



Kentucky Labor Cabinet Occupational Safety and Health Program

RESPONSE

to

FEDERAL ANNUAL MONITORING EVALUATION

for

FEDERAL FISCAL YEAR 2019

I. COMMENT REGARDING FAME REPORT

OSHA's FY 2019 Federal Annual Monitoring Evaluation (FAME) identified five (5) findings and seven (7) observations. This response is limited to OSHA's findings and does not address observations.

II. OSHA FINDINGS, RECOMMENDATIONS and KENTUCKY RESPONSES

OSHA Finding FY 2019-1

"KY OSH conducted a total of seven programmed health inspections during this period."

OSHA Recommendation

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

OSHA Finding FY 2019-2

"KY OSH conducted a total of 15 programmed safety inspections during this period."

OSHA Recommendation

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

State Response

Kentucky acknowledges the number of programmed health and safety inspections is fewer than desired. As OSHA is aware, Kentucky has a strategy in place to ensure programmed inspections are conducted; however, significant challenges remain. Staff turnover remains an issue and impacts the number of programmed inspections conducted. Vacancies are filled as expeditiously as possible but compliance officer training, coupled with the lag time before a compliance officer can perform solo inspections, make this issue problematic. Equally important, other inspection priorities, such as imminent dangers, amputations, hospitalizations, as well as electronic and written complaints, are a major factor impacting resources and the ability to conduct programmed inspections. An increase in FY 2020 is not likely due to the current public health crisis which has considerably affected Kentucky's ability to conduct programmed inspections. Nonetheless, Kentucky will attempt to perform more programmed inspections.

OSHA Finding FY 2019-3

"KY OSH has a significantly high average citation issuance lapse time for safety and health inspections, which are outside the FRLs."

OSHA Recommendation

"KY OSH should develop and implement a process to reduce the average lapse time for safety and health inspections to reduce lapse times to the national average."

State Response

Kentucky notes staff turnover as well as the increase in inspection activity is are important issues that affect this issue. Kentucky implemented organizational and process changes that have decreased lapse time for safety and health inspections. That said, the current public health crisis has considerably affected Kentucky's inspection activity and lapse times.

OSHA Finding FY 2019-4

“The case file review identified a number of cases where KYOSH failed to acquire and/or maintain correct retaliation case file documentation: to wit, (1) lack of determination letters or unsigned determination letters, (2) no case activity logs, (3) insufficient/inaccurate correspondence tracking information, and (4) erroneous IMIS entries.”

OSHA Recommendation

“KYOSH should establish procedures by which the Retaliation manager routinely reviews case files and online systems to ensure a thorough investigation was conducted, ensure that case file documentation is being retained in accordance with established retention policy, and ensure the accuracy of IMIS data entries.”

State Response

Kentucky acknowledges the issues OSHA presents in the finding. Unfortunately, OSHA does not present all the facts in the FAME regarding this finding. Kentucky presented this issue to OSHA well before the FAME. Kentucky was not comfortable with discrimination program issues and reached out to OSHA in August 2019 for assistance. OSHA advised Kentucky that although discrimination is joint federal-state jurisdiction, the agency would not assist the state with discrimination investigations. OSHA advised it could provide discrimination training opportunities.

In September 2019, OSHA provided discrimination training at the Kentucky office. During the training, at Kentucky's request, OSHA conducted a review of Kentucky's discrimination casefiles. The training, casefile review, and feedback OSHA provided to Kentucky was invaluable and the state is very appreciative. During the training, casefile review, and feedback, OSHA advised Kentucky that OSHA's discrimination oversight contributed to the issues Kentucky brought to OSHA's attention. OSHA advised the issues Kentucky brought to OSHA's attention were issues that OSHA should have raised with the state but had not addressed with Kentucky. OSHA advised the discrimination issues Kentucky brought to OSHA's attention were not an “at least as effective” (ALAE) concern due to the state's measures in seeking OSHA's assistance in correcting self-identified deficiencies. OSHA also gave Kentucky specific instruction regarding federal discrimination contacts the state should and should not use.

Unfortunately, additional training opportunity OSHA committed to Kentucky were not provided to the state. Kentucky abandoned pursuit of the training after three (3) requests from Kentucky to OSHA for the training were unanswered.

Page twenty-one (21) of the FAME states:

“As a result, the majority of the case files reviewed did not represent the work-product of the new staff.”

That is a correct statement but all the facts are not presented in the FAME. On more than one (1) occasion, Kentucky provided OSHA with information and examples of implemented discrimination program changes that reflected OSHA’s suggestions. OSHA advised Kentucky the changes were positive and corrected all issues. OSHA did not recognize or present that information in the FAME.

Kentucky questioned OSHA regarding the basis for the finding in light of OSHA’s representation to the state that it was not an ALAE concern. Kentucky was advised that since OSHA saw it, OSHA was compelled to issue a finding. Kentucky does not dispute the finding and recognizes OSHA’s perspective. However, Kentucky does not wholly agree. Kentucky questions OSHA’s commitment to assist the state in a constructive manner.

OSHA Finding FY 2019-5

“In six of the 40 (15%) of the consultation case files, “on the spot corrections” observed by the consultant were not correctly documented in the field notes as required by the CPPM, Chapter 4 III.C.2.”

OSHA Recommendation

“KY OSH should closely monitor consultation file documentation to ensure on the spot corrections are properly documented in the field notes including the correction method use to abate the hazardous condition.”

State Response

Kentucky takes issue with this finding. Kentucky concurs and acknowledges that in six (6) of the consultation files reviewed by OSHA, on the spot corrections observed by the consultant were not documented in the field notes. However, yet again, OSHA does not present all the facts in the FAME regarding this finding. Page twenty-six (26) of the FAME states:

“**The written reports to the employer contained abatement information;** however ‘on the spot corrections’ observed by the consultant, were not correctly documented in the field notes on six of the files reviewed.” [Emphasis added.]

OSHA informed Kentucky verbally during the FAME, and in writing post-FAME, that the language emphasized above was an acknowledgment that on the spot correction information was documented in all casefiles including the six (6) casefiles mentioned in the finding. OSHA acknowledged on the spot correction information in those six (6) casefiles was documented in another section of consultation casefile.

The finding is not a true representation of the consultation casefiles. It is based on six (6) instances of the forty (40) casefiles that OSHA choose to review from the 390 authored by consultation in FY 2019. A finding based on six (6) of 390 (1.54%) casefiles is not a true representation.

According to OSHA, a finding is limited to those issues that warrant corrective action by the state plan to ensure the state plan is ALAE as the federal program. Issues that question the final approval status of a state plan are noted as a formal finding. A recommendation, according to OSHA, has not proven to impact the effectiveness of the state plan but the federal state plan monitor wishes to continue monitoring for tracking purposes. As noted above, OSHA acknowledged, and confirmed, that on the spot correction information was in fact documented in all casefiles including the six (6) casefiles mentioned in the finding. At best, this may have been worthy of a FAME observation but it clearly does not epitomize an ALAE issue and does not warrant a finding.

OSHA's finding is concerning and reflects a lack of understanding by the federal monitor(s) of what a FAME finding is and what a FAME finding is not. Kentucky articulated this to OSHA during the FAME process and requested reconsideration. Kentucky rejects this finding and requests corrective action by the agency with reporting back to the state.