# FY 2022 Follow‐up Federal Annual Monitoring Evaluation (FAME) Report New Mexico Occupational Health and Safety Bureau (OHSB)



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## Executive Summary

The primary purpose of this report is to assess the State Plan’s progress in Fiscal Year (FY) 2022 for the State of New Mexico Occupational Health and Safety Bureau (OHSB) under the 23(g) State Plan grant, in resolving outstanding findings from the previous FY 2021 Comprehensive Federal Annual Monitoring Evaluation (FAME) Report. This report was prepared under the direction of Eric S. Harbin, Regional Administrator, Region VI, Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, and covers the period from October 1, 2021, to September 30, 2022.

This report also reviews recommendations from the FY 2021 Follow‐Up Federal Annual Monitoring and Evaluation (FAME) Report, focusing on the status of corrective activities. OHSB’s overall performance, as it relates to mandated activities and implementation of policies and regulations, continues to be at an acceptable level except for certain elements noted in this report.

The New Mexico OHSB conducted 186 inspections (37%) of their projected goal of 500 inspections for FY 2022 (SAMM 7). This was in part because OHSB continued to experience significant staff turnover and needed to train new personnel.

This FAME report shows eight findings, five continued and three new findings, and seven observations, six continued and one new. One of the observations are new and the rest are continued from FY 2021. Appendix A describes the new and continued findings and recommendations. Appendix B describes the observations subject to continued monitoring and the related federal monitoring plan. Appendix C describes the status of previous findings with completed corrective actions.

## State Plan Background

The New Mexico Occupational Health and Safety Program is administered by the Occupational Health and Safety Bureau (OHSB), which is part of New Mexico Department of the Environment. The New Mexico Department of the Environment State Plan designee is Secretary of the Environment Department James C. Kenney and the OHSB Bureau Chief is Robert Genoway.

The New Mexico program covers all private sector industries and state and local government workers within the state. There are no maritime (longshoring, ship building, and ship breaking) industries located in New Mexico. Federal OSHA covers federal workers, Tribal lands, military installations, US Postal Services, and other areas of exclusive federal jurisdiction within the state.

An expansion in the fourth quarter of fiscal year 2021 resulted in 17 new State Plan positions for 2022, and the Bureau filled and retained several key leadership positions such as the Operations and Planning Manager, the Compliance and Enforcement Section Chief, two Compliance Supervisors, and two Management Analysts. Additionally, the Bureau hired and onboarded several technical and administrative staff through a rapid hire event and expedited recruitment during FY2022.OHSB filled new and existing state plan positions including 3 health compliance officers, 5 safety compliance officers, 2 consultants, 2 compliance assistance specialists, and 3 administrative support staff. These additional staff will help OHSB reach its goals and expand our ability to ensure all New Mexicans have a safe and healthy work environment.

The Compliance and Enforcement Section Chief position was added to provide oversight and additional management support for the Whistleblower and Compliance and Enforcement Sections. The expectation is that the additional management support provided by the Section Chief position will result in an increased focus on key performance measures in Whistleblower and Compliance sections.

Along with the expansion, OHSB implemented a comprehensive review of Bureau policy and practices through the Management Analyst Team (MA Team). The purpose of the MA Team is to ensure that all grant requirements are met. The MA Team also focuses on providing information to operational sections to ensure that findings and observations highlighted in the Federal Annual Monitoring Evaluation (FAME) are addressed. The MA Team currently provides data on a weekly basis to the Compliance team and conducts quarterly file reviews. The MA Team presents this data to leadership so that OHSB operations can continue to improve.

The OHSB continued to experience high staff turnover throughout FY2022 with an average compliance officer vacancy rate of 37%. This high turnover rate was due to compliance and enforcement section expansion, competitive job markets, and staff making career changes. To improve professional recruitment and retention in FY2022, NMED implemented programs including new hire leave benefits, recruitment referral incentives and telework options.

## New Issues

The New Mexico OHSB has made some progress in addressing the previous five findings and six observations from the FY 2021 Comprehensive FAME Report but has not resolved these issues entirely. This follow‐up FAME report contains eight findings (five continued and three new) and seven observations (six continued and one new). Of the three new findings, all three are related to the Whistleblower Program, as was the new observation. No findings were completed, no observations were closed, six observations were continued and one observation from last year’s FAME was converted to a finding. Appendix A describes the new and continued findings and recommendations. Appendix B describes observations subject to continued monitoring and the related federal monitoring plan.

Whistleblower complaint intake procedures and complaint screening were inadequate. Evidence of complainant interviews and documentation of complainant concurrence were missing from the files. Several deficiencies were found with the intake and screening procedure. In a nutshell, administrative closure letters, procedures and files were inadequate.

* 12 complaints did not have a copy of the complainant interview.
* OHSB did not document complainants’ concurrence of the administrative closure of their complaints.
* We found 6 instances of complainants being given 48 hours to return a form (related to the “in writing and acknowledged” requirement discussed above) or the complaint would be administratively closed.
* In some instances, OHSB staff seems to be requiring that Complainant’s prove their case in the screening phase without an investigation. OHSB should open an investigation when a complainant presents a *prima facie* allegation.

Cases warranting OHSB referral to federal OSHA were not referred. The case file review revealed at least 8 cases that fell under other federal statutes or federal jurisdiction which were not referred to federal OSHA. OSHA has identified, through case file reviews as well as other means, 8 complaints that OHSB should have referred to federal OSHA, including potential cases under other federal whistleblower statues. In addition, one complaint involved a tribal owned entity that was not referred to federal OSHA for review. OHSB staff needs additional training and supervision to correct this deficiency.

OHSB does not have an accurate way of tracking how many outreach participants that directly participate in cooperative programs. OHSB does not utilize the OSHA Information System (OIS) to track OHSB 23(g) compliance assistance activities and are tracked in a Microsoft Excel spreadsheet titled “FY 2022 CAS Activities”. When reviewing the number of outreach participants affected, OHSB estimates seem to be a gross overestimation that does not realistically reflect the size of the program or the population of the state.

