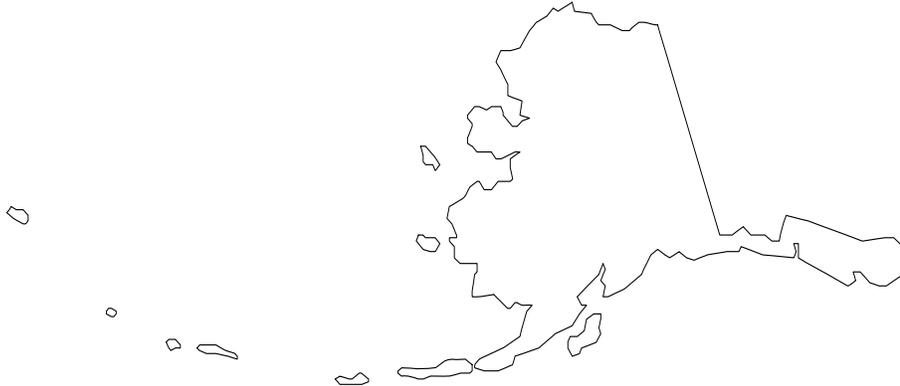


State of Alaska

Department of Labor and Workforce Development Labor Standards and Safety Division - *Alaska Occupational Safety and Health*



Enhanced Federal Annual Monitoring and Evaluation (FAME) Report on Alaska's Occupational Safety and Health (AKOSH) Program

FY 2009 Report Period
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Executive Summary

OSHA conducted a baseline special evaluation of Alaska's occupational safety and health agency, commonly known as AKOSH. The evaluation covered federal fiscal year 2009 and focused primarily on the effectiveness of the state's enforcement program. A special study of AKOSH's handling of fatalities and catastrophes was included in the evaluation.

Summary of the Report

Overall, OSHA found that the state is operating an enforcement program which directs resources to where they are most needed. AKOSH targets inspections in industries experiencing higher-than-average rates of injuries, illnesses, fatalities and workers' compensation claims. Nevertheless, OSHA identified a need for the state to boost the number of programmed inspections it conducts. Additionally, the special study of fatality and catastrophe case files found that improved documentation of employer knowledge of hazards by the state's compliance officers was needed; the study also found that AKOSH could do a better job of keeping victims' next of kin apprised of the outcomes of fatality investigations.

Recommendations

OSHA's recommendations are as follows:

1. Factually document employer knowledge in case files with as much specificity as feasible (p.11).
2. Use a structured informal conference worksheet to document the employer's position with regard to cited violations as well as the Chief's rationale for proposing settlement (p.12).
3. Ensure that condolence letters are sent in *every* fatality case. At the conclusion of fatality investigations, apprise next of kin, in writing, of investigation outcomes and provide copies of citations. Insert copies of all such correspondence in the case file (p.12).
4. Ensure an effective presence in private and public sector workplaces by increasing the number of programmed enforcement inspections using targeting tools such as the High Hazard Targeting plan, the Construction List, and Special Emphasis Programs (p.15).

During FY 2009, OSHA audited AKOSH's discrimination program and identified areas needing improvement. The recommendations listed below were communicated in a December 2, 2009, letter from OSHA's regional administrator to the director of the

state's program (Appendix E). Also included in Appendix E is the state's response to OSHA's recommendations indicating that AKOSH essentially implemented all of them, except for the first item listed below. Regarding concurrently filed complaints, it is OSHA's intent to communicate with the state and come to agreement about which agency should conduct the investigation. This will be done on a case-by-case basis.

5. In cases where a complainant files a discrimination complaint concurrently with AKOSH and OSHA, AKOSH should coordinate with OSHA to determine, on a case-by-case basis, which agency should conduct the investigation.
6. AKOSH should refrain from including provisions in its settlement agreements that allow for deducting unemployment benefits.
7. Closing letters to the parties should state that the complaint was settled and copies should be kept in the file.
8. Discontinue the practices of using statements submitted by complainants and witnesses as substitutes for interviews.
9. Ensure that witness interviews cover the four prima facie elements.
10. The FIR (Final Investigative Report) should include the date the complaint was filed with AKOSH. The date should be written on the first page of the FIR.
11. The coverage description in the FIR should include information that is similar to what is described in a safety and health inspection report, i.e., the number of employees, whether the employer is private or public, and union status (along with a brief description of the company).

Introduction

The state of Alaska, under an agreement with OSHA, operates an occupational safety and health program in accordance with Section 18 of the Occupational Safety and Health Act of 1970. The Alaska state plan was approved July 31, 1973, and its developmental period under Section 18(e) of the OSH Act ended October 1, 1976. On September 9, 1977, OSHA certified that the state had completed all developmental steps as specified in its plan, and granted AKOSH final state plan approval on September 26, 1984.

OSHA monitors state plans to ensure they are at least as effective as the federal program, and reports annually on state performance. Beginning in 1997, OSHA used strategic plans to establish five-year goals and objectives, and required state plan states to do likewise. As part of this process, states were asked to develop performance plans that would lead to the achievement of their five-year goals. The states' performance plans are included in each annual 23(g) and 21(d) grant application.

Evaluation Methodology. This Enhanced Federal Annual Monitoring and Evaluation (FAME) report is a Baseline Special Evaluation of the Alaska State Plan. It represents the combined efforts of OSHA's Seattle Regional Office and the Anchorage Area Office, and covers the period of October 1, 2008, through September 30, 2009. This report includes a special study of eight AKOSH fatality and catastrophe investigation case files completed during the period of October 1, 2008, through October 31, 2009. OSHA also reviewed 45 non-fatality/non-catastrophe case files created by AKOSH during federal fiscal year 2009 to assess how hazards were being identified, classified, documented, and how penalties were being assessed. During FY 2009, OSHA also audited AKOSH's discrimination program and identified areas needing improvement (Appendix E).

The opinions, analyses, and conclusions described herein are based on information obtained from a variety of sources, including the fatality/catastrophe special study; a whistleblower program audit; State Activity Mandated Measures (SAMM) report data; State Information Report (SIR) data; statistical reports comparing state performance to federal performance; quarterly monitoring meetings between OSHA and the state; and the State OSHA Annual Report (SOAR) prepared by AKOSH. The SOAR (Appendix C) contains the details of the state's achievements with respect to its annual goals. In addition, the views and opinions of stakeholders were taken into consideration in preparing this report. For example, input was received from employers, OSHA's alliance partners and organized labor groups such as Chevron, Peak Oilfield Services, Nabors Drilling, American Marine Corporation, Piledrivers and Divers Local 2520, and United Steelworkers of America.

Background. The Alaska occupational safety and health program (AKOSH) is a part of Alaska's Department of Labor and Workforce Development, Labor Standards and

Safety Division. The head of the Department is the Commissioner of Labor, who serves as the state plan designee. A director, appointed by the Commissioner, manages the Division. The day-to-day administration of AKOSH's program is delegated to a chief for enforcement and a chief for consultation and training. The two AKOSH chiefs share program management and supervisory duties and oversee two main offices located in Anchorage and Juneau, as well as smaller offices in Fairbanks and Ketchikan.

In 1995, AKOSH began adopting most federal OSHA standards by reference. A limited number of state-specific standards remain in effect at this time, including Petroleum Drilling & Production, and a logging code that differs from the federal OSHA logging rules. AKOSH has adopted the federal recordkeeping and reporting requirements, except that the state requires notification when one or more employees require hospitalization. Since Alaska has opted to have no jurisdiction in maritime industries, AKOSH has not adopted 29 CFR 1915, 1916, 1917, 1918 or 1919, or a state equivalent. The Alaska Occupational Safety and Health Review Board hears and decides appeals of AKOSH citations, including penalties and abatement dates.

AKOSH delivers on-site consultation services to the private sector through a 21(d) Consultation Program. Public sector employers can avail themselves of consultation services under the AKOSH 23(g) grant program.

For FY 2009, the state plan was staffed as follows: thirteen enforcement officers (eight safety and five industrial hygienists), one compliance assistance specialist, one discrimination investigator (health qualified), six public sector consultants (4.5 safety positions and 1.5 IH), eight administrative or support staff, in addition to the two chief positions.

In FY 2009, the AKOSH program covered approximately 316,361 workers in about 21,471 establishments statewide. It is funded jointly by state monies appropriated through the worker's safety and compensation administration account, and by federal grants. The total level of funding for the state's occupational safety and health efforts for FY 2009 is indicated below and shows the federal and state portions for 23(g) compliance and the 21(d) private sector consultation programs, including 100% state funds not matched by OSHA.

Program	Federal	State Match	100% State	Totals
AK 21(d)	\$658,100	\$70,677	\$186,001	\$914,778
AK 23(g)	\$1,393,500	\$1,393,500	\$799,672	\$3,586,672
Grand Totals:	\$2,051,600	\$1,464,177	\$985,673	\$4,501,450

AKOSH exercises jurisdiction over all private sector employers except those working: in Denali National Park; on the Metlakatla Indian Reservation; in maritime industries; in federal government-owned, contractor-operated (GOCO) Native Health Care Facilities; and, on several military installations. The state also has regulatory authority in state

and local government workplaces. OSHA covers all excepted employers noted above, as well as federal agencies.

Alaska's 2008 BLS Total Case Injury/Illness Rate (TCIR) for private sector employers was 5.1, compared to the national TCIR of 3.9. The Alaska industries with higher-than-average TCIRs included Construction (7.1); Transportation & Warehousing (7.4); and Seafood product preparation and packaging (8.5). AKOSH targets employers in these high rate industries for enforcement interventions and consultation visits using state workers' compensation data. Alaska also has one of the highest fatality rates among the 50 states; however, the majority of fatal events reflected in the 2008 BLS data, and in other recent years, are transportation-related incidents involving aircraft and vessels which are outside of AKOSH's jurisdiction.

Status of Recommendations from the FY 2008 FAME Report

The FY 2008 Alaska FAME covered the period from October 1, 2007, to September 30, 2008. That report contained one recommendation for program improvement. The recommendation, the state's response, and OSHA's assessment of the effects of the action taken follow.

Recommendation: Ensure compliance inspection goals are met. The FY 2007 FAME included a similar recommendation.

State's response: Due to staff turnover and training requirements for new personnel, AKOSH expects to see significant improvements in the third and fourth quarters of FY 2009. AKOSH recently pursued a waiver from the State of Alaska hiring freeze for two CSHO [Compliance Safety and Health Officer] positions. The waivers were approved and the positions were recruited successfully. AKOSH is committed to ensuring that CSHOs are adequately trained before performing inspections. Initial training course availability will be a factor in allowing these positions to contribute to the goal of improving inspection numbers.

