



Kentucky Labor Cabinet Occupational Safety and Health Program

RESPONSE

to

FEDERAL ANNUAL MONITORING EVALUATION

for

FEDERAL FISCAL YEAR 2015

I. POINTS REGARDING FAME REPORT

A. General Comment

OSHA's FY 2015 Federal Annual Monitoring Evaluation (FAME) identified eleven (11) findings and fifteen (15) observations. This response is limited to findings and does not address observations due to the very limited time OSHA provided for state response.

B. Specific Point

Kentucky strongly disagrees with information presented on page six (6) of the FAME. OSHA states:

“The FY 2015 SOAR documented that the State Plan did not meet its activity goal for compliance inspections in FY 2015. Analysis determined that KY OSH conducted 855 inspections in 2015, compared to 998 inspections in FY 2014, which was a decrease of 143 inspections. There were a number of underlying reasons that the State Plan did not meet the inspection goal. These factors include:

- The State Plan lost experienced and productive compliance safety and health officers (CSHOs) as a result of KY OSH salaries that were not competitive with other employers.
- Less experienced CSHOs and new hires require more time to complete inspections, especially more complicated investigations.”

These statements are factually inaccurate and have no basis. There is nothing in the SOAR that documents Kentucky did not meet its activity goal for compliance inspections in FY 2015. Kentucky projected to conduct 838 inspections in FY 2015 (approved by OSHA) and actually conducted 885, forty-seven (47) more than projected. That is a +5.3% difference.

Furthermore, page eight (8) of the FAME refutes the aforementioned page six (6) information. On page eight (8) OSHA states:

“A comparison of OSHA Express and the Integrated Management Information System (IMIS) data for FY 2009 through FY 2015 indicated that there is a significant decline in the number of inspections that were conducted, as the table below illustrates. This is a difference of 349 inspections from FY 2009 to FY 2015 and has accounted for an overall reduction of 28.2%. **The 2015 total of 885 inspections met the goal (projected inspection numbers per the FY 2015 grant).** KY OSH identified 1,332 violations, resulting in a penalty total of \$3,156,220. This is discussed in further detail in Section II of the report.” [Emphasis added.]

Kentucky rejects OSHA's statement on page six (6), it is factually inaccurate and incorrect. Kentucky also questions why OSHA was unwilling to correct the information when it was brought to the agencies attention. Kentucky requests OSHA correct and update the FAME.

II. OSHA's FINDINGS, RECOMMENDATIONS and KENTUCKY RESPONSES

OSHA Finding FY 2015-01 (formerly FY 2014-01)

KY OSH has not completed the revision to 803 KAR 2:412 - Residential Construction Fall Protection.

OSHA Recommendation

KY OSH should take appropriate action to revise 803 KAR 2:412 - Residential Construction Fall Protection to ensure that it is in line with the federal regulation.

State Response

Note: OSHA refers to 803 KAR 2:412 is the FY 2015 FAME as "Residential Construction Fall Protection." The title of 803 KAR 2:412 is "Fall protection."

OSHA' finding and recommendation is inconsistent with the information on page seven (7) of the FY 2015 FAME. OSHA states:

"At the time of the preparation of this report (March 1, 2016), **all issues have been resolved**. This brings the Kentucky Administrative Regulation into line with the federal requirement. It is noted that KY OSH has worked diligently to change their fall protection standard for residential construction, the proposed changes were agreed upon, and a letter from the Regional Administrator was sent to the state during the writing of this report so the State Plan can proceed with the changes. The changes should be approved during the Standards Board meeting in May." [Emphasis added.]

This should not be a finding. Kentucky requests OSHA change this finding and recommendation to reflect accurate information.

OSHA Finding FY 2015-02

Data indicated that there has been a significant decline in the number of inspections conducted by KY OSH, a difference of 349 from FY 2009 to FY 2015, accounting for an overall reduction of 28.2%.

OSHA Recommendation

KY OSH should identify the cause of the significant and gradual decline in the number of compliance inspections and develop and implement a strategy to increase and maintain the number of inspections that are conducted.

State Response

OSHA's table on page eight (8) of the FAME regarding the decreasing number of inspections is incomplete and misleading. OSHA's table is presented below.

Fiscal Year	Total Inspection	(#) Difference	% Difference
2015	885	113	11.3%
2014	998	+99	+11%
2013	899	12	1.3%
2012	911	143	13.6%
2011	1,054	10	.94%
2010	1,064	169	13.7%
2009	1,233	0	0

The table above does not present all pertinent information. An accurate table that includes all pertinent information is presented below.