OSHA will work with OHSB in this area during quarterly meetings. OSHA will provide guidance on methods OSHA has found successful in tracking how many outreach participants directly participate in cooperative programs and how to ensure these outreach participants are accounted for in the total number workers attended and affected.

In FY 2022, the OHSB state and local government consultation program completed 12% (3/25) of its FY 2022 23(g) State Plan Projected Onsite Consultation Visits Goal. Since 2020, there has been a consistent decline in projected onsite consultation visits.

OSHA will work with OHSB to ensure managers evaluate and monitor the program’s marketing efforts to generate additional requests for state and local government consultation visits. OHSB should adjust its goals as necessary to provide adequate resources when consultation visit activities are projected. OSHA will continue to monitor this in quarterly meetings to ensure its effectiveness.

## Assessment of State Plan Progress and Performance

### Data and Methodology

OSHA has established a two‐year cycle for the FAME process. This is the follow‐up year, and as such, OSHA did not perform an on‐site case file review associated with a comprehensive FAME except for whistleblower, that did have an onsite audit that reviewed 41 case files. This strategy allows the State Plan to focus on correcting deficiencies identified in the most recent comprehensive FAME. The analyses and conclusions described in this report are based on information obtained from a variety of monitoring sources, including:

* State Activity Mandated Measures (SAMM) Report
* 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

## Whistleblower Program

The FAME review included an evaluation of OHSB’s whistleblower program, including policy and procedures and investigative files. The Review Team evaluated 41 complaint files from FY 2022, conducted a data analysis of OIS, OITSS and OHSB reports and interviewed personnel responsible for the program.

OSHA began entering whistleblower cases in OIS which were received on or after June 27, 2022. New Mexico began entering cases in OIS which were received on or after July 11, 2022.

Because cases received before these dates exist in OITSS, both OSHA and New Mexico need to use both systems until all cases in OITSS have been closed. New management reports have been developed that contain both OIS and OITSS data. OHSB has access to these reports and should monitor them regularly to assess their program.

As part of this follow‐up FAME, a case file review was conducted on January 24‐26, 2023. For FY2022, OHSB had 145 closed complaints. OSHA reviewed 41 files for the FAME: 3 closed docketed cases, 3 open docketed complaints, 1 appeal file, 1 federal review file and 33 Administrative Closures.

Observation FY2021‐06 is being converted into a finding for FY2022 as OHSB has still failed to either adopt TED 01‐00‐020 (The Mandatory Training Program for OSHA Whistleblower Investigators) or an equivalent. In addition, OHSB has failed to adopt CPL 02‐03‐007 (The Whistleblowers Investigation Manual) or an equivalent.

## Voluntary Compliance Program

The Cooperative Programs in OHSB is administered under its 23(g)‐grant program. OHSB cooperative programs include eight Voluntary Protection Program (VPP) sites, six partnerships, and two alliances.

OHSB’s Voluntary Protection Programs is called the Zia Star Voluntary Protection Programs (VPP). OHSB continued to focus efforts on strengthening program quality and reviewing current VPP participants during the year.

OHSB improved strategic partnership programs through comprehensive onsite verification activities and by conducting reviews of existing agreements. OHSB and partner members focus work on common safety issues. There were 52 member companies participating in six industry association partnerships during FY 2022.

The New Mexico Construction Safety Coalition held virtual meetings in FY 2022 that emphasized best practices in preventing COVID‐19 transmission at partner worksites. The Coalition is composed of OHSB staff and representatives for each of the six OHSB Strategic Partnership for Construction (OSPC) associations.

OHSB conducted minimal compliance assistance activities in the state and local government agencies as part of the overall goal of reducing the injury rate. State and local governments continue to experience injury and illness rates greater than the private sector. As stated previously, in addition to providing technical assistance to several state and local government agencies, OHSB presented occupational safety and health information to a total of six county, city and state government agencies, reaching 948 workers and impacting many more. During FY 2022, limited outreach activities were focused on State Emphasis Programs (SEPs) within the industries of construction, primary and fabricated metals, oil and gas well drilling and servicing, and hospitals and nursing care. The Bureau continued its SEP for silica exposure in the construction and earth products manufacturing industries. A total 17 compliance assistance activities were completed in strategic SEPs and National Emphasis Programs (NEPs) in FY 2022. OHSB had established a goal of reaching 120,000 outreach participants in FY 2022 but fell short of this goal by reaching 85,686 workers.

## State and Local Government 23(g) On-Site Consultation Program

The State and Local Government Consultation Program conducted three consultation visits throughout New Mexico, reaching approximately 163 workers and impacting many more. Based on their FY 2022 grant proposal, OHSB had established a goal of 25 consultation visits but were not able to meet their goal. Through these visits, they identified 13 hazards. The consultation program manager stated that the program experienced staffing shortages, which posed a challenge to meeting the consultation visit goal. During the review period, OHSB had 0.1 FTE safety consultants and 0.5 health FTE consultants. In addition, OHSB had 0.6 FTE safety consultant vacancies and 0.1 FTE health consultant vacancies during the review period. The program continues to experience ongoing challenges with meeting its projected goals in the FY 2022 grant vs. total visits.

The MARC Report for Consultation contains five measures. OHSB did not meet MARC measure 1. The goal for MARC 1 is to conduct no less than 90% of initial visits in high hazard industries. OHSB conducted 33% (1/3) of their initial state and local Government consultation visits in high- hazard industries.

The MARC 2 goal is to conduct no less than 90% of initial visits in small businesses (defined as no more than 250 employees in the establishment with no more than 500 employers controlled by the employer). OHSB conducted 100% (3/3) of initial visits in establishments with 250 or fewer employees, and 100% (3/3) of initial visits in establishments with 500 or fewer employees controlled by the employer.

