



December 7, 2023

Douglas Parker,
U.S. Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
Occupational Safety and Health Administration (OSHA)
200 Constitution Avenue, N.W.
Washington, D.C. 20210

MARY KAY HENRY
International President

APRIL VERRETT
International Secretary-Treasurer

NEAL BISNO
Executive Vice President

JOSEPH BRYANT
Executive Vice President

HEATHER CONROY
Executive Vice President

LESLIE FRANE
Executive Vice President

ROCIO SÁENZ
Executive Vice President

Re: Petition to Revoke South Carolina Occupational and Health Safety Agency for Failure to Maintain an Effective Enforcement Program.

Dear Assistant Secretary Parker,

The Union of Southern Service Workers (USSW), Service Employees International Union, files this petition pursuant to 29 C.F.R. §1955.5, requesting that the Occupational Safety & Health Administration (OSHA) revoke its approval of the South Carolina State Plan (SC OSHA or State Plan), because the Plan has failed to maintain an effective enforcement program.

USSW advocates for improving wages and working conditions for low-wage service workers in fast food, restaurant, retail, warehousing, and care industries across the southern United States, including in South Carolina. While assisting workers across the State, it has been USSW’s experience that SC OSHA fails to adequately protect low-wage workers. USSW has previously filed a Title VI complaint against SC OSHA for engaging in unlawful discrimination by disproportionately excluding black workers from the protection of its programmed inspections. (A copy of the Title VI complaint that is currently pending at the U.S. Department of Labor is attached). Unfortunately, SC OSHA’s failure to protect workers does not end there.

The State Plan is seriously deficient in many key enforcement measures. There are substantial disparities between the level of protection provided to workers by SC OSHA and that provided by either Federal OSHA or state plans in neighboring southern states. Despite regularly noting these deficiencies in monitoring the State Plan, OSHA has allowed the disparities in enforcement to grow increasingly wide, so now the State Plan consistently fails to meet the requirements of the Occupational Safety & Health Act (OSH Act) and OSHA regulations.

OSHA regulations dictate that approval of under-performing state plans be withdrawn:

Whenever the Assistant Secretary determines that in the operation or administration of a State plan, or as a result of any modifications to a plan, there is a failure to comply substantially with any provision of the plan, including assurances contained in the

SERVICE EMPLOYEES
INTERNATIONAL UNION
SOC, CLC

1800 Massachusetts Ave., NW
Washington, DC 20036

202.730.7000

www.SEIU.org

plan, a withdrawal proceeding shall be instituted in a State which has received final approval under section 18(e) of the Act... Examples of a lack of substantial compliance include but are not limited to the following:

- (i) Where a State over a period of time consistently fails to provide effective enforcement of standards;
- (ii) Where the rights of employees are circumscribed in such a manner as to diminish the effectiveness of the program;
- (iii) Where a State, without good cause, fails to continue to maintain its program in accordance with the appropriate changes in the Federal program;
- (iv) Where a State fails to comply with the required assurances on a sufficient number of qualified personnel and/or adequate resources for administration and enforcement of the program; or
- (v) Where, on the basis of actual operations, the Assistant Secretary determines that the criteria in section 18(c) of the Act are not being met, that the period of concurrent authority under section 18(e) of the Act should not be extended, and that final approval under section 18(e) of the Act should not be given.

29 C.F.R. §1955.3(a)(3). Furthermore, the state must meet each indicia of enforcement. 29 C.F.R. §1902.4(c)(1).

The D.C. Circuit has found that in passing section 18 of the OSH Act, “Congress clearly intended that the states assure effective enforcement programs.” *American Federation of Labor, v. Marshall*, 570 F.2d 1030, 1035 (D.C. Cir. 1978). While the Court found that it was permissible for OSHA to initially approve a state plan whose enforcement was “as effective as” Federal OSHA’s based on certain objective benchmarks, it also found that the state must have a “coherent program to realize a fully effective enforcement effort at some point in the foreseeable future. These benchmarks must be pragmatic in terms of time frame but not lax in goal.” *Id.* at 1038.