Effect of state action(s): The state conducted a total of 355 inspections in FY 2009, representing an increase of 24% compared to the 266 inspections it conducted in FY 2008. Although these numbers reflect an improvement in enforcement activity, AKOSH still fell short of its FY 2009 goal of 465 inspections. OSHA requires its state partners to establish goals for compliance inspections because inspections identify and eliminate workplace hazards that can lead to injuries, illnesses, and fatalities. For the past three years, the state has not met its inspection goals. OSHA anticipates that the re-staffing process that is ongoing within AKOSH will result in performance improvement.

Major New Issues

Hiring Freeze. In January 2009, the governor of Alaska announced a hiring freeze due to the negative impact of low oil prices on state revenues. The hiring freeze applied to all departments in state government, including the Department of Labor and Workforce Development, Labor Standards and Safety Division, of which AKOSH is a part. The state agency had experienced significant turnover in staffing beginning in FY 2007, which continued through FY 2008. AKOSH sought and obtained a waiver from the 2009 hiring freeze in order to fill two vacant compliance officer positions. Doing so should enable AKOSH to increase the number of inspections it conducts in targeted high-hazard industries, and to subsequently meet its annual inspection goals.

Special Study. During portions of December 2009 and January 2010, OSHA's Anchorage Area Office conducted a special study to examine AKOSH's fatality case files and a representative sample of its accident files from FY 2009. The decision by OSHA, Region X, to review this aspect of the state's program was based largely on the findings and recommendations from a Nevada special evaluation. The Nevada FAME had identified, among other issues, failure by Nevada OSHA to cite all hazards identified during fatality investigations, and failure to notify the families of deceased workers that the agency was investigating the deaths of their loved ones.

Region X's special study found that AKOSH's response to fatalities and accidents is good; however, the state could do a better job of documenting employer knowledge of hazards and communicating with victims' next of kin. Recommendations for corrective actions are contained herein.

Discrimination Program Audit. In FY 2009, OSHA conducted an on-site audit of the state's discrimination program, as part of Region X's state plan monitoring responsibilities. The audit included reviews of case files and screened complaints to determine whether the state abided by the policies and procedures in its Whistleblower Investigations Manual. OSHA's previous audit, in FY 2008, had identified program deficiencies which were largely attributed to staffing issues. In FY 2009, AKOSH began to improve the quality of its discrimination program; however, certain areas were identified as in need of fine-tuning. The audit report lists seven recommendations to which the state satisfactorily responded. Refer to Appendix E for details on OSHA's findings and recommendations.

Complaints About State Program Administration (CASPs). Four CASPs were active in FY 2009. Two were closed after being found not valid, while the others remained open at the end of the evaluation period. In one of the closed cases, the complainant objected to the outcome of a safety and health inspection by AKOSH. Based on the state's initial response to the allegations, the CASPA was deemed not valid. The complainant appealed the determination to OSHA's regional administrator. Upon further examination, including interviews of the complainant and a state official,

and examination of supplemental information provided by the complainant and the state, the regional administrator affirmed that the CASPA was not valid.

The other closed case involved a complainant who alleged that AKOSH conducted an inadequate discrimination investigation and had pressured the complainant into a settlement. OSHA determined that the state had, in fact, conducted an adequate investigation and had *not* pressured the complainant to accept the settlement. Although OSHA took issue with certain procedural aspects of the state's investigation, the CASPA itself was deemed not valid.

The two remaining CASPAs pertain to AKOSH's discrimination program. At the close of the evaluation period, OSHA was investigating one of them because the state declined to provide an initial response to the allegations. The other was awaiting closure, pending a decision by the complainant on whether to request a review, by the regional administrator, of OSHA's determination of no validity to his complaint.

Assessment of AKOSH's Performance in Fiscal Year 2009

A. ASSESSMENT OF AKOSH PERFORMANCE IN MANDATED AND OTHER RELATED ACTIVITIES

This portion of the Enhanced FAME report discusses Alaska's performance in program areas mandated by OSHA. AKOSH has the necessary procedures in place to carry out those mandates in that it has adopted OSHA's Field Operations Manual (FOM) and compliance program directives, along with the consultation program requirements of 29 CFR §1908 and related implementing directives.

OSHA's assessment is based on information from grant assurances and statistical reports; reviews of 45 case files¹ (in addition to eight files reviewed for the special study discussed below in "Fatalities and Catastrophes"); discussions between OSHA and AKOSH at quarterly meetings; and staff interviews. Recommendations for improvement are made, where appropriate.

1. Enforcement

Complaints. Ensure that safety and health complaint processing is timely and effective, including notification of complainants and appropriateness of the State's responses.

During the period covered by this review, AKOSH had a policy of initiating on-site inspections within *seven* working days for formal complaints alleging serious hazards; this differed slightly from OSHA's policy of responding within *five* working days to such complaints. As of October 1, 2009, however, the state adopted a new Field Operations Manual which includes a policy identical to OSHA's on responding to formal complaints alleging serious hazards.

The state's policy on responding to complaints that *do not* meet the criteria for on-site inspections is the same as OSHA's. It requires AKOSH to promptly contact the employer by telephone to notify it of the complaint, followed by faxing or mailing a notification letter. This procedure is commonly known as "phone/fax" or an "inquiry."

¹ The 45 cases were randomly selected for review from among closed FY 2009 inspections containing at least one violation. The Anchorage Area Office reviews a representative number of the state's files each year to check for documentation of hazards, violation classification, penalty calculation, abatement verification and other factors.

AKOSH received 82 valid complaints in FY 2009. Of that number, 69 were handled by on-site inspections and 13 by phone/fax. Timeliness outcomes were as follows:

- 97 percent of complaints handled by inspections were inspected within seven working days; the average number of days to initiate inspections was 7.6 days.
- 85 percent of complaints handled by phone/fax were initiated within one working day; the average response time was one day.

Overall, 95% of complaints filed with the state were handled in a timely manner. Performance in this area was comparable to that of OSHA, and exceeded AKOSH's overall goal of 90% timeliness for both categories of responses. During the period covered by this evaluation, a Complaint About State Program Administration (CASPA) was filed regarding the appropriateness of the state's handling of a safety and health complaint; the CASPA was found to be not valid.

Fatalities and Catastrophes. Ensure fatalities and catastrophes are investigated properly, including responding timely to incidents and making contact with the families of victims.

AKOSH's policy on responding to fatalities and catastrophes (hospitalization of three or more employees) is the same as OSHA's in that it requires that inspections be initiated within *one* working day of notification. In addition, the state has a policy under which it investigates, within *seven* working days, accidents involving the hospitalization of two or fewer employees.

During portions of December 2009 and January 2010, OSHA's Anchorage Area Office conducted a baseline special study that included an examination of all closed fatality case files and a representative sample of the accident files, prepared by AKOSH during FY 2009. The Anchorage reviewers examined files for the following:

- a. Quality of documentation.*
- b. Correctness of violation classifications.*
- c. Proper application of probability and severity in determining violation penalties.*
- d. Abatement verification.*
- e. Appropriateness of penalty reductions, violation reclassifications or citation withdrawals resulting from informal conferences on fatality-related cases.*
- f. Whether the Related Event Code (REC) and the violations documented and cited in the case files were correct.*
- g. Notification of next of kin in fatality cases and providing an opportunity for family to communicate with AKOSH about the fatality investigation.*
- h. Whether employer injury/illness data were collected.*

Methods used to identify case files for this study included Web IMIS reports, IMIS Database Access, and Accident Investigation Search. This resulted in a list of five

fatality cases that met the study criteria. In addition, three cases (10% of 28 total cases) which met the state's criteria for an "accident" were added to the list for a total of eight cases reviewed. Screening criteria were developed and implemented to ensure that only completed cases were part of the study. A checklist was used to ensure consistency in evaluating the files. In addition to case file reviews, AKOSH's Chief of Enforcement was interviewed.

Case File Review Findings and Recommendations.

a. Quality of case file documentation.

In most instances, AKOSH's descriptions of fatal incidents were well documented and included discussions of causal factors. Photos, drawings and narrative descriptions of the work sites helped illustrate the circumstances and aided in identifying and documenting violations. Compliance officers routinely reviewed employers' OSHA 300 logs and safety programs, and documented findings in the files. Documentation of employer knowledge, however, was deficient because AKOSH's compliance officers relied, in most cases, on the term "reasonable diligence" to establish that the employer knew the hazardous condition existed. In every instance, there was sufficient evidence to develop knowledge through demonstrated "actual," "imputed," or "constructive" actions on the part of the employer.

RECOMMENDATION 1: Factually document employer knowledge in case files with as much specificity as feasible.

b. Correctness of violation classifications.

OSHA determined that all of the violations in the reviewed case files were correctly classified.

c. Proper application of probability and severity in determining violation penalties.

The state properly assessed the severity and probability of the cited hazards. AKOSH's penalties in fatality and accident cases were substantially higher than its overall average serious penalty, reflecting the seriousness of such incidents. Specifically, the state's average serious penalty for the violations cited in the reviewed cases was about \$2,500, compared to an average of \$973 for serious violations for *all* FY 2009 inspections.

d. Abatement verification.

Hazard abatement was properly verified in almost all of the cases reviewed. The only exception was a fatality case which was under judicial review, meaning abatement information was unavailable.

- e. *Appropriateness of penalty reductions, violation reclassifications or citation withdrawals resulting from informal conferences on fatality-related cases.*

OSHA found that the state is using its informal conference process effectively. Of the eight cases reviewed, three involved informal conferences. Of the remaining five, two went directly to the formal appeals process and three were resolved without informal conferences, *i.e.*, the employer complied and paid the full penalty.

For cases where informal conferences were held, adequate notes were in the file to document the decision-making process behind violation deletions, abatement date revisions, or penalty reductions. The state, however, does not require its Chief of Enforcement to use a structured worksheet to document the proceedings from informal conferences. This made it difficult, in some cases, to ascertain the employer's position with regard to the cited violations, and the Chief's rationale for proposing settlement.

RECOMMENDATION 2: Use a structured informal conference worksheet to document the employer's position with regard to cited violations as well as the Chief's rationale for proposing settlement.

- f. *Whether the Related Event Code (REC) and the violations documented and cited in the case files are correct.*

In most of the files reviewed, AKOSH entered the proper REC in the Integrated Management Information System. In only one case was the correct REC not entered.

