

FY 2021 Comprehensive Federal Annual Monitoring Evaluation (FAME) Report

**TENNESSEE
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**



Evaluation Period: October 1, 2020 – September 30, 2021

**Initial Approval Date: June 28, 1973
Program Certification Date: May 3, 1978
Final Approval Date: July 22, 1985**

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I. Executive Summary

The purpose of this report is to assess the performance of Tennessee OSHA (TOSHA) for Fiscal Year (FY) 2021. The FY 2021 FAME report is a comprehensive FAME report. This report is focused on the State Plan's overall enforcement program and its compliance assistance activities. This report is also based on the results of quarterly onsite monitoring visits, the State Office Annual Report (SOAR) for FY 2021, the State Activity Mandated Measures (SAMM) Report, and the State Indicator Report (SIR) reports ending September 30, 2021. A review of the SAMM data for FY 2021 indicated the Division of Occupational Safety and Health within the Tennessee Department of Labor and Workforce Development generally met or exceeded federal activity results. TOSHA continued to meet all criteria for an effective State Plan. The SAMM measures are identified and discussed in detail throughout the FAME report.

The Tennessee Occupational Safety and Health Strategic Management Plan for FY 2019 to FY 2023 established three primary outcome goals: 1) Improve workplace safety and health for all employees as evidenced by eliminating hazards, reducing exposures, injuries, illnesses, and fatalities; 2) Increase employer and employee awareness of, commitment to, and involvement in occupational safety and health; and 3) Maximize effectiveness by striving for continuous improvement in the area of service delivery. TOSHA establishes the framework in an annual performance plan to accomplish the goals in its Strategic Management Plan. Fatalities rose in Tennessee from 38 in FY 2020 to 69 in FY 2021, which included 34 COVID-19 fatalities investigated by TOSHA. Construction fatalities increased slightly, and manufacturing fatalities increased significantly, as compared to the same period last year.

On June 21, 2021, OSHA issued an emergency temporary standard (ETS) to protect healthcare and healthcare support service workers from occupational exposure to COVID-19 in settings, where people with COVID-19 are reasonably expected to be present. TOSHA adopted OSHA's Emergency Temporary Standard for Healthcare, except for four parts of the standard that differed from the federal standard, including mitigation measures, physical barriers, employee notification, and severability, with an effective date of August 24, 2021. While the federal standard expired on December 21, 2021, Tennessee Emergency Rule 0800-01-12: Occupational Safety and Health standards Covid-19 Emergency Temporary Rule remained in effect until February 20, 2022. Tennessee Emergency Rule 0800-01-12 is discussed in detail further in the report.

The FY 2020 Follow-up FAME report did not include any findings; however, there were two observations. In FY 2021, four observations from FY 2020 were closed. One observation was converted to a finding in the FY 2021 report. There are two new findings and three new observations in FY 2021. In general, the findings address inadequately documented employer knowledge for violations in casefiles, and the State Plan's failure to adopt OSHA's FY 2016 maximum and minimum penalty increases and subsequent annual increases. Appendix A describes the new and continued findings and recommendations. Appendix B describes the observations and the related federal monitoring plans. Appendix C describes the status of previous findings with associated completed corrective actions.

Tennessee's Total Recordable Case (TRC) rate for Calendar Year (CY) 2020 remained the same as (CY) 2019. The private sector TRC rate was 2.7 and the Days Away, Restricted, or Transferred (DART) rate was 1.7. These rates are equal to the respective national average. When the state and local government sector numbers are included, the overall TRC rate was 2.8 and the DART rate was 1.7. These rates are 4% lower and 6% lower, respectively, than the national rates.

II. State Plan Background

A. Background

The Tennessee Occupational Safety and Health State Plan received final approval under Section 18(e) of the OSH Act on July 22, 1985. The official designated as responsible for administering the program under the Tennessee Occupational Safety and Health Act of 1972 is the Commissioner of Labor and Workforce Development. The Tennessee Commissioner of Labor and Workforce Development is an appointed executive position in the Tennessee State government appointed by the Governor to oversee the Department of Labor and Workforce Development, whose mission is to promote workforce development and improve workplace safety and health throughout the State. The Commissioner of Labor, currently and during the period covered by this evaluation, is Jeff McCord. Within the Tennessee Department of Labor and Workforce Development, the Tennessee Occupational Safety and Health Administration has responsibility for carrying out the requirements of the State Plan. Wendylee Fisher serves as the Assistant Commissioner and the TOSHA Administrator.

TOSHA has the mission of ensuring that employers furnish a safe and healthful place of employment, which is free of recognized hazards. TOSHA is comprised of three sections: the Compliance Section, the Consultative Section, and the Training and Education Section. The central office is in Nashville, with seven additional field offices strategically located throughout the State in Knoxville, Memphis, Chattanooga, Gray, and Jackson, as well as two in Nashville. Currently, there are 98 positions funded under the 23(g) grant. These positions include 39 safety compliance officers and 24 health compliance officers assigned to field offices throughout the State. The worker population in Tennessee consists of approximately 2,976,889 workers and nearly 161,696 employers.

On October 1, 2020, Tennessee began its fifth year of the five-year planning cycle, as documented in the Strategic Plan. The five-year Strategic Plan includes three primary outcome goals: 1) Improve workplace safety and health for all employees as evidenced by eliminating hazards, reducing exposures, injuries, illnesses, and fatalities; 2) Increase employer and employee awareness of, commitment to, and involvement in occupational safety and health; and 3) Maximize effectiveness by striving for continuous improvement in the area of service delivery.

During FY 2021, TOSHA faced the challenge of meeting their goals despite staffing concerns. 36% of the State Plan's compliance officers have less than one year of experience, which means that they are not performing independent inspections. 77% have less than four years of experience. In addition, as of November 16, 2021, there were five vacant compliance officer positions. Effective Fiscal Year 2021, TOSHA increased the starting salary from \$3,780 per month to \$3,896 per month to attract qualified candidates. This increase included an adjustment in salary grade for all industrial hygiene and occupational safety positions to enable greater salary progression over time.

TOSHA continues its outreach to employers and employees by providing a variety of training and outreach services. In FY 2021, TOSHA continued to offer virtual seminar options, in addition to in-person, due to COVID-19 restrictions. TOSHA partnered with co-sponsors to offer these seminars, including but not limited to, the Tennessee Chamber of Commerce and Industry, Tennessee Association of Utility Districts, Associated Builders and Contractors, State Community Colleges, and other State, County, & City Agencies. The safety & health seminar topics include new regulations, basic requirements, and current topics of interest including Basic Safety & Health, Maintenance-Related Standards, Recordkeeping, Forklift Standards, Walking Working Surfaces, Health Hazards, and OSHA 30-Hour General Industry Courses, and the Tennessee Safety and Health Conference.

The data below was released by the Bureau of Labor Statistics in November 2019. The State's total recordable case (TRC) rate for Calendar Year (CY) 2020 remained at low levels. The private sector TRC rate was 2.7 and the Days Away Restricted Transfer (DART) rate was 1.7, which are equal to the national rates.

CY 2020	Tennessee		National Average		Comparison
<i>TRC Rate</i>	2.7	2.8*	2.7	2.9*	<i>4% lower than the Federal Data*</i>
<i>DART Rate</i>	1.7	1.7*	1.7	1.8*	<i>6% lower than the Federal Data*</i>

Worker protection from retaliation related to occupational safety and health is administered by TOSHA through the central office in Nashville. There is one compliance manager, and sufficiently trained safety and health staff may be tasked to conduct retaliation investigations as a collateral duty. The State Attorney General prosecutes retaliation cases found to be meritorious.

