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Director Naomi Barry-Pérez
Civil Rights Center
ATTENTION: Office of External Enforcement
U.S. Department of Labor
200 Constitution Ave NW
Room N-4123
Washington, DC 20210
crceexternalcomplaints@dol.gov

**Re: Civil Rights Complaint against the South Carolina Occupational Health and Safety Agency for Racial Discrimination in Programmed Inspections
[CORRECTED]**

Dear Director Barry-Pérez,

I write on behalf of the Union of Southern Service Workers, Service Employees International Union (USSW), to raise a complaint against the South Carolina Occupational Health and Safety Agency (SC OSHA) for race discrimination in violation of Title VI of the Civil Rights Act, and of the Department of Labor's anti-discrimination regulations, 29 C.F.R. § 31.3(b)(2).

SC OSHA discriminates by disproportionately excluding black workers from the protection of its programmed inspections, thereby exposing black workers to an unacceptable and inequitable risk of injuries and illness. For instance, from 2018 to 2022,¹ SC OSHA conducted *no* programmed inspections in the food/beverage and general merchandise industries, and only *one* such inspection in the food services and warehousing industries. These industries employ large numbers of South Carolinians, and they are disproportionately staffed by black workers. While neglecting these industries, SC OSHA has devoted its enforcement resources to industries that employ far fewer black workers. There is no legitimate justification for this severe racial disparity.

I. Background

A. Parties

As a campaign of the Service Employees International Union, USSW advocates for better wages and working conditions for low wage service workers in the fast food, restaurant, retail and care industries across the southern United States, including workers in South Carolina. USSW has a strong interest in assuring the workplace safety of its members and other workers. USSW has a particular interest in addressing anti-black discrimination among low-wage workers, as it seeks to organize workers of color who have been historically excluded from the right to form a union and other labor rights.

¹ As discussed in more detail below, our analysis of inspections excludes the year 2020 to minimize any distortion in the data from the COVID-19 pandemic.

USSW advocates on behalf of individuals employed in workplaces that have experienced significant safety risks and injuries. For example, USSW has served as the employee representative for workers requesting SC OSHA inspections in fast food and general retail establishments where workers are frequently burned, do not have access to adequate personal protective equipment or training, often work with defective or damaged equipment such as broken oil fryers and pallets, contend with fire hazards caused by obstructed aisles and exit routes, are exposed to higher rates of workplace violence due to chronic understaffing, work in standing water for extended periods of time due to clogged drains, regularly face the threat of electrocution from exposed electrical wires, and are subject to extreme, unrelieved heat.

SC OSHA is South Carolina's OSHA-approved state plan. Under the OSH Act, states can choose to have the federal government directly regulate workplace health and safety standards or develop their own plan, which must be approved by the Department of Labor and must comply with various federal regulations. South Carolina is one of 22 states with plans covering both the private sector and state and local government workers.²

OSHA approves and monitors all state plans and provides up to half of the funding for each program. According to the Fiscal Year 2021 South Carolina Federal Annual Monitoring Evaluation (FAME) Report,³ the federal government has provided the maximum 50% of SC OSHA's funding every year from at least 2017-2021, totaling over \$10 million.

B. South Carolina OSHA inspections

SC OSHA conducts programmed and unprogrammed inspections.⁴ This complaint focuses on programmed inspections, which are supposed to be scheduled based on neutral and objective criteria that are outlined in an annual high hazard planning guide.

According to its FY 2021 FAME Report, SC OSHA's programmed inspection activity falls short in a number of respects. First, SC OSHA only inspected 0.43% of employer establishments in the state. This is less than half current level of enforcement by federal OSHA nationally (1.0%), and about a third of the enforcement level by NC OSHA.

According to that same report, SC OSHA is not appropriately allocating its resources to the most hazardous work sites. In FY 2021, 62.71% of SC OSHA health inspections found that

² OSHA, *State Plans* (last visited Mar. 28, 2023), <https://www.osha.gov/stateplans/>.

³ OSHA, *FY 2021 Comprehensive Federal Annual Monitoring Evaluation (FAME) Report: South Carolina Department of Labor, Licensing and Regulation, Office of Occupational Safety and Health*, available at <https://www.osha.gov/sites/default/files/2022-07/south-carolina-fy-2021-comprehensive-fame-report.pdf>.

