



# Kentucky Labor Cabinet Occupational Safety and Health Program

**RESPONSE**

**to**

**FEDERAL ANNUAL MONITORING EVALUATION**

**for**

**FEDERAL FISCAL YEAR 2016**

## **I. POINTS REGARDING FAME REPORT**

### **A. General Comment**

OSHA's FY 2016 Federal Annual Monitoring Evaluation (FAME) identified four (4) findings and nine (9) observations. This response is limited to OSHA's findings and does not address OSHA's observations due to the very limited time OSHA provided for state response.

### **B. Specific Point**

Page four (4) of the FY 2016 FAME states:

“With the passage of the Bipartisan Budget Bill on November 2, 2015, OSHA raised its maximum penalties effective August of 2016 and again increased penalties according to the consumer price index (CPI) in January of 2017. As required by law, OSHA will continue to raise maximum penalties each year according to the CPI. State Plans are required to adopt both the catch-up increase and the annual increase.”

Kentucky does not concur with OSHA that state plans are required to adopt the catch-up increase and annual increase. Kentucky submitted formal comment to U.S. DOL, posted at [www.regulations.gov](http://www.regulations.gov), objecting to the rule.

## **II. OSHA's FINDINGS, RECOMMENDATIONS and KENTUCKY RESPONSES**

**OSHA Finding FY 2015-03** (currently FY 2016-01 and formerly FY 2014-08, FY 2013-09, FY 2010-08, and FY 2009-20)

KY OSH's Division of OSH Compliance has not implemented an internal self-evaluation program as required by the State Plan Policies and Procedures Manual.

### **OSHA Recommendation**

KY OSH should implement a process to ensure that an internal self-evaluation program possessing integrity and independence is completed and implemented. KY OSH should also ensure that periodic evaluations of all areas of the program are evaluated and that documentation of the evaluations is made available to OSHA.

### **State Response**

Kentucky implemented an internal self-evaluation program and is nearing completion of the final component of its program. Kentucky plans to implement the final component by the end of FY 2017.

**OSHA Finding FY 2015-04** (currently FY 2016-02)

All of the 20 non-formal complaints that were reviewed were classified as invalid even though they contained allegations of serious hazards, and nothing was done to address them.

### **OSHA Recommendation**

KY OSH should handle non-formal complaints alleging serious hazards as a referral or, at a minimum, as a complaint by letter (phone/fax investigation).

### **State Response**

OSHA's finding is incorrect. On page fifteen (15) of the FY 2016 FAME report, OSHA states:

“The program managers sent these workers, former workers, and others a letter requesting that they formalize the complaint or informing them that they are not workers and cannot file a complaint.”

OSHA's assertion that “nothing was done to address” non-formal complaints that contained allegations of serious hazards is simply not true as evidenced by the aforementioned language on page fifteen (15).

Kentucky follows state law regarding complaint inspections. Kentucky Revised Statute 338.121(1) states:

“Any employee, or representative of employees, who believes that a violation of an occupational safety and health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the commissioner of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or the employer's agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his or her name and the names of individual employees referred to therein shall not appear in such copy.”

Additionally, Kentucky has a well established process in place to address non-formal complaints by sending a complaint form with a letter asking the individual to complete with details, sign, and return the form.

To reclassify a complaint as a “referral” as OSHA suggests in its recommendation is semantics and would most likely not withstand legal challenge. Kentucky also requested OSHA update a single field in OSHA's online complaint form to better assist the state addressing complaints that do not conform to state statute. OSHA advised the field could be updated but to date, the work has not been completed.

Kentucky rejects this finding.

### **OSHA Finding FY 2015-06 (currently FY 2016-03)**

KY OSH conducted a total of six programmed planned health inspections during this evaluation period.

### **OSHA Recommendation**

KY OSH should develop and implement a strategy to ensure a more representative number of programmed planned health inspections are conducted to adequately address the scope and seriousness of the hazards found in high-hazard health industries.

### **State Response**

Significant staff turnover accounted for the low number of programmed planned health inspections. The turnover effect is intensified due to industrial hygienists who are on limited duty due to pregnancy.

During FY 2015, nearly forty (40) percent of the industrial hygiene (IH) enforcement officers had one (1) year or less experience. Kentucky was hopeful that programmed planned health inspections would increase as those staff members began performing their own inspections; but unfortunately, in FY 2016, only one (1) IH enforcement officer of that forty (40) percent remains on staff. It is worth noting that Kentucky has hired fourteen (14) IH enforcement officers in the last ten (10) years and only four (4) remain on staff.

Kentucky has a strategy in place to ensure a representative number of programmed health inspections are conducted and will stay the course; however, other inspection priorities take precedent while this issue is addressed. Kentucky anticipates little increased programmed planned health inspections in FY 2017.