The MARC 3 goal indicates OHSB consulted with workers in 100% (3/3) of the state and local government sector initial visits, follow-up visits, and training and education visits.

MARC 4 has several subsections, two of which have goals. The first is to ensure that 100% of serious hazards are verified to have been corrected within 14 days of the original correction due date. OHSB verified correction of 100% (13/13) of identified serious hazards within this timeframe. The second goal is to verify correction of at least 65% of serious hazards either on site or by the original correction due date. OHSB verified correction of 100% (13/13) of identified serious hazards either on site or by the original correction due date.

MARC 5 is the number of serious hazards requiring correction more than 90 days due past due. The goal is zero, and the program had none.

## Private Sector 23(g) On-Site Consultation Program

Private sector consultation services are provided in New Mexico under a 21(d) Cooperative Agreement, and state and local government agencies consultation services are provided under the 23(g) State Plan grant. Performance related to 21(d) funding work is reported in the Regional Annual Consultation Evaluation Report (RACER).

## Findings and Observations

### Previous Findings

The State Plan is continuing to address the previous five findings and six observations from the FY 2021 Comprehensive FAME Report. This follow‐up FAME report contains eight findings (five continued and three new) and seven observations (six continued and one new). No findings were completed, no observations were closed, six were continued and one observation from last year’s FAME was converted to a finding. Appendix A describes the new and continued findings and recommendations. Appendix B describes observations subject to continued monitoring and the related federal monitoring plan. Appendix C describes the status of each FY 2021 finding and recommendation in detail.

**Finding FY 2022‐01:** 35 of the total 54 inspections reviewed in FY 2021 (65%) lacked documentation of employee contact or interview where 100% were reportedly interviewed (SAMM 13).

**Status:** An onsite casefile review for the FY 2022 FAME was not conducted. This finding will be carried over into the 2023 comprehensive FAME when casefiles will be reviewed. During FY 2022 and in FY 2023, OHSB is taking steps to ensure written documentation of interviews and employee participation in inspections is included in case files. Text documentation of interviews and employee participation was added to the standard case file check list. OHSB’s Management Analyst Team instituted quarterly sample file reviews to ensure completeness of compliance case files. Text documentation of interviews was also included as part of the quarterly case file review process. This finding remains open.

**Finding FY 2022‐02:** In FY 2022, OHSB conducted 186 inspections of their projected goal of 500 (37.2%), (SAMM 7).

**Status:** OHSB did not accomplish their project goal of conducting 500 inspections in FY 2022 and were short by 314 inspections. The official projected goal of 500 inspections was derived from the Appendix D SAMM 7a/b metrics, which include safety and health inspections. OHSB has 12 compliance officers and is in the process of hiring two more compliance officers to help reach their goal of 264 inspections in FY 2023. OHSB calculates their projected goal by using the average of the last 3 years of actual inspections conducted, experience of compliance officers and required training needed, projections of staffed compliance officers for the year, and input from supervisors, managers, and the Bureau Chief. This finding remains open.

**Finding FY 2022‐03:** The average lapse time for health inspections in FY 2022 was 119.34 days and the average lapse time for safety inspections was 119.68 days. This exceeded the FRL range of 55.22 to 82.84 for health and 43.66 to 65.50 for safety. (SAMM 11)

**Status:** In FY 2021, the average lapse time for health inspections was 103.3 days and the average lapse time for safety inspections was 107 days. This exceeded the FRL range of 38.08 to 57.13 for safety and 45.78 to 68.68 for health. (SAMM 11). In FY 2022, the lapse time for safety and health inspections rose by 16 days and 12 days, respectively, to 119.68 (safety) and 119.34 (health). This item is not improving and is trending to higher lapse times. This finding remains open.

**Finding FY 2022‐04:** In FY 2021**,** 12 of the 12 (100%) fatality inspections lacked documentation for initial contact with family members, and/or family members did not receive final notification of inspection results**.**

**Status:** An onsite inspection for the 2022 FAME was not conducted. This finding will be carried over into the 2023 comprehensive FAME when casefiles will be reviewed.In FY 2022, OHSB instituted updated letters sent for every fatality case, and the Management Analyst Team conducted quarterly file reviews and weekly reporting to ensure letters are included in case files. The Management Analyst Team is also focused on documentation improvement through the development of standard operating procedures (SOPs) to prevent the loss of institutional knowledge resulting from staff turnover. This finding remains open.

**Finding FY 2022‐05:** Out of a total of 54 files reviewed for FY 2021, five inspection case files had unions and none of the union’s representatives were contacted during inspections.

**Status:** An onsite case file review for the 2022 FAME was not conducted. This finding will be carried over into the 2023 comprehensive FAME, when casefiles will be reviewed. In FY 2022, OHSB added documentation of union participation to the standard inspection check list. OHSB’s Management Analyst Team instituted quarterly sample file reviews to ensure completeness of Compliance & Enforcement inspection case files. The OHSB quarterly case file review also verifies documentation of union participation for applicable inspections. This finding remains open.

### New Findings

**Finding FY 2022‐06:** OHSB lacks adequate written procedures for its whistleblower program**.** OHSB did not adopt federal program changes or equivalents for TED 01‐00‐ 020 and CPL 02‐03‐011.

**Discussion:** On October 4, 2011, OHSB made changes to Chapter 13 of the NM Field Operations Manual (FOM) “to conform to changes in federal Whistleblower Investigations manual.” In 2015 OHSB adopted the Federal Whistleblower Manual (CPL 02‐03‐007, dated April 21, 2015). OSHA issued updates to its Whistleblower Investigations Manual (WIM) in 2016 and most recently on April 29, 2022. OHSB has failed to adopt these subsequent federal Whistleblower Investigations Manuals or an equivalent since 2015.

