results of MOSH's annual performance goal for the reduction of serious injuries and illnesses is unable to be determined as these are based on data provided by the Bureau of Labor Statistics, which will not be available until next year. MOSH's baseline for this measure was 2.4 Days Away, Restricted duty or Transfer cases (DART) rate cases per 100,000 workers. MOSH exceeded their goal to reduce this rate to 2.1 in 2008, and set a supplemental goal 1.9 cases per 100,000 workers. A review of the most recent Maryland DART rates published by the Bureau of Labor Statistics showed that there were 1.9 cases per 100,000 workers in 2008, 2.1 in 2010, and to 1.8 in 2011. MOSH's compliance assistance and enforcement efforts have been successful in reducing the incidence of serious injuries through the past five years.

MOSH made significant progress toward their overall strategic goal of promoting a safety and health culture. Their annual performance goals including increasing the number of participants in the Voluntary Protection Program (VPP), the Safety and Health Achievement Recognition Program (SHARP)², their Cooperative Compliance Program (CCP) and Alliances, as well as increasing the number of participants who attend training programs provided by their Outreach and Education Unit. MOSH has met or exceeded their annual performance goals for their VPP, CCP and Alliance programs. The state has been active in the development and offering of training classes, seminars and outreach; however, due to the economy and the change of workplace demographics there has been less participants than they had expected. MOSH continued to evaluate their goals and dedicate their efforts into the development of new technology and new approaches to educate the employers and employees in Maryland.

MOSH made significant progress in their third strategic goal to secure public confidence through excellence in the development and delivery of MOSH programs and services. Performance goals were met for timeliness in initiation of inspections of fatalities and serious complaints. However, the performance goal to complete discrimination complaint investigations within 90 days of initiation was not met, as MOSH was able meet this timeframe only 4.55 percent of the time. The agency took significant action to improve their website, which was another performance goal. Actions taken included the addition of social media links to their website, including the development of a Facebook page to improve communications with employers and employees, the development of a YouTube page and two agency videos which describe MOSH's services. No data was present in the percentage of users who had had a positive result on their page. However, it was noted that there was significant progress made towards achieving this goal.

¹ The fatality rate was calculated using Maryland DLLR's FY 2012 third quarter's average employment, as the final end of year data was not yet available.

² Note, MOSH's SHARP participation goal is covered under MOSH's 21(d) Private Sector Consultation Program therefore, the results of this goal are covered under the state's 21(d) program evaluation.

VI. Other Areas of Note

Public Sector Consultation

The state employs one consultant to provide free occupational safety and health consultation services to industries in municipal, state and county employees. These services include free surveys of the work place, training and assistance visits, and follow-up visits. These services are offered on a voluntary basis to encourage safe work places in state and local government. The only obligation is that an employer has is to correct all serious hazards that are identified in their workplace.

The state had a goal to conduct a total of 24 consultation visits in FY 2012. The state exceeded their goal, conducting 21 initial visits in the public sector, and 4 follow-up visits. During these initial visits, MOSH identified 580 serious hazards, averaging over 23 serious hazards per consultation visit. Over 90 percent of these were verified in a timely manner. The state is required to meet a number of mandated measures while implementing the public sector consultation program under this grant. MOSH met almost all of the applicable mandated measures. These included ensuring at least 90 percent of visits were conducted in high hazard industries and ensuring employees are conferred with during all visits. The one mandated measure that was not met during the year was ensuring 100 percent of serious hazards are verified as corrected within the latest correction date. The end of year MARC report indicated that out of the 580 serious hazards identified, 47 of were not verified as being corrected within 14 days of the latest correction date. There were no open uncorrected serious hazards which were more than 90 days past due.