OSHA initially approved South Carolina’s State Plan in 1972 and granted it final approval in 1987. But to date, SC OSHA is neither “fully effective” nor “as effective as” Federal OSHA. As detailed below, the South Carolina plan fails to adopt changes in a timely manner as required by the Federal program; has far too few inspectors to accomplish the goal of ensuring safe and healthful working conditions; woefully fails to effectively enforce health standards; and does not protect the rights of employees to participate in enforcement or to be free from discrimination. Congress intended the OSH Act to provide a uniform National floor of health and safety protections for all workers. For too long, despite monitoring the State Plan, OSHA has largely tolerated South Carolina’s operation of a subpar enforcement program, with an anemic enforcement presence, a skeletal inspection force, infrequent inspections, penalties so meager they do not deter violations, and a disgraceful disregard for employee rights. OSHA’s tolerance of the current and ongoing failure of South Carolina’s State Plan must come to a swift end.

Our analysis, detailed below, demonstrates that SC OSHA fails to provide a fully effective enforcement program, as required by OSHA regulations, in several areas. Using OSHA’s Federal Annual Monitoring Evaluation Reports for the years 2017-2019 and 2021-2022,¹ we analyzed how South Carolina performed compared to the Federal Review Level (FRL) for each State Activity Mandated Measure (SAMM). The FRL is the measure the states and Federal OSHA have agreed will serve as the basis for evaluating the state plan’s performance. The fact that a state meets the agreed upon measure does not, in our view, mean the state is operating a “fully effective” enforcement program. However, if the state consistently fails to meet the FRL, it means the state plan clearly is not “fully effective.” The more SAMMs the state does not meet, the weaker its state plan.

We also compared SC OSHA’s performance with several neighboring states in the southeastern United State: Virginia, North Carolina, and Tennessee. Again, South Carolina’s performance was subpar compared to these states’ programs, even though many of these plans have deficiencies of their own.

The results of our analysis clearly demonstrate that the South Carolina State Plan fails to meet the requirements of the OSH Act and OSHA’s regulation at 29 C.F.R. §1955.3.

I. SC OSHA’s Penalty Levels Do Not Meet Federal Requirements.

The Federal Civil Penalties Inflation Adjustment Act, Section 701 of Pub. L. 114-74, and OSHA regulations, 29 CFR §1902.4(c)(2)(xi), require that each state plan provide sanctions consistent with Federal penalty levels. However, South Carolina has refused to increase its penalty levels to match Federal levels. As demonstrated below, South Carolina’s average penalty level in FY 2022 is far lower than the \$3,259 national average for Serious violations.² In comparison, South Carolina’s average penalty for a Serious violation was \$2,019 for all private sector employers, about 38 percent lower than the national average. The low average penalty levels are due to the State’s willful refusal to adopt the mandatory Federal increase in penalty levels.³ This fact alone warrants withdrawal of the South Carolina State Plan under 29 CFR §1955.3(a)(3)(iii). OSHA previously threatened to withdraw Arizona’s state plan for this reason until that state adopted penalty levels comparable to Federal penalty levels. OSHA should take the same action with respect to the South Carolina State Plan.

¹ We omitted 2020 from our analysis because the COVID pandemic created unique enforcement challenges for all states and Federal OSHA.

² The figures cited here and in the following tables are from OSHA’s Federal Annual Monitoring Evaluation Reports.

³ The State’s litigation challenging the regulation requiring the mandatory penalty increases, *McMaster v US Department of Labor*, 3:22-cv-01038-SAL (DSC), does not relieve it of this regulatory duty. Besides, at least one court has dismissed an earlier version of the State’s suit, and DOL has filed a motion to have the pending litigation – which asserts essentially identical claims -- dismissed as well.