- g. *Notification of next of kin in fatality cases and providing an opportunity to communicate with AKOSH about the fatality investigation.*

Four of five fatality-related cases included the initial condolence letter from AKOSH to the victim's next of kin, and there were no indications in any of the files that the citation or a letter had been sent by AKOSH to the next of kin explaining the outcome of the investigation. In only one instance did the state include the family in communications after the citation was issued; this was achieved by a telephone call in lieu of a letter.

RECOMMENDATION 3: Ensure that condolence letters are sent in every fatality case. At the conclusion of fatality investigations, apprise next of kin, in writing, of investigation outcomes and provide copies of citations. Insert copies of all such correspondence in the case file.

h. Whether employer injury/illness data were collected.

Of the eight cases reviewed by OSHA, five involved employers who were exempt from recordkeeping requirements due to size or Standard Industrial Classification (SIC). In the remaining three cases, the OSHA 300 information was either incorrectly entered or was not included in the file. Recordkeeping will be a focus of monitoring by the Anchorage Area Office in FY 2010.

Other Observations. All compliance officers who conducted fatality or catastrophe inspections had successfully completed initial training covering OSHA Instruction CPL 02-00-137, "Fatality/Catastrophe Investigation Procedures."

In one case, a violation incorrectly alleged that the employer had not implemented a lockout program (1910.147(c)(3)(i)); that employer should have been cited, instead, for failing to provide lockout/tagout training. In another case, AKOSH cited a floor hole violation (1910.23(a)(8)(ii)) when the actual violation related to an open-sided floor (1910.23(c)(1)).

Conclusions. Overall, OSHA found that AKOSH is doing a good job of investigating fatalities and accidents within its jurisdiction. Nonetheless, improvements are needed in documenting employer knowledge of hazards, documenting informal conference proceedings, and in ensuring that next of kin are notified of investigation outcomes and are provided copies of citations. Also, the state must maintain copies of such correspondence in its case files.

Imminent Danger. Ensure imminent-danger situations are responded to promptly and appropriately.

AKOSH's policy on responding to imminent danger situations is to conduct inspections as expeditiously as possible, and no later than 24 hours after notification; this is essentially the same as OSHA's policy.

During this evaluation period, 48 imminent danger complaints/referrals were received by AKOSH and 46 were inspected within the required time frame. Two imminent danger inspections took two days to inspect because of travel delays. OSHA considers this to be acceptable performance. During the previous evaluation period, 13 imminent danger complaints or referrals were received.

Compliance Inspections. Ensure an effective program is in place allowing the conduct of unannounced enforcement inspections (both programmed² and unprogrammed³).

AKOSH has policies and procedures for conducting unannounced enforcement inspections, as required by OSHA. In FY 2009, the state conducted programmed inspections using the following:

- a. High Hazard Targeting (HHT) Plan: The HHT plan identifies employers reporting ten or more Lost Time Injury/Illness (LTII) cases, or those showing a 10% or greater Lost Time Case Rate (LTCR) increase from the previous reporting year, based on state workers' compensation data. The HHT directive prescribes the method for selecting establishments and assigning programmed inspections.
- b. Supplemental Construction List: The supplemental construction list is comprised of employers awarded construction bids as reported in *The Plans Room* – an Alaskan publication that advertises construction projects up for bid.
- c. Special Emphasis Programs (SEPs): The SEPs provide for programmed inspections of establishments in industries with high injury or illness rates that are not covered by other inspection scheduling systems. In FY 2009, AKOSH had SEPS for state public sector and for transportation and warehousing.

OSHA's monitoring found that AKOSH effectively identified establishments for programmed inspections using these scheduling tools. The state conducted a total of 355 inspections in FY 2009, representing an increase of 24% compared to the 266 inspections it conducted in FY 2008. Of the 355 inspections, 149 (42%) were programmed and 206 (58%) were unprogrammed. Although these numbers reflect an increase in enforcement activity in comparison to the previous year, the state still fell short of its FY 2009 goal of 465 inspections.

Enforcement of safety and health standards plays an important role in OSHA's efforts to reduce workplace injuries, illnesses, and fatalities. Each year, OSHA requires its state partners to establish reasonable goals for enforcement inspections. For the past three years, AKOSH has not met its inspection goals.

In FY 2007, AKOSH did not meet its inspection goal mainly because of a high vacancy rate among compliance officers. The state worked diligently to fill vacancies, but did not meet its goal the following year; in fact, AKOSH conducted 10% fewer inspections in

² Programmed inspections are scheduled based upon objective or neutral selection criteria. Examples include national and local emphasis programs which target inspections in high-hazard industries.

³ Unprogrammed inspections are conducted in response to imminent dangers, fatalities, catastrophes, complaints and referrals.

FY 2008 than it had the year before. The 2008 shortfall was attributed, in part, to additional turnover and the need to train newly hired compliance officers. Furthermore, in 2009, AKOSH was faced with a hiring freeze which resulted in the need to pursue waivers, which it did in order to fill two compliance officer vacancies. This past year, the state began to see positive results from its earlier hiring efforts. Nonetheless, as previously noted, it did not meet its FY 2009 inspection goal.

As more of its new staff gain experience in conducting inspections, AKOSH will be better able to meet or exceed its inspection goal. Increased enforcement activity should focus primarily on workplaces covered under the state's inspection targeting programs.

RECOMMENDATION 4: Ensure an effective presence in private and public sector workplaces by increasing the number of programmed enforcement inspections using targeting tools such as the High Hazard Targeting plan, the Construction List, and Special Emphasis Programs.

Hazard Recognition. In addition to reviewing case files prepared by the state, compliance officers from OSHA's Anchorage office accompanied state compliance officers on three inspections to evaluate hazard recognition and other inspection-related skills. In two of the three accompanied visits, discrepancies were noted with regard to the ability of the state's compliance officers to recognize and document hazards. Following the visits, the Anchorage Area Director met with AKOSH's Chief of Enforcement and informed the chief of the outcomes; the chief acknowledged OSHA's concerns, and indicated that remedial actions would be taken. OSHA will perform follow-up monitoring in this area during FY 2010.

Employee and Union Involvement. Ensure employees are allowed to participate in inspection activities.

AKOSH's policy on employee participation in the inspection process is the same as OSHA's. The state's compliance officers are required to determine, soon after arriving at the work site, whether employees are represented; if so, employee representatives are to be afforded the opportunity to participate in all phases of the inspection. OSHA's accompanied visits and its review of AKOSH's inspection files did not identify problems with respect to employee participation during inspections.

Citations and Penalties. Ensure timely issuance of citations which include appropriate penalties for serious violations.

Like OSHA, the state has policies and procedures with respect to the issuance of citations and penalties. During FY 2009, AKOSH's citation lapse times (the number of calendar days from opening conference to citation issuance) was 43.88 days for safety inspections and 53.58 days for health. Compared to FY 2008, this represents a slight decrease in the safety lapse time (44 days in FY 2008), and an increase of over eight days in the health lapse time (45.25 in FY 2008). Despite the rise in average health

lapse time, AKOSH's FY 2009 lapse times compare favorably to the averages of 43.8 and 57.4 days, for safety and health cases, respectively, for state plans as a whole.

In FY 2009, AKOSH cited an average of 3.6 violations per inspection, compared to 3.1 for OSHA. About 52.1% of AKOSH's violations were classified as serious, repeat or willful, compared to 58.6% for state plans as a whole.

Case file reviews verified that the state assessed penalties for all serious violations cited. In FY 2009, AKOSH's average penalty per serious was \$973, compared to OSHA's average of \$1,014.

During FY 2009, the state investigated a case which resulted in a notably high penalty for violations of rules pertaining to asbestos. AKOSH responded, in April 2009, to a complaint about possible asbestos exposure during remodeling work performed by a building owner. The state determined that the owner acted with plain indifference to worker safety and health by: (a) failing to conduct a proper initial exposure assessment; (b) using improper work practices; and (c) failing to notify building tenants and prospective contractors of the asbestos hazard. A penalty of \$70,000 was assessed. The owner appealed, but later agreed to pay the full amount in order to settle the case.

Abatement. Ensure an effective mechanism exists for assurance of hazard abatement.

The state's procedures for verifying hazard abatement are the same as OSHA's. Case file reviews identified no problems with regard to the appropriateness of abatement periods or abatement verification by AKOSH in general. However, the year-end State Activity Mandated Measures (SAMM) report shows that only 56% of serious, willful and repeat (SWR) violations cited in the private sector, and only 27% of the SWR violations cited in the public sector had been verified as abated. OSHA will work with the state during FY 2010 to determine whether this is a data entry issue.

Recordkeeping and Reporting. Ensure rules are in place requiring employer recordkeeping of workplace injuries and illness, and timely reporting of workplace fatalities and catastrophes.

AKOSH's regulations for injury and illness recordkeeping and for reporting workplace fatalities and catastrophes are comparable to OSHA's. As noted in the results of the special study, recordkeeping will be a focus of monitoring by the Anchorage Area Office in FY 2010. No problems were noted with regard to AKOSH being timely notified of fatalities and catastrophes.

Denials of Entry. Ensure an effective mechanism is in place to obtain inspection warrants when denials of entry occur.

AKOSH has effective mechanisms in place to obtain warrants to conduct inspections. In FY 2009, the state did not have any denials of entry where entry was not subsequently gained.

Review Procedures. Ensure effective mechanisms are in place to provide employers the right of review of alleged violations, abatement periods, and proposed penalties; that employees or their representatives have an opportunity to participate in the review proceedings and contest abatement dates.

Alaska's Administrative Code and AKOSH's Compliance Manual afford employers the right to administrative and judicial review of alleged violations, proposed penalties, and abatement periods. These procedures also give employees or their representatives the opportunity to participate in review proceedings and to contest citation abatement dates.

AKOSH's procedures require that informal conferences be held prior to the expiration of the 15-day contest period; this is the same as OSHA's procedures. Data regarding the state's "pre-contest" penalty reductions, violation reclassifications and violation withdrawals compare favorably to federal averages in the performance areas reported in the FY 2009 State Indicators Report (Appendix B). Specifically, 4.0% of AKOSH's violations were vacated as a result of informal settlements, compared to 5.1% of federal violations. The state reclassified violations in 1.8% of cases while federal violations were reclassified 4.8% of the time. AKOSH retained 63.9% of its average penalties following informal settlements, compared to 63.2% by OSHA. It should be noted that OSHA also examined informal conferences as part of its special study of AKOSH's fatality and accident cases; refer to that section for details.