OHSB lacks the written policies to be as effective as the federal program. OHSB continues to use Chapter 13 of the NM FOM as policy, which has not been updated since 2011, to address federal changes since publication of CPL 02-03-007 in 2015. OHSB should be able to address many of the FY 2021 and FY 2022 FAME observations and findings by instituting an updated policy that adopts the federal WIM or incorporates equivalent provisions.

**Recommendation:** OHSB should institute an updated policy that adopts the federal WIM or incorporates equivalent provisions.

**Finding FY 2022‐07:** OHSB is less effective than the federal program in its criteria for acceptance of whistleblower complaints because it places more stringent requirements on Complainants to file whistleblower complaints.

**Discussion:** OHSB must provideclearer guidance on Section 50‐9‐25A of the New Mexico OHS Act, which requires retaliation complaints be filed “in writing and acknowledged by the employee.” In the 2019 FAME, OHSB told OSHA that if a complainant contacts the Bureau by phone within 30 days of the retaliation activity and follows up in writing after the 30‐day period has expired, the complaint is deemed to have been filed within the 30‐day timeframe. However, during the 2021 FAME, OSHA found that the OHSB staff did not have a clear understanding of the requirements for complaints to be filed “in writing” and “acknowledged by the employee” and whether these requirements needed to be met within the 30‐day filing period. For the 2022 FAME, OSHA found that there was still confusion among OHSB about these requirements.

Section 50‐9‐25A of the New Mexico OHS Act requires retaliation complaints be filed “in writing and acknowledged by the employee.” Chapter 13 of the New Mexico FOM states, “Note: When the complainant has notified the Bureau orally within the 30‐day period, the Bureau shall proceed with the investigation and shall obtain a written, signed complaint later.”

However, the OHSB staff interviewed indicated that they did not have a clear understanding of what “acknowledged by the employee” means. In fact, there is evidence that OHSB quickly administratively closes or dismisses complaints that are not “in writing and acknowledged by the employee.”

A review of the FY2022 complaints shows that six of the administratively closed files we reviewed were closed for lack of cooperation. Of these, four were closed without an interview of the complainant. These six files were administratively closed because the Complainant failed to return a form that OHSB sent them. In most cases, the complainant was given an unreasonably short period of time (48 hours) to return the form, and if they failed to do so, their case was administratively closed with OHSB making no further attempt to contact the complainant. (Screening procedures will be covered in more detail below.)

Such a strict interpretation of the “in writing and acknowledged by the employee” requirement of Section 50‐9‐25.A, – especially closing complaints based on an unreasonably short period to return a form, makes the New Mexico State Plan less effective than the federal program in its criteria for acceptance of whistleblower complaints.

By way of comparison, the federal WIM states: “[a]lthough the implementing regulations for AIR21 and PSIA indicate that complaints must be filed in writing, that requirement is satisfied by OSHA’s longstanding practice of reducing all orally filed complaints to writing.” (See CPL 02‐03‐011 Whistleblower Investigations Manual, page 37.)

Federal OSHA’s criteria for accepting complaints under all statutes, including Section 11(c), are:

1. No form of complaint is required.
2. OSHA will accept the complaint in any language.
3. A complaint under any statute may be filed orally or in writing. [Emphasis added.]

**Recommendation:** OHSB should adopt requirements equivalent to federal requirements for acceptance of complaints. If OHSB believes that they are constrained by statute from having equivalent requirements for acceptance of complaints, the State Plan should pursue the necessary legislative changes to Section 50‐9‐25.A.

**Finding FY 2022‐08**: OHSB management did not review Administrative Closures and Case Files. Of the 41 files reviewed, 30 cases contained no evidence of supervisory review or approval in the case file.

**Discussion:** OHSB management must conduct case file reviews to ensure that Complainant interviews and final letters to Complainants are present in the case files, both for administrative closures (“screen outs”) as well as docketed cases. Case files should be reviewed for completeness and to ensure that all required documents and evidence are present.

OHSB’s requirements are similar to the federal requirements set out in the WIM. Federal WIM requires supervisory review of all administrative closures to confirm they are appropriate for administrative closure and to ensure all documents are in the proper folders. OHSB Supervisory review and approval has not occurred for all administrative closures.

OHSB only closed 3 docketed cases in FY 2022 according to OITSS and OIS reports. (Federal average was 24 closed cases per investigator.) OHSB had one experienced investigator for the whole period of FY 2022, as well as one new investigator for most of FY 2022. OHSB could offer no explanation for this low rate of production. The below chart shows the number of closed cases for the last 4 FYs.

Better supervisory review of case work could also help the State Plan address the low number of cases completed.

| **FY** | **OHSB Closed****Docketed Cases** |
| --- | --- |
| 2022 | 3 |
| 2021 | 7 |
| 2020 | 13 |
| 2019 | 14 |

According to OITSS and OIS, OHSB received a total of 152 complaints in FY2022. Of these, 142 (93%) were administratively closed. This is substantially higher than the federal administrative closure rate of 79% and should be examined by OHSB management.

**Recommendation:** OHSB management should conduct case file reviews to ensure that Complainant interviews and final letters to Complainants are present in the case files, both for administrative closures (“screen outs”) as well as docketed cases. The date on the final letter should match the closing date in OITSS or OIS. Also, case file reviews should ensure that they are complete, and all required documents and evidence are present.

### Observations

Closed FY 2022 Observations

NONE

### Continued FY 2022 Observations

**Observation FY 2022‐OB‐01:** In FY 2021, OHSB did not complete abatement in six safety inspections more than 60 days and eight Health inspections more than 90 days.

**Status:** OSHA has been monitoring this metric through quarterly meetings and it is tracked through weekly meetings by OHSB. This observation will be evaluated during the FY 2023 comprehensive FAME.

**Observation FY 2022‐OB‐02:** Of the 54 casefiles reviewed in FY 2021, the in‐compliance rate for safety and health inspections was 67%, which was above the FRL range of 24.24% to 36.36% (SAMM 9).