Further, the disparity between SC OSHA and the national average of penalties issued for Serious violations was even more pronounced for smaller employers, with a 46 percent difference for those with 1-25 workers and a 52 percent difference for employers with either 26-100 and 101-250 workers. For employers with more than 250 workers, South Carolina's penalties for Serious violations were 42 percent lower than the national average, a difference of nearly \$2,835. The acceptable range of penalties reported by state plans generally, without necessitating further review by OSHA, falls within a margin of 25 percent above or below the national average.

Table 1: Average Penalties for Private Sector Employers for Serious Violations (SAMM #8), South Carolina and National, by Employer Size, 2017-2022 (excluding 2020)

Employer Size	SC State Plan	National average*	Percent SC penalties below FRL [^]
Total for all private sector employers	\$2,019	\$3,259	38%
1-25 workers	\$1,154	\$2,145	46%
26-100 workers	\$1,843	\$3,819	52%
101-250 workers	\$2,648	\$5,470	52%
Greater than 250 workers	\$3,891	\$6,726	42%

* Figures are the further review level for SAMM #8. Figures are based on the three-year national average.

[^] Percent SC penalties below FRL = (FRL penalties - SC State Plan)/SC State Plan

South Carolina's average penalties are also substantially below the average penalties issued by its neighboring states. Table 2 shows the average penalties for South Carolina and neighboring states for the same time period.

Table 2: Average Penalties for All Private Sector Employers for Serious Violations (SAMM #8) for South Carolina, Further Review Levels (FRL), and the Average of Select Neighboring States, 2017-2022 (excluding 2020)

Year	SC State Plan	FRL	Percent SC penalties below FRL [^]	Comp states average penalties*	Percent SC penalties below comp states [†]
2017	\$1,042	\$2,517	59%	\$1,742	40%
2018	\$1,217	\$2,603	53%	\$1,890	36%
2019	\$1,142	\$2,872	60%	\$1,943	41%
2021	\$1,592	\$3,100	49%	\$1,866	15%
2022	\$2,019	\$3,259	38%	\$2,327	13%
Average	\$1,402	\$2,870	51%	\$1,954	28%

[^] Percent SC penalties below FRL = (FRL penalties - SC State Plan)/SC State Plan

* Comparison states are North Carolina, Tennessee, and Virginia

[†] Percent SC penalties below comp states = (Comp states average penalties - SC State Plan) / SC State Plan

II. SC OSHA is not a “fully effective” enforcement program.

SC OSHA’s enforcement program fails to meet the requirements of the OSH Act in several important respects, as described below.

a. South Carolina Has an Inadequate Enforcement Presence.

South Carolina has a woefully inadequate enforcement presence, that is, the number of inspections in proportion to the state’s economic size. As shown in Table 3, SC OSHA had a weak enforcement presence compared to Federal expectations from 2017 through 2022. In 2018, South Carolina’s enforcement presence was only 0.62%, 50 percent below the national FRL. In 2022, SC OSHA’s enforcement presence dropped to an abysmal 0.32%, only 26 percent of the performance presence that OSHA mandates before a further review is required.⁴ Furthermore, SC OSHA’s enforcement performance contrasts sharply with neighboring state plans as shown in Table 3.

Table 3: Enforcement Presence Rate (SAMM #17) for National FRL, South Carolina, North Carolina, Tennessee, and Virginia, 2017-2022 (excluding 2020)

Year	FRL	SC	NC	TN	VA
2017	1.26%	0.55%	1.26%	1.60%	1.59%
2018	1.24%	0.62%	1.24%	1.64%	1.39%
2019	1.23%	0.42%	1.23%	1.50%	1.38%
2021	0.99%	0.43%	0.99%	1.00%	1.15%
2022	1.64%	0.32%	1.64%	1.28%	1.21%
Average	1.27%	0.47%	1.27%	1.40%	1.34%

Not only has South Carolina historically had one of the weakest state plans, but some indicators show that its performance has been worsening in recent years. South Carolina’s State Plan is so weak that in 2023, the AFL-CIO estimated that it would take the state 442 years to inspect every business subject to the Act, up from its previous estimate of 333 years. This is the worst rate among all states.⁵

b. South Carolina Conducts Too Few Inspections to be Effective.