No decisions were issued by Alaska's Office of Administrative Hearings in FY 2009. At the close of this evaluation period, a safety and health appeal that had been heard in May 2009 had not yet resulted in a decision. Alaska's formal review procedures are adequate and are being followed.

Public Employee Program. Ensure a representative share of safety and health enforcement inspections is conducted in the public sector.

AKOSH conducted 34 public sector inspections (14 programmed, 20 unprogrammed) in FY 2009; this represents 10% of the 355 total inspections conducted and is exactly twice the number conducted last year in this category. During FY 2008, the state conducted seven programmed and ten unprogrammed public sector inspections. The state offered no explanation for the doubling of activity in both areas.

AKOSH imposes monetary sanctions on public agencies over which it exercises regulatory authority. It also applies its abatement verification procedures to ensure hazard correction where public agencies are concerned.

Information Management. Use of IMIS reports for program management; accuracy and integrity of data; timeliness of data entry and updates.

Although OSHA, Region X, does not routinely audit AKOSH's performance with regard to information management, other methods are used to ensure the integrity of the data. For example, OSHA meets quarterly with representatives of AKOSH to review program performance. Prior to such meetings, IMIS reports are run by the Anchorage Area Office for purposes of gauging the state's performance with respect to mandated activities. Likewise, the state updates its report on performance against the goals in its annual plan. In order for such reports to be accurate, the data need to be properly entered in a timely fashion; if any issues or concerns about data integrity arise, they are discussed at quarterly meetings in order to achieve resolution.

In addition to the above, the Seattle Regional Office monitors the IMIS monthly to ensure that the state plans in Region X enter OSHA-170 information for fatalities they investigate. Also, responses are prepared for ad hoc requests for clarification or correction of state data in the IMIS.

Bureau of Labor Statistics (BLS) Rates. Review state-specific rates to determine trends; compare to targeting and emphasis programs for correlation.

An overview of Alaska's private industry TCIR⁴ and DART⁵ rates for calendar years 2004 through 2008, as well as for select industries, is provided in the table that follows. At the close of this monitoring period, 2008 was the most recent calendar year for which data were available. [Data source: www.bls.gov]

	CY 2004	CY 2005	CY 2006	CY 2007	CY 2008	% Change, 04-08	% Change, 06-08
Private Industry							
TCIR	5.1	6.2	6.2	5.5	5.1	0%	-17.7%
DART	3.0	3.0	3.0	2.7	2.7	-10%	-10%
Construction, NAICS⁶ 23							
TCIR	6.0	8.0	9.4	8.0	7.1	+18.3%	-24.4%
DART	3.9	3.9	4.4	3.3	3.4	-12.8%	-22.7%
Transportation/Warehousing, NAICS 48-49							
TCIR	9.0	9.1	9.1	7.4	7.4	-17.7%	-18.6%
DART	5.4	5.4	5.7	4.9	4.7	-12.9%	-17.5%
Seafood product preparation and packaging, NAICS 3117							
TCIR	11.9	7.8	8.5	11.3	8.5	-28.5%	0%
DART	7.4	5.5	5.7	6.4	5.5	-25.6%	-3.5%
State and local government							
TCIR	5.9	4.8	5.4	4.2	5.5	-6.7%	+1.8%
DART	2.6	2.2	2.4	1.9	2.4	-7.6%	0%

As stated previously, AKOSH conducts inspections and delivers training in the construction, transportation/warehousing, and seafood processing industries in an effort to reduce injuries and illnesses. Five-year BLS data presented above show that the state is justified in focusing its resources in these industries because TCIR and DART rates have been consistently higher in the three targeted industries than the rates for private industry as a whole. Between 2004 and 2008, reductions ranging from 12.8% to 28.5% in TCIR and DART rates occurred in these industries. The only exception was the construction TCIR, which rose 18.3%; however, between 2006 and 2008, there was

⁴ TCIR is the total case incident rate, which represents the number of recordable injuries and illnesses per 100 full-time workers, calculated as: $(N/EH) \times 200,000$ where N = number of injuries and illnesses; EH = total hours worked by all employees during the calendar year; and 200,000 = base for 100 equivalent full-time workers (working 40 hours per week, 50 weeks per year).

⁵ DART is the days away from work, job transfer, or restriction rate, which represents the number of such cases per 100 full-time workers. Calculation of the DART rate is similar to that of TCIR, as described in footnote 4 above.

⁶ NAICS is the North American Industry Classification System.

a 24.4% decrease in the construction TCIR. In summary, it appears that AKOSH's efforts are contributing to rate reductions in the targeted industries.

Earlier in this report, it was noted that AKOSH has a Special Emphasis Program for targeting inspections in the public sector; this includes state and local government, but not federal agencies (the latter are covered by OSHA). Five-year data in the preceding table show that the DART rates for Alaska's state and local government agencies have been consistently lower than those of private industry. Nevertheless, the state believes there is value in conducting inspections in the public sector, and intends to continue to do so.

With regard to fatalities, this report earlier discussed the state's progress in achieving its performance goals – one of which addresses fatalities. It was noted that the BLS fatality rate in Alaska is high compared to many other states; however, the rate is influenced primarily by transportation-related deaths which occur outside of AKOSH's jurisdiction. Consequently, the state has elected to track progress in reducing fatalities using the IMIS FAT/CAT Report instead of the data published by BLS.

2. Standards, Variances, and Plan Changes

Standards Adoption and Variance Actions. Ensure new and revised standards are adopted within required time frames and variance applications are processed properly and decisions justified.

Standards. AKOSH adopts most federal standards by reference. In doing so, standards are automatically adopted within the time frame allowed, and the effective dates of standards are the same as OSHA's effective dates. For standards not adopted by reference, the state has acceptable procedures for promulgating standards that are at least as effective as those promulgated by OSHA.

During this evaluation period, OSHA issued three final rules, two of which were required to be adopted by AKOSH. The "Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee" and "Revising Standards Referenced in the Acetylene Standard," rules were required to be adopted by the state. Adoption of the "Updating OSHA Standards Based on National Consensus Standards: PPE" rule was optional.

The state adopted the "Revising Standards Referenced in the Acetylene Standard" by reference. The state also adopted the "Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee" and "Updating OSHA Standards Based on National Consensus Standards: PPE" rules for all activities under its jurisdiction. The state did not and was not required to adopt changes made to 29 CFR, Parts 1915 and 1917 because shipyards and marine terminals are not under the state's jurisdiction.

Variations. AKOSH did not process a variance action during this evaluation period. During the previous three years of reporting, AKOSH granted an average of fewer than one permanent variance a year. No temporary variances have been granted in the last three report years.

Federal Program Changes (FPCs) and State-Initiated Changes (SICs). Ensure timely adoption of program changes.

Federal. OSHA policy requires states to acknowledge each Automated Tracking System (ATS) change within 70 days of a program change's transmittal date. Acknowledgment by the state must include whether it intends to adopt the change or adopt an alternative. The ATS also requests the state's projected date of adoption.

In FY 2009, seven FPCs transmitted via the ATS required acknowledgement by the state; AKOSH timely acknowledged each of those FPCs. Two FPCs had final responses due within this evaluation period. Both FPC final responses were timely submitted. OSHA has been satisfied with the state's performance with respect to FPC acknowledgements and final responses.

State-Initiated. Alaska did not submit any state-initiated program changes in FY 2009.

3. Voluntary Compliance

Ensure the existence and implementation of an appropriate program to encourage voluntary compliance by employers through consultation and intervention.

Public Sector Consultation. OSHA, in conjunction with its stakeholders, developed a set of mandated activity measures or standards of acceptable performance for consultation programs. Quarterly data relating to each of those standards are reported in the Mandated Activities Report for Consultation (MARC). The MARC and supplemental monitoring data are typically used to assess each state's performance. For FY 2009, AKOSH met or exceeded all of the measures in the MARC. The state verified that 100% of the serious hazards identified by the consultants were corrected in a timely manner, thereby meeting the performance standard. Additionally, the number of hazards verified corrected in the original time allotted, or verified on-site, was nearly 72%, thereby exceeding the standard of 65%. The FY 2009 MARC data confirm that AKOSH's public sector consultation program is being managed and operated effectively.

Other Voluntary Compliance. A discussion of AKOSH's performance with respect to outreach, education, the Voluntary Protection Programs (VPP), and the Safety and Health Achievement Recognition Program (SHARP) appears later in this report. See *B. Assessment of AKOSH's Progress in Achieving its Annual Performance Goals; AKOSH Five-Year Strategic Goal 2.*

4. Discrimination Program

Ensure the state provides necessary and appropriate protection against employee discharge or discrimination.

The following table is a summary of Alaska discrimination activity during FY 2009:

Disposition	Totals
Total cases from FY 2009	17
Cases completed in FY 2009	15
Cases completed timely	4
Overage cases	11
~ Withdrawn	0
~ Dismissed	7
~ Merit	8
~Settled	5
~Settled other	2
~ Litigated	1
Investigators on staff	1 ⁷

In FY 2009, AKOSH received and completed eight more discrimination cases than it had the previous fiscal year, and finished FY 2009 with no pending cases. The merit rate on completed cases increased from 14% in FY 2008 to 53% in FY 2009. The timeliness rate decreased from 57% to 27%.

Four Complaints About State Program Administration (CASPA) were filed against AKOSH – three in FY 2009 and one in FY 2008 (details in the section that follows). Of the four CASPAs, three related to the discrimination program. One of the discrimination-related CASPAs was found to be not valid while two remained open at the end of the monitoring period.

In August 2009, OSHA conducted an on-site audit of AKOSH's discrimination program. The audit covered most of FY 2009 and included reviews of case files, screened complaints, and CASPAs to determine whether the state abided by the policies and procedures established in its Whistleblower Investigations Manual. Audit findings were transmitted to AKOSH, and the state provided written responses to the report's recommendations. See Appendix E for details; the recommendations are presented in the Executive Summary. OSHA intends to continue to monitor the state's progress toward achieving improvements in its discrimination program.

⁷ AKOSH has one full-time investigator.

5. Complaints About State Program Administration (CASPA)

Ensure timely and thorough responses to CASPA allegations, investigative findings and recommendations for program improvement are provided by the state.

AKOSH does not have written policies or procedures that provide guidance to managers and staff on responding to CASPAs – nor does OSHA require states to have such policies and procedures. Nevertheless, AKOSH has historically responded in a satisfactory manner to OSHA’s recommendations for remedial actions whenever CASPA allegations are found to be valid.

Four CASPAs were active in FY 2009. Of that number, three were filed in FY 2009 and one had been filed in FY 2008. Two complaints were closed after being found not valid, while the others remained open at the end of the evaluation period.