The Tennessee Department of Labor and Workforce Development provides on-site consultative support to employers in the state and local government sector. During this period six public sector visits were conducted, four safety visits and two health visits. All visits, except for one the health visit, was a full-service visit. Approximately 5.5 hazards were identified during each visit and TOSHA ensured that all the hazards were corrected in a timely manner. The State Plan equivalent to the OSHA Voluntary Protection Program (VPP) is the Tennessee's Volunteer Star Program, and it organizationally falls within Education, Training, and Technical Assistance.

The table below shows TOSHA's funding levels from FY 2017 through FY 2021.

FY 2017-2021 Funding History					
Fiscal Year	Federal Award (\$)	State Plan Match (\$)	100% State Funds (\$)	Total Funding (\$)	% State Plan Contribution
2021	4,188,600	4,188,600	887,213	9,264,413	55%
2020	3,926,200	3,926,200	831,629	8,684,029	55%
2019	3,850,300	3,850,300	606,546	8,307,146	53.46
2018	3,850,300	3,850,300	569,391	8,269,991	53.44
2017	3,850,300	3,850,300	483,016	8,183,616	52.95

[Reference: State Plan Grant]

B. New Issues

During FY 2021, TOSHA's overall performance was significantly impacted by the global COVID-19 pandemic. Throughout the year TOSHA staff members experienced exposure to the virus, which required them to quarantine. Additionally, during the surge of COVID-19 cases in November and December TOSHA, was forced to suspend some on-site activity. However, TOSHA continued to conduct accident investigation and inspections alleging exposure to highly hazardous conditions. As a result, TOSHA did not achieve several of its established annual performance goals. Additional details regarding the impact of COVID-19 are provided in TOSHA's SOAR (State Office Annual Report).

On June 21, 2021, OSHA issued an emergency temporary standard (ETS) to protect healthcare and healthcare support service workers from occupational exposure to COVID-19 in settings where people with COVID-19 are reasonably expected to be present. Tennessee adopted the federal OSHA's Emergency Temporary Standard for Healthcare except for four parts of the standard that differed from the federal standard with an effective date of August 24, 2021. OSHA's review identified two areas of

Tennessee's rule that do not appear to be at least as effective as OSHA's COVID-19 emergency temporary standard (ETS) applicable to the healthcare industry (Healthcare ETS) (29 CFR 1910.502).

The first area TOSHA was not at least as effective as OSHA regarded employer notification to employees of COVID-19 exposure in the workplace. OSHA requires the employer to notify each employee who was not wearing a respirator and any other required PPE and has been in close contact with a person in the workplace who is COVID-19 positive. In addition, OSHA requires the employer to notify all other employees who were not wearing a respirator and any other required Personal Protective Equipment (PPE) and worked in a well-defined portion of a workplace (e.g., a particular floor) in which that person was present during the potential transmission period. 29 CFR 1910.502(l)(3)(i)(B). TOSHA only requires the employer to notify "all other close contact employees" who were not wearing a respirator and any other required PPE and worked in a well-defined portion of a workplace (e.g., a particular floor) in which that person was present during the potential transmission period. 0800-01-12-.12(3)(a)(2). Thus, TOSHA's rule is under-inclusive, because it limits the notification requirement to close contact employees, whereas the federal standard does not.

The second area TOSHA was not at least as effective as OSHA also regarded employer notification to employees of COVID-19 exposure in the workplace. OSHA requires the employer to notify other employers whose employees were not wearing respirators and any other required PPE and have been in close contact with that person or worked in a well-defined portion of a workplace (e.g., a particular floor) in which that person was present during the potential transmission period. TOSHA requires the employer to notify other employers whose employees were not wearing respirators and any other required PPE and have been in close contact with that person during the potential transmission period. 0800-01-12-.12(3)(a)(3). Again, TOSHA's rule is under-inclusive, because it limits the notification requirement to the employers of "close contact" employees, whereas the federal standard does not. The State Plan responded that TOSHA plans to amend its Emergency Temporary Rule (ETR) for healthcare employees in those two specific provisions that federal OSHA identified as not being at least as effective as OSHA's ETS for healthcare employees. Tennessee worked to amend their standard; however, the standard expired prior to the finalization of the amendments. While the federal standard expired on December 21, 2021, Tennessee Emergency Rule 0800-01-12: Occupational Safety and Health standards Covid-19 Emergency Temporary Rule remained in effect until February 20, 2022. The State Plan updated their TOSHA website to include information about the new rule; their consultation and public sector managers conducted outreach out to their customers to provide information on the new rule; they worked with their communications department to ensure information on the new rule is sent out via all the social media outlets, (FB, Twitter, etc.); and TOSHA's training manager sent out information on the new rule via their "list serv" outlet.

Despite the pandemic, TOSHA was able to continue its relationship with Meharry Medical College (MMC). Meharry Medical College is one of only four Historically Black College and University (HBCU) medical programs in the county. It is also the only occupational medicine residency program in Tennessee, and it has played an important role in training qualified professional occupational health practitioners to serve the State, as well as the nation. In FY 2021, TOSHA trained four occupational medicine residents, providing opportunities for practicum experience.

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 six-person OSHA team, which included two whistleblower investigators, was assembled to conduct a full on-site case file review. Prior to the onsite visit, Tennessee OSHA made all requested files available for review using a cloud service, during period from December 6, 2021, through December 17, 2021. The files were again made available during the onsite evaluation. The case file review was conducted at the Tennessee State Plan office during the timeframe of January 24-28, 2022. A total of 114 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 October 1, 2020, through September 30, 2021. The selected population included:

- Twenty (20) fatality case files
- Ten Health Construction files
- Ten Safety Construction files
- Ten Health General Industry files
- Ten Safety General Industry files
- Fifteen COVID-19 files
- Five Public Sector files
- Ten Unprogrammed Activity complaint case files
- Ten Unprogrammed Activity SIR case files
- Fourteen (14) 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 Report (Appendix D)
- State Information Report
- Mandated Activities Report for Consultation
- State OSHA Annual Report (Appendix E)
- State Plan Annual Performance Plan
- State Plan Grant Application
- Quarterly monitoring meetings between OSHA and the State Plan
- Full case file review

Each State Activity Mandated Measures (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

The State Plan continues to operate a training and education program, which is similar to the federal training and education directive 01-00-018, “Training Program for OSHA Compliance Personnel,” with minimal differences. These differences include the fact that the State Plan does not offer a construction specialist career path, and that TOSHA utilizes its own form to document the completion of on-the-job training (OJT).

Newly hired TOSHA compliance officers are immediately registered in Blackboard for participation in the initial training courses conducted at the OSHA Training Institute (OTI). Additional courses are scheduled as dictated in the instruction. A new compliance officer's basic training is accomplished by the successful completion of three initial OTI training courses. In subsequent years, compliance safety and health officers (CSHOs) will attend another five courses at OTI, in accordance with that CSHO's designated training track. In the first year, concurrent with the three initial OTI training courses, new compliance officers participate in OJT. At the end of the first year, the CSHO is administered an in-house test to evaluate their knowledge of the standards and TOSHA procedures. TOSHA maintains a training database, which enables the State Plan to effectively track the training of all its personnel throughout their career. The database also allows the State Plan to compile several training-related reports. TOSHA has also collaborated with local employers to established career development opportunities for its compliance and consultation personnel. For example, September 23 -24, 2021, TOSHA worked with United Rental to provide the trenching and excavation competent personnel-training course for 15 staff members.

TOSHA continues to provide personnel interested in obtaining their professional certifications access to training materials. The State Plan does not finance the worker's enrollment in preparation courses or the actual certification examination. However, if a worker successfully completes the certification examination, he or she is provided with a 5% increase in salary, which is equivalent to one-step on the State's pay scale.

