

**FY 2021 Comprehensive
Federal Annual Monitoring Evaluation (FAME) Report**

**State of New York
Public Employee Safety and Health (PESH) Bureau**



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I. Executive Summary

The purpose of this report is to assess the New York Public Employee Safety and Health (NY PESH) State Plan's performance for Fiscal Year (FY) 2021, and its progress in resolving outstanding findings from previous Federal Annual Monitoring Evaluation (FAME) reports.

NY PESH is responsible for protecting the health and safety of more than two million state and local government (SLG) workers in New York. PESH continues to have a presence in SLG workplaces through its inspection activity, partnerships, and outreach activity. The PESH Strategic Plan focuses enforcement, compliance assistance, and consultation visits to reduce injury and illnesses in the following three industries: fire service, police, and nursing homes and hospitals.

NY PESH conducted 567 inspections in FY 2021 or about 42% of their goal of 1,350 inspections for the year. In FY 2020, PESH conducted 427 more inspections than in FY 2021. In addition to the reduction in inspections, a comparison between FY 2020 and FY 2021 reveals that NY PESH issued 1,685 less violations than in FY 2020 (NY SOAR, FY 2021). This be contributed to factors including a backlog of fatality inspections from FY 2020, the effects of the continuing COVID-19 pandemic, hiring freezes, new staff, staff retirements, and vacant staff positions. All these factors have played a role in reducing the effectiveness of the New York State Plan and negatively impacting the metrics used to measure effectiveness. Some of these metrics include a significant increase in lapse time for both disciplines and a higher percentage of in-compliance inspections in FY 2021 compared to FY 2020 (SAMM Reports).

Since the beginning of FY 2020, OSHA's Region II has experienced a dramatic increase in the number of Complaints About State Program Administration (CASPA) received from stakeholders. Prior to 2020, OSHA had not received a NY PESH-related CASPA since 2015. Four CASPAs were processed in FY 2020, four in FY 2021, and 13 have been received-to-date in FY 2022.

During the FY 2021 performance period, NY PESH was responsive to OSHA, including providing requested information in a timely manner, actively participating in the regular quarterly meetings, and adopting the COVID-19 Healthcare Emergency Temporary Standard (ETS). However, the New York State Plan failed to adopt two Federal Program Changes – one from FY 2015 and the other from FY 2017. These include the FY 15 Recordkeeping standard and the FY 17 Final Rule on Walking-Working Surfaces and Personal Protective Equipment. Adopting these two Federal Program Changes much be a priority for NY PESH during the FY 2022 performance period to ensure that SLG workers have the same protections as other workers.

The FY 2020 PESH FAME report included five findings and four observations. Two findings were completed based on this FAME review. During this comprehensive on-site case file review, OSHA converted two observations into two findings, three findings were continued, four new findings and six new observations were identified, and two observations continued.

In summary, this report contains a total of nine findings and eight observations. Appendix A describes the new and continued findings and recommendations. Appendix B describes the observations and related federal monitoring plans. Appendix C describes the status of previous findings with associated completed corrective actions.

II. State Plan Background

A. Background

The New York Department of Labor administers the New York State Plan. Roberta Reardon, Commissioner of Labor, has full authority to enforce and administer all laws and rules protecting the safety and health of all SLG workers in the state and its political subdivisions. In addition to the State Plan's enforcement responsibilities, NY PESH provides free on-site consultation and training services to SLG agencies, upon request.

NY PESH consists of one central office in Albany, New York, and eight district offices located in Binghamton, Syracuse, Utica, Rochester, Buffalo, White Plains, Garden City, and New York City (Manhattan). The NY State Plan applies to all SLG employers in the state, including state, county, town, and village governments, as well as public authorities, school districts, and paid and volunteer fire departments.

Private sector enforcement is retained under federal jurisdiction while private sector consultative services are provided by the New York State Department of Labor-Division of Safety and Health (NYSDOL-DOSH) Consultation Services Bureau under Section 21(d) of the OSH Act. A new director for DOSH was hired in December of 2020, and a new program manager was hired in early 2021. NY PESH adopted all applicable OSHA safety and health standards either identically or through alternative means. However, the PESH ACT does not allow for the issuance of "first instance" monetary penalties for SLG employers found in violation of NY PESH standards. Per diem penalties can be assessed when failure-to-abate (FTA) notices are issued.

The New York State Plan was staffed with 30 compliance safety and health officers (CSHOs) in FY 2021. There were five consultants employed in FY 2021. There were 30 vacant positions that were allocated in the FY 2021 grant that remained vacant during FY 2021 (NY SOAR, FY 2021).

During FY 2021, there were 218 compliance assistance activities conducted by six NY PESH consultants and 14 compliance assistance visits performed by NY PESH enforcement staff. The total compliance assistance activities for FY 2021 were 232 compared to 202 in FY 2021 (NY SOAR, FY 2021).

The New York State Plan operated with a federal base award of \$4,011,700 in FY 2021. PESH was awarded \$1,625,000 in funding on August 6, 2021 under the American Rescue Plan (ARP). As of December 31, 2021, NY PESH obligated \$29,676 of this ARP funding to support work

directly related to COVID-19. During FY 2022, NY PESH plans to utilize ARP COVID-19 grant funds to fill vacant positions as appropriate to assist in enforcing federal and state standards related to COVID and to support related projects (NY SOAR, FY 2021 and NY ARP FY 22 Quarter 1 Report).

B. New Issues

Lapsing of Federal Funds

On August 8, 2019, OSHA implemented a new policy for permanently redistributing 23(g) funds from State Plans that repeatedly lapse or deobligate. Under this policy, State Plans who lapse or deobligate funds in three consecutive years will have a portion of their base awards permanently reduced in Year Four. NY PESH lapsed a total of \$5,842.35 from its FY 2020 federal grant award. This was the first year that NY PESH lapsed funds. OSHA sent a formal warning letter to program administration reiterating the lapse and reminding them that lapsing of funds three consecutive years in a row will lead to a permanent reduction in their award amount. PESH did not lapse any funds in FY 2021 (OSHA Financial Reports)

Complaint About State Program Administration (CASPAs)

In FY 2020, there were four CASPAs received for this State Plan from stakeholders. Prior to the receipt of these CASPAs, the last NY PESH-related CASPA was received by Region II on April 17, 2015. The Region investigated one of these CASPAs and the New York State Plan responded to the investigation timely. The other two CASPA complaints were not investigated because they alleged the same hazards as addressed in CASPA 2020-05-NY. The third request for a CASPA was also determined by the Region not to be valid.

In FY 2021, the Region received four more CASPAs from stakeholders. All four CASPAs were investigated by the Region and the State Plan responded to the investigations timely. The allegations raised in the CASPAs were the following: failure to enforce workplace violence standards, failure to provide an investigative narrative, not providing sampling results to union representatives, not closing files timely, not permitting union participation in inspections, and not verifying abatement for citations issued for missing load capacity ratings on racking systems.

Three of four of the CASPAs were closed in FY 2021. Two of the three CASPAs were closed without requiring a corrective action plan. The other CASPA was closed after a corrective action plan was approved for tracking complaint inspections.

The CASPA on failure to enforce workplace violence standards remains open. The State Plan, in response to that CASPA, is in the process of conducting a workplace violence inspection at multiple locations of the facilities that are represented by the union that filed the original CASPA. To date in FY 2022, OSHA has received 13 requests for CASPAs. The volume of the CASPAs is a drain on time and limited resources of both NY PESH and OSHA.

III. Assessment of State Plan Progress and Performance

A. Data and Methodology

OSHA established a two-year cycle for the FAME process. FY 2021 is a comprehensive year and as such, OSHA was required to conduct an on-site evaluation and case file review. A four-person OSHA team, which included the Region II Assistant Regional Administrator for Whistleblower, the Region II auditor, the Region II VPP Manager and the Region II State Plan Program Manager, was assembled to conduct a full on-site case file review. The case file review was conducted at the NY PESH State Plan office during the timeframe of January 24-27, 2021. A total of 90 safety, health, and whistleblower inspection case files were reviewed. The safety and health inspection files were randomly selected from closed inspections conducted during the evaluation period (Oct 1, 2020 through September 30, 2021). The selected population included:

- 38 safety enforcement files
- 27 health enforcement files
- 12 fatality/catastrophe files
- 13 invalid complaints
- Seven valid complaint investigations
- 15 consultation case files
- 13 closed whistleblower case files

The analyses and conclusions described in this report are based on information obtained from a variety of monitoring sources, including the:

- State Activity Mandated Measures (SAMM) Report (Appendix D)
- State Information Report (SIR)
- Mandated Activities Report for Consultation (MARC)
- State OSHA Annual Report (SOAR)
- State Plan Annual Performance Plan (APP)
- State Plan Grant Application
- Quarterly monitoring meetings between OSHA and the State Plan
- Limited (*or full*) case file review

Each SAMM Report has an agreed-upon Further Review Level (FRL) which can be either a single number, or a range of numbers above and below the national average. State Plan SAMM data that falls outside the FRL triggers a closer look at the underlying performance of the mandatory activity. Appendix D presents the State Plan's FY 2021 State Activity Mandated Measures Report and includes the FRL for each measure.