Appendix A – New and Continued Findings and Recommendations
 FY 2012 Maryland State Plan Abridged FAME Report

Rec #	Findings	Recommendations	FY 11
12-01	MOSH Instruction 98-3 prevents the Commissioner from assessing penalties for other-than-serious violations (in manufacturing and construction when less than 10 total violations are cited).	MOSH Instruction 98-3 must be revised to allow the Commissioner the ability to assess penalties for instances when it is appropriate to achieve the necessary deterrent effect.	11-02
12-02	Federal Program Changes (FPCs) are not being adopted within a timely manner.	MOSH must take action to adopt FPC's within six months of notification.	11-04
12-03	Investigative reports must include the required elements under the Whistleblower Investigations Manual, including: rights to an appeal, case identifiers, back pay calculations and mitigation of damages for settlements, references to tabbed evidence, and address the elements of a prima facie case (protected activity, respondent knowledge, adverse action, and nexus).	Review the Whistleblower Investigations Manual and revise the investigative reports to include all required components. MOSH and federal OSHA will work jointly to evaluate and address this issue in FY 2013.	11-07
12-04	Closing letters must include all information required by the Whistleblower Manual.	In closing letters and conferences, inform complainants of their right to appeal a dismissal. Include the case identifier on all correspondence. MOSH and federal OSHA will work jointly to evaluate and address this issue in FY 2013.	11-08
12-05	Staff who do not perform enforcement inspections are being counted towards enforcement benchmarks.	MOSH must ensure that only staff who perform general enforcement inspections are designated as fulfilling its benchmark requirements pursuant to 29 CFR §1952.213. MOSH should revise their FY 2013 grant to remove positions from the benchmarks that do not conduct these activities and reallocate additional positions to meet the benchmark requirements.	11-06

Appendix B – Observations Subject to Continued Monitoring
FY 2012 Maryland State Plan Abridged FAME Report

Maryland does not have any new or continued observations.

Appendix C - Status of FY 2011 Findings and Recommendations

FY 2012 Maryland State Plan Abridged FAME Report

Rec #	Findings	Recommendations	Corrective Action Plan	State Action Taken	Status
11-1	Case file review revealed that next-of-kin letters were not sent on all fatality inspections (where required).	At the start of all fatality inspections/ investigations, send condolence letters to next-of-kin. Families of fatality victims also must be kept up-to-date about investigations and informed of the outcome of MOSH investigations.	MOSH did not adopt this non-mandatory policy, however, they concur correspondence with the families is a good practice and will continue the process. Differences between sending duplicate reports or when not requested is under review.	In April of 2012, OSHA adopted CPL 02-00-153, Communicating OSHA Fatality Inspection Procedures to a Victim's Family to provide agency guidance to ensure families are provided information on fatality procedures and provide them the opportunity to receive updates throughout the inspection and settlement process. State adoption of this policy, which includes information on sending next of kin letters, was encouraged; however, it was not mandatory.	Closed
11-2	MOSH does not assess penalties for first instance other-than-serious violations (in manufacturing, and in construction when less than 10 total violations).	Revise MOSH Instruction 98-3 dated September 28, 1998 to eliminate Section C.3 that does not permit penalty assessment for first instance other than serious violations.	MOSH will take this request under advisement and discuss it with the legal staff. This procedure is in place due to an Executive Order (EO).	MOSH reported that they would take OSHA's request under advisement and discuss it with the legal staff during FY 2012, however, no action was taken to revise this policy in FY 2012.	Open
11-3	MOSH offers penalty reductions in excess of what is offered by federal OSHA.	Rescind Memorandum 01-2 dated April 9, 2001 titled "Employer Incentive 50% Penalty Reduction."	No Action Plan. MOSH believes that this procedure is more effective than its federal counterpart and declines to rescind this memorandum. Immediate abatement on-site is more effective at reducing employee exposure to hazards and this penalty incentive is a tool	MOSH maintained that their policy removes employees from risk faster than the federal counterpart by providing an additional incentive for employers to correct hazards immediately. The Region reviewed this finding and has agreed to	Closed