**Status:** In FY 2022, the SAMM 9A metric for safety inspections was 49.23% which was down from FY 2021 but still outside the FRL of =/‐ 20% of the 32.25%. SAMM 9B for health was 40.91% which was within the FRL of =/‐ 44.42%.

**Observation FY 2022‐OB‐03:** In FY 2021, four UPAs handled as an inspection have been open for more than 60 calendar days and 34 handled as a phone/fax have been open more than 30 calendar days.

**Status:** OSHA has been monitoring this metric through quarterly meetings and this observation will be evaluated during the FY 2023 comprehensive FAME.

**Observation FY 2022‐OB‐04:** OHSB’s working definition of a complaint is not the same as the federal definition and results in fewer complaints and inspections initiated from complaints.

**Status:** Of the 54 inspection case files reviewed in the FY 2021 FAME, one was based on a complaint. OHSB’s average number of workdays to initiate a complaint inspection was one day, meeting the negotiated goal of 1 day (SAMM 1A). However, the one complaint documented by OHSB during FY 2021, accounted for less than 2% of enforcement activity that was reviewed. Referrals accounted for 70.37% of the inspection files reviewed In FY 2022 NM OHSB conducted nine inspections based on a complaint (less than 5%) and 45 inspections based on a referral (24 %) out the 186 for the year.

The one inspection opened based off a complaint out of the 54 reviewed was attributed to OSHB’s definition of a complaint not being at least as effective as the federal definition. OHSB categorizes more of their unprogrammed activities as referrals as opposed to complaints that allows for a longer time to respond.

Note: New Mexico has interpreted the New Mexico Occupational Health and Safety Act to define complaints as only those “signed” notices of alleged hazards filed by current workers or their representatives. All other notices of alleged hazards, including those from former workers and unsigned notices from current workers or employee representatives, are classified as referrals. All complaints are responded to by inspection in accordance with the New Mexico OHS Act and regulations. Referrals may be handled by phone and fax, letter, or inspection, as determined by the CPM. Because of this, SAMM 01A does not accurately reflect whether OHSB enforcement policies and procedures in place are at least as effective as the Federal OSHA.

OHSB’s FOM refers to “all other notices of alleged hazards, including those from former workers and unsigned notices from current workers or employee representatives, are classified as referrals.” However, this does not meet their definition of a referral as defined in the NM FOM.

A referral, according to the OHSB FOM, is an allegation of a potential workplace hazard or violation received from one of the sources listed below.

1. CO referral - information based on the direct observation of a CO.
2. Safety and health agency referral – from sources including, but not limited to: NIOSH; state programs; OHSB consultation; state or local health departments; local police and fire departments; medical doctors; and safety or health professionals in federal agencies.
3. Discrimination complaint referral – made by a discrimination investigator when an employee alleges that she was retaliated against for complaining about safety or health conditions in the workplace, for refusing to perform an allegedly imminently dangerous task, or for engaging in other activities related to occupational safety or health.
4. Other government agency referral – made by other federal, State, or local government agencies or their employees.
5. Media report – either news items reported in the media or information reported directly to OHSB by a media source.
6. Employer report – notification of accidents other than fatalities or catastrophes.

A case file review is necessary to gather the facts needed to evaluate performance in relation to this observation. This observation will be a focus of next year’s on‐site case file review during the FY 2023 comprehensive FAME. OHSB is currently evaluating the NM FOM on their definition of a complaint. This observation is continued.

**Observation FY 2022‐OB‐05:** During the review of a fatality inspection in the FY 2021 FAME, equipment malfunctioned repeatedly, and next‐of‐kin were not notified of findings.

**Status:** A case file review is necessary to gather the facts needed to evaluate performance in relation to this observation. This observation will be a focus of next year’s on‐site case file review during the FY 2023 comprehensive FAME. This observation will be continued.

**Observation FY 2022‐OB‐06:** OHSB has not properly entered data in OITSS and OIS for whistleblower activities.

**Status:** For the reasons discussed below, Observation FY2021‐01 will be continued as an observation for FY2022 (OIS was added in FY2022).

In FY 2022, OSHA found 21 cases where the dates when complaints were filed were not accurately noted in OITSS and OIS. In many cases, the date a complaint was noted as being filed was the date it was received by the WB investigator, not the date the complainant filed the complaint.

In addition, we found the following inaccurate entries in OITSS and OIS:

* Three duplicate cases were entered into OIS which should be deleted.
* Several cases were not accurately entered in OITSS or OIS, for example:
	+ One case was settled but is listed as dismissed in OITSS.
	+ One case was referred to legal but not updated in OITSS.
	+ One case was settled but shows pending in OITSS.
	+ One case was settled but shows pending in OIS.
	+ One case was a federal case referral, but there is no OIS entry for OHSB.
	+ One case was a federal review case which is not entered in OITSS.
	+ One case was entered into OIS but should be in OITSS.

### New FY 2022 Observation

**Observation FY 2022‐OB‐07:** Whistleblower case files lacked a system of organization and many files were missing documents. Among the 41 files reviewed there were 178 instances of missing items including documents and signatures.

**Discussion:** On June 18, 2020, Federal OSHA issued Electronic Case File (ECF) System Procedures for the Whistleblower Protection Program, CPL 02‐03‐009. The purpose of the Instruction was to establish policies and procedures to create, maintain, and archive electronic case files (ECF) for whistleblower retaliation complaint investigations. The policy outlines case file materials should be organized within each case file by exhibit. The exhibit folders are organized by numerical exhibits, which correspond to the evidentiary exhibits traditionally stored on the right side of paper case files, and alphabetical exhibits, which correspond to the administrative materials traditionally contained on the left side of paper case files. Any internal emails or communication that OSHA has within the agency, within DOL, or to another government agency (such as a sharing letter) should be within Exhibit C (Government Correspondence).