B. Review of State Plan Performance

1. PROGRAM ADMINISTRATION

a) Training

In FY 2021, enforcement and consultation staff completed available virtual courses and webinars on various subjects. Examples of specific webinars attended by the staff during FY 2021 included a webinar on the Emergency Temporary Standard for Healthcare and Confined Spaces in General Industry. Additionally, all NY PESH staff completed mandated annual training on the Statewide Learning Management System (SLMS). Relevant SLMS training coursework completed included workplace violence prevention, de-escalation techniques for worker protection field staff, and cyber security. To encourage professional certification among the staff, all staff was given the opportunity to attend the American Industrial Hygiene conference held virtually May 24-26, 2021. During FY 2021, one industrial hygienist earned her Certified Industrial Hygiene (CIH) certification and began preparation for the Certified Safety Professional exam, and another began the CIH preparation process (NY SOAR, FY 2021).

b) OSHA Information System (OIS)

NY PESH uses OIS data for tracking purposes. The FRL for average lapse time for safety is +/- 20% of the three-year national average of 52.42 days which equals a range of 41.94 days to 62.90 days. During FY 2021, NY PESH's average lapse time for citations was calculated at 123.86 days for safety which is substantially higher than the FRL. The FRL average lapse time for health is +/- 20% of the three-year national average of 66.10 which equals a range of 52.88 days to 79.32 days. In FY 2020, the average safety lapse time (SAMM 11) for citations was calculated at 117.79 days compared to 89.61 days in FY 2019. The FY 2020 average is above the FRL range of 40.46 to 60.70 days. PESH's safety lapse time has continued to go up since it was identified as an observation in FY 2018.

The FRL average lapse time for health is +/- 20% of the three-year national average of 66.10 which equals a range of 52.88 days to 79.32 days. NY PESH's health lapse time was calculated at 164.93 days which also exceeds the FRL (SAMM #11). PESH's health lapse time has continued to increase since this metric was identified as an observation in FY 2018. This is the fourth year that NY PESH significantly exceeded the FRL on SAMM 11; therefore, this previous observation was converted to a finding.

Finding FY 2021-01 (FY 2020-OB 01, FY 2019-OB-01, FY 2018-OB-08): Safety Lapse Time

In FY 2021, the average safety lapse time (SAMM 11) for citations was calculated at 123.86 days which is above the FRL range of 41.94 days to 62.90 days for safety.

Recommendation FY 2021-01:

NY PESH needs to utilize the OIS Report System and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse

time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources.

Finding FY 2021-02 (FY 2020-OB-02, FY 2019-OB-02, FY 2018-OB-09): Health Lapse Time

In FY 2021, the average health lapse time (SAMM #11) for citations was calculated at 164.93 days which is above the FRL range of 52.88 days to 79.32 days.

Recommendation FY 2021-02:

PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources.

Processing of Unprogrammed Activities (UPAs)

Observation FY 2021-OB-01: Processing of UPAs

Eight of the 20 UPAs (40%) reviewed had either incomplete or incorrect entries in OIS. Six UPAs were missing entries in the response section showing the date that the employer provided evidence of a satisfactory response to the complaint allegations. One complaint was marked invalid in OIS but an investigation was conducted, and another was marked valid and an investigation was not conducted.

Federal Monitoring Plan FY 2021-OB-01:

During the next comprehensive FAME review, closed complaint files will be selected and reviewed to determine if this is a trend requiring further review.

OIS Data/Information

Finding FY 2021-03: OIS Reports

Open abatement OIS reports run on January 3, 2022 showed that in some of the RIDS there was overdue abatement from FY 2020 and FY 2021. For example, in RID 253610, there were 10 inspections with overdue abatement, 13 inspections in RID 253620, 21 inspections in RID 253650, and three inspections in RID 253690. These inspections were opened in either FY 2020 or FY 2021.

Recommendation FY 2021-03:

NY PESH needs to develop a written procedure to address how OIS reports will be used to ensure timely abatement of all hazards.

c) State Internal Evaluation Program Report (SIEP)

The New York SIEP Report documents field audits of CSHOs to evaluate performance. These field audits are conducted by supervisors using a standardized checklist. PESH conducts at least one field audit for each inspector as well as for each consultant annually. These audits were performed and documented in FY 2020 and FY 2021.

Additionally, internal “weekly action reports” from each district are drafted, reviewed by management, and copied to the director. The weekly action reports highlight open cases/lapse time, petition for modification of abatement, appeals, informal conferences, failure to abates, fatalities, personnel issues, etc. (NY SOAR, FY 2021).

d) Staffing

During FY 2021, 30 PESH compliance safety and health officers (CSHOs) conducted 568 inspections, as compared to FY 2020, when 991 inspections were conducted by 29 CSHOs. Three additional CSHOs were hired in FY 2020 and began performing inspections in FY 2021. Fifteen safety staff conducted 336 inspections, compared to 601 inspections in FY 2020 conducted by 14 safety staff. Fifteen industrial hygiene staff conducted 232 inspections, compared to 390 inspections in FFY 2020 conducted by 15 industrial hygiene staff (NY SOAR, FY 2021).

Insufficient staffing continues to be the most significant factor affecting the program’s overall performance. At the start of the final quarter of FY 2021, staffing was at less than 63% of that specified in our grant. The 30 grant-allocated positions listed below remain vacant (NY SOAR, FY 2021):

- One manager
- 14 safety compliance officers
- Two health compliance officers
- Two safety consultants
- Two health consultants
- One compliance assistance specialist
- Eight clerical/administrative/data system staff

As of February 25, 2022, the New York State Plan had three health CSHOs, 15 safety CSHOs, nine administrative positions, and one management vacancy in the enforcement section. There were four vacant consultant positions. The New York State Plan has started the process of hiring new staff but the process of training the new staff will take time. During FY 2022, American Rescue Plan (ARP) COVID-19 grant funds will be used to fill vacant items as appropriate to apply federal and state standards related to COVID-19 and to support related projects.

Finding FY 2021-04 (FY 2020-03): Staffing

NY PESH staffing level is allocated for 43 CSHOs, but currently there are only 30 onboard as of the end of FY 2021.

NY PESH continues to struggle to fill staff vacancies. Staffing vacancies affect the New York State Plan’s ability to timely address complaints/referrals/fatalities, as well as achieving their targeting and programmed inspection goals established in their FY 2021 grant. Over the last three years, NY PESH has seen a reduction in the number of compliance safety and health officers (CSHOs) allocated versus onboard. Information provided for the FY 2021 SOAR showed that there were 30 vacancies. These staffing

vacancies affect the New York State Plan's ability to timely address complaints/referrals/fatalities, as well as achieve its targeting and programmed inspection goals established in the grant application. The New York State Plan has been under a hiring freeze for years and is currently working with NYDOL's deputy commissioner to prioritize hiring based on the need and availability.

Recommendation FY 2021-04:

NY PESH should fill current staffing vacancies with qualified staff, specifically in the New York City office.

2. ENFORCEMENT

a) Complaints

During this evaluation period, PESH responded to 155 complaints with an average response time of 10.45 days from notification (NY SOAR, FY 2021 and SAMM #1a). This is an increase from the 6.58 days in FY 2020 and is slightly above the negotiated level of 10 days (SAMM #1a). The timeliness of the New York State Plan's response to complaint inspections was the subject of Complaint Against State Plan Administration (CASPA) NY-2021-12 filed. In response to that CASPA, the New York State Plan agreed to the following correction:

NY PESH developed a complaint tracker system which will support the weekly monitoring and oversight of complaint inspections, and the provision of inspection results to complainant and/or employee representatives. The complaint tracker system is maintained by the Manhattan District Office Administrative Assistant who reports directly to the district office supervisor. The complaint tracker system prompts notifications from the district supervisor to the complainant and/or employee representative, regarding any undue delay of the inspections results. NY PESH conducted staff and supervisor training, on October 20, 2021, to reinforce compliance with these procedures and to implement the complaint tracker system.

The Region will continue to monitor quarterly through the SAMM Report and discussions at quarterly meetings regarding the progress of this corrective action plan.

NY PESH investigated 264 complaints in FY 2020. The number of inspections has declined, due in large part to reduced staffing and disruptions in programmed enforcement and on-site inspections due to COVID-19. This factor, along with the general increase in complaints each year, has resulted in the percentage of complaint inspections of the total yearly inspections to increase from 17% in FY 2017 (1,761 inspections), 22% in FY 2018, 24% in FY 2019, and remain at 27% in FY 2020 and 2021 (NY SOAR, FY 2021).

