



**New York State Department of Labor**

David A. Paterson, *Governor*

Colleen C. Gardner, *Commissioner*

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October 29, 2010

Robert D. Kulick, Regional Administrator  
U.S. Department of Labor  
Occupational Safety and Health Administration  
201 Varick Street  
New York, NY 10014

Dear Mr. Kulick:

The New York State Department of Labor's Public Employee Safety and Health (PESH) program is in receipt of the State's Enhanced Federal Annual Monitoring Evaluation (FAME) Baseline Special Evaluation (BSE) report for the period October 1, 2008 through September 30, 2009.

Your report has determined that PESH continues to work in a positive manner to continuously improve program effectiveness: and that the State continues to meet its 23(g) enforcement programs operational requirements. The evaluation identifies both areas where we are in compliance with state plan requirements and areas where we need to improve our operations.

We have provided a detailed response to your findings and look forward to working cooperatively on program improvements that contribute to ensuring the protection of public employees in New York State.

Sincerely,

Colleen C. Gardner

Cc Pico Ben-Amotz  
Maureen Cox  
David Ruppert  
Norm Labbe  
Tom Rath  
David Merriman

# 2009 Enhanced Fame OSHA Recommendations and NYSDOL PESH Responses

## Complaints/Referrals

**Recommendation 1:** PESH should implement internal controls, such as supervisory notification of the receipt of complaint, so that the supervisor can prioritize the assignments, to ensure that complaint inspections are opened within the timeframes established by Agency Policy.

**PESH Response:** Complaints received are evaluated by the Supervisors, input into IMIS, and assigned to inspectors. Supervisors review the “Unsatisfied Activity” report routinely to monitor status of pending complaint inspections. Most PESH district offices are able to provide a quick response to complaints, but downstate districts receive more complaints and struggle to provide the same timely response.

**Recommendation 2:** Implement internal controls such as diary sheet entries, IMIS and other correspondence tracking methods (IMIS Standard Letters) and supervisory oversight to ensure that before the complaint investigation is closed that all appropriate notifications and/or correspondences have sent and noted in the file.

**PESH Response:** CSHOs have been instructed to enter all activities on the “Case Contact” sheet attached to each case file. The purpose of this sheet is to record all activity related to the file. Supervisors review all inspections completed which includes completion of all appropriate notifications and/or correspondences.

**Recommendation 3:** Implement internal controls and supervisory oversight to ensure that before the CSHO has completed their on-site portion of the inspection that all complaint items have been investigated.

**PESH Response:** CSHOs have been instructed to address all items contained in the complaint. Additionally, “Sample Narrative” templates for complaints have been developed and provided to CSHOs to utilize when preparing complaint narratives itemizing each complaint item and observation by CSHO.

**Recommendation 4:** Provide additional training to all field staff, including supervisory staff, to ensure that all inspection case file documentation meets the minimum requirements as set forth by State of New York policy.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. Each District Supervisor reviews a section of the PESH Field Operations Manual with staff during monthly staff meetings. OSHA recommendations resulting from the 2009 E-Fame will be reviewed with supervisors and staff. A Supervisory meeting is scheduled for November 4<sup>th</sup> and it is expected that local office meetings will be held before the end of the 2010 calendar year which will include case file documentation.

**Recommendation 5:** Provide training to all field staff, including supervisory staff, to ensure that referrals are handled in accordance with requirements set forth in PESH's Field Operations Manual.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. Each District Supervisor reviews a section of the PESH Field Operations Manual with staff during monthly staff meetings. A Supervisory meeting is scheduled for November 4<sup>th</sup> and it is expected that local office meetings will be held before the end of the 2010 calendar year which will include a review of the proper handling of referrals.

**Recommendation 6:** Include sufficient documentation to describe the events that occurred during and after the inspection so that the status of the case is clearly described.

**PESH Response:** Ongoing efforts are continuing to instruct and train staff to document all events and observations and/or actions pertaining to each case file. A Supervisory meeting is scheduled for November 4<sup>th</sup> and it is expected that local office meetings will be held before the end of the 2010 calendar year which will include documentation to clearly identify the case file status.