OHSB moved to electronic case files (ECFs) after the FY 2021 FAME audit, which should have assisted, OHSB in resolving some of the issues the review team found with the paper files during the FY 2021 FAME. However, OHSB has not adopted the instruction – which was not required – but OHSB has no ECF organizational procedures of their own. Thus, there is no internal guidance on how case files should be organized and what should be included.

As part of the FY 2022 Follow-up FAME, a case file review of whistleblower cases was conducted. For FY 2022, OHSB had 145 closed complaints and we reviewed 41 files for the FAME: three closed docketed cases, three open docketed complaints, one appeal file, one federal review file and 33 Administrative Closures.

The below chart depicts the 178 deficiencies noted in the 41 files we reviewed.

| **Deficiency** | **Total Files (of 46 Reviewed)** | **% of Files Reviewed** |
| --- | --- | --- |
| Did not have an activity log \* | 35 | 76.1% |
| Contained no evidence of supervisory review | 30 | 65.2% |
| Did not have a complainant interview in file | 14 | 30.4% |
| Did not have a copy of the complaint in the file | 12 | 26.1% |
| Did not appear to follow any organized format  | 11 | 23.9% |
| No documented closure letter in the file | 10 | 21.7% |
| Contents outside folders/miss filed | 10 | 21.7% |
| Request for dual file, referral not made to federal OSHA | 9 | 19.6% |
| OIS/IMIS summary missing from the case file | 8 | 17.4% |
| Closure letter missing or not signed | 8 | 17.4% |
| No record of delivery receipt | 7 | 15.2% |
| NL missing/complaint missing/signature missing from letter | 5 | 10.9% |
| No record of closing conference | 4 | 8.7% |
| ROI not in case file | 4 | 8.7% |
| No documentation of referral to federal OSHA | 4 | 8.7% |
| Determination letter not signed | 3 | 6.5% |
| SA not signed/no delivery receipt | 3 | 6.5% |
| Findings not in file/no delivery receipt | 1 | 2.2% |
| **Total Deficiencies**  | **178** | **N/A** |

Recently, in FY 2023, OHSB adopted a policy outlining the procedures for organizing case files under the new ECF. This should address many of the issues noted here.

**Federal Monitoring Plan:** OSHA will continue to monitor implementation of the new ECF policy and case file deficiencies will be reevaluated in the FY 2023 comprehensive FAME.

## State Activity Mandated Measures (SAMM) Highlights

Each SAMM has an agreed upon 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 2022 State Activity Mandated Measures (SAMM) Report and includes the FRLs for each measure.

It should be noted that OSHA is in the final stages of transitioning from the Whistleblower Application in the OSHA IT Support System (OITSS), a legacy data system, to the Whistleblower module in OIS, a modern data system. For FY 2022, a portion of the State Plan whistleblower data was recorded in OITSS, and a portion was captured in OIS. OSHA encountered challenges in combining the report that generates SAMM 14, 15, and 16 from both systems. As such, OSHA will not be relying on SAMMs 14, 15, or 16 in their evaluation of the State Plans whistleblower programs for FY 2022.

Any SAMMs that were below the FRL were reviewed and addressed accordingly through a finding or observation and discussed in those respective sections. OHSB did have the following highlights for FY 2022, where they exceeded the FRL in a positive way.

SAMM 5a- OHSB had a 2.39 average number of violations per inspection with violations by violation type (SWRU). The 2.39 average number of violations was above the high limit of the FRL at 2.12 and surpassed that high limit by 0.27. This is a positive indicator.

SAMM 8 – OHSB average current serious penalties for private sector from one to 250 workers was $4,214.74 and above the upper end of the FRL at $4,074.19. NMS OHSB is issuing violations with higher penalty amounts than the national average and exceeded that category for employees from 26-100, 101-250, and greater than 250. This is a positive indicator.

SAMM 12- OHSB was able to stay near their issued penalty amount and had a 95.93 percent penalty retained average. This was above the high end of the FRL of 80.47%. OHSB has exceeded the national average for retaining the penalty amount issued. This is a positive indicator.

## Appendix A – New and Continued Findings and Recommendations

FY 2022 New Mexico Follow‐up FAME Report

| **FY 2022‐#** | **Finding** | **Recommendation** | **FY 20XX‐# or FY 20XX‐OB‐#** |
| --- | --- | --- | --- |
| FY 2022‐01 | In FY 2021, 35 of the total 54 inspections reviewed (65%) lacked documentation of employee contact or interview where 100% were reportedly interviewed (SAMM 13).  | Ensure compliance officers conduct and document employee interviews as required by the OHSB FOM Chapter 3.  | FY 2021‐01, FY 2020‐01, and FY 2019‐01 |
| FY 2022‐02 | In FY 2022 OHSB conducted 186 out of their project goal of 500 (37%) (SAMM 7). | OHSB should implement a corrective action to ensure yearly goals are met. Managers should monitor and adjust if goals are not being met weekly to monthly. | FY 2021‐02, FY 2020‐02 |
| FY 2022‐03 | In FY 2022 The average lapse time for health inspections was 119.34 days and the average lapse time for safety inspections was 119.68 days. This exceeded the FRL range of 43.66 to 65.50 for safety and 55.22 to 82.84 for health. (SAMM 11). | OHSB should periodically review all open cases with the compliance officers to prevent high lapse times. | FY 2021‐03 |
| FY 2022‐04 | In FY 2021, 12 of the 12 (100%) fatality inspections lacked documentation for initial contact with family members, and/or family members did not receive final notification or inspection results.  | Family members of employees involved in fatal or catastrophic occupational incidents should be contacted early in investigation, be allowed to discuss incident circumstances, and be sent a letter of finding in accordance with the NM FOM. | FY 2021‐04 |
| FY 2022‐05 | Unions not contacted: Out of a total of 54 files reviewed for FY 2021, five inspection case files had unions and none of the union’s representatives were contacted during inspections. | Follow the policies in the OHSB FOM, Chapter 3. During the opening conference, the highest‐ranking in‐site union official or union employee representative shall designate who will participate in the walkaround. | FY 2021‐05 |
| FY 2022‐06 | OHSB lacks adequate written procedures for its whistleblower program. OHSB did not adopt federal program changes or equivalents for TED 01‐00‐ 020 and CPL 02‐03‐011.  | OHSB should institute an updated policy that adopts the federal WIM or incorporates equivalent provisions. | New |
| FY 2022‐07 | OHSB places excessive requirements on its whistleblower complainants in order to file a complaint.  | OHSB should adopt requirements equivalent to federal for acceptance of complaints. If OHSB believes that they are constrained by statute from having equivalent requirements for acceptance of complaints, a legislative change to Section 50‐9‐25.A should be sought. | New |
| FY 2022‐08 | OHSB management did not review Administrative Closures and Case Files. Of the 41 files reviewed in FY 2022, 30 cases contained no evidence of supervisory review or approval in the case file. | OHSB management should conduct case file reviews to ensure that Complainant interviews and final letters to Complainants are present in the case files, both for administrative closures (“screen outs”) as well as docketed cases. The date on the final letter should match the closing date in OITSS or OIS. Also, case file reviews should ensure that they are complete, and all required documents and evidence are present. | New |