The average number of days to initiate complaint investigations was 4.25 days in FY 2021 which is above the negotiated level of one day (SAMM #2a). This is an increase from the 2.48 days in FY 2020 and 2.20 days reported in FY 2019.

During FY 2020, NY PESH received one imminent danger complaint or referral (SAMM #3) and responded within one day. In FY 2021, NY PESH received three imminent danger complaints or referrals and responded to two of the three within one day (66.67%) as reported by SAMM#4.

During the ongoing COVID-19 pandemic in FY 2021, NY PESH received 86 COVID-19-related complaints which were either addressed or referred to the PAUSE NY Task Force that handled allegations of non-compliance with the governor's various executive orders (NY SOAR, FY 2021).

Observation FY 2021-OB-02: *Timeliness of State Plan Response*

In 2021, NY PESH failed to respond to complaint investigations within the FRL of one day. SAMM #2a reported a response time of 4.25 days for FY 2021. SAMM #2b reported a response time of 3.25 days for FY 2021 (federal formula).

NY PESH has a requirement in their FOM that a valid complaint must include a signature of a current employee. NY PESH often receives complaints electronically from OSHA through the hot line. These complaints are not signed. Therefore, NY PESH must go back to the complainant and request a signature before deciding how best to address the allegations. This process can take more than a day. The metric in OIS being used to track the number of days to respond is based on the receipt date and first contact with the employer, not the date that the complaint was determined to be valid for SAMM #2a. SAMM #2b derives the data differently and accounts for a delay in receipt due to the requirement to obtain a signature. Not all complaints are received electronically and require that NY PESH go back to the complainant, but some do, which delays contacting the employer.

Federal Monitoring Plan FY 2021-OB-02:

The Region will review both SAMM #2a and #2b with NY PESH quarterly and identify trends.

Complaint Investigation Documentation

Thirteen invalid unprogrammed activities and seven valid unprogrammed activities (UPAs) were reviewed for this evaluation period. It was noted that six of 20 (30%) of the case files were missing a diary sheet.

Observation FY 2021-OB-03: *Complaint Investigation Documentation*

Complaint investigation documentation was lacking. Six of 20 (30%) of the case files were missing a diary sheet.

Federal Monitoring Plan FY 2021-OB-03:

During the next comprehensive FAME review, a limited number of complaint investigations will be reviewed to determine if this is a trend that requires further evaluation.

Complaint Letters for Formal Inspections

During this FAME review, 28 complaint inspection files were reviewed. In two of 28 (7%) of the complaint inspection files reviewed, the letter to the complainant was not in the file. In eight of 28 (28.5%) of the complaint files reviewed, the letter to the complainant was issued prior to the final report being written, reviewed by the supervisor, and issued. The letter being issued to the complainant was either a letter stating that the allegations were not sustained with no specific reason(s) listed or a listing of the alleged hazards with a statement that a final report would follow. However, there was no evidence in these files that the report was mailed to the complainant after it was approved for issuance. This practice of issuing the complaint letters prior to supervisory review of the report appeared to be isolated to one district office.

Observation FY 2021-OB-04: *Complaint Letters*

Complaint inspection files lacked evidence that either the complainant was provided a complainant letter or that the complainant letter provided an explanation of the evaluation of each alleged hazard or a copy of the report to supplement the complaint letter.

Federal Monitoring Plan FY 2021-OB-04:

During the next comprehensive FAME review, a limited number of complaint inspections will be reviewed to determine if this is a trend that requires further evaluation.

Notification of Delay to Complainants

During the last comprehensive FAME review in 2019, the following finding was noted:

Finding FY 2019-02: *Notification of Delay to Complainants*

Of the five complaint case files reviewed with delays in issuing the Notice of Violation (NOV) of more than 30 days from the inspection, three (60%) did not contain documentation that the complainant and/or employee representative was informed of a delay in issuing the Notice of Violation (NOV).

A review of the complaint case files during this FAME evaluation period, noted five complaint inspections with NOVs that were issued more than 30 days from completion of the inspection. The diary sheets in these files documented contact with the complainant to provide notification of the delay.

b) Fatalities

NY PESH conducted 82 fatality and/or catastrophe (FATCAT) investigations in FY 2021 compared to 167 investigations in FY 2020. PESH conducted 20 fatality inspections related to COVID-19 (NY SOAR, FY 2021).

NY PESH received 322 potential workplace-related COVID-19 fatalities during FY 2020 compared to 11 workplace-related fatalities in FY 2019. The global pandemic placed huge demands on the resources of NY PESH.

PESH failed to make initial contact in response to hundreds of fatalities reported – stemming primarily from emergency responders, Metropolitan Transit Authority (MTA), and hospital workers in FY 2020. Therefore, NY PESH began FY 2021 with a backlog of fatality inspections from FY 2020. The backlog of inspections from FY 2020 and the loss of staffing further strained the resources of NY PESH and impacted response time to fatalities reported in FY 2021.

To clean-up the backlog of fatalities from FY 2020, the NY PESH combined numerous fatalities from the same employer into one inspection regardless of the location where they worked. In one of the files reviewed, one inspection was related to 74 fatalities that were related to COVID-19 for victims employed by the same employer. The locations and tasks being performed as well as their dates of death were all merged into one inspection.

The response time to initiate fatalities within one working day fell from 100% in FY 2019 to 28% in FY 2020, and then a slight decrease to 38.46% in FY 2021 (SMM #10). The FRL is 100%.

Twelve fatality inspections were reviewed during the FAME review. Ten of these fatalities were related to COVID-19 deaths. Four of the 10 fatality inspections reviewed were for fatalities that occurred almost a year after the event had occurred. This delay in responding to fatalities negatively impacted the results of the investigation as evident by the review of these findings. Gathering evidence to support violations and documenting working conditions at the time of the event was challenging.

A review of these COVID-19 fatalities that were predominately conducted using virtual procedures found that the investigations failed to follow the NY PESH Field Operations Manual (FOM) regarding contact with the families of the victims. Specifically, next-of-kin letters were not forwarded to the families of the victims. There was no evidence in the files that the families of victims for COVID-19 deaths were contacted during the inspection process.

The review also noted that six of 10 (60%) of these COVID-19 case files lacked evidence that the injury and illness records were reviewed for the last three years and the current year to identify trends in cases of COVID-19. The files also lacked documentation that the respiratory protection programs including fit testing, medical evaluations and training were reviewed for six of the 10 inspections where respirators were being required according to the notes in the file.

Evidence of interviews with non-management employees was lacking in four of 10 (40%) of the case files. In one of 10 (10%) of the fatality inspection reports, there was evidence in the file that employees were not wearing masks and practicing social distance in an office environment. A hazard alert letter or citation under the general duty clause was not documented as being considered.

Finding FY 2021-05: Case File Documentation

In six of 10 (60%) case files, documentation was lacking for COVID-19 fatality inspections, and four of 10 (40%) were lacking evidence of interviews with non-managerial employees.

Recommendation FY 2021-05:

NY PESH should consider developing a quality control procedure to ensure that adequate documentation is obtained for fatality inspections. NY PESH needs to follow its FOM regarding required case file documentation.

Finding FY 2021-06 (FY 2020-04): Responding to Fatalities

In 10 of 12 (83%) of the COVID-19 fatality inspections, the inspection was not initiated within one working day of the report. SAMM #10 reported that the New York State Plan responded 38.46% of the time within one workday of a fatality notification. The FRL is 100%.

Recommendation FY 2021-06:

NY PESH should respond to worker fatalities within one workday which is the SAMM reference agreed upon measure and federal OSHA requirement.

Finding FY 2021-07: Next-of-Kin Letters

In 10 of 12 (83%) of the COVID-19 fatality inspections, both the initial notification of inspection and results of the inspection next-of-kin letters were not sent to the families of the victims. The practice of sending next-of-kin letters was ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only. Due to the novel nature of these fatalities, there was confusion by the New York State Plan whether these letters should be sent since it was often unclear if the victim was exposed to the virus at work or through community spread.

Recommendation FY 2021-07:

NY PESH needs to follow their FOM regarding issuing letters to the families of victims. NY PESH will report quarterly to OSHA on the percentage of next-of-kin letters sent to families.

c) Targeting and Programmed Inspection

NY PESH conducted 568 inspections with 30 CSHOs in FY 2021 – 42% of the goal of 1,350 inspections. In FY 2020, there were 991 inspections conducted by 29 CSHOs. Three additional CSHOs were hired in FY 2020 and began performing inspections in FY 2021 (NY SOAR, FY 2021).