In FY 2021, TOSHA conducted 160 formal safety and health training session and 4,490 employees and employers. In comparison, 284 training sessions on safety and health topics were conducted, and 8,590 attendees were training in FY 2019. The pandemic forced TOSHA to reduce its offering of outreach training; however, TOSHA continued to provide employers with effective safety and health training.

b) OSHA Information System (OIS)

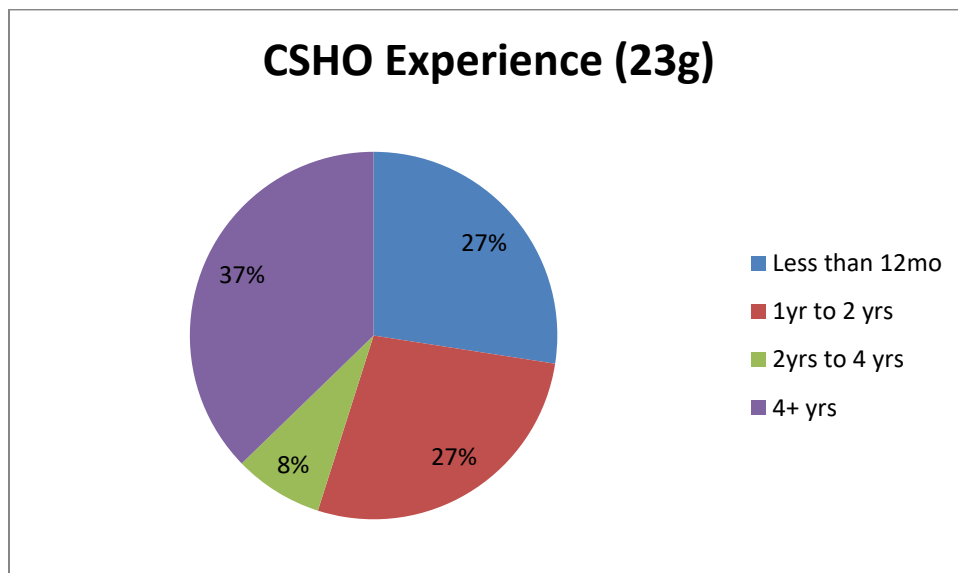
TOSHA remains the only State Plan in Region IV that uses OIS directly, rather than through an interface system. The State Plan has consistently utilized OIS reports and other data to manage the program, and to track OSH program activity. This includes both mandated activity, activity goals, and outcome goals, as per the Strategic Plan. The reports are utilized by all levels of management including the Administrator, Assistant Administrator, Program Managers and Supervisors. The reports are used to track program activity, as well as to assess activity by individual CSHOs. The reports are run at an appropriate frequency, as conditions dictate. By tracking activity, potential outliers are detected, before they become a serious problem.

c) State Internal Evaluation Program Report

TOSHA has developed and implemented ADM-TN 03-00-011, Audit Program for the Central and Area Offices, to provide guidance regarding the internal evaluation of its program. The procedure evaluates two Area Offices each fiscal year on an ongoing basis. TOSHA's standards and procedures manager serves as the lead auditor. The most recent audit, of the Memphis office, was conducted in FY 2019 on December 4, 2018. COVID-19 restrictions, as well as staffing losses in senior management impacted the State Plan's ability to complete the audits. TOSHA experienced several retirements and staff reassignments at the senior level, resulting in temporarily low staffing levels in senior management that were not remedied until the latter part of FY 2021. During this period, efforts were made to schedule and conduct audits, but other higher priority issues did not leave sufficient manpower resources available for audits. An audit of the Gray Office is scheduled for April 2022. This document meets the criteria outlined in the State Plan Policies and Procedures Manual.

d) Staffing

During this period, TOSHA's staffing levels met or exceeded the established benchmarks for the program, based on the benchmark criteria. The State Plan remains committed to staffing its program at the appropriate level, within the current budgetary constraints. At the time of this report, TOSHA's compliance staffing included 30 safety compliance officers and 20 health compliance officers. There are currently three vacant safety compliance positions and three vacant health compliance positions. There are also one vacant safety and one vacant health supervisor positions. During this period, the State Plan has worked aggressively to fill all vacant positions. Currently, 54% of the compliance officers have less than two years of experience and 77% have less than four years of experience.



2. ENFORCEMENT

a) Complaints

TOSHA's procedures for handling complaints and referrals alleging unsafe or unhealthful working conditions are very similar to those of OSHA. These procedures are covered in TOSHA'S Field Operations Manual (FOM), Chapter 9: Complaint and Referral Processing. Inspection data indicates that TOSHA handled 1,364 complaints in FY 2021 of which 317 (23%) were complaint inspections and 1,225 (77%) were complaint investigations. [Reference: FY 2021 EOY SAMM] According to the SAMM Report, TOSHA responds timely to complaints. The average number of days to initiate a complaint inspection in FY 2021 was 3.58, well below the negotiated standard of 15 days. [SAMM 1a] The average number of days to initiate a complaint investigation was 1.34 days, which is also well below the negotiated standard of five days. OSHA selected ten complaint investigations, and 31 complaint inspections for review, during this evaluation of the TOSHA program. Approximately 34.28% of the total number of complaint inspections were found to be in-compliance.

TOSHA has a centralized complaint and referral intake procedure, with complaints transferred to the field supervisor having geographic jurisdiction. The State Plan's emphasis has been on customer service, and assuring that each complaint is given attention, consistent with the severity of the alleged hazards. TOSHA considers electronic complaints obtained through the federal complaint system as a formal complaint. After the receipt of an electronic complaint, a follow-up call to the complainant is usually made to clarify the complaint items and perfect the complaint. The source of the complaint, with employer reports of serious injuries and those from a current employee having priority, and the severity of the alleged hazards, are primary considerations for supervisors to decide, whether to handle the complaint by letter, or by inspection.

In FY 2021, 436 referrals were processed by the State Plan, including 387 reports of amputations, hospitalizations, and loss of an eye. [Reference OIS UPA One Liner Detail Report] Referrals are alleged hazards or violations of the Act, which are typically received from other federal, state, or local agencies, the media, a compliance officer, or an employer reporting an injury or illness. TOSHA follows similar procedures as OSHA for employer reported referrals.

b) Fatalities

Workplace fatalities increased significantly in FY 2021. A total of 82 fatalities were reported to TOSHA, up from 42 the previous year. Sixty-nine of the reported fatalities were work-related. SAMM 10 indicates that the State Plan responded to 93.65% of the reported events within one workday. The four fatalities that were not responded to timely involved deaths related to COVID-19 and the State Plan responded once they had sufficient information to respond.

Next-of-Kin (NOK) were contacted on all investigations. TOSHA has a procedure for communication with family members of deceased workers. Letters are sent to the NOK at the beginning of the investigation and when the investigation has concluded. Additionally, the NOK is notified of informal conferences and hearings, as well as any changes in the citations, as a result of a settlement or hearing. Copies of the NOK letters are maintained in the file. Managers and supervisors indicated that they check to assure that the letters have been sent when they review the file.

All work-related fatalities were investigated, and the causes of the accidents were identified. There were no reported fatalities that were handled inappropriately; however, eight of the 20 fatality files that were reviewed could have been investigated more thoroughly. Employee

interviews, in most instances were not reduced to writing, and there was no evidence that appropriate foundational and follow-up questions were asked. In some cases, management officials were not being interviewed or not adequately interviewed, and statements were developed to support the violations. The State Plan attributes this to the inexperience and ongoing

development of the CSHOs. The Program Managers and Administrators review all reported fatalities to assure the appropriate use of “no inspection” or “no jurisdiction,” when a fatality falls outside TOSHA jurisdiction.