Fiscal Year	Total Enforcement Inspections Conducted	Total Enforcement Inspections Projected and Approved by OSHA	Difference between Total Enforcement Inspections and Total Enforcement Projections	% Difference
2015	885	838	+47	+5.3
2014	998	1090	-92	-9.2
2013	899	867	+32	+3.6
2012	911	1068	-157	-17.2
2011	1,054	1146	-92	-8.7
2010	1,064	1124	-60	-5.6
2009	1,233	1073	+160	+12.9

The second table above illustrates that OSHA's analysis is not sound or productive. In some years the projected number of inspections for the state was less than the previous year; in some years the projection was more than the previous year. Nonetheless, each year OSHA approved the number of projected inspections, regardless if it was a lesser number or a greater number than the previous year.

Kentucky requests OSHA update the table to reflect accurate information.

If Kentucky had not met its numbers for FY 2015, it is understandable if OSHA issued a finding observing the state did not meet its inspection goal. (Or a similar finding for any other year in the past when Kentucky did not meet its projected goal.) But that is not the case, Kentucky *exceeded* projected goals for two (2) out of the past three (3) years, and in fact, Kentucky *exceeded* its projected goal for the period of the FY 2015 FAME. OSHA would have to go back six (6) years to 2010 to demonstrate a pattern of Kentucky not meeting the inspection projections approved by OSHA. (Kentucky did not meet enforcement inspection projections for three (3) years, FY 2010, FY 2011, and FY 2012.) However, OSHA never raised a concern during that period.

As mentioned above, Kentucky *exceeded* enforcement projections for FY 2015. It is illogical for OSHA to cast a negative light on the number of inspections conducted and issue this finding in a year when Kentucky *exceeded* the projected goal that OSHA approved. Even more so considering Kentucky *exceeded* projected goals for two (2) out of the past three (3) years

OSHA Finding FY 2015-03 (formerly FY 2014-08, FY 2013-09, FY 2010-08, and FY 2009-20) KY OSH's Division of OSH Compliance has not implemented an internal self-evaluation program as required by the State Plan Policies and Procedures Manual.

OSHA Recommendation

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

State Response

Implementation of a robust and effective internal self-evaluation program has taken longer than anticipated. Kentucky is nearing completion of its program and plans to deploy it in the near future.

OSHA Finding FY 2015-04

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

OSHA Recommendation

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

State Response

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

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

Kentucky has a system in place to address non-formal complaints. Kentucky sends the complainant a letter, and complaint form, asking the individual to complete, sign, and return the form. To reclassify a complaint as a “referral” is semantics and would most likely not withstand legal challenge.

Kentucky also requested OSHA update a single field in OSHA's online complaint form to better assist the state addressing complaints that do not conform to state statute. OSHA advised the field could be updated but has not done so.

OSHA Finding FY 2015-05

KY OSH conducted a total of three targeted programmed inspections of the high-hazard industries from the inspection lists under the TOP or STOP Program in FY 2015.

OSHA Recommendation

KY OSH should develop and implement a strategy to ensure a representative number of targeted programmed safety and health inspections are conducted at facilities within Kentucky's high-hazard industries.

State Response

Significant staff turnover accounted for the low number of targeted programmed safety and health inspections. Kentucky anticipates increased targeted programmed safety and health inspections in FY 2016 as staff become qualified to conduct inspections. However, progress will continue to be measured.

OSHA Finding FY 2015-06 (formerly FY 2014-05, FY 2013-05, and FY 2011-06)

KY OSH conducted a total of six programmed planned health inspections during this evaluation period, which is a 60% decrease from FY 2013.

OSHA Recommendation

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

State Response

Significant staff turnover accounted for the low number of programmed planned health inspections. During FY 2015, nearly 40% of the industrial hygiene enforcement officers had one (1) year or less experience.

Kentucky has a strategy in place to ensure a representative number of programmed health inspections are conducted and will stay the course. Kentucky anticipates increased programmed planned health inspections in FY 2016 as staff become qualified to conduct inspections. However, progress will be measured.

Kentucky also notes increased outreach activities by the Division of Occupational Safety and Health Education and Training to assist employers in voluntary compliance with issues associated with programmed planned health inspections.

OSHA Finding FY 2015-07

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

OSHA Recommendation

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

State Response

Page eighteen (18) of the FAME states:

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

Kentucky questions the rationale for this finding in light of the last sentence in the paragraph above. It appears Kentucky received this finding because Kentucky inspects all contractors onsite and does not limit the inspection(s) to “focus four” issues.

OSHA does not document instances of missed hazards, inappropriate or incorrect citations, or question CSHO hazard recognition. Page twenty (20) of the FAME states:

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

There is no detrimental effect on Kentucky’s program, or the safety and health of Kentucky’s construction workers, based on the information OSHA presents regarding this finding. Kentucky suggests this issue may be related to targeting and is not a finding.

OSHA Finding FY 2015-08 (formerly FY 2014-06, FY 2013-06, FY 2011-07, and FY-2009-11) Based on data provided by the state, KY OSH has high average citation issuance lapse time for health inspections.