### **Fatalities**

**Recommendation 7:** Provide training to CSHOs to reiterate the policies relating to fatality investigations including the following: Proper procedures relating to making the appropriate communication to the family of victims (i.e. next of kin letters, inspection findings, etc.) and the requirement of documenting the communication in the file.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. This item will be reviewed with supervisors and field staff. A Supervisory meeting is scheduled for November 4<sup>th</sup> and it is expected that local office meetings will be held before the end of the 2010 calendar year which will include appropriate communication with the family of fatality victims.

**Recommendation 8:** Provide training to all field staff, including supervisory staff, to ensure that all accident/fatality investigations meet the minimum requirements of the PESH FOM (i.e. providing detailed narrative documenting the facts that surround the incident, field notes, evidence of employee exposure, evidence of employer knowledge and completion of the appropriate forms (i.e. OSHA 36's and OSHA 170's)).

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. This item will be reviewed with supervisors and field staff. A Supervisory meeting is scheduled for November 4<sup>th</sup> and it is expected that local office meetings will be held before the end of the 2010 calendar year which will include providing detailed narratives documenting the facts that surround the incident, field notes, evidence of employee exposure, evidence of employer knowledge and completion of the appropriate forms .

## IMIS

**Recommendation 9:** PESH must ensure compliance staff, consultation staff, support staff and management complete, and enter required IMIS forms into the system and ensure IMIS standard reports are reviewed on a regular basis to ensure that forms are complete.

**PESH Response:** Supervisory Staff utilize IMIS generated reports to monitor CSHO activity and completion of forms. Secretaries monitor Host Reject and Draft Form reports 2 to 3 times per week for proper completion of IMIS forms. IMIS entries for contests and penalties have been a concern and we look forward to working on this with OSHA. Emphasis will be placed on the updating IMIS information after an Informal Conference. In the meantime, penalty and contest data can be provided to OSHA on a quarterly basis

## Timeliness/File Completion

**Recommendation 10:** Provide additional hazard recognition, and IMIS training for CSHOs to ensure that investigations are completed, and all hazards and potential violations are addressed and corrected in a timely manner.

**PESH Response:** CSHOs attend OTI to enhance hazard recognition skills as demonstrated by PESH inspections citing more hazards than the federal average per inspection. Open inspection reports are reviewed during monthly staff meetings to monitor status of inspections. Emphasis on documenting the date hazards are abated continues. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff training that may be needed. Management reports including Open Inspection and Unsatisfied Activity are and will be reviewed on a monthly basis.

**Recommendation 11:** Provide training to all field staff regarding the interviewing procedures and Agency's policy of Union/Employee Representative involvement during and after inspections and the requirement to properly document compliance with this policy in case file.

**PESH Response:** Interviewing techniques and documentation training has been conducted over the last three months. Supervisors will monitor the case files for improvement.

**Recommendation 12:** Provide additional training to all field staff to adequately classify violations with appropriate description, severity, and probability of potential resulting injury.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. Violation Worksheets to document classification of all hazards is being implemented. OSHA recommendations resulting from the 2009 E-Fame will be reviewed with supervisors on November 4<sup>th</sup> who will in turn review with CSHOs before the end of the year.

### **Hazard Identification**

**Recommendation 13:** Implement internal controls and supervisory oversight to ensure that CSHO has evaluated all relevant hazards on the site, and has determined that all appropriate potential citations have been evaluated for issuance.

**PESH Response:** Supervisory Staff have conducted field audits of all CSHOs this past year which did include a review of hazard identification for some staff. Supervisors are instructed to conduct a field audit with staff semi-annually. Training of staff is an ongoing commitment. Additional training including fire safety, health and safety cross over courses, cranes and material handling, excavation and trenching, and machine guarding have been scheduled for FY 2011.

**Recommendation 14:** If a documentation issue – review with the staff the requirement to note why an obviously violative condition documented in a case file was not cited (i.e. no exposure, knowledge etc.)

**PESH Response:** Documentation of hazards or lack of hazards (for complaint items) is reviewed by each CSHOs technical supervisor for every inspection.

**Recommendation 15:** If a hazard recognition issue – bolster supervisory review of CSHO's field observations. Supervisors should discuss field observations with CSHOs prior to issuing citations or closing the case as In-Compliance.