According to fatality figures for FY 2021, the State experienced nine fatalities in the Service Industry, which is 11 less than the same period last year. The State experienced fourteen fatalities in the Manufacturing Industry, and 12 construction fatalities, which are ten and two more, respectively, compared to the same period the previous year. The State Plan investigated 34 fatalities from reports of death related to COVID-19. TOSHA uses all available resources, including the Bureau of Labor Statistics rates to assess trending and appropriate targeting of resources, as well as the State’s statistics and trends to focus their targeting and resources to prevent workplace fatalities. TOSHA has maintained strategic goals related to reducing the number of exposures to carbon monoxide and falls in the workplace.

The tables below detail the industries, where fatalities occurred in FY 2020 and FY 2021.

By Industry	FY 2020	FY 2021
Construction	10	12
Manufacturing	4	14
Transportation & Public Utilities	2	4
Retail Trade	0	0
Services	20	9
Agriculture, Forestry, Fishing	1	0
Government	1	8
Finance: Insurance & Real Est.	0	0
Other	0	22
Total	38	69

c) Targeting and Programmed Inspection

According to inspection statistics reviewed, TOSHA conducted 1,388 inspections in FY 2021, of which 754 were programmed. The Public Sector accounted for 593 (79%) of the 754 programmed inspections. [Reference OIS Inspection Summary Report] Sixteen percent were conducted in the construction industry. [Reference OIS Inspection Summary Report] Construction work is also considered high hazard, and inspection sites are targeted using several procedures, based on specified criteria. TOSHA conducts several programmed inspections in the construction sector, particularly under their Special Emphasis Program (SEP) for fall protection. These are associated with their strategic goal to reduce construction fatalities. According to the SIR, 93.33% of private sector programmed safety inspections and 100% of private sector programmed health inspections had violations and of those 77.27% of safety inspections and 84.21% of health inspections currently had a serious, repeat, and/or willful

violation (SRW) [SIR Measure 2c]. This is significantly higher than the average of all state and the average of all federal RIDs.

TOSHA has a variety of Special Emphasis Programs (SEPs) for construction and general industry, some are associated with their strategic goals, and others support National Emphasis Programs (NEPs). TOSHA's strategy for reducing injury, illness, and fatality rates is based on addressing specific areas that have the greatest impact on the overall rates. These goals incorporate targeted inspections employing an inspection scheduling system, the DODGE inspection scheduling system, and local and national emphasis programs. TOSHA's General Schedule Program uses data provided by OSHA's National Office to a general schedule inspection list that is made up of the top 200 high-hazard NAICS codes. These NAICS codes are run through a database to generate the list of sites for inspection. TOSHA continues to follow scheduling directives when conducting inspections on construction sites in an attempt to prevent injuries and illnesses. Trenching and excavation operations have continued to be targeted under the National Emphasis Program (NEP). Fall hazards continued to be targeted under the Special Emphasis Program (SEP) for fall protection. Workplaces with high noise were targeted to identify the efficacy of all elements of the hearing conservation program. Carbon monoxide exposures were evaluated on all compliance inspections. Amputations were targeted through the NEP for amputations. The State Plan maintained the following Local Emphasis Programs (LEPs): Carbon monoxide; Fall Protection; Noise and Targeting Initiative for Dental Offices (Blood Borne Pathogens).

TOSHA also participates in the following federal NEP's: Trenching and Excavation; Amputations; Hexavalent Chromium; PSM Covered Facilities; Primary Metal Industries; Combustible Dust; Lead, Silica, and COVID-19.

d) Citations and Penalties

In FY 2021, the 1,388 inspections conducted resulted in an average of 2.85 SRWU violations per inspection and 0.67 other-than-serious violations (OTS) per inspection, this includes Private and Public Sector. The 742 Private Sector inspections resulted in an average of 1.6 SRWU violations per inspection and .98 other-than-serious violations per inspection. TOSHA exceeds the three-year national average, and is above range of the FRL for SWRU, which is 1.42 to 2.14 (SAMM 5). The FRL for OTS violations is 0.73 to 1.09; however, the State Plan is citing significantly higher number of violations as serious in the Public Sector, which is reflected in the overall data. This is discussed further in the Public Sector section of the report. The average SWRU and OTS violations per inspection for the Public Sector is within the FRL; therefore, this is not an issue that would require further review. Serious violations are categorized as high, moderate, or low severity serious, for penalty calculation purposes.

Additionally, 79 repeat violations were issued; and two willful violations were issued. The two willful violations were reclassified in the informal conference. As with OSHA, TOSHA has discretion to reclassify violations during an informal conference. The State Plan provided that the violations were reclassified in the interest of correcting a hazard quickly to protect employees. Casefile reviews identified seven cases with possible evidence of intentional disregard or plain indifference and a heightened awareness however willful violations were not pursued. Also, TOSHA has a higher enforcement presence in the workplace at 1.21 compared to the FRL at $\pm 25\%$ of .99 or 0.74% to 1.24%. TOSHA's enforcement presence measure is within the FRL measure range. (SAMM 17).

Actual inspections (SAMM 7) increased in FY 2021 compared to FY 2020. TOSHA conducted 1,056 safety and 303 health inspections, which was 91.2% of the planned inspection goal of 1,490 inspections. The State Plan fell short of the safety goal by 109 and health goal by 22 inspections, respectively. The impact of the COVID-19 pandemic, the turnover rate, and the departure of experienced compliance safety and health officers continue to contribute to the lower number of safety and health inspections.

TOSHA also maintained a significantly lower average lapse time from opening conference to citation issuance date than the FRL (SAMM 11) as referenced below:

Average Lapse Time	TOSHA	FRL
Safety	23.86 days	41.94 – 62.90
Health	41.11 days	52.88 – 79.32

Case files reviewed included necessary documentation to support the violations. The case files that were reviewed were sufficiently documented overall, to support the violations with minor exceptions. The inspection files had very detailed narratives explaining the inspection process, the employer's business/processes, findings, and any other issues. As with previous FAME evaluations, knowledge was lacking in some of the case files reviewed. Compliance officers are documenting constructive knowledge (with the exercise of reasonable diligence, the employer should have known) without sufficient evidence to show how the employer should have known, rather than actual knowledge or providing an adequate explanation for the constructive knowledge in the Violation Worksheet. The Tennessee Field Operations Manual (FOM) Chapter 4 – II. Serious Violations - C. Four Steps to be Documented – 4. Knowledge of Hazardous Condition - a. states, "CSHOs shall record any/all evidence that establishes employer knowledge of the condition or practice. CSHOs shall record any evidence that substantiates that the employer could have known of the hazardous condition.

It continues to be a practice not to include inspection field notes, including interview notes, in the inspection files. Notes used as the basis to write a report are classified as "working papers" under the Tennessee Public Records act, specifically n T.C.A. § 10-7-301(14). Working papers are required to be destroyed under the State's record disposition authorization for working papers. This applies to every state agency, not just TOSHA. They cannot remain in the file and must be destroyed. Furthermore, the field notes are not retained at the instruction of the State Attorney when the compliance officer completes the Violation Worksheet Form. It is the State's contention that the information contained in the field notes is transferred to the Violation Worksheet Form, and the notes are no longer necessary at that point. This is contrary to the Tennessee FOM, Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records. A. Generally. Which provides 1. Inspections records are any record made by a CSHO that concern relate to, or are part of, any inspection, or are a part of the performance of any official duty. And 2. All official forms and notes constituting the basic documentation of a case must be part of the case file. Original field notes, if retained by the CSHO, are part of the inspection record and shall be maintained in the file. The State attorney's office that litigates TOSHA's cases has provided this and has never been challenged in litigation. In most of the casefiles reviewed, the information recorded in the worksheets that could be associated with interview(s) was very minimal and supports that the CSHO is asking very few questions in interviews, foundational and follow-up questions were hardly ever asked, and potential

evidence from interviews rarely supported required prima facie evidence and affirmative defenses including knowledge, exposure, and employee misconduct.