Fifteen safety staff conducted 336 inspections in FY 2021 or 39.5% of the goal. In FY 2020, 601 inspections were conducted by 14 safety staff. Fifteen industrial hygiene staff conducted 232 inspections or 46% of the goal in FY 2021. In FY 2020, 390 inspections were conducted by 15 industrial hygiene staff (NY SOAR, FY 2021).

The decline in inspection numbers can be attributed to the loss of experienced staff, new staff, vacancies that have been unfilled for years, the impact of COVID-19 on inspection procedures and the backlog of COVID-19 fatalities from FY 2020 that were not investigated.

NY PESH focused its inspection resources within the following three state and local government agencies targeted for enforcement interventions (NY SOAR, FY 2021):

- Police Protection – 27 inspections
- Fire Service – 61 inspections
- Nursing Care Facilities/Hospitals – 17 inspections

In addition to enforcement inspections, NY PESH conducted compliance assistance activities in these targeted government agencies. In FY 2021, NY PESH conducted 43 compliance assistance activities with police agencies, 19 compliance assistance activities with fire services and five compliance assistance activities for nursing and hospitals. During this FY, a Public Safety Dive Factsheet was finalized and distributed statewide to address the unique hazards faced by law enforcement officers involved in search and rescue activities under water (NY SOAR, FY 2021).

The FRL for percent in-compliance for safety inspections is +/- 20% of the three-year national average of 31.65% which equals a range of 25.32% to 37.98%. NY PESH's percent in-compliance for safety is 47.10% which is above the FRL. The FRL for percent in-compliance for health inspections is +/- 20% of the three-year national average of 40.64% which equals a range of 32.51% to 48.77%. NY PESH's percent in-compliance for health is 72.84% which is above the FRL (SMM #9).

Observation FY 2021-OB-05: The percent in-compliance rate for both safety and health inspections exceeded the FRL.

Federal Monitoring Plan FY 2021-OB-05: The Region will monitor quarterly with the SMM Report.

d) Citations and Penalties

NY PESH issued 702 violations in FY 2021 compared to 2,387 violations issued in FY 2020 – a decrease of 1,685 (70%) violations. Of the 702 violations issued, 526 were serious, one was willful, 50 were FTA, one was a repeat, and the remaining 165 were other-than-serious (NY SOAR, FY 2021). The New York State Plan contributes the significant reduction in violations issued due to a lapsed in programmed inspections. Programmed inspections were suspended due to the pandemic during the evaluation period (NY SOAR, FY 2021).

However, NY PESH's violations continue to be above average. The FRL for the average number of violations per inspection with violations by violation type is +/- 20% of the three-year national average of 1.78 for serious/willful/repeat (S/W/R) violations which equals a range of 1.42 to 2.14. NY PESH's S/W/R average is 2.76 violations which is

above the FRL range. The FRL for other-than-serious (OTS) violations is +/- 20% of the three-year national average of 0.90 which equals a range of 0.73 to 1.09. NY PESH's OTS average is 0.90 which is within the FRL range (SAMM #5).

Violations for the most part appeared to be classified and grouped appropriately. One inspection reviewed documented a willful violation under the trenching standard. The justification for issuing the violation as a willful citation was well documented.

NY PESH does not issue monetary penalties except in cases of FTA violations. During FY 2021, NY PESH issued 50 FTAs, billed \$119,382 and collected a total of \$13,832 in penalties (NY SOAR, FY 2021).

e) Abatement

The review of case files during this audit revealed that adequate verification/evidence of abatement was being obtained in the case files that had citations. Follow-up inspections were performed when indicated and FTAs issued when appropriate.

f) Worker and Union Involvement

NY PESH continued to follow proper procedures outlined in its FOM regarding appropriate notification being delivered to workers and their union representatives for most of the files reviewed. Of the 77 case files reviewed, 59 (77%) involved unions.

In five of 59 (8.4%) of the inspection files reviewed, documentation was lacking in the file that when the CSHO contacted the employer following virtual inspection procedures initially via phone to discuss inspection procedures that the union representative was invited to participate. The union representatives were not involved in these discussions and were contacted weeks after these initial contacts.

Specifically, in one file the employer was contacted on 10/23/2020 and an opening was held with the employer and union on 11/19/2020; in another case, the employer was contacted on 11/25/2020 and first contact with union was on 1/13/2021; in the third case, the employer was contacted via phone for an opening conference on 3/16/2021 and the union was contacted on 4/1/2021; in the fourth case the employer was contacted on 3/15/2021 and provided a copy of the complaint and the union was not contacted until 4/21/2021; and in the final case, the employer was contacted for a remote opening conference on 4/22/2021 and the union on 5/5/2021.

In 53 of 59 (90%) of the inspection files reviewed, union representatives were either invited to participate initially in the inspection process or the file contained documentation that the union was invited but declined. In one of 59 (2%) of the inspection case files, documentation could not be located showing that the union was invited to participate.

An observation is not being considered for these deficiencies because of the small percentage of files documented with this discrepancy. However, the New York State Plan

should reinforce to staff the importance of inviting the union to participate initially upon contact with the employer and document in the case files this information. This issue has been the subject of CASPAs received and investigated by OSHA. Union representation was included 95% of the time in various aspects of the inspection process (SMM #13).

3. REVIEW PROCEDURES

a) Informal Conferences

During FY 2021, eight informal conferences were conducted. Since first instance penalties are not issued, few informal conferences are held. NY PESH penalties billed during FY 2021 totaled \$119,382. Penalty collection for the year totaled \$13,832. Total NY penalties billed during FY 2020 were \$147,652. Penalty collection for the year totaled \$4,450 (NY SOAR, FY 2020, and FY 2021).

b) Formal Review of Citations

Any investigation that is contested is turned over to the Industrial Board of Appeals (IBA). During FY 2021, NY PESH reported 13 new contested cases and none in FY 2020 (NY SOAR, FY 2021).

4. STANDARDS AND FEDERAL PROGRAM CHANGE (FPC) ADOPTION

a) Federal Program Change (FPC) Adoption

In accordance with 29 CFR 1902, State Plans are required to adopt standards and Federal Program Changes (FPCs) within a six-month timeframe. State Plans that do not adopt identical standards and procedures must establish guidelines which are "at least as effective as" the federal rules. State Plans also have the option to promulgate standards covering hazards not addressed by federal standards. During this period, NY PESH responded in a timely manner to most requests with the required notice of intent to adopt.

The NY State Plan did eventually adopt the Occupational Exposure to COVID-19; Healthcare Emergency Temporary Standard (ETS) with a minor revision, but the adoption date was delayed until October 21, 2021. The delay was due to the program not being able to reference the American National Standards Institute (ANSI) standard for face protection without having to obtain a license for the ANSI standard. The language of the ETS was modified to reference the ANSI as guidance and information only rather than a requirement. The definition of a face shield as required by 1910.502 (b) was adopted; therefore, the standard was still as effective as the federal ETS. The ETS was effective for 90 days with an expiration on January 18, 2022.

Finding FY 2021-08 (FY 2020-08): Federal Standard Changes

NY PESH has not adopted the FY 2015 Federal Standard Number 1904 – Occupational Injury and Illness Recording and Reporting Requirement as it is a requirement for all State Plans.

NY PESH anticipated adopting the 1904.39-reporting standard in January 2016, but approval from the NY Counsels Office has not been received to date. It is OSHA's understanding that SLG employers are following the requirements and reporting worker fatalities within eight hours, as well as hospitalizations, amputations, and loss of an eye; to NY PESH. However, a federal register notice has not been posted informing employers of these requirements.

Additionally, NY PESH has not adopted the FY 2017 Final Rule on Walking-Working Surfaces and Personal Protective Equipment.

Recommendation FY 2021-08:

NY PESH should take action to adopt both federal program changes by obtaining approval from the NY Counsels Office to allow publication in the NY Register no later than September 30, 2022.