In one of the closed cases, the complainant objected to the outcome of a safety and health inspection by AKOSH. Based on the state’s initial response to the allegations, the CASPA was deemed not valid. The complainant appealed the determination to OSHA’s regional administrator. Upon further investigation, including interviews of the complainant and a state official, and examination of supplemental information provided by the complainant and the state, the regional administrator affirmed that the CASPA was not valid.

In the other closed case, the complainant alleged that AKOSH conducted an inadequate discrimination investigation and pressured the complainant into a settlement. OSHA determined that the state had conducted an adequate investigation and had *not* pressured the complainant to accept the settlement. Although OSHA took issue with certain procedural aspects of the state’s investigation, the CASPA itself was not valid. For details regarding OSHA’s audit findings, see Appendix C.

The two open CASPAs pertain to AKOSH’s discrimination program. At the close of the evaluation period, OSHA was investigating one of them because the state declined to provide an initial response to the allegations. The other was awaiting closure, pending a decision by the complainant on whether to request a review, by the regional administrator, of OSHA’s determination of no validity to his complaint.

6. Other Program Elements

Personnel-Benchmark Positions Authorized and Filled. Track the state’s authorized field safety and health enforcement positions at or above benchmark levels and actual safety and health enforcement positions filled.

Alaska’s safety enforcement staffing is above the four positions benchmark level. Alaska has allocated eight positions of which seven are filled. For health enforcement

staffing, the benchmark is five, Alaska has allocated 4.5 positions, and 3.5 are filled (a .50 position that handles 11(c) discrimination has been excluded from the enforcement count).

For consultation, 11 of 12 full-time equivalent positions authorized are encumbered.

Laboratory. Accredited and participates in quality assurance program.

AKOSH continues to use the OSHA Salt Lake City Technical Center to analyze samples.

Summary Assessment of AKOSH's Performance of Mandated and Related Activities

AKOSH has the necessary policies and procedures in place to fulfill its mandated responsibilities. Overall, the state's performance with respect to mandated activities is satisfactory. Although the shortfall in total inspections for FY 2009 was less than in FY 2008 or FY 2007, OSHA recommends that AKOSH continue its efforts to meet its annual compliance inspection goal. OSHA conducted an audit of the state's whistleblower program in FY 2009. Findings and recommendations from that audit are included in Appendix E.

B. ASSESSMENT OF AKOSH'S PROGRESS IN ACHIEVING ITS ANNUAL PERFORMANCE GOALS

In 2009, AKOSH established a five-year strategic plan covering the period of FY 2009 through FY 2013. The plan includes outcome and performance goals which were approved by OSHA. Also in 2009, the state developed an annual performance plan as part of its grant application for federal funds. AKOSH's report of accomplishments with respect to its FY 2009 performance plan goals is contained in its State OSHA Annual Report (SOAR), attached as Appendix C. The following is OSHA's assessment of AKOSH's progress in achieving its annual performance goals.

Strategic Goal 1: Improve workplace safety and health in both the public and private sectors as evidenced by a reduction in the rate of injuries, illnesses and fatalities.

FY 2009 Performance Goal 1.1 – Concentrate on the primary causes of fatalities and the industries where fatalities take place by focusing AKOSH efforts to Goals 1.2 and 1.3.

Results – This goal was met in that AKOSH focused successfully on fatality reduction via Performance Goals 1.2 and 1.3.

OSHA's Assessment – In developing its 2009 performance goals to reduce injuries, illnesses, and fatalities, AKOSH used workers' compensation data to determine that the construction and transportation/warehousing industries had above-average injury/illness rates as well as the potential for fatal accidents. Goal 1.1 attempts to link AKOSH's focused activity in these industries to fatality reduction, while Goals 1.2 and 1.3 address injury/illness reduction in general.

Although this performance goal was met by AKOSH, the desired outcome – a decrease in the rate of Alaska workplace fatalities – cannot be measured at this time. The BLS fatality rate in Alaska, although high relative to many other states, is influenced primarily by transportation-related deaths which occur outside of AKOSH's jurisdiction. The desired outcome associated with this goal is a 10% reduction in the rate of fatalities occurring in the state's jurisdiction over the five-year period of its strategic plan. Because the number of fatalities within AKOSH's jurisdiction each year is relatively small, however, there is no annual fatality reduction goal. OSHA will be better able to assess the impact of this performance goal when more than one year of data has been generated.

FY 2009 Performance Goal 1.2 – Reduce the lost time injury and illness rate in the construction industry, as determined by the number of lost time injuries and illnesses per hundred employees, by 2%.

Results – This goal was exceeded. Compared to a construction lost time injury and illness baseline rate of 4.01 per 100 employees (FY 2004-2008 average), the rate for the period in question was 2.42 lost time injuries and illnesses per 100 employees, or a decrease of 40% from the baseline. [Data Sources: Alaska workers' compensation data and Alaska Economic Trends publication. The data from these sources differ slightly from the BLS data provided in later in this report, in the section on mandated activities.]

OSHA's Assessment – AKOSH focused its compliance, consultation, and outreach efforts in the construction industry in an effort to reduce lost time injuries, illnesses, fatalities in that industry sector. The state further concentrated its efforts on construction work sites where "struck by" and "fall" incidents were most likely to occur. A total of 174 construction inspections were conducted along with 18 23(g) and 181 21(d) consultation interventions during the evaluation period. The resulting reduction in lost time injuries and illnesses exceeded AKOSH's performance goal.

FY 2009 Performance Goal 1.3 – Reduce the rate of lost time injuries and illnesses in the transportation and warehousing industry sector by 2%.

Results – This goal was exceeded. Compared to a transportation and warehousing industry lost time injury and illness baseline rate of 3.35 per 100 employees (FY 2004-2008 average), the rate during FY 2009 was 2.29 per 100 employees, or a decrease of 32% from the baseline. [Data Sources: Alaska workers' compensation data and Alaska Economic Trends publication. The data from these sources differ slightly from the BLS data provided in later in this report, in the section on mandated activities.]

OSHA's Assessment – AKOSH focused on this industry by conducting 30 compliance inspections and 12 and 70 23(g) and 21(d) consultation interventions, respectively, in transportation and warehousing establishments. The resulting reduction in lost time injuries and illnesses exceeded AKOSH's performance goal.

FY 2009 Performance Goal 1.4 – Reduce the lost time injury and illness rate in the seafood processing industry as determined by the number of lost time injuries and illnesses per hundred employees by 3%.

Results – This goal was exceeded. Compared to a lost time injury and illness baseline rate of 5.06 per 100 employees (FY 2004-2008 average) in the seafood processing industry, the rate in FY 2009 was 4.06 per 100 employees, or a decrease of 20%. [Data Sources: Alaska workers' compensation data and Alaska Economic

_____ publication. The data from these sources differ slightly from the BLS data provided later in this report, in the section on mandated activities.]

OSHA's Assessment – OSHA and AKOSH share jurisdiction in the seafood processing industry in Alaska, which is seasonal in nature. The state's interventions are targeted in shore-based seafood processing plants located in southeast Alaska, Kodiak, and the Kenai Peninsula, while OSHA's activities are limited to floating processors operating within the state's territorial waters (traditionally defined as the waters within three nautical miles of the shoreline).

AKOSH conducted 12 enforcement inspections and 33 consultation visits in the seafood processing industry (the latter were all 21(d)). The resulting FY 2009 reduction in the lost time injury/illness rate exceeded the state's goal.

FY 2009 Performance Goal 1.5a – Initiate inspections of fatalities and catastrophes (three or more hospitalizations) within one working day and for two or less hospitalizations within seven working days for 90% of occurrences to prevent further injuries or deaths.

Results – This goal was exceeded. AKOSH responded to 100% of the fatalities/catastrophes and hospitalizations within the one and seven working day time frames stated in the goal. [Data Source: IMIS.]

OSHA's Assessment – There were five fatalities/catastrophes and 28 hospitalization cases which occurred within AKOSH's jurisdiction during the evaluation period. All were responded to within one working day and seven working days, respectively. Taking into account the necessity in Alaska for air travel, and the potential for frequent weather delays associated with it, AKOSH's performance in this program area was commendable.

FY 2009 Performance Goal 1.5b – Initiate inspections within seven working days or investigations within one working day of worker complaints for 90% of the cases.

Results – This goal was exceeded. AKOSH responded to 72 of 73 complaints by initiating inspections within one working day of receipt. The state also responded with "investigations" (also known as "phone/fax") within seven working days in 15 of 15 complaints. [Data Source: IMIS.]

OSHA's Assessment – AKOSH met or exceeded its target response times in approximately 99% of the complaint inspections or investigations.

FY 2009 Performance Goal 1.5c – Resolve 75% of all discrimination cases within 90 days.

Results – This goal was not met. Three out of 15 discrimination cases completed during FY 2009, or 20%, were resolved within 90 days. [Data Source: IMIS.]

OSHA's Assessment – Only 3 of the 15 cases (20%) that AKOSH completed were completed timely. During the fiscal year, an on-site audit of the whistleblower program was conducted by OSHA. As a result of the audit, OSHA made recommendations for program improvement, and AKOSH's responses to those recommendations were acceptable. A more complete description of federal OSHA's review of the AKOSH Discrimination program and the resultant recommendations are contained in Appendix C of this report. OSHA's monitoring in FY 2010 will include a review of AKOSH's progress toward achieving discrimination program improvements.

Summary Assessment of Strategic Goal 1 – AKOSH met or exceeded most of its annual performance goals related to strategic goal 1. The lone exception was goal 1.5c concerning the discrimination program. OSHA recommended program improvements in an audit report issued to the state earlier in FY 2009. The audit report and the state's satisfactory responses to the report's recommendations are included herein.

AKOSH Five-Year Strategic Goal 2: Promote a safety and health culture in the Alaskan workplace (both public and private sectors) through compliance assistance, cooperative programs, and consultation assistance.

FY 2009 Performance Goal 2.1a – Develop and deliver training to workers and employers in the construction industry that target the most likely causes of injuries, illnesses, and fatalities.

Results – This goal was met. During FY 2009 AKOSH developed a formal outreach and training plan that identified the components and timetable for delivering safety and health training to workers and employers in the construction industry. AKOSH then held a total of 175 formal and informal training events where 1,529 individuals from the construction industry received training.