Except for the fatality files and a few others, the case files reviewed did not contain written witness or management statements. Interviews and photographs were referenced in the file, but there was no documentation, including field notes or other documentation containing interview notes. In some cases, the only evidence that employees were interviewed was through the documentation stating they were interviewed, and/or their names and addresses being in the case file. According to the State Plan's FOM - Chapter three Inspections Procedures – VII. Walk-around Inspection – I. Interviews – 5. Conducting Employee Interviews – b. Interview Statements states, “Interview statements of employees or other persons shall be obtained whenever CSHOs determine that such statements would be useful in documenting potential violations.” Additionally, the State Plan's FOM – Chapter 5 - Case File Preparation and Documentation – VII. Interview Statements – A. During Management interviews, CSHOs are encouraged to take verbatim, contemporaneous notes whenever possible, as these tend to be more credible than later general recollections. As stated previously casefile reviews identified seven cases where there was evidence of willful disregard and plain indifference, including heightened awareness which, if pursued, may have resulted in the development of willful violations. The quality of interviews and lack of statements interview notes and statements was determined to be a factor with the documentation of sufficient actual and constructive knowledge as well as the development of potential willful violations. The State Plan should continue to reinforce training regarding knowledge, interviewing, and when to include written statements in their next staff professional development conference (PDC) in the spring. Additionally, supervisors were instructed to review all statements with CSHOs early in the inspection to ensure improved quality in statements.

The total in-compliance rate (SAMM 9) for all safety inspections in FY 2021 was 12.55% and 30.65% for health inspections. The percentage for safety and health are well below the FRLs.

TOSHA's average current penalty per serious violation in the private sector (SAMM 8: 1- 250+ workers) was \$2,084.67 in FY 2021. The further review level (FRL) is $\pm 25\%$ of the three-year national average, \$3,100.37. TOSHA's penalty per serious violation is 10% lower than the lowest acceptable FRL measure of \$2325.28.

Employer Size	TN Avg. Current Penalty Per Serious Violation	Fed Avg. Current Penalty Per Serious Violation	Difference
1-25 Employees	\$1,660.00	\$2,823.99	41.2%
26-100 Employees	\$2,023.56	\$5,253.35	61.5%
101-250 Employees	\$2,158.60	\$7,189.99	70%
Greater than 250 Employees	\$3,021.56	\$8,794.98	65.7%
Total	\$2,084.67	\$4,161.79	49.9%

Reference: SAMM 8

TOSHA's penalty calculation procedures differ from OSHAs in several aspects. Both OSHA and TOSHA consider severity first, then probability for determining the gravity- based penalty. To promote consistency in determining probability and severity, the State Plan implemented procedures that include a probability and severity quotient (formula). Probability is determined

by averaging the number of workers exposed (1- 10), the frequency of exposure (1-10), the duration (1-10, depending on how long), and stress and other environmental factors (1-10). All factors are defined to determine the appropriate value. Severity is determined by the severity of the potential injury. These two factors are averaged together to determine the probability/severity quotient. The penalty associated with this value is applied to the violation, in accordance with the table provided in the directive. The TOSH Act establishes a penalty maximum of \$7,000 per violation, excluding those classified as willful or repeat.

The adjustment factors that reduce the gravity-based penalty also differ from OSHA as follows:

Penalty Reductions	TOSHA	OSHA	
Size (number of workers)	< 25 = 60% 26-100 = 40 % 101-250 = 20% >250 = 0%	< 25 = 60% 26-100 = 40% 101-250 = 20% >250 = 0%	
Good Faith	10%, 20%, or 30%	10%, 15%, or 25%	
History	10% = no S, W, R violations in past five years	10% = no S, W, R violations in past five years	

Finding FY 2021-01: In 17 of 43 (39.5%) files reviewed that had violations, employer knowledge was not adequately documented.

Recommendation: TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles as required by the Tennessee FOM.

FY 2021-OB-01: Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form and the notes are destroyed in accordance with the Tennessee Public Records Act, specifically n T.C.A. § 10-7-301(14) which is contrary to Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records.

Federal Monitoring Plan: The OSHA Area Office will closely monitor to ensure TOSHA implements strategies to ensure field notes, including interview notes, are included in all inspection casefiles as required by the Tennessee FOM.

FY 2021-OB-02: TOSHA issued only two willful violations which were reclassified as serious, following the informal conference. Casefile reviews identified seven cases with evidence of intentional disregard or plain indifference and a heightened awareness; however, willful violations were not pursued.

Federal Monitoring Plan: The OSHA Area Office will closely monitor State data and review casefiles during the FY 2022 FAME review to ensure cases with evidence of intentional disregard or plain indifference and a heightened awareness are pursued.

e) Abatement

Available procedures and inspection data indicate that TOSHA obtains adequate and timely abatement information in most case files and has processes in place to track employers who are

late in providing abatement information. The Assistant Administrator runs a weekly past due abatement report that is shared with managers and supervisors and is sorted by CSHOs.

Follow-up inspections accounted for 2.3% of the total inspections in Tennessee for FY 2021. Follow-up inspections are useful to ensure abatement if there is a problem with abatement verification. According to the State Indicator Report (SIR) for FY 2021, the number of private sector inspections that have unabated violations that were greater than 60 calendar days for safety, and 90 calendar days for health, past the issuance date, was 50 for safety, and 15 for health, respectively. In addition, there were 42 valid unprogrammed activities handled as inspections, which were open more than 60 days, and there were 33 valid complaints handled as investigations (phone/fax) which were open more than 30 days. TOSHA should ensure that the number of complaint investigations open remains low, so that hazards are quickly eliminated.

Most case files reviewed contained written documentation, photos, work orders, or employer's certification of abatement. Petitions for Modification of Abatement (PMA) were appropriately provided when the employer requested an extension for their corrective action timeframe and interim protection information was provided in the case file.

In the casefiles reviewed, where serious hazards were identified, and the abatement was classified as "Corrected During Inspection (CDI)", the files had the specific description outlining the corrective action observed by the compliance officer, as well as photos for evidence. A violation can be considered corrected during the inspection, when the compliance officer witnesses the correction to the specific violation while onsite. TOSHA requires that the worksheet contain information on how the violation was abated.

f) Worker and Union Involvement

TOSHA has procedures for employee and union involvement are identical to those of OSHA. Case file review disclosed that union representatives and employees were included in 93.65% of fatality investigations and other inspections. This determination was supported by SAMM measure 13.

3. REVIEW PROCEDURES

a) Informal Conferences

TOSHA has procedures in place for conducting informal conferences and proposing informal settlement agreements. Based on our review, these procedures appear to be followed consistently by the managers and supervisors. According to the State Indicator Report (SIR), 1.87% of violations were vacated and 1.74% of violations were reclassified, because of informal settlement agreements. The percent of penalty retained was 94.15%, which exceeds the national average of 70.04%. Case files reviewed had similar results, with very few violations noted as being vacated or reclassified, and most cases were resolved with some penalty reduction. Supervisors are required to get the employer to agree to workplace safety and health program improvements, training, or other agreements in exchange for citation modifications. Where there were vacated or reclassified violations, or a larger penalty reduction, the files included the rationale for the changes documented in the informal conference memo with the manager's approval. The compliance manager is required to get any changes, modifications, or deletions to citations approved by the administrator. No negative trends or problems with citation documentation have been noted.

b) Formal Review of Citations

In FY 2021, 3.82% of inspections with citations were contested. An in-house attorney represents TOSHA from the Tennessee Attorney General's Office (AG). This attorney is assigned exclusively to represent TOSHA. The Attorney participates in organizations, such as the State OSHA Litigators Organization (SOLO), where state and federal high-profile cases, and cases with special legal issues, are shared and discussed. The attorney works closely with the compliance staff, during the preparation of fatality inspections and other high-profile inspections. The attorney is very knowledgeable of OSHA requirements, and what is needed for a case to be legally sufficient.