The tables below provide a complete list of the federal directives and standards which required action during this performance period:

Table A
Status of FY 2020 and FY 2021 Federal Standards Adoption

Standard	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
Final Rule on the Beryllium Standard for General Industry 29 CFR 1910 (7/14/2020)	9/14/2020	8/17/2020	Y	Y	1/14/2021	1/4/2021
Final Rule on the Beryllium Standard for Construction and Shipyards 29 CFR 1915, 1926 (8/31/2020)	10/30/2020	12/12/2020	Y	Y	2/27/2021	2/15/2021
Occupational Exposure to COVID-19; Emergency Temporary Standard 29 CFR 1910 (6/21/2021)	7/6/2021	7/18/2021	Y	N	7/21/2021	10/21/2021
Final Rule on the Implementation of the 2020 Annual Adjustment to Civil Penalties for Inflation 29 CFR 1903 (1/15/2020)	3/15/2020	2/14/202	N	N/A	7/15/2020	N/A
Final Rule on the Implementation of the 2021 Annual Adjustment to Civil Penalties for Inflation (1/15/2021)	3/16/2021	5/6/2021	N	N/A	7/14/2021	N/A
Final Rule on the Rules for Agency Practice and Procedures Concerning OSHA Access to Employee Medical Records	9/28/2020	10/19/2020	N	N/A	1/26/2021	N/A

Standard	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
29 CFR 1913 (7/30/2020)						
Final Rule on Cranes and Derricks in Construction: Railroad Roadway Work 29 CFR 1926 (9/15/2020)	11/14/2020	12/12/2020	Y	Y	3/14/2021	2/15/2021

Table B
Status of FY 2020 and FY 2021 Federal Program Change (FPC) Adoption

FPC Directive/Subject	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
<i>Adoption Required</i>						
Amputations in Manufacturing Industries NEP CPL 03-00-022 (12/10/2019)	2/10/2020	2/14/2020	N	N/A	6/10/2020	N/A
Respirable Crystalline Silica NEP CPL 03-00-023 (2/4/2020)	4/4/2020	2/14/2020	Y	Y	8/4/2020	2/19/2020
<i>Equivalency Required</i>						
Field Operations Manual CPL 02-00-164 (4/14/2020)	6/13/2020	5/28/2020	Y	N	10/14/2020	9/1/2020
Inspection Procedures for the Respirable Silica Standards CPL 02-02-080 (6/25/2020)	8/24/2020	7/16/2020	Y	Y	12/22/2020	8/3/2020
Site-Specific Targeting (SST) CPL 02-01-062 (12/14/2020)	2/12/2021	7/8/2021	N	N/A	6/12/2021	N/A
Consultation Policies and Procedures Manual CSP 02-00-004 (3/19/2021)	5/19/2021	5/19/2021	N	N/A	9/19/2021	N/A
Inspection Procedures for the COVID-19 Emergency Temporary Standard CPL DIR 2021-02 (CPL 02) (6/28/2021)	7/13/2021	9/24/2021	Y	N	7/28/2021	10/21/2021

FPC Directive/Subject	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
Compliance Directive for the Excavation Standard 29 CFR 1926, Subpart P CPL 02-00-165 (7/1/2021)	8/30/2021	8/30/2021	Y	Y	12/28/2021	10/1/2021
Revised National Emphasis Program-Coronavirus Disease2019 (COVID-19) CPL DIR 2021-03 (CPL 03) (7/7/2021)	7/22/2021	9/24/2021	Y	Y	8/7/2021	10/21/2021
<i>Adoption Encouraged</i>						
Voluntary Protection Programs Policies and Procedures Manual CSP 03-01-005 (1/30/2020)	3/30/2020	2/14/2020	N	N/A	N/A	N/A
Electronic Case File System Procedures for the Whistleblower Protection Program CPL 02-03-009 (6/18/2020)	8/18/2020	9/16/2020	Y	N	N/A	12/1/2020
National Emphasis Program – Coronavirus Disease 2019 (COVID-19) CPL DIR 2021-01 (CPL-03) (3/12/2021)	5/12/2021	5/21/2021	Y	N	N/A	7/20/2021
Communicating OSHA Fatality Inspection Procedures to a Victim's Family CPL 02-00-166 (7/7/2021)	9/7/2021	8/30/2021	N	N/A	N/A	N/A

5. VARIANCES

Variance requests were not received or processed during FY 2020 and FY 2021.

6. STATE AND LOCAL GOVERNMENT WORKER PROGRAM

One hundred percent (100%) of all inspections conducted by NY PESH occurred in the SLG workplaces during FY 2020 and FY 2021 (SAMM #6). NY PESH does not contain provisions for the issuance of monetary penalties for state and local government employers found not to be in-compliance with applicable standards on a first instance basis (except in cases when FTA notices are issued). If an employer incurs penalties for violations, the employer may have an informal conference with NY PESH or can contest

the penalties and be heard by the New York State Industrial Board of Appeals (IBA).

7. WHISTLEBLOWER PROGRAM

NY PESH received 58 discrimination cases in FY 2021 compared to 22 discrimination cases in FY 2020. One of these cases was dismissed as non-merit, one case was settled, and one case was determined to have merit. Fifty-three (53) cases were pending at the close of FY 2021. The cases are assigned to ten investigators as collateral duty with their safety and health cases. SMM #14 documented zero percent of whistleblower complaint investigations completed within 90 days, SMM #15 reported 33% of whistleblower complaints were meritorious, and SMM #16 noted the average number of calendar days to complete a whistleblower investigation was 263 days (NY SOAR, FY 2021).

NY PESH completed three investigations pertaining to allegations of workplace retaliation during FY 2021, compared to 18 in FY 2020, and 24 in FY 2019. During this evaluation period, Region II's Assistant Regional Administrator for the Whistleblower Protection Programs reviewed 13 case files. Of the 13 case files reviewed, 10 (77%) were administratively closed (no full field investigation), and three (23%) were docketed full field investigations. Of the three docketed files reviewed, one (33%) was dismissed, one (33%) was withdrawn, and one (33%) was settled.

Case files indicate complaints are not being adequately screened for threshold and prima facie allegations. This delays notification to respondents in cases that result in docketing and can negatively impact NY PESH's ability to obtain a remedy for a complainant when appropriate. This may also ultimately delay a complainant's right to appeal NY PESH's determination to the Industrial Board of Appeals in a timely manner. To assess the appropriateness of determinations, NY PESH must implement all sections of Chapter X, with an emphasis on screening new complaints, docketing complaints in a timely fashion, issuing accurate determinations, and adequately documenting case files.

NY PESH has operated under unprecedented circumstances since the New York State Governor declared a state of emergency in March of 2020. NY PESH's discrimination program initiated electronic case files to continue with and document their workplace retaliation investigations. This is a best practice. OSHA also suggests NY PESH use Electronic Case File (ECF) System Procedures for the Whistleblower Protection Program (CPL 02-03-009) as a guide when maintaining docketed and administratively closed ECFs.

Observation FY 2021-OB-06 (FY 2020-OB-03, FY 2019-OB-03): Worker Retaliation Case File Documentation and Organization

Like the previous on-site review (Observation FY 2019-OB-03), worker retaliation case files did not accurately reflect the case determination or document threshold requirements for docketing complaints had been met. Case files did not document that NY PESH obtained or reviewed third party settlements in accordance with Chapter X of the Field Operations Manual. PESH should consider implementing procedures to ensure confidential medical information and confidential business information obtained during an investigation is properly protected.

In one of three (33%) docketed investigations, the complaint was incorrectly docketed when it was time barred from investigation.

In two of the three (67%) docketed investigations, PESH noted that the complainants settled their complaints. In both cases, the complainants were issued withdrawal approval letters. Per Chapter X, the program manager and Counsel's Office are required to review the third-party agreements. In both cases, the determinations were incorrectly recorded in OITS as either settled by the agency or withdrawn.

In two of the 10 (20%) administratively closed complaints, it appears that the complaints were docketed (respondents notified of the retaliation allegation) and investigations conducted, but the determinations in OITS reflected the complaints were administratively closed without an investigation.

In two of the ten (20%) administratively closed complaints, the case file had insufficient information to evaluate the nature of the complaint, or the actions taken.

In four of the 10 (40%) administratively closed complaints, the case file did not contain a retaliation complaint, or the intake form required by Chapter X of the Field Operations Manual.

Federal Monitoring Plan FY 2021-OB-06:

During the next comprehensive FAME, a limited number of whistleblower case files will be selected and reviewed to further evaluate if this observation is isolated or represents a trend.

Finding FY 2021-09: Responding to Worker Retaliation Cases Timely

At the conclusion of the review period (FY 21) NY PESH had 48 pending whistleblower retaliation investigations with an average number of days pending of 453. The oldest case was filed on November 6, 2017. As of February 7, 2022, there were four pending cases from FY 2018, six pending cases from FY 2019, 14 pending cases from FY 2019, and 24 pending cases from FY 2021. Approximately five of the pending cases have been referred to the New York State Department of Labor's Counsel's Office as meritorious complaints or for additional guidance and/or analysis. NY PESH's discrimination program cannot be at least as effective as OSHA's if it is unable to complete complaint investigations or litigate meritorious complaints.

Recommendation FY 2021-09:

OSHA will monitor quarterly utilizing the SAMM Report.

8. COMPLAINT ABOUT STATE PROGRAM ADMINISTRATION (CASPA)

In FY 2021, the Region received four CASPAs from union representatives which were investigated by the Region and responded to by NY PESH timely. The allegations raised in the CASPAs were the following: failure to enforce workplace violence standards, failure to provide an investigative narrative, not providing sampling results to union representatives, not closing files timely, not permitting union participation in inspections,

and not verifying abatement for citations issued for missing load capacity ratings on racking systems.