**PESH Response:** Supervisors are instructed to conduct a field audit with staff semi-annually. Training of staff is an ongoing commitment. Documentation of hazards or lack of hazards (for complaint items) is reviewed by each CSHOs technical supervisor for every inspection. Despite concerns with hazard recognition, PESH staff were able to cite more hazards in FY09 than the federal average.

**Recommendation 16:** PESH should provide additional hazard recognition training for CSHOs to ensure that all hazards and potential violations are addressed.

**PESH Response:** CSHOs attend OTI to enhance hazard recognition skills as demonstrated by PESH inspections citing more hazards than the federal average per inspection. Open inspection reports are reviewed during monthly staff meetings to monitor status of inspections. Emphasis on documenting the date hazards are abated continues. Additional training including fire safety, health and safety cross over

courses, cranes and material handling, excavation and trenching, and machine guarding have been scheduled for FY 2011.

### **Violation Classification**

**Recommendation 17:** Provide additional training to all field staff to adequately classify violations with appropriate severity (including willful classification) and probability of potential resulting injury. Train CSHOs on the concept of citing the most likely/most serious injury/illness likely to result from exposure.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. The use of the 1B Violation Worksheets to document classification of all hazards is being implemented and will be reviewed with staff before the end of CY 2010.

### **Employee/Union Involvement**

**Recommendation 18:** Provide additional training to all field staff, including supervisory staff, to ensure that all inspection case file documentation meets the minimum requirements as set forth by State on New York policy.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. Efforts are being made to improve documentation of employer knowledge, employee exposure, and affirmative defense issues. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any additional field staff training that may be needed.

**Recommendation 19:** Provide training to all field staff regarding the agency's policy of Union/Employee Representative involvement during and after inspections and the requirement to properly document compliance with this policy in case file.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. This issue will be covered with Supervisors and inspection staff. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff training that may be needed.

### **Citations/Penalties**

**Recommendation 20:** Provide training to all field staff, including supervisory staff, to ensure that all inspection case file documentation meets the minimum requirements set forth in PESH's Field Inspection Reference Manual or Field Operations Manual.

**PESH Response:** PESH conducted an audit of CSHO's in 2<sup>nd</sup> qtr 2009 and also identified the need for better documentation of case files. As a result of the audit we began a review of the FOM at monthly staff meetings. Training of staff is an ongoing commitment through staff meetings on the State and Local level. Each District Supervisor reviews a section of the PESH Field Operations Manual with staff during monthly staff meetings. OSHA recommendations resulting from the 2009 E-Fame will be reviewed with supervisors and staff including prima facie documentation of violations. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Additional all staff training on specific topics such as critical elements of Prima Facie documentation will be conducted using teleconferencing to reach all field staff statewide. This will be performed before the second quarter of FY 2011.

**Recommendation 21:** Provide additional training to all field staff, including supervisory staff, to ensure that all citation documentation meets the minimum requirements of a prima facie case as set forth by federal OSHA and the FOM.

**PESH Response:** PESH conducted an audit of CSHO's in 2<sup>nd</sup> qtr 2009 and also identified the need for better documentation of case files. As a result of the audit we began a review of the FOM at monthly staff meetings. Training of staff is an ongoing commitment through staff meetings on the State and Local level. Each District Supervisor reviews a section of the PESH Field Operations Manual with staff during monthly staff meetings. OSHA recommendations resulting from the 2009 E-Fame will be reviewed with supervisors and staff. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff training that may be needed. Additional all staff training on specific topics such as critical elements of Prima Facie documentation will be conducted using teleconferencing to reach all field staff statewide. This will be performed before the second quarter of FY 2011.

**Recommendation 22:** Implement internal controls to ensure that all cases are reviewed on a supervisory level to make certain that all violations issued meet the prima facie requirements. Prima Facie documentation included evidence of employee exposure to a hazard, evidence of employer knowledge, an assessment of the severity of the injury/illness resulting from exposure to the hazard, and the probability of that exposure.

**PESH Response;** . Additional internal controls will be implemented to look for adequate documentation of Prima Facie elements. With advice from our internal control unit, we can look to review an appropriate number of random case files for proper violation documentation on a quarterly basis. Comprehensive annual audits will be performed for each CSHO.