The Tennessee Occupational Safety and Health Review Commission is an independent body appointed to the part-time positions by the governor, and generally serves a three-year term. The Review Commission hears and issues decisions on appeals, relating to the issuance of citations and assessment of penalties by TOSHA. All meetings of the Tennessee Occupational Safety and Health Review Commission are announced in advance, and a notice is placed on the department's website <https://www.tn.gov/workforce/contact-the-department0/boards---commissions/boards---commissions-redirect/tosha-review-commission/tosha-review-commission-public-notice.html>, and the State of Tennessee Meeting page <https://www.tn.gov/meetings>. Accommodations are available for members of the public that wish to attend the meeting. The conclusions of law and findings of fact are available to the public, upon request in compliance with the Tennessee Open Records Act.

During FY 2021, the State Plan did not receive any negative decisions by the Tennessee Occupational Safety and Health Review Commission. All decisions are reviewed by the TOSHA Administrator and senior management staff to determine if changes in policies and procedures need to be made.

4. STANDARDS AND 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 requirements that are at least as effective (ALAE) as the federal rules. State Plans also have the option to promulgate standards covering hazards not addressed by federal standards. During this period, with a few exceptions, TOSHA adopted all the OSHA-initiated standards, which required action in a timely manner. The exceptions were the standards impacting the penalty levels and the Emergency Temporary Standard (ETS) for COVID-19. TOSHA adopted the ETS on 8/24/2021, which was just a few weeks after the established adoption date. The tables below provide a complete list of the federal directives and standards, which required action during this period:

Table A
Status of FY 2021 Federal Standards Adoption
(May include any delinquent standards from earlier fiscal years)

Standard	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
<i>Adoption Required</i>						
Final Rule on the Implementation of the 2020 Annual Adjustment to Civil Penalties for Inflation 29 CFR 1903 (1/15/2020)	3/15/2020		No	N/A	7/15/2020	N/A
Final Rule on the Beryllium Standard for General Industry 29 CFR 1910 (7/14/2020)	9/14/2020	8/25/2020	Yes	Yes	1/14/2021	1/1/2021
Final Rule on the Beryllium Standard for Construction and Shipyards 29 CFR 1915, 1926 (8/31/2020)	10/30/2020	10/27/2020	Yes	Yes	2/27/2021	1/1/2021
Final Rule on the Implementation of the 2021 Annual Adjustment to Civil Penalties for Inflation (1/15/2021)	3/16/2021	1/27/2021	No	N/A		N/A
Occupational Exposure to COVID-19; Healthcare Emergency Temporary Standard 29 CFR 1910 (6/21/2021)	7/6/2021	7/6/2021	Yes	No	8/6/2021	8/24/2021
<i>Adoption Encouraged</i>						
Final Rule on the Rules for Agency Practice and Procedures Concerning OSHA Access to Employee Medical Records 29 CFR 1913 (7/30/2020)	9/28/2020	10/26/2020	No	N/A	N/A	N/A
Final Rule on Cranes and Derricks in Construction: Railroad Roadway Work 29 CFR 1926	11/14/2020	10/27/2020	Yes	Yes	3/14/2021	1/1/2021

Standard	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
(9/15/2020)						

Table B
Status of FY 2021 Federal Program Change (FPC) Adoption
(May include any delinquent FPCs from earlier fiscal years)

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		Yes	No	5/10/2020	3/31/2020
Respirable Crystalline Silica NEP CPL 03-00-023 (2/4/2020)	4/4/2020		Yes	Yes	8/4/2020	4/30/2020
<i>Equivalency Required</i>						
Field Operations Manual CPL 02-00-164 (4/14/2020)	6/14/2020		No	N/A	N/A	N/A
Inspection Procedures for the Respirable Crystalline Silica Standards CPL 02-02-080 (6/25/2020)	8/24/2020		Yes	No	12/25/2020	7/25/2020
Site-Specific Targeting (SST) CPL 02-01-062 (12/14/2020)	2/12/2021		Yes	Yes		02/09/2021
Consultation Policies and Procedures Manual CSP 02-00-004 (3/19/2021)	5/19/2021		Yes	Yes		05/03/2021
Inspection Procedures for the COVID-19 Emergency Temporary Standard CPL DIR 2021-02 (CPL 02)	7/13/2021		Yes	No		08/27/2021

FPC Directive/Subject	Response Due Date	State Plan Response Date	Intent to Adopt	Adopt Identical	Adoption Due Date	State Plan Adoption Date
(6/28/2021)						
Compliance Directive for the Excavation Standard 29 CFR 1926, Subpart P CPL 02-00-165 (7/1/2021)	8/30/2021		Yes	Yes		08/25/2021
Revised National Emphasis Program - Coronavirus Disease 2019 (COVID-19) CPL DIR 2021-03 (CPL 03) (7/7/2021)	7/22/2021		Yes	Yes		09/10/2021
<i>Adoption Encouraged</i>						
Voluntary Protection Programs Policies and Procedures Manual CSP 03-01-005 (1/30/2020)	3/30/2020		Yes	No	6/30/2020	2/14/2020
Electronic Case File System Procedures for the Whistleblower Protection Program CPL 02-03-009 (6/18/2020)	8/18/2020		No	N/A	N/A	N/A
National Emphasis Program - Coronavirus Disease 2019 (COVID-19) CPL DIR 2021-01 (CPL-03) (3/12/2021)	5/12/2021		Yes	Yes		4/2/2021
Communicating OSHA Fatality Inspection Procedures to a Victim's Family CPL 02-00-166 (7/7/2021)	9/7/2021	9/13/2021	Yes	No		08/25/2021

Adoption of Maximum and Minimum Penalty Increases

In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on November 2,

2015, OSHA published a rule on July 1, 2016, raising its maximum and minimum penalties. See [81 FR 43429](#). As required by law, OSHA then increased penalties annually, most recently on January 14, 2022, according to the Consumer Price Index (CPI). See 2022 Annual Adjustments to OSHA Civil Penalties, available at <https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osh-civil-penalties>; [87 FR 2328](#) (Jan. 14, 2022).

OSHA-approved State Plans must have penalty levels that are at least as effective as OSHA's per Section 18(c)(2) of the Occupational Safety and Health Act; 29 CFR 1902.37(b)(12). State Plans were required to adopt the initial maximum penalty level increase and the subsequent annual increases. State Plans were required to submit their initial intent to adopt by September 1, 2016. The first deadline for adoption of an annual increase was January 1, 2017.

The TOSHA is required to adopt maximum and minimum penalty increases that are at least as effective as the Agency's most recent increase issued in January 2022, without further delay. OSHA recognizes that the State has needed to implement legislative changes before this adoption can be completed. However, we are now five years past the initial adoption deadline. A letter sent to TOSHA indicated that failure to adopt these increases would very likely result in FAME finding and requesting that the State Plan respond with an action plan for completing the necessary legislative changes, was sent on September 2, 2021.

TOSHA responded on September 30, 2021. In the response provided, Commissioner Jeff McCord informed OSHA that the Tennessee General Assembly "believes that the TN-OSH Act currently provides effective sanctions against employer who violate" Tennessee's standards. The response indicates that TOSHA has not deemed it necessary to increase the amount of the penalties that the TOSHA assesses. The letter also maintained that the TOSHA remains as effective as the OSHA program, regardless of its failure to adopt maximum and minimum penalty amounts on par with OSHA's penalty levels, and it cited injury and illness data and other metrics unrelated to penalty rates to support that claim.