OSHA Recommendation

KY OSH should develop and implement a process to reduce the average lapse time for non-in-compliance health inspections.

State Response

Note: This finding is worded differently on page A-2. The language on page A-2 inserts ‘significantly’ so that it reads:

“Based on data provided by the state, KY OSH has significantly high average citation issuance lapse time for health inspections.”

The table on page twenty (20) of the FAME is presented below.

Average Lapse Time	KY OSH	OSHA
Safety	56.43 (54.6)	42.78
Health	79.28 (78.0)	53.48
Total Average	59.0	44.0

*State data for lapse time is in parentheses.

The data in the table above is incorrect. The correct information is presented below.

Average Lapse Time	KY OSH	OSHA
Safety	54.58 (49.33)	42.78
Health	77.96 (70.32)	53.48
Total Average	66.27 (59.8)	48.13

*State data is in parentheses.

According to OSHA, the acceptable deviation is +/- 20%. Kentucky’s deviation for health lapse time is 31.5% based on the correct information presented in the table immediately above. Kentucky has made improvement reducing lapse time for health inspections and strives to continue improving.

OSHA Finding FY 2015-09

Consultation reports are sent to the employers more than 20 calendar days after the closing conference.

OSHA Recommendation

KY OSH should ensure that written consultation reports are sent to the employers as soon as possible, but no more than 20 calendar days after the closing conference.

State Response

Consultants conduct onsite and population center training, live webinars, develop and present online modules, and attend professional development training, in addition to conducting surveys and producing a written report. Despite this very full and diverse workload, Kentucky's consultation program averages twenty-seven (27) days to send its report to employers. Kentucky will endeavor to send written consultation reports no more than twenty (20) days after the closing conference.

Finding FY 2015-10

A review of the 23(g) consultation case files revealed that the description of the workplace and the working conditions at the site was not included in the employer consultation reports.

Recommendation

KY OSH should provide additional training to consultants to ensure that all required information is included in the employer consultation reports.

State Response

Kentucky rejects this finding. Every consultation report has a description of the workplace and the working conditions at the site. The information is part of the OSHA Express template that is completed by every consultant for every report.

The report template utilized for consultative services has been the same for approximately ten (10) years without prior issue. Consultants enter worksite-specific information relative to the operation as well as specific items that "particular attention was given to." Additionally, working conditions are addressed in every report. The information is found in every report in the "Summary of the Visit" section.

Kentucky believes OSHA reached the conclusion that consultation case files did not have a description of the workplace and the working conditions at the site because the auditors did not review case files in Kentucky's OSHA Express system. The auditors reviewed printed files, as requested, that did not have the information. This issue was not brought to Kentucky's attention during the onsite FAME review or the closing conference. If it had been, Kentucky could have easily provided the information to OSHA. Furthermore, OSHA's auditors have reviewed consultation case views numerous times before and have repeatedly seen this information.

There was no mention of this finding or issue in the closing conference. Kentucky first learned of this issue when OSHA shared a draft of the FAME with the state. Kentucky explained to OSHA that the finding was incorrect and expressed the information above. Kentucky has also requested, on two (2) separate instances, for OSHA to identify the specific cases that did not contain the information. To date, OSHA has not done so.

Kentucky requests OSHA correct and update the FAME.

Finding FY 2015-11

A review of three 23(g) consultation case files revealed that sampling and the evaluation of health hazards inherent to specific industries was not always completed by consultants.

Recommendation

KY OSH should provide additional training to consultants to ensure they are conducting sufficient sampling and/or evaluations of health hazards specific to the type of industries visited.

State Response

Kentucky rejects this finding. Consultation staff are on-site at the employer's invitation and cannot compel or force an employer to allow sampling if the employer does not wish to have it done. Other measures, such as a referral to enforcement, can be taken if a consultant believes the inability to sample presents a serious hazard to the health or safety of employees. OSHA did not allege or substantiate that was the case regarding this finding.

Also, Kentucky believes any finding based on three (3) casefiles out of 381 does not represent an issue, pattern, or practice that have a detrimental effect on the program or safety and health of employees. Three (3) casefiles represent .8% of the 381 initial visits conducted by the Division of OSH Education and Training in FY 2015. An issue found in .8% of the casefiles may warrant a review of additional casefiles to determine if an issue, pattern, or practice exists that has a detrimental effect on the program or safety and health of employees; it does not justify or rise to the level of a finding.

Finding FY 2015-11 is another issue that was not brought to Kentucky's attention during the onsite FAME review or the closing conference. Kentucky first learned of this issue when OSHA shared a draft of the FAME with the state. Kentucky advised OSHA of the information above yet OSHA choose to retain this finding even though it has no merit.

Kentucky requests OSHA correct and update the FAME.