## **Adequate Verification/Evidence of Abatement**

**Recommendation 23:** Internal controls should be developed and implemented to ensure that appropriate PESH staff tracks the status of abatement for every citation issued by PESH. OSHA recommends that staff reviews IMIS generated abatement status reports to identify citations with pending or overdue abatement dates. Prior to the abatement due date PESH personnel should follow up with employers requesting the required abatement information and re-emphasizing the abatement due date. If at that time, if the employer needs additional time a timely and proper PMA can be submitted to PESH.

**PESH Response:** Supervisors review IMIS generated reports at least monthly to monitor status of inspections. CSHOs are instructed to make contact with an employer three times after the closing conference to monitor abatement progress. If there is any concern in meeting the assigned abatement dates, the CSHO reminds the employer of the process for a PMA. These contacts are being documented on the Case Contact sheet. We will include this topic in our audits as part of our internal control program

**Recommendation 24:** Provide additional training to all field staff, including supervisory staff, to ensure that abatement issues are handled in accordance with established policy including:

- Ensure appropriate abatement periods are assigned for unabated violations.
- Ensure that all abatement information accepted satisfies the order to comply prior to closing the case.
- For cases with CDI, ensure that the file documents the method of abatement and that the CSHO observed the abatement.

**PESH Response:** Training of staff is an ongoing commitment through staff meetings on the State and Local level. Each District Supervisor reviews a section of the PESH Field Operations Manual with staff during monthly staff meetings. Supervisors review case files for appropriate abatement periods and verification of abatement methods. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff training that may be needed. Additional all staff training on specific topics such as abatement procedures will be conducted using teleconferencing to reach all field staff statewide. This will be performed before the second quarter of FY 2011.

## **Follow-up/Monitoring Inspections**

**Recommendation 25:** Include sufficient documentation to describe the events that occurred during and after the inspection so that the status of the case is clearly described and the reasons for actions such as follow-up inspections are described.

**PESH Response:** Follow-up narratives are being standardized to address method of abatement for each violation cited. Case Contact sheets are maintained in each case file to document all activities related to the inspection. Supervisors review all follow-up inspections as per PESH policy.

## **PMA's**

**Recommendation 26:** Implement internal controls to ensure that all Petitions for Modification of Abatement Dates (PMA's) are reviewed on a supervisory level to ensure that all required information is contained in the request prior to granting the PMA, and that once a PMA is granted it is managed in accordance with PESH requirements.

**PESH Response:** PMA's are only granted at the supervisory level with input from Program Managers. Approved PMA's are entered into IMIS and tracked on Open Inspection Reports during monthly staff meetings. All PMA's will be reviewed by the Program Manager's Office for proper documentation and management. The PMA form itself was recently revised to improve clarity and to gather more information. We will include this topic as part of our internal controls program. We plan to audit a sampling of PMA 's prior to approval being granted.

## **Failure to Abate**

**Recommendation 27:** Implement internal controls including supervisory oversight to ensure that Failure To Abate notices are issued where appropriate and administered in accordance with PESH policy.

**PESH Response:** All case files are reviewed at the supervisory level including the issuance and monitoring of Failure To Abate citations. Emphasis by supervisors on monitoring when violations reach their Abatement Due Date takes place through review of Open Inspection Reports at monthly staff meetings. FTA cases will be included in the random quarterly audits for proper documentation and management.

## **Informal Conferences**

**Recommendation 28:** Relating to informal conferences, PESH representatives must thoroughly document the following in the case file: The fact that the appropriate notifications to the parties of the date, time and location of the informal conference was made; indicate the date of the informal conference was held in the diary sheet; at the conclusion of the conference, all main issues and potential courses of action must be summarized and documented.

**PESH Response:** The PESH Field Operations Manual addresses notification and the preparation of an Informal Conference Report. Such instruction will be reinforced at the next supervisor meeting. This will be reviewed with supervisors on November 4<sup>th</sup>.

### **Information Management**

**Recommendation 29:** PESH must begin to update the IMIS in a timely manner relating to logging status of informal conferences and contested cases. Federal OSHA Region II is willing to assist with resolving IMIS compatibility issues which have contributed to this problem.

**PESH Response:** PESH appreciates OSHA assistance and looks forward to OSHA correcting IMIS compatibility issues to incorporate PESH policies and procedures related to informal conferences and contested cases.