## Appendix B – Observations Subject to Continued Monitoring

FY 2022 New Mexico Follow‐up FAME Report

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Observation #** **FY 2022‐OB‐#** | **Observation#****FY 20XX‐OB‐# *or* FY 20XX‐#** | **Observation** | **Federal Monitoring Plan** | **Current Status** |
| FY 2022‐OB‐01 | FY 2021‐OB‐01 FY 2020‐OB‐01 | OHSB did not complete abatement in 6 safety inspections more than 60 days and 8 health inspections more than 90 days. | OSHA will continue to monitor performance in this area during quarterly meeting and FY 2022 case file review | Continued |
| FY 2022‐OB‐02 | FY 2021‐OB‐02 FY 2020‐OB‐03 | Of the 54 files reviewed in FY 2021, the in‐compliance rate for safety and health inspections was 67%, which was above the FRL range if 24.24% to 36.36% (SAMM 9). | OSHA will continue to monitor performance in this area during quarterly meeting. | Continued |
| FY 2022‐OB‐03 | FY 2021‐OB‐03 | In FY 2021, there were four valid complaint UPAs handled as an inspection which have been open for more than 60 calendar days and 34 number of valid complaints handled as a phone/fax which have been open more than 30 calendar days | OSHA will continue to monitor performance in this area during quarterly meeting. | Continued |
| FY 2022‐OB‐04 | FY 2021‐OB‐04 | OHSB working definition of a complaint is not at least as effective as the federal program and results in fewer complaints. OHSB categorizes more of their unprogrammed activities as referrals as opposed to complaints that allows for a longer time to respond. | OSHA will continue to monitor performance in this area during quarterly meeting. | Continued |
| FY 2022‐OB‐05 | FY 2021‐OB‐05 | In FY 2021, one fatality inspection did not include documentation of next‐of‐kin being notified of the findings and employee interviews were missing from case file. | OSHA will continue to monitor performance in this area during quarterly meeting. | Continued |
| FY 2022‐OB‐06 | FY 2021‐OB‐06 | OHSB has not properly enter data in OITSS for whistleblower activities. | OSHA will continue to monitor performance in this area during quarterly meeting. | Continued |
| FY 2022‐OB‐07 | N/A | Whistleblower case files were unorganized and missing documents. 178 deficiencies were found in the 41 files reviewed in FY 2022. | OSHA will offer assistance and reevaluate performance in this area during the FY 2023 FAME | New |

## Appendix C ‐ Status of FY 20XX Findings and Recommendations

FY 2022 New Mexico Follow-up FAME Report

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **FY 2021‐ #** | **Finding** | **Recommendation** | **State Plan Corrective Action** | **Completion Date** | **Current Status and Date** |
| FY 2021‐01 | 35 of the total 54 inspections reviewed (65%) lacked documentation of employee contact or interview where 100% was reportedly interviewed (SAMM 13). | Ensure COs conduct and document employee interviews as required by OHSB FOM Chapter 3. | OHSB added documentation of interviews to the standard casefile checklist in FY 2022. The Bureau created and filled additional supervisor positions in FY 2022 for immediate review of CO inspections including employee contact. OHSB created and filled Management Analyst Program (MAP) positions in FY 2022 and instituted quarterly case reviews. The MAP team reviews files for employee participation. OHSB anticipates completion by March 31, 2023. | Not completed | OpenLast reviewed: February 25, 2022 |
| FY 2021‐02 | OHSB conducted 140 inspections of their projected goal of 315 (44%),(SAMM 7). | OHSB should implement a corrective action to ensure yearly goals are met. Managers should monitor and adjust if goals are not being met weekly to monthly. | OHSB adjusted FY 2022 goals to reflect continued COVID protocols. As OHSB returns to normal operations, increased staffing and reorganization put the bureau on track to meet inspection goals and exceed the SAMM measure for enforcement presence. In FY 2022 OHSB implemented a proactive training schedule to ensure more trained inspectors and increased inspections. OHSB anticipates completion by September 30, 2023. | Not completed | OpenLast reviewed: August 18,2022 |
| FY 2021‐03 | The average lapse time for health inspections was103.3 days and the average lapse time for safety inspections was107 days. This exceeded the FRL range of 38.08 to 57.13 for safety and 45.78 to 68.68 for health. (SAMM 11). | OHSB should periodically review all open cases with compliance officers to prevent high lapse times. | OHSB created and filled additional CO positions in FY 2022 to address caseloads and lapse times. OHSB’s new MAP team reported lapse times to compliance supervisors on a weekly basis and in quarterly file reviews. Leadership set goals for staff and added supervisors to direct workflow and reduce lapse times. OHSB anticipates completion by September 30, 2023. | Not completed | OpenLast reviewed: August 18, 2022 |
| FY 2021‐04 | 12 of the 12 (100%) fatality inspections lacked documentation for initial contact with family members, and/or family members did not receive final notification of inspection results. | Family members of employees involved in fatal or catastrophic occupational incidents should be contacted early in investigations, be allowed to discuss incident circumstances and be sent a letter of findings in accordance with the NM FOM. | OHSB instituted updated letters in FY 2022 send to families in all cases. The MAP team provided weekly reports and conducted quarterly file reviews to address errors. The MAP team is also developing standard operating procedure to supplement the FOM and prevent loss of institutional knowledge during periods of high staff turnover. OHSB completed corrective action. | January 15, 2022. | Awaiting verification |
| FY 2021‐05 | Unions not contacted: Out of a total of 54 files reviewed for FY 2021, five inspections case files had unions and none of the union’s representatives were contacted during inspections. | Follow OHSB, FOM, Chapter 3; during the opening conference, the highest‐ranking on‐site union official or union employee representative shall designate who will participate in the walkaround. | OHSB added documentation of union participation to the standard casefile checklist. Expanded supervisory staff conducts follow‐ up with COs to verify union contacted during inspections. The MAP team conducts quarterly reviews to ensure completeness of files. OHSB completed all corrective action items for this finding on March 31, 2023. | Not completed | OpenLast reviewed: February 25, 2022 |