OSHA’s Assessment – During AKOSH’s development of its FY 2009 performance goals, workers’ compensation data identified construction as a high rate industry in Alaska. The data further indicated that “falls” or “struck by” incidents accounted for some of the claims. AKOSH assessed its ability to provide training in these subject areas, developed a plan for directing outreach training and consultations toward activities most likely to cause “fall” or “struck by” injuries and fatalities, and then delivered training events to a large working population in the state.

FY 2009 Performance Goal 2.1b – Develop and deliver training to workers and employers in the transportation and warehousing industry sector (NAICS codes 48xxxx – 49xxxx) that targets the most likely causes of injuries, illnesses, and fatalities.

Results – This goal was met. AKOSH conducted 56 formal and informal training events affecting 284 employees in the transportation and warehousing industry sector.

OSHA’s Assessment – AKOSH targeted this industry sector for training, consultations, and enforcement interventions based on workers’ compensation claims data. Training and consultations were directed at activities most likely to cause “caught in or between,” “falls,” and “struck by” injuries or fatalities.

FY 2009 Performance Goal 2.1c – Develop and deliver training to workers and employers in the seafood processing industry that targets the most likely causes of injuries, illnesses, and fatalities.

Results – This goal was met. AKOSH conducted 33 formal and informal training events affecting 252 employees in the seafood processing industry sector.

OSHA’s Assessment – AKOSH targeted this industry sector for training, consultation, and enforcement interventions based on workers’ compensation claims

data. Training and consultations were directed at activities most likely to cause amputation or “pinch-point” injuries, as well as “falls” and “caught in or between.”

FY 2009 Performance Goal 2.2a – Maintain, at a minimum, fifteen VPP participants with the intent to increase by two by end of FY 2013.

Results – This goal was met. AKOSH began FY 2009 with 15 VPP participants and did not add any new sites during the evaluation period.

OSHA’s Assessment – During the evaluation period, AKOSH promoted the benefits of the VPP program during inspections, consultations, and at conferences and other outreach activities. The lack of new applicants during the evaluation period was likely due to the economy and other factors outside of AKOSH’s control.

FY 2009 Performance Goal 2.2b – While maintaining, at a minimum, a level of sixteen SHARP participants, increase the number of SHARP participants by one.

Results – This goal was not met.

OSHA’s Assessment – AKOSH lost one SHARP member due to a disqualifying injury and illness rate. No new SHARP companies were added. AKOSH continues to publicize this program and should be able to meet this goal in FY 2010.

Summary Assessment of Strategic Goal 2 – AKOSH met or exceeded most of its annual performance goals related to strategic goal 2. The only exception was goal 2.2b which proposed increasing by one the number of SHARP sites in Alaska while maintaining a minimum of sixteen participants. Since no new SHARP sites were added and one SHARP site became disqualified, the state fell short of that goal.

AKOSH Five-Year Strategic Goal 3: Secure public confidence through excellence in the development and delivery of AKOSH's programs and services.

FY 2009 Performance Goal 3.1a – Work with OSHA Training Institute (OTI) and Region X to address the issue of establishing regional training to assure that compliance and consultation staff receives basic and specialized training necessary to effectively carry out this strategic plan.

Results – This goal was met. During the evaluation period, AKOSH staff attended the following OTI courses: OSHA 1250, Introduction to Safety and Health Standards for Industrial Hygienists; OSHA 1230, Accident Investigation; and, OSHA 1900, Recordkeeping. In addition, six enforcement staff members attended “National Certified Investigator Training” during FY 2009. This course was held in Anchorage by a private vendor, and was designed to help in investigation of accident scenes. AKOSH also arranged to have its 11(c) Discrimination Investigator perform one week of on-the-job training with OSHA’s Region X whistleblower investigative staff.

OSHA’s Assessment – AKOSH recognizes the importance of having trained compliance officers and consultants, and provides necessary OTI and other required or technical training. Because of the costs associated with travel between Alaska and the OSHA Training Institute, AKOSH usually requests that one or more OTI courses be brought to Alaska each year. OSHA, Region X has facilitated this, and has assisted AKOSH in reserving training slots in OTI courses so that new staff do not have to wait months to attend mandatory training. AKOSH did an effective job of addressing staff training needs during this evaluation period.

FY 2009 Performance Goal 3.1b – In cooperation with Region X staff, conduct annual reviews of enforcement and consultation case files to evaluate the effectiveness and consistency of services.

Results – This goal was met. OSHA randomly selected and reviewed 45 of AKOSH’s inspection files in September, 2009. Findings, which primarily centered on case file documentation, were provided to AKOSH’s Chief of Enforcement at the completion of the review. In addition, audits of the consultation and discrimination programs were conducted by OSHA in July 2009 and August 2009, respectively.

OSHA’s Assessment – AKOSH has historically been amenable to allowing OSHA to conduct case file and program reviews for purposes of evaluating effectiveness and consistency. Issues arising from these reviews are almost always resolved by the state through policy directives and/or staff training. During this evaluation period, AKOSH cooperated fully and took appropriate corrective actions in response to feedback from OSHA.

Summary Assessment of Strategic Goal 3 – AKOSH met both of its annual performance goals related to strategic goal 3.

Appendix A

FY 2009 Findings and Recommendations

Appendix A
FY 2009 Alaska State Plan (AKOSH) Enhanced FAME Report prepared by Region X
Summary of Findings and Recommendations

Enforcement Findings		Enforcement Recommendations	
1	Documentation of employer knowledge [in fatality and accident case files] was deficient because AKOSH's compliance officers relied, in most cases, on the term "reasonable diligence" to establish that the employer knew the hazardous condition existed. In every instance, there was sufficient evidence to develop knowledge through demonstrated "actual", "imputed", or "constructive" actions on the part of the employer.	Factually document employer knowledge in case files with as much specificity as feasible (p.11).	
2	[Failure to document informal conference results] made it difficult, in some cases, to ascertain the employer's position with regard to the cited violations, and [AKOSH's] rationale for proposing settlement	Use a structured informal conference worksheet to document the employer's position with regard to cited violations as well as the Chief's rationale for proposing settlement (p.12).	
3	Four of [the] five fatality-related cases included the initial condolence letter from AKOSH to the victim's next of kin, and there were no indications in any of the files that the citation or a letter had been sent by AKOSH to the next of kin explaining the outcome of the investigation. In only one instance did the state include the family in communication after the citation was issued; this was achieved by a telephone call in lieu of a letter.	Ensure that condolence letters are sent in <i>every</i> fatality case. At the conclusion of fatality investigations, apprise next of kin, in writing, of investigation outcomes and provide copies of citations. Insert copies of all such correspondence in the case file (p.12).	
4	For the past three years, AKOSH did not meet its inspection goals [due to staffing problems]. The state conducted a total of 355 inspections in FY 2009, ...an increase of 24% compared to the 266 inspections it conducted in FY 2008, ...[but] the state still fell short of its FY 2009 goal of 465 inspections.	Ensure an effective presence in private and public sector workplaces by increasing the number of programmed enforcement inspections using targeting tools such as the High Hazard Targeting Plan, the Construction List, and Special Emphasis Programs (p.15).	
Discrimination Program Findings		Discrimination Program Recommendations	
5	Complainant filed concurrent 11(c) complaints with AKOSH and federal OSHA, and there was miscommunication between the agencies.	In cases where a complainant files a discrimination complaint concurrently with AKOSH and OSHA, AKOSH should coordinate with OSHA to determine, on a case-by-case basis, which agency should conduct the investigation. (Appendix E p.4).	
6	AKOSH's settlement agreements continue to allow for unemployment benefits to be deducted. The OSHA <i>Whistleblower Investigations Manual</i> states that "unemployment compensation benefits may never be considered as a back pay offset."	AKOSH should refrain from including provisions in its settlement agreements that allow for deducting unemployment benefits [repeat rec.] (Appendix E p.4).	
7	Closing letters to the parties [are not stating] that the complaint was settled and copies of the letters [are not being] maintained in the case file.	Closing letters to the parties should state that the complaint was settled and copies should be kept in the file (Appendix E p.4).	
8	AKOSH continues to use statements submitted by a complainant and/or a witness to substitute for an interview even after the complaint has been docketed and filed.	Discontinue the practices of using statements submitted by complainants and witnesses as substitutes for interviews [repeat rec.] (Appendix E p.4).	
9	[Witness interviews are not covering the four prima facie elements, and are not indicating if one element is missing.]	Ensure that witness interviews cover the four prima facie elements (Appendix E p.4).	
10	The Final Investigative Reports (FIR) do not state the date that the discrimination complaint was filed.	The FIR (Final Investigative Report) should include the date the complaint was filed with AKOSH. The date should be written on the first page of the FIR (App. E p.4).	
11	The state's FIRs include a section on coverage; however, they do not describe how the employer is covered by the Act in order to establish jurisdiction.	The coverage description in the FIR should include information that is similar to what is described in a safety and health inspection report, i.e., the number of employees, whether the employer is private or public, and union status (along with a brief description of the company) (Appendix E p.4).	

Appendix B

FY 2009 Alaska Enforcement Activity

FY 2009 Alaska Enforcement Activity

	Alaska	State Plan Total	Federal OSHA
Total Inspections	338	61,016	39,004
Safety	237	48,002	33,221
<i>% Safety</i>	70%	79%	85%
Health	101	13,014	5,783
<i>% Health</i>	30%	21%	15%
Construction	163	26,103	23,935
<i>% Construction</i>	48%	43%	61%
Public Sector	34	7,749	N/A
<i>% Public Sector</i>	10%	13%	N/A
Programmed	149	39,538	24,316
<i>% Programmed</i>	44%	65%	62%
Complaint	68	8,573	6,661
<i>% Complaint</i>	20%	14%	17%
Accident	5	3,098	836
Insp w/ Viols Cited	249	37,978	27,165
<i>% Insp w/ Viols Cited (NIC)</i>	74%	62%	70%
<i>% NIC w/ Serious Violations</i>	64%	62%	87%
Total Violations	871	129,363	87,663
Serious	226	55,309	67,668
<i>% Serious</i>	26%	43%	77%
Willful	2	171	401
Repeat	18	2,040	2,762
Serious/Willful/Repeat	246	57,520	70,831
<i>% S/W/R</i>	30%	44%	81%
Failure to Abate	-	494	207
Other than Serious	625	71,336	16,615
<i>% Other</i>	72%	55%	19%
Avg # Violations/ Initial Inspection	3.6	3.3	3.1
Total Penalties	\$ 288,920	\$ 60,556,670	\$ 96,254,766
Avg Current Penalty / Serious Violation	\$ 787.40	\$ 800.40	\$ 970.20
Avg Current Penalty / Serious Viol- Private Sector Only	\$ 730.20	\$ 934.70	\$ 977.50
<i>% Penalty Reduced</i>	47.6%	51.9%	43.7%
% Insp w/ Contested Viols	2.9%	13.0%	7.0%
Avg Case Hrs/Insp- Safety	25.1	15.7	17.7
Avg Case Hrs/Insp- Health	34.4	26.6	33.1
Lapse Days Insp to Citation Issued- Safety	31.7	31.6	34.3
Lapse Days Insp to Citation Issued- Health	39.7	40.3	46.7
Open, Non-Contested Cases w/ Incomplete Abatement >60 days	7	2,010	2,234