Three out of four of these CASPAs were closed in FY 2021. Two of the three closed CASPAs were closed without findings or recommendations. The other CASPA was closed after a corrective action plan was approved for tracking complaint inspections.

The CASPA on failure to enforce workplace violence standards remains open. The New York State Plan in response to that CASPA is in the process of conducting a workplace violence inspection at multiple locations of the facilities that are represented by the union that filed the original CASPA.

In FY 2020, there were four CASPAs received for the NY State Plan. The Region investigated one of these CASPAs and the State Plan responded to the investigation timely. The other two CASPA complaints were not investigated because they alleged the same hazards as addressed in CASPA 2020-05-NY.

CASPA 2020-05-NY alleged the following:

- Failing to respond to complaints and/or reports of imminent danger in a timely manner.
- Citations to the employer were not issued with reasonable promptness.
- Failure to conduct on-site inspections for complaints.
- Not adequately identifying hazards in the workplace during inspections.
- Not conducting sampling where alleged health hazards exist.
- Pre-issuance modification of inspection citations without involving worker representative(s).
- Failing to investigate reports of retaliation against employees submitting complaints and/or hazard information to the employer.
- Not responding timely to COVID-19 fatalities occurring between March 1, 2020 and July 31, 2020.
- NY PESH staff when conducting inspections in areas where personal protective equipment (PPE) is mandatory are not using PPE.

The Region is continuing to work with NY PESH on this corrective action plan.

9. VOLUNTARY COMPLIANCE PROGRAM

NY PESH does not administer a Voluntary Compliance Program.

10. STATE AND LOCAL GOVERNMENT 23(g) ON-SITE CONSULTATION PROGRAM

In FY 2020, NY PESH conducted 99 consultation visits with 48 health, 48 safety, and one both discipline visit. PESH projected to conduct 225 visits. NY PESH completed 44% of their visit goal. There were 57 initial, 15 follow-ups, and 27 training and education visits (OSHA Consultation Data). During these visits, 91 serious hazards were documented which put 1,784 workers at risk of injury. The New York State Plan is averaging 2.84 serious hazards per initial visit. All serious hazards documented in 2021 were corrected and none were referred to enforcement (OSHA Consultation Data).

During this FAME review, 15 consultation case files were selected to be reviewed. There were eight initial visits, three follow-ups, and four training and education visits. Within the files reviewed, there were three files with documented health sampling.

The New York State Plan did not adopt the latest version of the federal Consultation Policies and Procedures Manual (CPPM) CSP 02-00-004 dated March 19, 2021. The previous version of this manual identified as CSP-02-003, dated November 19, 2015, was also not adopted. Since NY PESH has not adopted the federal CPPM, the program adopted its own manual. The manual that was effective during this rating period was identified as Directive A 05-1 dated September 20, 2005. Therefore, consultation files were evaluated based on the requirements of the 2005 NY PESH manual rather than the requirements of the CPPM dated March 19, 2021, or November 19, 2015.

Consultation Case File Documentation

Eight initial consultation visit files were reviewed. In five of the eight (62.5%) of the consultation files reviewed (Appendix B, the employer notification of correction), was either missing in the file or the dates of correction were not completed on the form. The NY PESH manual on page VI-10 discusses the requirement to obtain evidence of correction with corrective dates.

In four of eight (50%) of the consultation files reviewed, the time given to correct serious hazards was not reasonable. The NY PESH manual on page 36 discusses the requirement to work with the employer to reach consensus on reasonable timeframes for correction. For example, in one file, the employer was given almost four months from the issuance of the report to correct two citations under the noise standard-audiograms and training. Both hazards were corrected and documented in OIS in a month and half after the report issuance. In another file, the employer was given three months to clear a blocked electrical panel, replace a missing cover on an electrical panel and post the annual summary.

Additionally, in three of eight (37.5%) cases, all hazards were assigned the same dates of correction. Specifically, in one file, unmarked exit doors were given the same correction dates as guarding an open pit and conducting a lockout/tagout certification.

In one of eight (12.5%) of the case reviews, there was no documentation in the case file that the employer requested an extension of correction. The correction due date for this hazard was in October 2020 but final correction was not documented until April 2021.

Observation FY 2021-OB-07: *Consultation Case File Documentation*
Consultation case file documentation was lacking.

Federal Monitoring Plan FY 2021-OB-07:
OSHA will monitor quarterly utilizing the OIS Consultation reports.

Consultation Policy and Procedures Manual (CPPM)

Observation FY 2021-OB-08 (FY 2020-OB-04, FY 2019-OB-03 and FY 2018-OB-07):
Written policies and procedures for NY PESH's On-Site Consultation Program are not equivalent or at least as effective as OSHA's latest CPPM (CSP 02-00-003) dated November 19, 2015, and CSP 02-00-004 dated March 19, 2021.

Examples of where NY PESH's Consultation Policy and Procedures Manual (CPPM) Directive A 05-1, differs from OSHA's CPPM include, but are not limited to, the following:

There is no requirement to provide a copy of the list of identified hazards to the union. (OSHA's FY 2015 and FY 2021 CPPM requires that the union be provided with a copy of the list of identified hazards.) Additionally, there is no requirement to provide an updated list of hazards to the employer or union representative when the correction dates are extended.

In both NY PESH's CPPM and the report to the employer, there is no requirement to post the list of hazards identified at the worksite. (OSHA's FY 2015 and FY 2021 CPPM requires the list of hazards be posted at the worksite for at least three days or until the hazard is abated/corrected.)

There is no deadline established to issue the report to the employer after the closing conference. Both the 2015 and 2021 versions of the CPPM have a deadline for issuing the report to the employer. Additionally, the NY PESH manual does not address the deadline for conducting a second closing conference when air sampling results are pending.

NY PESH never adopted FORM 33; however, an evaluation of the worksite's Safety and Health Management System (SHMS) is required for full-service consultation visits per their CPPM on full-service visits only. NY PESH conducts a limited number of full-service visits. There were no full-service visits selected for review.

The NY PESH manual does not identify that three-years and the current year of injury and illness records should be reviewed, compared against the Bureau of Labor Statistics (BLS) for their industry and noted in the report to the employer.

The rooster and syllabus are not required to be in the file for training visits in the PESH CPPM. Both versions of the federal CPPM require this documentation.

Federal Monitoring Plan FY 2021-OB-08:

NY PESH has worked diligently over the last evaluation period to re-write their CPPM to be at least as effective (ALAE) as the federal CPPM. The latest version of its CPPM effective October 1, 2021, is a major improvement over previous versions, but is still not at least as effective as the federal CPPM in all areas. There are only a few issues remaining to be resolved before the manual can be submitted for final approval. The remaining issues include: union participation on all visits, posting and sharing the list of hazards, Form 33 utilization, and deadlines for submitting the report to the employer. Currently, the Solicitor's Office is reviewing and will provide guidance on next steps.

11. PRIVATE SECTOR 23(g) ON-SITE CONSULTATION PROGRAM

NY PESH does not operate a private sector 23(g) on-site consultation program.

Appendix A – New and Continued Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

FY 2021-#	Finding	Recommendation	FY 2020-# or FY 2020-OB-#
FY 2021-01	<p><i>Safety Lapse Time</i></p> <p>In FY 2021, the average safety lapse time (SAMM #11) for citations was calculated at 123.86 days which is above the FRL range of 41.94 days to 62.90 days for safety.</p>	NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources.	FY 2020-OB-01 FY 2019-OB-01 FY 2018-OB-08
FY 2021-02	<p><i>Health Lapse Time</i></p> <p>In FY 2021, the average health lapse time (SAMM11) for citations was calculated at 164.93 days which is above the FRL range of 52.88 days to 79.32 days.</p>	NY PESH needs to utilize the OIS report system and the SAMM Report to track lapse time and encourage CSHOs to issue simple inspections rapidly to average out the lapse time associated with more complex inspections. In addition, NY PESH needs to fill vacant CSHO positions to provide additional resources.	FY 2020-OB-02 FY 2019-OB-02 FY 2018-OB-09
FY 2021-03	<p><i>OIS Reports</i></p> <p>Open abatement OIS reports run on January 3, 2022 showed that in some of the RIDS there was overdue abatement from FY 2020 and FY 2021. For example, in RID 253610, there were 10 inspections with overdue abatement, 13 inspections in RID 253620, 21 inspections in RID 253650, and three inspections in RID 253690. These inspections were opened in either FY 2020 or FY 2021.</p>	NY PESH needs to develop a written procedure to address how OIS reports will be used to ensure timely abatement of all hazards.	New

Appendix A – New and Continued Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