South Carolina conducts very few inspections relative to the number of establishments and employees that work in the State. In 2022, South Carolina conducted a meager 287

⁴ In 2022, the FRL for enforcement presence, SAMM 17, was 1.64%. The range of acceptable data not requiring further review is 25% from the FRL, or between 1.23% to 2.05%.

⁵ Compare Death on the Job: The Toll of Neglect, AFL-CIO (April 2023) at p. 215, available at <https://aflcio.org/reports/death-job-toll-neglect-2023>, with Death on the Job: The Toll of Neglect, AFL-CIO (April 2022) at p. 231, available at <https://aflcio.org/reports/death-job-toll-neglect-2022>.

inspections. With 152,259 establishments and 2.1 million employees working in the State,⁶ this equates to 1.9 inspections per 1,000 establishments and 1.4 inspections per 10,000 employees. South Carolina’s rate of inspections was about one-third the rate of inspections conducted by its neighboring states. In 2022, the rate of inspections per 1,000 establishments in North Carolina, Tennessee and Virginia was 6.2, 7.8, and 6.2, respectively. Similarly, the rate of inspections per 10,000 employees was 4.3, 4.8, and 4.8 inspections in North Carolina, Tennessee and Virginia, respectively. Nationally, the rate of inspections per 1,000 establishments was 6.0 and the rate of inspections per 10,000 employees was 4.5.

Table 4: OSHA Inspections, Establishments, and Employees in South Carolina, North Carolina, Tennessee and Virginia, 2022

State	Total OSHA inspections*	Number of establishments [^]	Number of employees [^]	Inspections per 1,000 establishments	Inspections per 10,000 employees
SC	287	152,259	2,093,950	1.9	1.4
NC	1,954	315,112	4,509,160	6.2	4.3
TN	1,450	185,331	3,016,458	7.8	4.8
VA	1,847	297,191	3,838,861	6.2	4.8
National	64,980	10,909,076	144,691,437	6.0	4.5

* Aggregate of programmed and unprogrammed health and safety inspections reported in SIR 1C

[^] Source: *Death on the Job: The Toll of Neglect*, AFL-CIO (April 2023). National number of establishments is for 2021.

South Carolina consistently fails to conduct the number of inspections OSHA expects. The number of inspections that each state plan is expected to complete annually is negotiated with Federal OSHA and is captured by the state’s FRL. There is no reason to believe these negotiated measures represent a “fully effective” enforcement scheme. However, even if these negotiated measures were appropriate, South Carolina consistently failed to meet these inspection goals.

South Carolina consistently conducted fewer actual inspections than the goal it set with Federal OSHA. Specifically, as shown in Table 5, South Carolina failed to meet Federal expectations in four of the five years analyzed. During this period, SC OSHA conducted an average of 315 safety inspections per year, 27 percent less than the average Federal expectation for the five years analyzed. In the last year – 2022 – SC OSHA only conducted 210 out of the 300 inspections it was supposed to conduct.

⁶ Number of inspections are from State Indicator Report 1C. Number of establishments and employees are from AFL-CIO’s *Death on the Job: The Toll of Neglect* (April 2023) at p. 107, 108, 208, 205, 217, and 221.

Table 5: Total South Carolina Safety Inspections and Further Review Level (FRL) (SAMM #7a), 2017-2022 (excluding 2020)

Year	SC State Plan	FRL	State Plan falls outside FRL
2017	379	760	Yes
2018	399	510	Yes
2019	278	347	Yes
2021	308	250	No
2022	210	300	Yes

c. South Carolina Has Too Few Inspectors to Maintain an Effective Enforcement Program.