## Appendix D – FY 2022 State Activity Mandated Measures (SAMM) Report

FY 2022 New Mexico Follow-up FAME Report

| SAMM Number | SAMM Name | State Plan Data | Further Review Level | Notes |
| --- | --- | --- | --- | --- |
| 1a | Average number of work days to initiate complaint inspections (state formula) | 5.13 | 5 | The further review level is negotiated by OSHA and the State Plan. |
| 1b | Average number of work days to initiate complaint inspections (federal formula) | 3.63 | 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) | 5.32 | 0 | The further review level is negotiated by OSHA and the State Plan. |
| 2b | Average number of work days to initiate complaint investigations (federal formula) | 3.39 | 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) | N/A | 100% | N/A – The State Plan did not receive any imminent danger complaints or referrals in FY 2022.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) | 2.39 | +/- 20% of 1.77 | 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 2.12 for SWRU.  |
| 5b | Average number of violations per inspection with violations by violation type (other) | 0.59 | +/- 20% of 0.90 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 0.72 to 1.08 for OTS. |
| 6 | Percent of total inspections in state and local government workplaces | 14.52% | +/- 5% of 12% | 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 11.40% to 12.60%. |
| 7a | Planned v. actual inspections (safety) | 138 | +/- 5% of 360 | 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 342 to 378 for safety. |
| 7b | Planned v. actual inspections (health) | 48 | +/- 5% of 140 | 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 133 to 147 for health. |
| 8 | Average current serious penalty in private sector - total (1 to greater than 250 workers) | $4,214.74 | +/- 25% of $3,259.35 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $2,444.51 to $4,074.19. |
| 8a | **a**. Average current serious penalty in private sector (1-25 workers) | $2,017.00 | +/- 25% of $2,145.46 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $1,609.10 to $2,681.83. |
| 8b | **b**. Average current serious penalty in private sector (26-100 workers**)** | $5,178.21 | +/- 25% of $3,818.56 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $2,863.92 to $4,773.20. |
| 8c | **c**. Average current serious penalty in private sector (101-250 workers) | $7,760.80 | +/- 25% of $5,469.60 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $4,102.20 to $6,837.00. |
| 8d | **d**. Average current serious penalty in private sector (greater than 250 workers) | $9,078.40 | +/- 25% of $6,725.78 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from $5,044.34 to $8,407.23. |
| 9a | Percent in compliance (safety) | 49.23% | +/- 20% of 32.25% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 25.80% to 38.70% for safety. |
| 9b | Percent in compliance (health) | 40.91% | +/- 20% of 44.42% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 35.54% to 53.30% for health. |
| 10 | Percent of work-related fatalities responded to in one workday | 100% | 100% | The further review level is fixed for all State Plans. |
| 11a | Average lapse time (safety) | 119.68 | +/- 20% of 54.58 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 43.66 to 65.50 for safety. |
| 11b | Average lapse time (health) | 119.34 | +/- 20% of 69.03 | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 55.22 to 82.84 for health. |
| 12 | Percent penalty retained | 95.93% | +/- 15% of 69.97% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 59.47% to 80.47%. |
| 13 | Percent of initial inspections with worker walk-around representation or worker interview | 97.31% | 100% | The further review level is fixed for all State Plans. |
| 14 | Percent of 11(c) investigations completed within 90 days | \*N/A | \*N/A | This measure is not being reported for FY 2022. Please see note below. |
| 15 | Percent of 11(c) complaints that are meritorious | N/A\* | N/A\* | This measure is not being reported for FY 2022. Please see note below.  |
| 16 | Average number of calendar days to complete an 11(c) investigation | N/A\* | N/A\* | This measure is not being reported for FY 2022. Please see note below. |
| 17 | Percent of enforcement presence | 0.54% | +/- 25% of 1.64% | The further review level is based on a three-year national average. The range of acceptable data not requiring further review is from 1.23% to 2.05%. |

NOTE: The national averages in this report are three-year rolling averages. Unless otherwise noted, the data contained in this Appendix D are pulled from the State Activity Mandated Measures (SAMM) Report in OIS run on November 14, 2022, as part of OSHA’s official end-of-year data run.

\*Due to the transition of 11(c) data from IMIS to OIS, SAMMs 14, 15, and 16 are not being reported for FY 2022.