### **Standards Adoption**

**Recommendation 30:** Standards adoption should be carefully reviewed and response to adoption be timely according to the Automated Tracking System request response date.

**PESH Response:** PESH adopts new OSHA standards through the State Administrative Procedures Act. PESH strives to adopt all new OSHA standards within OSHA parameters.

The Final Rule – Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee; 73 CFR, No. 240 (75568-75589) was adopted in the State Register on 2/24/2010.

### **Public Sector Consultation**

**Recommendation 31:** Internal controls should be implemented to ensure that all required consultation forms are completed, that field notes are maintained in case files, the employee involvement is documented, and that referrals to PESH enforcement are made as appropriate.

**PESH Response:** All PESH consultation forms are reviewed by supervisors. Additional emphasis will be provided regarding documentation issues, verification of abatement, and referral to enforcement. This will be reviewed with supervisors on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff

training that may be needed. PESH will look to adopt the elements of 1908 and will require employee participation in every consultation.

**Recommendation 32:** PESH should provide additional hazard recognition training for Consultation to ensure that all hazard and potential violations are addressed, that serious hazards are verified as being abated in a timely manner, and if not abated to be referred to enforcement for appropriate action.

**PESH Response:** PESH routinely cites more hazards than the federal average, but the scope of the consultation may be limited by the employer in accordance to PESH policies. These issues have been reviewed with supervisors and consultation staff for proper case file documentation and follow up action. This will be reviewed with supervisors again on November 4<sup>th</sup> and they will in turn review with CSHOs before the end of the year. Supervisors will continue to monitor case file documentation for any addition field staff training that may be needed.

### **Discrimination Program**

**Recommendation 33:** PESH should test respondent's position statements without waiting for a response from department counsel.

**PESH Response:** PESH has revised the PESH discrimination portion of our Field Operations Manual to more closely mirror OSHA discrimination procedures including completion of a Complaint Intake Form to assess whether the complaint meets required criteria. Training on the new procedures is scheduled for Q1FY11.

**Recommendation 34:** Overall timeliness can likely be improved by issuing clear guidance to investigators with respect to complainant's prima facie allegations.

**PESH Response:** PESH has revised the PESH discrimination portion of our Field Operations Manual to more closely mirror OSHA discrimination procedures. Training on the new procedures is scheduled for Q1FY11.

**Recommendation 35:** Once investigators have determined that there is a prima facie discrimination allegation they should continue with investigation by sending out a notification to the respondents. This has been counsel's policy since at least 2001.

**PESH Response:** PESH has revised the PESH discrimination portion of our Field Operations Manual to more closely mirror OSHA discrimination procedures. Training on the new procedures is scheduled for Q1FY11.

**Recommendation 36:** PESH should ensure that all cases that are docketed have a final report outlining the work done regardless of the outcome. Each investigation should be documented by the creation of, at least, a simple narrative outlining the steps that were taken and the reasoning behind the actions taken in the investigation. These

reports should be dated and recorded in IMIS. Each file should also have a table of contents (exhibit list).

**PESH Response:** PESH has revised the PESH discrimination portion of our Field Operations Manual to more closely mirror OSHA discrimination procedures. Training on the new procedures is scheduled for Q1FY11.

**Recommendation 37:** PESH should provide pertinent, such as Basic Whistleblowing Training 1420, for discrimination investigators, discrimination investigators' direct supervisors, and all program managers.

**PESH Response:** All current and future discrimination investigators have or will receive Whistleblower training. Considering the differences between OSHA and PESH rules and regulations, PESH would welcome an abbreviated offsite OTI Whistleblower class to be held in upstate NY.

### **CSHO Training**

**Recommendation 38:** Develop and implement a comprehensive training plan to improve existing training records and to provide mandatory training to CSHOs and their supervisors to bring them up to the minimum training standards established in OSHA Instruction TED-01-00-018 "Initial Training Program for OSHA Compliance Personnel".

**PESH Response:** PESH has strived to train CSHOs to OSHA standards at the time such standards were in place. PESH and OSHA training records were not compatible. PESH has centralized training records in the Program Manager's office and continues to send CSHOs to OTI training with priority to newer CSHOs and continuing training for experienced CSHOs on a cyclical basis. We will train all staff hired after we adopted TED-01-00-018 to the level that meets that directive. That effort was started in 2009 and will continue.