Source: DOL-OSHA. State Plan INSP & ENFC Reports, 11-19-2009. Federal INSP & ENFC Reports, 11-9-2009. Private Sector ENFC- State Plans 12.4.09 & Federal 12.14.09

Appendix C

AKOSH FY 2009 State OSHA Annual Report (SOAR)

(available separately)

Appendix D

State Performance Data

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)

OCT 23, 2009
 PAGE 1 OF 2

State: ALASKA

RID: 1050200

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD
1. Average number of days to initiate Complaint Inspections	519 7.63 68	7 3.50 2	Negotiated fixed number for each State
2. Average number of days to initiate Complaint Investigations	18 1.38 13	1 1.00 1	Negotiated fixed number for each State
3. Percent of Complaints where Complainants were notified on time	66 98.51 67	1 100.00 1	100%
4. Percent of Complaints and Referrals responded to within 1 day -ImmDanger	45 95.74 47	0 0 0	100%
5. Number of Denials where entry not obtained	0	0	0
6. Percent of S/W/R Violations verified			
Private	115 56.10 205	0 .00 89	100%
Public	4 26.67 15	0 .00 11	100%
7. Average number of calendar days from Opening Conference to Citation Issue			
Safety	7325 43.86 167	720 65.45 11	2489573 43.8 56880
Health	3965 53.58 74	241 48.20 5	692926 57.4 12071

*FY09AK

**PRELIMINARY DATA SUBJECT TO ANALYSIS AND REVISION

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)

OCT 23, 2009
 PAGE 2 OF 2

State: ALASKA

RID: 1050200

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD
8. Percent of Programmed Inspections with S/W/R Violations			
	49	4	92328
Safety	52.13	50.00	58.6 National Data (3 years)
	94	8	157566
	23	2	11007
Health	63.89	50.00	51.2 National Data (3 years)
	36	4	21510
9. Average Violations per Inspection with Vioations			
	273	20	420601
S/W/R	1.13	1.25	2.1 National Data (3 years)
	241	16	201241
	631	45	243346
Other	2.61	2.81	1.2 National Data (3 years)
	241	16	201241
10. Average Initial Penalty per Serious Violation (Private Sector Only)	230700	18025	492362261
	973.41	901.25	1335.2 National Data (3 years)
	237	20	368756
11. Percent of Total Inspections in Public Sector	34	2	79
	10.09	50.00	8.9 Data for this State (3 years)
	337	4	884
12. Average lapse time from receipt of Contest to first level decision	1163	0	4382038
	290.75		246.1 National Data (3 years)
	4	0	17807
13. Percent of 11c Investigations Completed within 90 days	4	1	100%
	26.67	100.00	
	15	1	
14. Percent of 11c Complaints that are Meritorious	8	0	1466
	53.33	.00	20.8 National Data (3 years)
	15	1	7052
15. Percent of Meritorious 11c Complaints that are Settled	7	0	1263
	87.50		86.2 National Data (3 years)
	8	0	1466

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT (SIR)

STATE = ALASKA

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		-----12 MONTHS-----		-----24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
1. PROGRAMMED INSPECTIONS (%)								
A. SAFETY	6212	34	11892	59	21855	96	42572	183
	67.3	51.5	67.5	44.7	66.8	43.8	65.2	45.9
	9230	66	17617	132	32713	219	65304	399
B. HEALTH	508	20	1004	26	1963	39	3678	66
	34.5	71.4	34.1	54.2	35.3	45.9	34.0	45.5
	1471	28	2946	48	5559	85	10829	145
2. PROGRAMMED INSPECTIONS WITH VIOLATIONS (%)								
A. SAFETY	4645	15	8997	35	16745	68	32019	139
	67.7	57.7	65.9	68.6	65.8	77.3	65.9	77.2
	6860	26	13654	51	25453	88	48603	180
B. HEALTH	368	8	746	12	1486	25	2884	46
	52.2	100.0	50.8	85.7	51.7	78.1	55.6	79.3
	705	8	1468	14	2873	32	5187	58
3. SERIOUS VIOLATIONS (%)								
A. SAFETY	15510	35	29490	61	56535	130	111717	252
	81.8	53.8	81.1	36.5	80.0	40.6	79.4	37.4
	18952	65	36371	167	70692	320	140747	673
B. HEALTH	2802	22	5343	43	10035	85	19393	152
	70.1	13.8	69.9	16.0	69.7	17.3	67.7	18.1
	4000	160	7645	269	14395	490	28659	842
4. ABATEMENT PERIOD FOR VIOLS								
A. SAFETY PERCENT >30 DAYS	2938	11	5782	24	12109	33	25516	111
	15.9	15.3	16.2	20.7	17.6	14.4	18.7	23.8
	18492	72	35597	116	68607	229	136812	466
B. HEALTH PERCENT >60 DAYS	256	6	577	13	1452	16	3111	17
	6.3	9.4	7.5	10.1	10.0	6.8	10.9	4.4
	4078	64	7720	129	14561	236	28488	390

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT (SIR)

STATE = ALASKA

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		-----12 MONTHS-----		-----24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
5. AVERAGE PENALTY								
A. SAFETY								
	280876	3250	628826	6750	1303857	9500	2663433	24700
OTHER-THAN-SERIOUS	923.9	1625.0	998.1	1687.5	1030.7	1583.3	1049.4	1646.7
	304	2	630	4	1265	6	2538	15
B. HEALTH								
	83100	1650	142950	2100	294225	7050	654830	7950
OTHER-THAN-SERIOUS	799.0	825.0	803.1	700.0	855.3	705.0	867.3	496.9
	104	2	178	3	344	10	755	16
6. INSPECTIONS PER 100 HOURS								
A. SAFETY								
	10459	72	19991	141	37160	238	73338	431
	6.1	6.0	5.7	7.1	5.5	6.3	5.3	3.2
	1722	12	3533	20	6727	38	13759	134
B. HEALTH								
	1764	33	3581	55	6701	101	12705	170
	1.8	3.3	1.7	2.9	1.6	2.8	1.5	2.4
	994	10	2112	19	4125	36	8503	71
7. VIOLATIONS VACATED %								
	1278	7	2561	18	5139	44	10097	67
	4.9	2.2	5.0	3.0	5.1	4.0	5.0	3.4
	26336	313	51387	604	100187	1104	201495	1991
8. VIOLATIONS RECLASSIFIED %								
	1130	2	2440	18	4798	20	9539	33
	4.3	.6	4.7	3.0	4.8	1.8	4.7	1.7
	26336	313	51387	604	100187	1104	201495	1991
9. PENALTY RETENTION %								
	13523966	38895	27149245	62407	54889469	186918	111585445	320204
	63.4	64.5	62.9	62.8	63.2	63.9	62.9	64.5
	21315664	60325	43130384	99430	86796382	292735	177346966	496630

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OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009

INTERIM STATE INDICATOR REPORT

STATE = ALASKA

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		----- 12 MONTHS-----		----- 24 MONTHS-----	
	PRIVATE	PUBLIC	PRIVATE	PUBLIC	PRIVATE	PUBLIC	PRIVATE	PUBLIC
D. ENFORCEMENT (PUBLIC SECTOR)								
1. PROGRAMMED INSPECTIONS %								
A. SAFETY	34	4	59	4	96	8	183	11
	51.5	66.7	44.7	50.0	43.8	44.4	45.9	39.3
	66	6	132	8	219	18	399	28
B. HEALTH	20	2	26	2	39	6	66	10
	71.4	40.0	54.2	28.6	45.9	37.5	45.5	43.5
	28	5	48	7	85	16	145	23
2. SERIOUS VIOLATIONS (%)								
A. SAFETY	35	3	61	5	130	9	252	14
	53.8	100.0	36.5	62.5	40.6	40.9	37.4	42.4
	65	3	167	8	320	22	673	33
B. HEALTH	22	1	43	4	85	5	152	11
	13.8	10.0	16.0	14.3	17.3	11.6	18.1	13.4
	160	10	269	28	490	43	842	82

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009

COMPUTERIZED STATE PLAN ACTIVITY MEASURES

STATE = ALASKA

PERFORMANCE MEASURE	----- 3 MONTHS-----		----- 6 MONTHS-----		----- 12 MONTHS-----		----- 24 MONTHS-----	
	FED	STATE	FED	STATE	FED	STATE	FED	STATE
E. REVIEW PROCEDURES								
1. VIOLATIONS VACATED %	446	13	875	13	1756	60	3749	61
	22.8	34.2	24.2	18.1	23.4	43.5	24.1	39.4
	1956	38	3609	72	7506	138	15528	155
2. VIOLATIONS RECLASSIFIED %	282	5	563	5	1133	8	2274	8
	14.4	13.2	15.6	6.9	15.1	5.8	14.6	5.2
	1956	38	3609	72	7506	138	15528	155
3. PENALTY RETENTION %	2319074	11093	4080249	14392	10792902	69067	20045599	82267
	54.1	71.5	51.5	69.7	58.5	61.2	55.9	65.2
	4286744	15525	7922126	20650	18457526	112925	35865959	126125

Appendix E

Audit of AKOSH's Discrimination Program

See Executive Summary and Appendix A for revised recommendation #1.

U.S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101 - 3212



Telephone No. 206-553-5930
Fax No. 206-553-6499

Refer to: FSO/vc

December 2, 2009

Mr. Grey Mitchell, Director
Alaska Dept. of Labor and
Workforce Development
P.O. Box 111149
Juneau, AK 99811-1149

RE: Audit of AKOSH's Discrimination Program

Dear Mr. Mitchell:

During August 2009, OSHA conducted an on-site audit of AKOSH's Discrimination Program. The period covered by OSHA's review was federal fiscal year 2009. The audit included reviews of case files, two CASPAs, and screened complaints to determine whether the state abided by the policies and procedures established in its Whistleblower Investigations Manual. At the conclusion of the audit, AKOSH was briefed on OSHA's findings. In early November, AKOSH sent Ms. Daniella Pereyra, its new investigator, to Seattle for a week of coaching and to observe OSHA's whistleblower investigators conduct investigations. We believe Ms. Pereyra's visit was a success and we are glad she was afforded that opportunity.