Appendix C - Status of FY 2011 Findings and Recommendations

FY 2012 Maryland State Plan Abridged FAME Report

Rec #	Findings	Recommendations	Corrective Action Plan	State Action Taken	Status
			to accomplish this shared goal. MOSH continues to believe that this procedure is more effective than its federal counterpart. The Region reviewed this finding and has agreed to close.	close.	
11-4	Not all Federal Program Changes (FPCs) are adopted within the six month period.	Recommend MOSH develop strategies to adopt Federal Program Changes within the six month period.	MOSH will work hard to adopt the voluminous amount of Federal Program Changes within the six month period. However, there are certain changes that require comprehensive review and evaluation by key enforcement and management personnel where the six month time frame is not attainable. MOSH notes that it is impossible for a State program to do the type of review that is required of the comprehensive documents being prepared by OSHA within a six month time frame. Involvement by State Plans in the beginning of a FPC would help reduce the short turn around on large workloads. / Continue to monitor.	MOSH committed to work hard to address this issue during FY 2012, however, they cited inherent obstacles which prevent timely adoption. Of the nine FPCs (six directives and three standards) that had adoption due dates in FY 2012, only one was adopted within 6 months.	Open
11-5	Whistleblower investigations were not completed in accordance with MOSH FOM, Chapter X, A 3 (b), which requires investigations to be completed within 90 days of filing. Section 5-604(d) (3) of the MOSH Act requires that "within 90 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the	Whistleblower investigations must be completed within 90 days in accordance with MOSH FOM and the MOSH Act. MOSH should provide a plan to the Region to detail what steps are to be taken to increase the percentage of investigations completed within 90 days, including those	MOSH concurs that major program improvements are warranted in its Discrimination Program and is actively working through the plan submitted and will also continue to track and monitor progress.	During FY 2012, MOSH completed 4.55 percent (one out of twenty-two) of discrimination investigations within 90 days. However, this measure is one that is a challenge for many programs, as a proper investigation of complaints may involve complex	Closed

Appendix C - Status of FY 2011 Findings and Recommendations

FY 2012 Maryland State Plan Abridged FAME Report

Rec #	Findings	Recommendations	Corrective Action Plan	State Action Taken	Status
	determination under this subsection.”	dismissed due to lack of cooperation. .		activities which take longer than 90 days to complete. Therefore, this item was closed.	
11-6	Enforcement staff, designated as benchmark positions, are not performing enforcement activities	MOSH must ensure that personnel designated as fulfilling its benchmark requirements pursuant to 29 CFR §1952.213 are performing enforcement activities and conducting enforcement inspections for the majority of their work time. Clarification of staffing and the breakdown assigned to each unit/program including the separation of enforcement and compliance assistance activities must be provided.	MOSH disagrees with this finding. Benchmark staff do perform certain administrative functions, but all are engaged in performing enforcement work for the majority of their time. However, they will seek additional positions to begin to assign certain administrative duties to non-benchmark positions. MOSH still maintains a request to review state plan state allotted benchmarks and their need to be revised to reflect current state condition, appropriate funding levels for those positions, and with consideration to equal benchmark staffing as compared to similar federal states.	MOSH provided a staffing breakdown of their benchmark positions. It was noted that three positions in the outreach unit, who do not conduct enforcement inspections, are still being counted towards benchmarks. The state needs to remove these positions from the benchmarks and allocate an appropriate number of safety and health compliance officers to meet the requirements of the grant.	Open
11-7	Investigative reports did not include the required elements under the Whistleblower Investigations Manual, including: rights to an appeal, case identifiers, back pay calculations and mitigation of damages for settlements, or references to tabbed evidence. Three of the eight investigative reports reviewed that should have had an analysis did not address the elements of a prima facie case (protected	Review the Whistleblower Investigations Manual and revise the investigative reports to include all required components.	MOSH concurs that major program improvements are warranted in its Discrimination Program and is actively working through the plan submitted and will also continue to track and monitor progress.	MOSH did not report any progress in this category during FY 2012.	Open