South Carolina’s failure to conduct an adequate number of inspections is no surprise given that the State Plan employs too few inspectors to be “fully effective.” Over time, the number of inspectors has declined, even as the state population has increased. South Carolina has admitted that it cannot conduct the expected number of inspections until it increases its staffing,⁷ yet its staffing levels have remained consistently below Federal benchmarks since 2017.⁸ The lack of adequate personnel to implement an effective enforcement program, standing alone, is adequate grounds to withdraw the State Plan. *See* 29 CFR §1955.3(a)(3)(iv).

d. South Carolina Fails to Initiate Formal Inspections and Phone/Fax Investigations in a Timely Manner.

South Carolina takes an unreasonably long period of time to respond to complaints. In each year from 2017-2022, it took South Carolina longer to respond to complaints than the negotiated benchmarks required. In 2022, SC OSHA took an average of four full weeks (20 work days) after receiving a complaint to initiate a formal inspection, which was nearly three times above the FRL level.⁹ It also took SC OSHA an average of more than 18 days after receiving a complaint to initiate a complaint phone/fax investigation, more than three times its FRL. This is especially concerning given that phone/fax investigations require far fewer resources and less time to initiate than does a formal inspection.

Similarly, SC OSHA takes an unreasonable amount of time to respond to complaints compared to neighboring states. For instance, among the states bordering South Carolina, Tennessee was the slowest to initiate a response to complaints in 2022. Tennessee took less than half of the time it took South Carolina, 9.8 days, to initiate an inspection and less than one-quarter of the time, 4.0 days, to initiate a phone/fax investigation.

⁷ 2020 FAME

⁸ 2021 FAME p.7; 2022 FAME, p. 8.

⁹ 2022 FAME at 7, 13.

Table 6: Average Number of Work Days to Initiate Complaint Inspections (SAMM #1a) and Complaint Investigations (SAMM #2a) and State-Specific FRLs, South Carolina, North Carolina, Tennessee, and Virginia, 2022

State	Days to initiate inspection (SAMM #1a)	SAMM #1a FRL*	Days to initiate investigation (SAMM #2a)	SAMM #2a FRL*
SC	20.0	7.0	18.4	5.0
NC	5.7	10.0	2.3	4.0
TN	9.8	15.0	4.0	5.0
VA	2.6	5.0	1.2	3.0

* FRLs for SAMM 1a and 2a are individually negotiated by each State Plan

e. South Carolina Conducts Too Few Inspections.

South Carolina also fails to conduct on-site inspections when it receives formal complaints requesting that it do so. Data from the 2021 FAME Report indicate South Carolina received 598 formal complaints during FY 2021.¹⁰ However, it conducted a total of only 389 inspections – both 169 programmed and (presumably) 220 unprogrammed (including both Complaint inspections and Referral inspections).¹¹ That means that SC OSHA failed to conduct on-site inspections in response to more than 378 formal complaints. The failure to conduct on-site inspections violates the SC OSHA Field Operations Manual Chapter III on Complaints which provides essentially the same criteria as Federal OSHA for conducting formal enforcement inspections. Had SC OSHA followed the established process, it should have conducted far more on-site inspections than it did.

Although Federal OSHA’s monitoring did not question this discrepancy in the enforcement numbers, we believe it plainly shows the SC OSHA enforcement program is not “fully effective.” We suspect, based on the experience in cases of specific Complaints described below, that SC OSHA responded to some, but not all, of these formal complaints by conducting a phone/fax investigation. Such investigations are poor substitutes for on-site enforcement inspections for several reasons: phone/fax investigation do not include an opportunity for participation by employee representatives; they almost never lead to citations and penalties for violations; and they do not provide SC OSHA with any enforceable means to verify that an employer’s response to the investigation is reliable (comparable to the detailed requirements for employer reporting of abatement of hazards – including the mandatory employer certification requirement under Section 71-411 of the SC OSH Act).

USSW’s experience is that South Carolina notified employers by phone/fax, even when USSW members had filed formal complaints. For example, a Popeyes worker filed a formal complaint with SC OSHA on March 29, 2023. The Complainant alleged that she and her co-

¹⁰ 2021 FAME at p. 8.