### **OSHA Finding FY 2015-07 (currently FY 2016-04)**

KY OSH has an extremely low average number of violations, a high in-compliance rate, and a low percentage of violations classified as serious, repeat, and willful for programmed construction inspections.

### **OSHA Recommendation**

KY OSH should evaluate the cause of the extremely low average number of violations, high in-compliance rate, and the low percentage of violations classified as serious, repeat, and willful for programmed construction inspections and develop and implement a strategy to increase the average number of violations, decrease the in-compliance rate, and increase the percentage of violations classified as serious, repeat, and willful for programmed construction inspections.

### **State Response**

Page twelve (12) of the FY 2016 FAME states:

“SAMM 9 - Percent in compliance

The one-year national rate for this measure for safety inspections is 28.85%, with an acceptable range of +/- 20%, which is between 34.62% and 23.08%. The State Plan's percent in-compliance for safety inspections is 52.85%, which greatly exceeds the acceptable range for this measure. The one-year national rate for this measure for health inspections is 35.68%, with an acceptable range of +/- 20%, which is between 42.82% and 28.54%. The State Plan's percent in-compliance for health inspections is 58.87%, which is also above the acceptable range for this measure. **This is attributed to three**

**factors.** First, the State Plan has a high staff turnover and a low number of experienced staff. Secondly, KY OSH does not follow the focused-inspection guidance for construction. Comprehensive inspections are conducted for all the contractors performing work at the site, **resulting in a high number of in-compliance construction inspections.** Finally, given the combination of activities of the Division of Education and Training and Division of OSH Compliance with employers across the state, it is believed that many of the employers being inspected have a history of consultation and training activities, as well as enforcement inspections, which have resulted in a higher number of in-compliance inspections.” [Emphasis added.]

Kentucky has evaluated the cause of the extremely low average number of violations, high in-compliance rate, and the low percentage of violations classified as serious, repeat, and willful for programmed construction inspections. OSHA’s aforementioned language is the information Kentucky provided to OSHA for the cause of the extremely low average number of violations, high in-compliance rate, and the low percentage of violations classified as serious, repeat, and willful for programmed construction inspections.

OSHA also made the same point in the FY 2015 FAME. Page eighteen (18) of the FY 2015 FAME states:

“Many programmed construction inspections are partial in scope. According to the OSHA Express data, only 4.8% of programmed safety inspections in construction had violations. This was a significant decline from FY 2013 when 92.1% had violations. KY OSH does not follow the Focused Construction Inspection Guidelines, which focus on the four leading causes of fatalities (fatal four hazards) in the construction industry, which include electrical hazards, fall hazards, struck-by hazards, and caught in-between hazards. KY OSH opens inspections and conducts inspections on all of the contractors on a worksite. **This has resulted in the poor average number of violations, the high in-compliance rate, and the low percentage of violations classified as serious, repeat, and willful.**” [Emphasis added.]

Kentucky questions the rationale for this finding in light of OSHA’s language in the FY 2016 and FY 2015 FAME. OSHA does not document or suggest instances of missed hazards, inappropriate or incorrect citations, or question CSHO hazard recognition. That point was made by OSHA on page twenty (20) of the FY 2015 FAME. It states:

“One hundred twenty-four case files reviewed included adequate documentation overall to support the violations with detailed narratives explaining the inspection process, the employer’s business processes, findings, and any other factors or issues. The violations contained all of the required information and supporting documentation for a prima facie violation, including all of the required forms, photographs, interview notes, field notes, diagrams, and other technical documentation.”

OSHA’s FY 2016 FAME recommendation states that Kentucky should “...develop and implement a strategy to increase the average number of violations, decrease the in-compliance rate, and increase the percentage of violations classified as serious, repeat, and willful for

programmed construction inspections.” As noted above, OSHA’s language above from page twenty (20) of the FY 2015 FAME establishes that OSHA did not document or suggest instances of missed hazards, inappropriate or incorrect citations, or question CSHO hazard recognition. Likewise, the FY 2016 FAME does not document or suggest instances of missed hazards, inappropriate or incorrect citations, or question CSHO hazard recognition. Therefore, Kentucky does not understand OSHA’s recommendation that Kentucky “...develop and implement a strategy to increase the average number of violations, decrease the in-compliance rate, and increase the percentage of violations classified as serious, repeat, and willful for programmed construction inspections.” What does “...develop and implement a strategy to increase...” mean? Exactly what is OSHA recommending Kentucky do “to increase” the average number of violations, decrease the in-compliance rate, and increase the percentage of violations classified as serious, repeat, and willful for programmed construction inspections?

There is no detrimental effect on the safety and health of Kentucky’s construction workers, or Kentucky’s program, based on the information OSHA presents in the FY 2016 or FY 2015 FAME regarding this finding.