A second letter to TOSHA informed the State that OSHA has determined that, if TOSHA fails to adopt these increases, the State Plan cannot be at least as effective in this area, regardless of actual assessed penalties, injury and illness rates, or other data points, was sent on March 11, 2022. The letter provided that the response that The State Plan will continue using the current penalty structure is not an acceptable response and acknowledge that increasing penalty levels will require legislative changes, as it has for other State Plans. We are reiterating our request for an action plan to make the legislative changes necessary to increase TOSHA's maximum and minimum penalties. Please provide the dates by which a proposed amendment will be drafted and introduced to the Tennessee General Assembly by November 15, 2021.

TOSHA responded on December 2, 2021. The letter from Commissioner Jeff McCord indicated that a penalty increase would require legislative action, as well as the support of both legislative leadership and relevant stakeholders. To obtain that support, the Department of Labor and Workforce Development must meet and attempt to educate those parties on the need for such legislation. Due to the recent and upcoming holidays, it is difficult to meet with all the necessary authorities and stakeholders in such a short period of time to develop and implement an action plan to get such legislation successfully enacted. Accordingly, TOSHA requested additional time in which to submit the Department's official or final response. During this FAME review, TOSHA expressed a commitment to continue its efforts to educate leaders in the legislative and business communities about this requirement.

Finding FY 2021-03: The Tennessee State Plan has failed to adopt OSHA’s initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.

Recommendation: TOSHA should work with their state authorities to complete the legislative changes necessary to enable it to adopt maximum and minimum penalty amounts that are at least as effective as OSHA’s maximum and minimum penalty levels.

5. VARIANCES

No variances were requested from TOSHA during this period.

6. STATE AND LOCAL GOVERNMENT WORKER PROGRAM

In the early 1970’s, TDLWD Rule 0800-01-05-.08(3)(a): Monitoring inspections of each employer will be conducted at least biennially and shall cover, at a minimum, inspection of at least one (1) workplace in at least two (2) departments or establishments. As an option, State and local government sector employers in Tennessee were given the option of complying with the State and Local Government Sector Program or submitting to traditional enforcement. There are 544 public sector programs, most of these have multiple departments/establishments subject to monitoring. A majority of the state and local government sector operations selected the State and Local Government Sector Program option, which is very similar to OSHA’s handling of federal agencies. However, a few state and local government sector employers expressed a preference for traditional enforcement. The Tennessee State and Local Government Sector Program requires that each agency and department head designate a staff member to administer the organization’s safety and health program. The designated safety and health official is responsible for assisting the chief executive officer of the state agency or local government in carrying out all facets of the program. Additionally, by state law, all state and local government sector entities are required to be inspected at least every two years. This is accomplished by dividing the State into four territories, with a CSHO assigned to each.

TOSHA conducted 617 state and local government sector inspections in FY 2021, which accounted for 45.47% of all inspections. [Reference: SAMM 6] TOSHA has a dedicated Public Sector Program that is separate from private sector enforcement which is staffed by five dedicated compliance officers assigned entirely to the public sector enforcement program along with one supervisor and one manager. This is significantly less than the private sector, which includes 4 managers positions, 14 supervisor positions, and 37 compliance officer positions. Less than 12% of the State’s overall compliance officers are assigned to public sector compliance. The average citation lapse time for state and local government sector enforcement files are 8 days, well below the performance goal of 20 days. The 2020 TCIR for the state and local government sector in Tennessee is 3.6, lower than the National average of 3.0, indicating that TOSHA has strong State and Local Government Program.

Caseloads for FY21:

	Inspections	UPAs
State and Local Government Sector	617	176
Private Sector	772	2545

7. WHISTLEBLOWER PROGRAM

The Tennessee Occupational Safety and Health Act of 1972 (T.C.A. 50-3-409) prohibits retaliation against workers, who engage in protected activities, as defined by the Tennessee Occupational Safety and Health Act of 1972 (T.C.A. 50-3-409). This is comparable to OSHA protection from retaliation under Section 11(c) of the OSH Act. TOSHA has a dedicated discrimination case manager and utilizes supervisory compliance safety and health officers to conduct investigation of alleged acts of retaliation.

TOSHA's program for investigating whistleblower complaints closely mirrors that of OSHA. TOSHA utilizes OSHA's most current Whistleblower Investigations Manual (WIM) as their ready-reference and guideline for investigative procedures.

Meritorious Complaints		Merit Cases Settled	
FY 2021	27%	FY 2021	100%
FY 2020	13%	FY 2020	86%
FY 2019	13%	FY 2019	100%
FY 2018	24%	FY 2018	100%

During FY 2021, data shows that TOSHA received 83 complaints. Of the complaints received, 35 were docketed and 48 were administratively closed. According to the data, 66% of the investigations were completed timely; that is, completed within ninety days, as compared to 50% in FY 2019. The average lapse time for retaliation cases was 95 days as compared to 107 days in 2019. TOSHA has continued to successfully work on improving their completion rate of retaliation investigations. [Reference: State Discrimination Data]

A review of 15 electronic files established that the case files are organized in a logical sequence and comport with the applicable policies. The use of a case tracking system to document incoming complaints and record final determinations is similar to that utilized by OSHA. It appears that the investigators have a working knowledge of the investigative process and the pertinent evidentiary burdens that are applicable to a retaliation allegation. As was found in FY 2019 OB-5, the agency continues to issue administrative closure letters that advise parties of appeal rights which conflicts with the WIM. Per the WIM, no right to appeal exists when a complaint is administratively closed or withdrawn by the complainant. It is recommended that TOSHA adopt the WIM with a change to the appeal rights for administrative closures. Investigative findings are accurately documented in the case files and support the findings. All complaints appeared to have been investigated, at least as thoroughly as OSHA would have investigated. The Assistant Administrator's initials were on the cover page of the casefile however there was no documentation of discussion regarding the final report between the investigator and the Assistant Administrator supporting the review prior to issuance. It is recommended that the State Plan include documentation of the assistant Administrator's review. If a complainant appeals the dismissal to the Commissioner, under TOSHA's appeals process, proper action is taken by the Commissioner to evaluate the case.

During this review two observations were noted:

FY 2021-OB-3: The agency incorrectly and inconsistently uses administrative closure and case withdrawal procedures. Specifically, certain cases were listed as agency withdrawals but dismissed because of a lack of cooperation by the complainant.

Federal Monitoring Plan: During the FY23 FAME review, OSHA will review a sample of cases administratively closed or dismissed due to Complainant's lack of cooperation and ensure the State Plan is correctly and inconsistently using administrative closure and case withdrawal procedures.

8. COMPLAINT ABOUT STATE PROGRAM ADMINISTRATION (CASPA)

No CASPAs were filed during this evaluation period.

9. VOLUNTARY COMPLIANCE PROGRAM

TOSHA did not adopt the OSHA Strategic Partnership Program or the OSHA Alliance Program. However, TOSHA implemented the Tennessee Volunteer Star Program in 1997, and the program continues to operate effectively. The program is similar to the federal Voluntary Protection Program (VPP). TOSHA limits participation to the Star level, while the OSHA VPP also includes Merit and Demonstration levels. TOSHA continues to effectively manage the growth of its program by primarily limiting participation to employers in the manufacturing NAICS codes; however, applications outside these NAICS codes are considered on a case-by-case basis. During FY 2021, the Tennessee Volunteer Star Program experienced a decline from 39 participating worksites to 36 sites. TOSHA's goal for FY 2021 was the establishment of two new sites. However, the pandemic, corporate acquisitions and plant closures impacted the State Plan's ability to achieve this goal. TOSHA CSP – TN 03-01-003 directive effectively addresses enforcement activities at VPP sites, such as fatality investigations. Each of the VPP sites that experience enforcement activity, which resulted in the identification of hazards, also received a follow-up visit for the program manager for VPP. CSP – TN 03-01-003, policies, and procedures manual. According to the program manager for VPP, all required documentation are maintained in the VPP files including receipt of application, acceptance, and deferral letter documentation.