¹¹ *Id.* at 10-11.

workers had received multiple burns while working on the fryer because it did not have a splash guard to stop the boiling grease from splashing onto them. Furthermore, workers were not provided with adequate personal protective equipment (PPE) to protect against hot grease burns or an appropriate first aid kit to treat burns. The Complainant also designated USSW as the employee representative in all contacts with SC OSHA for this complaint. Despite having filed a formal complaint and designating USSW as her worker representative, SC OSHA directly contravened her instructions and contacted the worker directly to convert her complaint into an informal complaint. Instead of conducting an on-site inspection, SC OSHA simply sent a letter to the employer asking the company to voluntarily fix the hazard.

We have reason to believe that South Carolina's resolution of phone/fax investigations does not adequately protect workers. Recently, USSW acted as the employee representative for a Dollar General worker who filed a complaint about mold in the store, a rat infestation, and merchandise boxes consistently blocking aisles and exits. Despite OSHA repeatedly citing this company for similar violations, SC OSHA simply conducted a phone/fax investigation. Dollar General submitted photos to SC OSHA ostensibly showing that it had corrected the violations. Unknown to SC OSHA, the photos it received were from a different location than the one complained about. SC OSHA closed the complaint upon receiving those photographs, apparently without understanding that the photographs were from a completely different work site. Unfortunately, the alleged workplace hazards in the worker's complaint persisted.

SC OSHA took this negligent action despite the fact that earlier that year, Federal OSHA added Dollar General to its "Severe Violators Enforcement Program", or SVEP – which establishes a very high priority for on-site inspections at all companies in the SVEP program.¹² Shortly afterwards, in contravention of the spirit of that extensive Federal effort to rein in Dollar General's abuses, SC OSHA closed the worker's complaint.

f. South Carolina OSHA Fails to Cite Employers for Workplace Hazards.

Even when they do conduct health inspections, South Carolina consistently fails to identify violations at the same rate as do Federal OSHA and neighboring states. OSHA and state plan inspectors are directed to follow similar or identical criteria for finding violations of standards. The rate by which inspectors find such violations varies by worksite and industry but OSHA maintains they should be similar to the national average. However, as shown in Table 8, SC OSHA's health inspections are much more likely than those conducted by Federal OSHA and comparable state plans to find employers in compliance with OSHA standards. In FY 2022, 67 percent of South Carolina health inspections of worksites found the sites in compliance, compared to the national average of 44 percent.

¹² U.S. Department of Labor, "US Department of Labor finds Dollar General blocked emergency exits, allowed other safety hazards at 4 southern Pennsylvania stores", <https://www.osha.gov/news/newsreleases/region3/06012023>.

Table 7: Health Inspection Compliance Rates (SAMM #9b) and South Carolina, Further Review Level (FRL), and Average for Neighboring States, 2017-2022 (excluding 2020)

SC State Plan	FRL	Diff. between SC OSHA and FRL	Comp states average	Diff. between SC and comp states	Diff. between SC and comp states
2017	63%	36%	77%	39%	62%
2018	65%	36%	81%	37%	75%
2019	62%	36%	71%	35%	74%
2021	63%	41%	54%	*	-
2022	67%	44%	51%	41%	66%
Average	64%	39%	66%	38%	68%

* Excludes 2021 data because North Carolina and Tennessee did not calculate separate values for SAMM #9a (safety) and SAMM#9b (health).

g. South Carolina Frequently Vacates or Reclassifies Violations When Employers Contest Citations.

When OSHA or a state plan issues a citation to an employer, the employer has the right to contest some or all of the cited violations. South Carolina vacates a far higher share of violations issued to private sector employers that contest the agency’s citations compared to North Carolina, Tennessee, and Virginia and to the national average for all state plans. From 2017 to 2019 and 2021 to 2022, South Carolina vacated between 37 and 65 percent of all contested violations. In contrast, the rate of vacated violations for all state plans during that period ranged between 11 and 13 percent. In 2022, SC OSHA vacated 37 percent of all contested violations, which is almost three times higher than the 13 percent rate for all state plans. These figures demonstrate clearly that SC OSHA is more lenient on private sector employers in its enforcement practices than the comparison states and the national average for all state plans.

