



State of Utah
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Labor Commission
JACSON R. MAUGHAN
Commissioner
**Occupational Safety and
Health Division**
CAMERON S. RUPPE
Director

July 1, 2020

Via U.S. Mail and E-Mail

Rita M. Lucero, Acting Regional Administrator, Region VIII
Occupational Safety and Health Administration
Denver Regional Office
Cesar E. Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204

**Re: Response of the Utah Occupational Safety and Health Division to the FY 2019
Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report**

Dear Ms. Lucero,

Thank you for the opportunity to participate in the FY 2019 Comprehensive FAME of the Utah Occupational Safety and Health (UOSH) Division of the Utah Labor Commission. It is a pleasure working with you and your staff, and UOSH looks forward to continuing to build a mutually beneficial relationship with Region VIII. This letter will serve as UOSH's formal response to the specific findings and observations set forth in the FY 2019 Comprehensive FAME.

The mission of UOSH is to help ensure a safe and healthy workplace for every worker in the state of Utah. To this end, UOSH has worked diligently to correct findings and observations in previous FAMES and to improve its internal processes. Changes such as setting standards of work and implementing the electronic filing system have greatly improved the ability of UOSH to work effectively and continue to improve. The current FAME contains two findings and six observations. UOSH has made significant improvements, and will continue to make improvements in accomplishing its mission.

UOSH responds specifically as follows to the findings in the FY 2019 Comprehensive FAME:

Finding FY 2019-01 (previously FY 2018-OB-02, FY 2017-OB-03, FY 2016-OB-07, and FY 2015-OB-08): In FY 2019, UOSH did not ensure that non-management employees were provided an opportunity to participate in the inspection process, through interviews or other means, in 11 of the 102 (10.8%) case files.

UOSH Response: UOSH management has changed some of its internal procedures for the Compliance Safety and Health Officers (CSHOs) to address this finding. It should be noted, that in the previous four FAMES, this was listed as an observation, and OSHA never clarified that the definition of “worker” was intended to mean solely non-managerial employees. In each instance, this observation was dealt with as deemed appropriate by UOSH, but the 2019 Comprehensive FAME is the first time that OSHA clarified this expectation.

SAMM Measure 13 was understood literally to mean the “percent of initial inspections with employee walk around representation or employee interview” as stated in the State Plan Policies and Procedures Manual (SPPPM). Now that the language has been changed in the FAME to specify non-managerial employees being provided an opportunity to participate in the inspection, UOSH will ensure better documentation in UOSH case files in order to correct this finding.

Finding FY 2019-02: The State Plan has denied due process and a possible remedy for complainants in four whistleblower cases who reported an injury as a protected activity. The State Plan has not pursued these investigations while waiting for the results of a case in the UOSH Division of Adjudication appealing UOSH’s authority to reopen the case.

UOSH Response: UOSH has discussed this issue at length with Region VIII OSHA. UOSH has no authority to pursue cases that are currently under review by the Utah Labor Commission’s Adjudication Division. Once a party seeks review of a case in the Adjudication Division, UOSH no longer retains any jurisdiction over these cases. The Adjudication Division is a completely separate entity, and is not under the control of UOSH.

Also, UOSH has neither denied due process nor a possible remedy for complaints in four whistleblower cases. The parties are provided due process in the fact that either party may seek review of a UOSH decision by appealing the UOSH decision to the Adjudication Division. An Administrative Law Judge (ALJ) within the Adjudication Division will hear the case *de novo*, from the beginning, and give no deference to the UOSH decision. Once the Adjudication Division makes its decision, either party may appeal that decision to either the Labor Commissioner or to the Appeals Board (an independent appeals board made up of three individuals appointed by the governor). Once the Labor Commissioner or the Appeals Board makes a decision, either party may appeal that decision to the Utah Court of Appeals. Further, the ALJ may award the same possible remedy as UOSH may in any case brought before the Adjudication Division seeking an appeal from a UOSH decision. Thus, neither due process, nor a possible remedy has been denied any party.

It is also unclear how UOSH can control the corrective action due to the fact that the authority to re-open any final order can only come through a change in statute. In addition, any change in statute would certainly not grant UOSH the required authority to retroactively open the four cases mentioned.

UOSH made adjustments to meet OSHA’s requirements early in 2019, and has corrected all of the apparent issues since that time. UOSH believes that it is inappropriate for OSHA to make findings of issues that have already been corrected as of the date of the FAME. For example, if OSHA determined during a FAME that a state plan state should have cited something differently

in an enforcement case, to UOSH's knowledge, a state plan state has never been, nor should it be, expected to reopen such a case.

The FY 2019 Comprehensive FAME included five new observations related to the Compliance program and one new observation specific to the Whistleblower program. Through the implementation of the electronic filing system, the State Internal Evaluation Plan (SIEP), Field Operations Manual (FOM) and the Whistleblower Manual, UOSH believes that many of these issues have already been, or will be resolved by the FY 2020 Follow-up FAME.

UOSH will continue to work towards consistency and efficiency so that it can better serve the people of Utah by helping to create a safe and healthy workplace.

The response to the findings and observations found in the FY 2019 Comprehensive FAME will be summarized in the corrective action plan (CAP) which UOSH will provide by July 31, 2020.

UOSH requests that this letter be posted on OSHA's webpage in conjunction with the FY 2019 Comprehensive FAME.

If you have any comments or concerns regarding this response or any UOSH matter, please feel free to contact me.

Sincerely,

/s/

Jaceson R. Maughan
Commissioner
Utah Labor Commission