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

TOSHA operates a State and Local Government Program, which enforces workplace safety and health among most state and local government sector employers. The State and Local Government Program also extends on-site consultative support to employers in the state and local government sector. During this review period, state and local government sector employers requested six (6) on-site consultative visits. According to the State, TOSHA now conducts state and local government agency consultation visits using members of the State's consultation staff, rather than the Public Sector Division. These cases are now recorded in the OIS consultation module, and they are documented as outlined in the Consultation Policies and Procedures Manual.

In FY 2021, the consultation program projected two state and local government on-site consultation visits, one safety and one health; the State Plan exceeded the projected goal. Six public sector visits were conducted, four safety visits and two health visits. All visits, except for one the health visit, was a full-service visit. Approximately 5.5 hazards were identified during each visit and TOSHA ensured that all hazards were corrected in a timely manner.

Appendix A – New and Continued Findings and Recommendations

FY 2021 Tennessee Comprehensive FAME Report

FY 2021-#	Finding	Recommendation	FY 20XX-# or FY 20XX-OB-#
FY 2021-01	In 17 of 43 (39.5%) case files reviewed that had violations, employer knowledge was not adequately documented.	TOSHA should implement strategies to ensure that adequate actual or constructive knowledge is documented in all inspection casefiles as required by the Tennessee FOM.	FY 2019-OB-01
FY 2021-02	The Tennessee State Plan has failed to adopt OSHA's initial FY 2016 maximum and minimum penalty increase and subsequent annual penalty amount increases.	TOSHA should work with their state authorities to complete the legislative changes necessary to enable it to adopt maximum and minimum penalty amounts that are at least as effective as OSHA's maximum and minimum penalty levels.	

Appendix B – Observations Subject to New and Continued Monitoring

FY 2021 Tennessee Comprehensive FAME Report

Observation # FY 2021-OB-#	Observation# FY 2020-OB- #	Observation	Federal Monitoring Plan	Current Status
FY 2021-OB-1	FY 2020-OB-02	Inspection field notes, including interview notes in the inspection files, are transferred to the Violation Worksheet Form and the notes are destroyed in accordance with the Tennessee Public Records act, specifically n T.C.A. § 10-7-301(14) which is contrary to Tennessee Field Operations Manual Chapter 5 – Case File Preparation and Documentation – XII. Inspection Records.	Federal Monitoring Plan: The OSHA Area Office will closely monitor by to ensure TOSHA implements strategies to ensure field notes, including interview notes, are included in all inspection casefiles as required by the Tennessee FOM.	Continued
FY 2021-OB-2		TOSHA issued only two willful violations, which were reclassified to serious, following the informal conference. Casefile reviews identified seven cases with evidence of intentional disregard or plain indifference and a heightened awareness however willful violations were not pursued.	The OSHA Area Office will closely monitor State data and review casefiles during the FY 2022 FAME review to ensure cases with evidence of intentional disregard or plain indifference and a heightened awareness are pursued.	New
FY 2021-OB-3		TOSHA incorrectly and inconsistently uses administrative closure and case withdrawal procedures. Specifically, certain cases were listed as agency withdrawals but dismissed because of a lack of cooperation by the complainant.	During FY 2023 FAME, OSHA will review a sample of cases administratively closed or dismissed due to Complainant's lack of cooperation and ensure the State is correctly and inconsistently using administrative closure and case withdrawal procedures.	New

Appendix C - Status of FY 2020 Findings and Recommendations

FY 2021 Tennessee Comprehensive FAME Report

FY 20XX-#	Finding	Recommendation	State Plan Corrective Action	Completion Date (if Applicable)	Current Status (and Date if Item is Not Completed)
	None				

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

FY 2021 Tennessee Comprehensive FAME Report

U.S. Department of Labor

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

State Plan: SAMM Number	State Plan: SAMM Name	State Plan: Data	FY 2021 Further Review Level	FY 2021 Notes
1a	Average number of work days to initiate complaint inspections (state formula)	7.95	15	The further review level is negotiated by OSHA and the State Plan.
1b	Average number of work days to initiate complaint inspections (federal formula)	3.58	N/A	This measure is for informational purposes only and is not a mandated measure.
2a	Average number of work days to initiate complaint investigations (state formula)	3.16	5	The further review level is negotiated by OSHA and the State Plan.
2b	Average number of work days to initiate complaint investigations (federal formula)	1.34	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)	100%	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.
5	Average number of violations per inspection with violations by violation type	2.85	+/- 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.
6	Percent of total inspections in state and local government workplaces	0.67	+/- 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.
7	Planned v. actual inspections – safety/health	45.47%	+/- 5% of 38.26%	The further review level is based on a number negotiated by OSHA and the State Plan through the grant application.

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

FY 2021 Tennessee Comprehensive FAME Report

U.S. Department of Labor

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

State Plan: SAMM Number	State Plan: SAMM Name	State Plan: Data	FY 2021 Further Review Level	FY 2021 Notes
				The range of acceptable data not requiring further review is from 36.34% to 40.17%.
8	Average current serious penalty in private sector - total (1 to greater than 250 workers)	1,054	+/- 5% of 1,165	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 1,106.75 to 1,223.25 for safety.
	a. Average current serious penalty in private sector (1-25 workers)	303	+/- 5% of 325	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 308.75 to 341.25 for health.
	b. Average current serious penalty in private sector (26-100 workers)	\$2,084.67	+/- 25% of \$3,100.37	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$2,325.28 to \$3,875.46.
	c. Average current serious penalty in private sector (101-250 workers)	\$1,660.00	+/- 25% of \$2,030.66	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$1,523.00 to \$2,538.33.
	d. Average current serious penalty in private sector (greater than 250 workers)	\$2,023.56	+/- 25% of \$3,632.26	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$2,724.20 to \$4,540.33.
9	Percent in-compliance	\$2,158.60	+/- 25% of	The further review level is

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State Plan: SAMM Number	State Plan: SAMM Name	State Plan: Data	FY 2021 Further Review Level	FY 2021 Notes
			\$5,320.16	based on a three-year national average. The range of acceptable data not requiring further review is from \$3,990.12 to \$6,650.20.
10	Percent of work-related fatalities responded to in one workday	\$3,021.56	+/- 25% of \$6,575.70	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from \$4,931.78 to \$8,219.63.
11	Average lapse time	12.55%	+/- 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.
12	Percent penalty retained	30.65%	+/- 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.
13	Percent of initial inspections with worker walk around representation or worker interview	93.65%	100%	The further review level is fixed for all State Plans.
14	Percent of 11(c) investigations completed within 90 days	23.86	+/- 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.
15	Percent of 11(c) complaints that are meritorious	41.11	+/- 20% of 66.10	The further review level is based on a three-year national average. The range of acceptable data not requiring

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State Plan: SAMM Number	State Plan: SAMM Name	State Plan: Data	FY 2021 Further Review Level	FY 2021 Notes
				further review is from 52.88 to 79.32 for health.
16	Average number of calendar days to complete an 11(c) investigation	95.83%	+/- 15% of 69.08%	The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 58.72% to 79.44%.
17	Percent of enforcement presence	99.56%	100%	The further review level is fixed for all State Plans.