Table 8: Percent of Private Sector Employer Violations Vacated after Employer Contest (SIR #5b), for South Carolina, Neighboring States, and All State Plans, 2017-2022 (excluding 2020)

Year	SC	Neighboring states*	All States Plans
2017	58%	23%	11%
2018	57%	21%	11%
2019	65%	15%	11%
2021	39%	19%	13%
2022	37%	27%	13%

* Neighboring states figures is the average of the rates reported in SIR #5b for North Carolina, Tennessee, and Virginia.

In addition to requesting that a citation be vacated, an employer contesting a citation may ask the agency to reclassify all or some of the cited violations. The reclassification of violations is likely to result in a decrease in the penalties imposed on employers. SC OSHA reclassifies a

far higher share of violations issued to private sector employers that contest the agency’s citations compared to North Carolina, Tennessee, and Virginia and to the national average for all state plans. Between 2017- 2022, South Carolina reclassified between 27 to 100 percent of all contested violations, compared to a range of 16 to 26 percent for South Carolina’s neighboring states, and 8 to 11 percent for all state plans. In 2022, SC OSHA reclassified about 27 percent of all contested violations, which is more than double the 11 percent rate for all state plans.

Table 9: Percent of Private Sector Employer Violations Reclassified after Employer Contest (SIR #6b), for South Carolina, Neighboring States and All State Plans, 2017-2022 (excluding 2020)

Year	SC	Neighboring states*	All States Plans
2017	100%	20%	8%
2018	50%	19%	10%
2019	43%	16%	10%
2021	59%	26%	10%
2022	27%	26%	11%

* Neighboring states figures are the average of the rates reported in SIR #6b for North Carolina, Tennessee, and Virginia.

III. SC OSHA has Circumscribed Workers’ Rights in Such a Manner as to Diminish the Effectiveness of the Program.

South Carolina also fails to effectively protect workers’ rights to be free from discrimination and to participate in inspections. Workers in South Carolina have little effective protection against retaliation. As far back as 1994, Congress found that SC OSHA had dismissed every complaint of discrimination filed with it.¹³ In 2019 and 2021, SC OSHA only found 10 percent and 6 percent of retaliation complaints to have merit.¹⁴ SC OSHA’s rate of merit findings for these types of violations are far below the FRL, and the State dismisses most without even consulting the complainant.

Also, OSHA’s 2021 FAME evaluation shows that South Carolina took an average of 545 days to conclude 11(c) investigations. This is a particularly egregious failure since South Carolina has one of the lowest union densities in the country. Non-union workers are unlikely to have “just cause” protections so State action is their only recourse if their employer retaliates against them. As OSHA’s statistics show, South Carolina rarely acts to protect vulnerable workers.

Furthermore, SC OSHA fails to allow complainants to participate in the complaint process. USSW has filed several complaints on behalf of workers in South Carolina. Generally, complainants designate an employee to act as the workers’ representative during the walkaround inspection. Our experience is that South Carolina routinely ignores these requests, so no workers

¹³ Comprehensive Occupational Safety & Health Reform Act, 103rd Cong. 2d Sess., H. Rpt. 103-825 Part 1 at 105.

¹⁴ SC OSHA FAME report FY 2021, p. 19.

participate in the inspection process. A random worker interview, if one occurs, is no substitute for actual worker participation.

For example, USSW helped Husqvarna warehouse workers file a formal OSHA complaint on March 27, 2023. Workers alleged, among other things, that they were exposed to electrical outlets and wires, they were not properly trained to work the forklifts, and the warehouse's ventilation system did not function properly. The complainants designated a co-worker as their employee walk-around representative in their OSHA complaint. However, none of the complainants, including the designated employee walk-around representative, were interviewed during the inspection. Ultimately, SC OSHA did not find any violations. If the designated employee walk-around representative had been interviewed, they could have provided pertinent information to the SC OSHA inspector about the unsafe conditions normally present in their workplace.