FY 2021-04	<i>Staffing</i> PESH staffing level is allocated for 43 CSHOs, but currently there are only 30 onboard as of the end of FY 2021.	NY PESH should fill current staffing vacancies with qualified staff, specifically in the NYC office.	FY 2020-03
FY 2021-05	<i>Case File Documentation</i> In six of 10 (60%) case files, documentation was lacking for COVID-19 fatality inspections, and four of 10 (40%) were lacking evidence of interviews with non-managerial employees.	NY PESH should consider developing a quality control procedure to ensure that adequate documentation is obtained for fatality inspections. PESH needs to follow their FOM regarding required case file documentation.	New
FY 2021-06	<i>Responding to Fatalities</i> In 10 of 12 (83%) of the COVID-19 fatality inspections, the inspection was not initiated within one working day of the report. SAMM #10 reported that the State Plan responded 38.46% of the time within one workday of a fatality notification. The FRL is 100%.	NY PESH should respond to worker fatalities within one workday which is the SAMM reference agreed upon measure and federal OSHA requirement.	FY 2020-04
FY 2021-07	<i>Next-of-Kin Letters</i> In 10 of 12 (83%) of the COVID-19 fatality inspections, both the initial notification of inspection and results of the inspection next-of-kin letters were not sent to the families of the victims. The practice of sending next-of-kin letters ceased at the beginning of the COVID-19 pandemic for those fatalities related to COVID-19 only.	NY PESH needs to follow their FOM regarding issuing letters to the families of victims. NY PESH will report quarterly to OSHA on the percentage of next-of-kin letters sent to families.	New
FY 2021-08	<i>Federal Program Changes (FPCs)</i> NY PESH has not adopted the FY 2015	NY PESH should take action to adopt both federal program changes by obtaining approval	FY 2020-05

Appendix A – New and Continued Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

	<p>Federal Standard Number 1904 – Occupational Injury and Illness Recording and Reporting Requirement as it is a requirement for all State Plans.</p> <p>NY PESH anticipated adopting the 1904.39-reporting standard in January 2016, but approval from the NY Counsels Office has not been received to date. It is OSHA’s understanding that SLG employers are following the requirements and reporting worker fatalities within eight hours, as well as hospitalizations, amputations, and loss of an eye to PESH. However, a federal register notice has not been posted informing employers of these requirements.</p> <p>Additionally, NY PESH has not adopted the FY 2017 Final Rule on Walking-Working Surfaces and Personal Protective Equipment.</p>	<p>from the NY Counsels Office to allow publication in the NY Register no later than September 30, 2022.</p>	
FY 2021-09	<p><i>Responding to Worker Retaliation Cases Timely</i></p> <p>At the conclusion of FY 21, NY PESH had 48 pending whistleblower retaliation investigations with an average 453 days pending. The oldest case was filed on November 6, 2017. NY PESH’s discrimination program cannot be at least as effective as OSHA’s if it is unable to complete complaint investigations or litigate meritorious complaints.</p>	<p>OSHA will monitor quarterly utilizing the SAMM Report.</p>	New

Appendix A – New and Continued Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

	(Note: As of February 7, 2022, there were four pending cases from FY 2018, six pending cases from FY 2019, 14 pending cases from FY 2019 and 24 pending cases from FY 2021. Approximately five of the pending cases have been referred to the New York State Department of Labor’s Counsel’s Office as meritorious complaints or for additional guidance and/or analysis.)		
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Appendix B – Observations and Federal Monitoring Plan

New York PESH FY 2021 Comprehensive FAME Report

FY 2021-OB-#	Observation# FY 2020-OB-# or FY 2020-#	Observation	Federal Monitoring Plan	Current Status
FY 2021-OB-01		<i>Processing of UPAs</i> Eight of the 20 UPAs (40%) reviewed had either incomplete or incorrect entries in OIS. Six UPAs were missing entries in the response section showing the date that the employer provided evidence of a satisfactory response to the complaint allegations. One complaint was marked invalid in OIS but an investigation was conducted, and another was marked valid and an investigation was not conducted.	During the next comprehensive FAME review, closed complaint files will be selected for review to determine if this is a trend that requires further evaluation.	New
FY 2021-OB-02		<i>Timeliness of State Plan Response</i> In 2021, NY PESH failed to respond to complaint investigations within the FRL of one day. SAMM #2a reported a response time of 4.25 days for FY 2021. SAMM #2b reported a response time of 3.25 days for FY 2021 (federal formula).	The Region will review both SAMM #2a and #2b with PESH and monitor quarterly to identify trends.	New
FY 2021-OB-03		<i>Complaint Investigation Documentation</i> Complaint investigation documentation was lacking. It was noted that in six of 20 (30%) case files were missing a diary sheet.	During the next comprehensive FAME review, a limited number of complaint investigations will be reviewed to determine if this is a trend that requires further evaluation.	New
FY 2021-OB-04		<i>Complaint Letters</i>	During the next comprehensive FAME review, a limited number of complaint	New

Appendix B – Observations and Federal Monitoring Plan

New York PESH FY 2021 Comprehensive FAME Report

		Complaint inspection files lacked evidence that either the complainant was provided a complainant letter or that the complainant letter provided an explanation of the evaluation of each alleged hazard or a copy of the report to supplement the complaint letter.	inspections will be reviewed to determine if this is a trend that requires further evaluation.	
FY 2021-OB-05		<i>Percent of In-Compliance</i> The percent of in-compliance inspections for both safety and health exceeded the FRL.	The Region will monitor quarterly utilizing the SAMM Report.	New
FY 2021-OB-06	FY 2020-OB-03 FY 2019-OB-03	<i>Worker Retaliation Case File Documentation and Organization</i> Like the previous on-site review (Observation FY 2019-OB-03), worker retaliation case files did not accurately reflect the case determination or document threshold requirements for docketing complaints had been met. Case files did not document that PESH obtained or reviewed third party settlements in accordance with Chapter X of the Field Operations Manual. PESH should consider implementing procedures to ensure confidential medical information and confidential business information obtained during an investigation is properly protected. In one of three (33%) docketed investigations, the complaint was incorrectly docketed when it was time barred from investigation.	During the next comprehensive FAME review, a limited number of whistleblower case files will be selected and reviewed to further evaluate if this observation is isolated or represents a trend.	Continued

Appendix B – Observations and Federal Monitoring Plan

New York PESH FY 2021 Comprehensive FAME Report

		<p>In two of the three (67%) docketed investigations, PESH noted that the complainants settled their complaints. In both cases, the complainants were issued withdrawal approval letters. Per Chapter X the Program Manager and Counsel's Office are required to review the third-party agreements. In both cases the determinations were incorrectly recorded in OITS as either settled by the agency or withdrawn.</p> <p>In two of the 10 (20%) administratively closed complaints it appears that the complaints were docketed (respondents notified of the retaliation allegation) and investigations conducted, but the determinations in OITS reflected the complaints were administratively closed without an investigation.</p> <p>In two of the 10 (20%) administratively closed complaints, the case file had insufficient information to evaluate the nature of the complaint, or the actions taken.</p> <p>In four of the 10 (40%) administratively closed complaints, the case file did not contain a retaliation complaint, or the intake form required by Chapter X of the Field Operations Manual.</p>		
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Appendix B – Observations and Federal Monitoring Plan

New York PESH FY 2021 Comprehensive FAME Report

FY 2021-OB-07		<i>Consultation Case File Documentation</i> Consultation case file documentation was lacking.	OSHA will monitor quarterly utilizing the OIS Consultation reports.	New
FY 2021-OB-08	FY 2020-OB-04 FY 2019-OB-04 FY 2018-OB-07 FY 2017-OB-07	<i>Consultation Policies and Procedures Manual</i> Written policies and procedures for NY PESH's On-Site Consultation Program are not equivalent or at least as effective as OSHA's latest CPPM (CSP 02-00-003) dated November 19, 2015, and CSP 02-00-004 dated March 19, 2021.	PESH has work diligently over the last evaluation period to re-write their CPPM to be at least as effective as the federal CPPM. The latest version of their CPPM effective October 1, 2021, is a major improvement over previous versions but is still not at least as effective as the federal CPPM in all areas. There are only a few issues remaining to be resolved before the manual can be submitted for final approval. The issues that remain to be resolved include the following: union participation on all visits, posting and sharing the list of hazards, Form 33 utilization and deadlines for submitting the report to the employer.	Continued
	FY 2020-OB-01 FY 2019-OB-01 FY 2018-OB-08	<i>Safety Lapse Time</i> In FY 2020, the average safety lapse time for citations was calculated at 117.79 days which is above the FRL range of 40.46 to 60.70 days.	In FY 2021, OSHA will continue to monitor this issue utilizing quarterly SAMM reports.	Converted to a finding
	FY 2020-OB-02 FY 2019-OB-02 FY 2018-OB-09	<i>Health Lapse Time</i> In FY 2020, the average health lapse time for citations was calculated at 112.90 days which is above the FRL range of which is above the FRL range of 48.31 to 72.47 days.	In FY 2021, OSHA will continue to monitor this issue utilizing quarterly SAMM reports.	Converted to Finding