Appendix C - Status of FY 2011 Findings and Recommendations

FY 2012 Maryland State Plan Abridged FAME Report

Rec #	Findings	Recommendations	Corrective Action Plan	State Action Taken	Status
	activity, respondent knowledge, adverse action, and nexus).				
11-8	Closing letters did not include all information required by the Whistleblower Manual.	In closing letters and conferences, inform complainants of their right to appeal a dismissal. Include the case identifier on all correspondence.	MOSH concurs that major program improvements are warranted in its Discrimination Program and is actively working through the plan submitted and will also continue to track and monitor progress.	MOSH did not report any progress in this category during FY 2012.	Open

Appendix D - FY 2012 State Activity Mandated Measures (SAMM) Report

FY 2012 Maryland State Plan Abridged FAME Report

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U. S. D E P A R T M E N T O F L A B O R
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
STATE ACTIVITY MANDATED MEASURES (SAMMs)
State: MARYLAND

NOV 09, 2012
PAGE 1

RID: 0352400

MEASURE	From: 10/01/2011 To: 09/30/2012	CURRENT FY-TO-DATE	REFERENCE/STANDARD
1. Average number of days to initiate Complaint Inspections	364 2.54 143	6 3.00 2	Negotiated fixed number for each state
2. Average number of days to initiate Complaint Investigations	344 2.60 132	0 .00 13	Negotiated fixed number for each state
3. Percent of Complaints where Complainants were notified on time	129 87.16 148	3 100.00 3	100%
4. Percent of Complaints and Referrals responded to within 1 day -ImmDanger	7 100.00 7	0 0 0	100%
5. Number of Denials where entry not obtained	1	0	0
6. Percent of S/W/R Violations verified			
Private	1593 83.53 1907	12 9.23 130	100%
Public	100 71.94 139	0 .00 36	100%
7. Average number of calendar days from Opening Conference to Citation Issue			
Safety	48321 43.65 1107	4911 54.56 90	2032800 55.9 36336
Health	10150 65.48 155	493 61.62 8	647235 67.9 9527

U. S. D E P A R T M E N T O F L A B O R
 OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
 STATE ACTIVITY MANDATED MEASURES (SAMMs)
 State: MARYLAND

NOV 09, 2012
 PAGE 2

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MEASURE	From: 10/01/2011 To: 09/30/2012	CURRENT FY-TO-DATE	REFERENCE/STANDARD
8. Percent of Programmed Inspections with S/W/R Violations			
	719	58	76860
Safety	66.95 1074	61.05 95	58.5 131301
			National Data (3 years)
Health	49 73.13 67	5 83.33 6	9901 53.0 18679
			National Data (3 years)
9. Average Violations per Inspection with Violations			
S/W/R	2694 2.13 1262	256 2.61 98	367338 2.1 175950
			National Data (3 years)
Other	2849 2.25 1262	244 2.48 98	216389 1.2 175950
			National Data (3 years)
10. Average Initial Penalty per Serious Violation (Private Sector Only)	2829402 1139.50 2483	180095 1192.68 151	624678547 1990.5 313826
			National Data (3 years)
11. Percent of Total Inspections in Public Sector	67 4.33 1546	4 7.02 57	210 5.3 3968
			Data for this State (3 years)
12. Average lapse time from receipt of Contest to first level decision	13810 219.20 63	248 248.00 1	3197720 187.0 17104
			National Data (3 years)
13. Percent of 11c Investigations Completed within 90 days*	1 4.55 22	0	100%
14. Percent of 11c Complaints that are Meritorious*	10 45.45 22	0	1619 23.4 6921
			National Data (3 years)
15. Percent of Meritorious 11c Complaints that are Settled*	9 90.00 10	0	1444 89.2 1619
			National Data (3 years)

*Note: Discrimination measures have been updated with data from SAMM reports run on 1/3/2013

Appendix E - State OSHA Annual Report (SOAR)
FY 2012 [*State Name*] State Plan Abridged FAME Report

[Available Separately]