Our review of OSHA's monitoring of South Carolina's efforts to involve workers in inspections shows OSHA gives the State more credit than it is due. OSHA reported that 100% of inspections show either worker participation as a walk-around representative or worker interviews.¹⁵ It also concludes that in 21 of 33 inspection files, there were no documented worker interviews.¹⁶ Both cannot be true.

Similarly, SC OSHA has also failed to allow workers to participate in closing conferences. Closing conferences are an important opportunity for the employer and the employees to meet with the compliance officer to ask questions about SC OSHA's findings. However, in USSW's experience workers who file complaints with SC OSHA rarely have an opportunity to participate in closing conferences. USSW had both a meeting with and sent a letter to SC OSHA requesting that the workers we represent be given the opportunity to attend closing conferences. USSW was assured both in a meeting with SC OSHA officials and in a letter drafted by SC OSHA's General Counsel that they would allow these workers to attend closing conferences. However, SC OSHA continues to block workers from participating in closing conferences.

For example, USSW helped several Waffle House workers file a formal complaint in response to their store's broken air-conditioning system on July 11, 2023. As a result of working in extreme heat, workers reported that they experienced heat exhaustion with symptoms such as dizziness, lightheadedness, swaying/loss of coordination, dehydration, and vomiting. In addition, workers reported being exposed to extreme violence, including an incident where a customer retrieved a gun over hash browns. Workers designated USSW as their employee representative and requested to have a closing conference with the compliance officer handling their case. However, USSW still had to follow-up multiple times with SC OSHA's representatives to get approval for a closing conference. When SC OSHA finally met with the complainant, they refused to answer the complainant's questions and ended the closing conference within 5 minutes of the meeting starting. Such overt hostility to worker participation is unacceptable.

¹⁵ 2021 FAME at p.13.

¹⁶ *Id.* at C-1.

What is more, there is evidence that this weak enforcement effort falls disproportionately on low wage workers of color. As stated earlier, USSW has separately filed a civil right complaint against South Carolina. Our data analysis shows that South Carolina OSHA has virtually no programmatic inspection presence in industries where low-wage workers of color are the predominate workforce.

South Carolina's operation of its State Plan diminishes the rights of employees to be free from discrimination and to participate in the enforcement process. Under 29 CFR §1955.3(a)(3)(ii) this is yet another reason to initiate withdrawal proceedings against the state.

IV. South Carolina Fails to Issue Citations Under the State OSHA's General Duty Clause for Heat, Violence and Other Hazards Cited Under 5(a)(1) by Federal OSHA.

The SC State Plan failed to cite employers for any violations of the state OSHA law's General Duty Clause (Ch. 15, Art. 1, Section 41-15-80), such as the hazards from excessive heat and workplace violence identified in complaints filed by USSW members. For example, when USSW recently filed a complaint about excessive heat, South Carolina initially responded that it does not enforce "comfort" standards. SC OSHA subsequently admitted that such hazards fell within the agency's jurisdiction but failed to adequately investigate the heat hazards about which complaints had been filed. South Carolina's disregard of its obligation to protect workers is demonstrated in other stark ways as well. Indeed, a search of OSHA's IMIS data for South Carolina shows no evidence of any General Duty Clause violations regarding any hazards in any industry for the last decade.

V. Relief Requested

Each of the failures detailed in this petition, standing alone, would justify OSHA in withdrawing South Carolina's State Plan, because each show that on well-defined indices of enforcement effectiveness, South Carolina falls well below what the OSH Act requires. Taken together, the combined effect of this weak enforcement effort forcefully compels OSHA to take action to withdraw the South Carolina Plan under 29 CFR §1955.3(a)(3)(i).

Sincerely,
/s/ Dorothy Singletary
Counsel to USSW
1800 Massachusetts Avenue
Washington, DC 20036
dorothy.singletary@seiu.org
202-836-1343(c)