Appendix C - Status of FY 2020 Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

FY 2020-#	Finding	Recommendation	State Plan Corrective Action	Completion Date (if Applicable)	Current Status (and Date if Item is Not Completed)
FY 2020-01	<p><i>OSHA Information System (OIS) Data/Information</i></p> <p>In FY 2019, five enforcement health case files (where sampling was performed) were reviewed resulting in finding that data/information was incomplete and/or not entered OIS. For example:</p> <p>Pre-and post-calibration information was missing in all five (100%) case files reviewed.</p> <p>Sampling data collected was not entered into OIS in all five (100%) case files reviewed.</p>	PESH enforcement should ensure that when sampling is performed, complete data is entered in the OIS system on the appropriate form.	Sampling documentation was reinforced with the Industrial Hygiene (IH) staff. The Supervisory Associate IH will ensure that the updated PESH 915 Case Review Sheet is utilized to document IH calibration and OIS sampling data entry. Completed internal case file audit forms will be reviewed by the Program Manager 1 on an ongoing basis to ensure adherence of proper documentation and procedures.	September 30, 2021	Completed

Appendix C - Status of FY 2020 Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

FY 2020-02	<i>Notification Delay to Complainants and/or Worker Representatives</i> In FY 2019, 11 of the 21 (52%) complaint files reviewed did not contain documentation that the complainant and/or employee representative was informed of a delay in issuing the Notice of Violation (NOV).	PESH should ensure that the complainant and/or employee representative are informed of any delay in issuing the NOV as stated in their Field Operations Manual (FOM) Chapter IX A.9.c - "A delay of more than 30 days following the inspection would warrant such notification."	During district office staff meetings, the requirements as stated in Chapter IX A.9.c were reinforced to staff. The case file reviewers will utilize the updated PESH 915 Case Review Sheet to document timely notification to the complainant.	September 30, 2021	Completed
FY 2020-03	<i>Staffing</i> PESH staffing level is allocated for 43 CSHOs, but currently there are only 29 onboard.	PESH should fill current staffing vacancies with qualified staff, especially in the NYC office.	As of 7/21/21, waivers have been granted to fill three safety inspector positions in NYC (including one senior), one safety inspector Garden City, one Senior IH Albany District, and one Albany District administrative assistant. Additional waivers are pending to fill critical vacancies in other districts.		Continued
FY 2020-04	<i>Response Time to Work-Related Fatalities</i> One workday response time to fatalities in FY 2020	PESH should respond to worker fatalities within one workday which is the SAMM reference agreed	PESH has assigned for investigation all outstanding reports of public employee deaths related to COVID-19 and continues to examine incoming cases for work-relatedness as well		Continued

Appendix C - Status of FY 2020 Findings and Recommendations

New York PESH FY 2021 Comprehensive FAME Report

	was 28% substantially below the FRL of 100%	upon measure and federal OSHA requirement. PESH needs to properly address the worker fatality response backlog that accumulated during the performance.	as protective measures employers continue to implement as federal and state guidelines change with conditions. Outstanding cases are closely monitored by management. PESH responds to reported work-related deaths within one workday except where extenuating circumstances justify a delay.		
FY 2020-05	<i>Federal Program Changes (FPCs)</i> PESH has not adopted the FY 2015 Federal Standard Number 1904-Occupational Injury and Illness Recording and Reporting Requirements as it is a requirement for all State Plans.	PESH should take action to adopt the FY 2015 Federal Standard Number 1904-Occupational Injury and Illness Recording and Reporting Requirements by obtaining approval from the NY Counsel's Office to allow publication in the NY Register by September 30, 2021.	Updates to Part 801 of NYS Labor Law 27-a, submitted to NYSDOL Counsel, will make PESH at least as effective as 1904. PESH anticipates being up to date with adoption in 2022.		Continued

Appendix D - FY 2021 State Activity Mandated Measures (SAMM) Report

New York PESH C FY 2021 Comprehensive FAME Report

U.S. Department of Labor

Occupational Safety and Health Administration State Plan Activity Mandated Measures (SAMMs)

SAMM Number	SAMM Name	State Plan Data	FY 2021 Further Review Level	FY 2021 Notes
1a	Average number of workdays to initiate complaint inspections (state formula)	10.45	10	The further review level is negotiated by OSHA and the State Plan.
1b	Average number of workdays to initiate complaint inspections (federal formula)	9.53	N/A	This measure is for informational purposes only and is not a mandated measure.
2a	Average number of workdays to initiate complaint investigations (state formula)	4.25	1	The further review level is negotiated by OSHA and the State Plan.
2b	Average number of workdays to initiate complaint investigations (federal formula)	3.25	N/A	This measure is for informational purposes only and is not a mandated measure.
3	Percent of complaints and referrals responded to within one workday (imminent danger)	66.67%	100%	The further review level is fixed for all State Plans.
4	Number of denials where entry not obtained	0	0	The further review level is fixed for all State Plans.
5a	Average number of violations per inspection with violations by violation type (SWRU)	2.76	+/-20% of 1.78	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 1.42 to 2.14 for SWRU.
5b	Average number of violations per inspection with violations by violation type (OTS)	0.90	+/-20% of 0.91	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.73 to 1.09 for OTS.
6	Percent of total inspections in state and local government workplaces	100%	100%	Since this is a State and Local Government State Plan, all inspections are in state and local government workplaces.

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New York PESH C FY 2021 Comprehensive FAME Report

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Occupational Safety and Health Administration State Plan Activity Mandated Measures (SAMMs)

SAMM Number	SAMM Name	State Plan Data	FY 2021 Further Review Level	FY 2021 Notes
7a	Planned v. actual inspections (safety)	335	+/- 5% of 850	The further review level is based on a number negotiated by OSHA and the State Plan through the grant application. The range of acceptable data not requiring further review is from 807.50 to 892.50 for safety.
7b	Planned v. actual inspections (health)	232	+/- 5% of 500	The further review level is based on a number negotiated by OSHA and the State Plan through the grant application. The range of acceptable data not requiring further review is from 475 to 525 for health.
8	Average current serious penalty in private sector - total (1 to greater than 250 workers)	N/A	+/-25% of \$3,100.37	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.
	a. Average current serious penalty in private sector (1-25 workers)	N/A	+/- 25% of \$2,030.66	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.
	b. Average current serious penalty in private sector (26-100 workers)	N/A	+/-25% of \$3,632.26	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.
	c. Average current serious penalty in private	N/A	+/-25% of \$5,320.16	N/A-This is a State and Local Government State Plan and is

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New York PESH C FY 2021 Comprehensive FAME Report

U.S. Department of Labor

Occupational Safety and Health Administration State Plan Activity Mandated Measures (SAMMs)

SAMM Number	SAMM Name	State Plan Data	FY 2021 Further Review Level	FY 2021 Notes
	sector (101-250 workers)			not held to this SAMM. The further review level is based on a three-year national average.
	d. Average current serious penalty in private sector (Greater than 250 workers)	N/A	+/-25% of \$6,575.70	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.
9a	Percent in-compliance (safety)	47.10%	+20% of 31.65%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 25.32% to 37.98% for safety.
9b	Percent in-compliance (health)	72.84%	+ 20% of 40.64%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 32.51% to 48.77% for health.
10	Percent of work-related fatalities responded to in one workday	38.46%	100%	The further review level is fixed for all State Plans.
11a	Average lapse time (safety)	123.86	+/-20% of 52.42	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 41.94 to 62.90 for safety.
11b	Average lapse time (health)	164.93	+/-20% of 66.10	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 52.88 to

Appendix D - FY 2021 State Activity Mandated Measures (SAMM) Report

New York PESH C FY 2021 Comprehensive FAME Report

U.S. Department of Labor

Occupational Safety and Health Administration State Plan Activity Mandated Measures (SAMMs)

SAMM Number	SAMM Name	State Plan Data	FY 2021 Further Review Level	FY 2021 Notes
				79.32 for health.
12	Percent penalty retained	N/A	+/- 15% of 69.08%	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.
13	Percent of initial inspections with worker walk around representation or worker interview	94.71%	100%	The further review level is fixed for all State Plans.
14	Percent of 11(c) investigations completed within 90 days	0%	100%	The further review level is fixed for all State Plans.
15	Percent of 11(c) complaints that are meritorious	33%	+/-20% of 20%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 16% to 24%.
16	Average number of calendar days to complete an 11(c) investigation	263	90	The further review level is fixed for all State Plans.
17	Percent of enforcement presence	N/A	+/-25% of 0.99%	N/A-This is a State and Local Government State Plan and is not held to this SAMM. The further review level is based on a three-year national average.