Summary of findings with regard to *previous year's* recommendations:

There were several recommendations from the FY 2008 audit which were largely the result of staffing issues. AKOSH acknowledged there were staffing challenges in a letter to OSHA dated January 8, 2009, and indicated that it would improve the quality of its discrimination program. The audit for FY 2009 showed definite improvement in AKOSH's discrimination program; however, certain areas need fine-tuning as discussed below.

Summary of *current* findings and recommendations:

IMIS reports note that approximately 17 discrimination complaints were filed and docketed with AKOSH between October 1, 2008, and September 30, 2009. The table below is a summary of discrimination activity during FY 2009:

Disposition	Totals
Total cases from FY 2009 ¹	17
Cases completed FY 2009 ²	15
Cases completed timely ³	4
Overage cases ⁴	11
~ Withdrawn ⁵	0
~ Dismissed ⁶	7
~ Merit ⁷	8
~ Settled ⁸	5
~ Settled Other ⁹	2
~ Litigated ¹⁰	1
Investigators on staff	1

Discrimination CASPAs

This year's audit included two Complaints About State Program Administration (CASPAs) which alleged that AKOSH allowed for a pattern of delays in processing discrimination complaints. In both cases, the complainants had to contact AKOSH more than once in order to file their complaints. However, there was insufficient evidence that the agency exhibited a pattern of delays in processing either complaint.

In one of the two cases, the complainant filed concurrent 11(c) complaints with AKOSH and federal OSHA, and there was some miscommunication between the agencies. As a result, we recommend that, in the future, federal OSHA be allowed to assume jurisdiction in cases where employees file 11(c) complaints with both agencies.

¹ Use the IMIS Activity Measures report, case backlog, total cases
² Use the IMIS Activity Measures report, Timeliness, cases completed
³ Use the IMIS Activity Measures report, case backlog, subtract overage cases from total cases
⁴ Use the IMIS Activity Measures report, case backlog, overage cases
⁵ Use the IMIS Investigation Data report, withdrawn number
⁶ Use the IMIS Investigation Data report, dismissed number
⁷ Use the IMIS Investigation Data report, merit findings
⁸ Use the IMIS Investigation Data report, settled number
⁹ Use the IMIS Investigation Data report, settled other number
(NOTE: Investigation Data report includes backlog cases filed from previous FY)
¹⁰ Use the IMIS Case Listing report, count Litigation/Merit number

Settlement Agreements

AKOSH's settlement agreements continue to allow for unemployment benefits to be deducted. This is incorrect and was a recommendation in the audit from fiscal year 2008¹¹. The *Whistleblower Investigations Manual* states that "unemployment compensation benefits may never be considered as a back pay offset." In 1951, the U.S. Supreme Court determined that unemployment benefits cannot be deducted as part of labor related settlement agreements. See *Labor Board v. Gullett Gin Co.*, 340 U.S. 361 (1951).

Closing letters to the parties should state that the complaint was settled and copies of the letters should be maintained in the case file in order to get credit for a settled case. See the *Whistleblower Investigations Manual*, Chapter 6-11 and 6-12.

Interviews

AKOSH continues to use statements submitted by a complainant and/or a witness to substitute for an interview even after the complaint has been docketed and filed. During last year's audit, it was recommended that AKOSH not substitute handwritten statements for an official interview.

With few exceptions, all interviews should cover the four basic elements of a prima facie complaint: (1) protected activity (i.e., a workplace safety/health concern); (2) employer knowledge of the protected activity; (3) adverse employment action; and (4) nexus. If one of the elements is lacking in the interview, the interview should indicate the element is missing. For example, the interview can state that "witness A was not aware of Complainant's workplace safety concern."

Final Investigative Reports

The Final Investigative Reports (FIR) do not state the date that the discrimination complaint was filed. See the *Whistleblower Investigations Manual*, Chapter 5-3.

The state's FIRs include a section on coverage; however, they do not describe how the employer is covered by the Act in order to establish jurisdiction. For example, the coverage description can include information that is similar to what is described in a safety and health inspection report, i.e., the number of employees, whether the employer is private or public, and union status (along with a brief description of the company).

¹¹ Letter to Grey Mitchell dated December 3, 2008.

Notice to Employees

While we were pleased to note that AKOSH required employers to post a Notice to Employees in merit cases, the Notices sometimes stated that the employer did not admit to any liability or to any wrongdoing. It is not clear why such an admission would be included in a Notice to Employees.

Improvements

AKOSH uses a table of contents for each side of its case file. The two tables of contents make reviewing the case file easier and allows for a more professional work product.

AKOSH uses a chronology in its FIR which also allows for a quick review of the relevant facts.

Communication between federal OSHA and AKOSH is more open and frequent. Federal OSHA will continue to be a resource and available for troubleshooting issues with AKOSH when necessary.

Recommendations/Suggestions:

1. In cases where a complainant files 11(c) complaints concurrently with AKOSH and OSHA, AKOSH should relinquish jurisdiction.
2. AKOSH should refrain from including provisions in its settlement agreements that allow for deducting unemployment benefits.
3. Closing letters to the parties should state that the complaint was settled and copies should be kept in the file.
4. Discontinue the practices of using statements submitted by complainants and witnesses as substitutes for interviews.
5. Ensure that witness interviews cover the four prima facie elements.
6. The FIR should include the date the complaint was filed with AKOSH. The date should be written on the first page of the FIR.
7. The coverage description in the FIR should include information that is similar to what is described in a safety and health inspection report, i.e., the number of employees, whether the employer is private or public, and union status, (along with a brief description of the company).

The merit and settlement rates for AKOSH's discrimination cases in FY 2009 significantly increased in comparison to previous years. We appreciate the state's efforts to uphold the provisions in Section 11(c) of the OSH Act.

Please provide responses to our recommendations by January 4, 2010. In summary, our audit this year found that AKOSH's discrimination program has improved and, by all appearances, will continue to do so. Please feel free to contact me or my staff should you have any questions.

Enclosed for your information, is an IMIS Report entitled "Investigation Data" for fiscal year 2009. This report contains 11(c) complaint statistics for all state plan programs in the system, including data from your state plan. It also includes information as to how many complaints were dismissed, how many were settled, the average days to complete and other data. Also enclosed is a report on comparable federal 11(c) data. We thought you might find this information useful.

/signed/

Richard S. Merrill
Regional Administrator

Enclosures

STATE OF ALASKA

Department of Labor and Workforce Development

Labor Standards and Safety Division

SEAN PARNELL, GOVERNOR

P. O. Box 111149

Juneau, AK 99811-1149

PHONE: (907) 465-4855

FAX: (907) 465-6012

<http://www.labor.state.ak.us/lss/lss.htm>

January 22, 2010

Mr. Richard Terrill
Regional Administrator
Occupational Safety and Health Administration
U.S. Department of Labor
1111 Third Avenue, Suite 715
Seattle, WA 98101-3212

RE: Audit of AKOSH's Discrimination Program

Dear Mr. Terrill,

Thank you for your letter dated December 2, 2009. As you know, 2009 has been a year of transition for the AKOSH Discrimination Program and we are grateful for OSHA's evaluation and guidance. OSHA's recommendations, along with the one-on-one training your office provided to Daniella Pereyra in November, will help ensure positive future results for AKOSH's Discrimination Program.

Under the heading of "Final Investigative Reports," your letter identified a perceived inadequacy regarding coverage and jurisdiction information under the Act (presumably referring to the OSH Act of 1970). However, AKOSH authority to investigate and take action is based on Alaska law (AS 18.60.089). Consequently, AKOSH does not believe an explanation of coverage under the federal law to be relevant. If this notation was intended to suggest that an explanation of coverage under Alaska law should be provided in the Final Investigative Report, AKOSH can add that section, but the discussion will be extremely limited as there are virtually no exclusions.

Your letter provided several recommendations and requested responses by January 4, 2010. We regret the delay in responding.

OSHA Recommendation 1: In cases where a complainant files 11(c) complaints currently with AKOSH and OSHA, AKOSH should relinquish jurisdiction.

AKOSH Response: AKOSH recommends that communications between AKOSH and OSHA concerning whistleblower complaints filed with AKOSH and OSHA be made in writing to avoid confusion. AKOSH is willing to consider entering a written agreement to allow OSHA to perform the sole investigation of a particular 11(c) complaint that is subject to Alaska Statute 18.60.089. The agreement must allow AKOSH timely access to OSHA's investigation documents and findings to determine whether AKOSH is in agreement or whether concurrent or alternative action should be pursued under Alaska law.

OSHA Recommendation 2: AKOSH should refrain from including provisions in its settlement agreements that allow for deducting Unemployment Insurance benefits.

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LSS DIVISION

Mr. Richard Terrill
January 22, 2010
Page 2

AKOSH Response: AKOSH has implemented this recommendation.

OSHA Recommendation 3: Closing letters to the parties should state that the complaint was settled and copies should be kept in the file.

AKOSH Response: AKOSH has implemented this recommendation.

OSHA Recommendation 4: Discontinue the practices of using statements submitted by complainants and witnesses as substitutes for interviews.

AKOSH Response: AKOSH will vigorously pursue witness interviews in lieu of using statements submitted by complainants and witnesses. When conditions prohibit witness interviews, AKOSH will use statements submitted by complainants and/or witnesses as evidence.

OSHA Recommendation 5: Ensure that witness interviews cover the four prima facie elements.

AKOSH Response: AKOSH has implemented this recommendation.

OSHA Recommendation 6: The FIR should include the date the complaint was filed with AKOSH. The date should be written on the first page of the FIR.

AKOSH Response: AKOSH has included this date in the chronology in the past but will add the complaint date to the first page of the FIR in accordance with this recommendation.

OSHA Recommendation 7: The coverage description in the FIR should include information that is similar to what is described in a safety and health inspection report, i.e., the number of employees, whether the employer is private or public, and union status, (along with a brief description of the company.)

AKOSH Response: AKOSH will implement this recommendation and include background information about the respondent.

AKOSH is proud of the improvements made in the Discrimination Program over the last year and looks forward to continued improvement in 2010. We encourage OSHA to conduct a follow up audit of the program in 2010.

Sincerely,
/signed/

Grey Mitchell
Director

cc: Clark Bishop, Commissioner
Steve Standley, AKOSH Chief of Enforcement