⁴ S.C. OSHA's Field Operations Manual (FOM), available at <https://osha.llr.sc.gov/pdfs/fieldmanual.pdf>. The manual defines "programmed inspections" as "planned inspections as opposed to those inspections which occur due to a fatality complaint, referral, etc."

the work site was in compliance. That is significantly higher than the 32.7% rate of compliance found by federal inspectors.

Finally, the FY 2021 FAME Report pointed out that South Carolina has failed to adopt OSHA's maximum and minimum penalty increase for health and safety standard violations. This has resulted in unacceptably low penalties. In FY 2021, SC OSHA's average penalty per serious violation in the private sector was \$1,592.07 for smaller employers (1-250 workers) and \$3,360.79 for larger employers. These are only about half of the average penalties issued by Federal OSHA over the last 3 years. Rather than heed the federal government's directive to bring itself into compliance with federal regulations regarding penalties, South Carolina sued DOL.⁵

As discussed below, South Carolina's OSHA program falls short in another critical respect, aside from the defects discussed in the FAME report: it discriminates against black South Carolinians.

C. Data analyzed in this complaint

For purposes of this complaint, USSW has conducted an analysis of South Carolina's OSHA inspections by industry. The analysis looks at SC OSHA inspections from 2018, 2019, 2021, and 2022. (The year 2020 was excluded from the analysis to minimize distortions from the COVID-19 pandemic.) Data regarding OSHA inspections comes from the Department of Labor website.

USSW's analysis focuses on six industries, described below with reference to their three-digit codes under the North American Industry Classification System (NAICS). The first two industries receive the vast majority of programmed inspections by SC OSHA, more than 70% during the time period analyzed here. The other four industries, those where USSW focuses its advocacy efforts, receive virtually no programmed inspections by SC OSHA.

Industries:

- Construction of Buildings, NAICS code 236. This industry "comprises establishments primarily responsible for the construction of buildings."⁶
- Specialty Trade Contractors, NAICS code 238. This industry "comprises establishments whose primary activity is performing specific activities... involved in building construction or other activities that are similar for all types of construction, but that are not responsible for the entire project."⁷

⁵ South Carolina Governor's Office, *Gov. Henry McMaster Sues Biden Administration's OSHA* (last visited Mar. 28, 2023), <https://governor.sc.gov/news/2022-08/gov-henry-mcmaster-sues-biden-administrations-osh>

⁶ See United States Census Bureau, *North American Industry Classification System: 236-Construction*, (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=236&year=2022&details=236>.

⁷ United States Census Bureau, *North American Industry Classification System: 238 – Specialty Trade Contractors* (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=238&year=2022&details=238>.

- Food and Beverage Retailers, NAICS code 445. This industry includes “general or specialized lines of food and beverage products,” such as grocery stores.⁸
- General Merchandise Stores, NAICS codes 452, 453, and 455. The codes 452 and 453 were used for General Merchandise Stores and Miscellaneous Store Retailers in the 2017 NAICS. Those codes were eliminated in the 2022 NAICS, which instead uses code 455 for General Merchandise Retailers. This industry includes retail businesses that sell new general merchandise.⁹
- Warehousing and Storage, NAICS code 493. This industry includes businesses that “are primarily engaged in operating warehousing and storage facilities for general merchandise, refrigerated goods, and other warehouse products.”¹⁰
- Food Services and Drinking Places, NAICS code 722. This industry includes businesses that “prepare meals, snacks, and beverages to customer order for immediate on-premises and off-premises consumption.”¹¹

Aside from inspection data, USSW’s analysis incorporates several other public data sources to assess whether SC OSHA’s programmed inspections create a disparate impact on black workers.

First, the Quarterly Census of Employment and Wages (QCEW) provides a count of businesses and employees in South Carolina by industry. For purposes of this complaint, USSW used the September 2022 QCEW data set.

Second, the Equal Employment Opportunity Commission (EEOC) collects demographic data from private employers with more than 100 employees and certain federal contractors. The data is collected through a form known as the “EEO-1.” Although not all employers are required to submit EEO-1s, we use the data as roughly representative of the demographics of the relevant industries in South Carolina. For purposes of this complaint, USSW used the 2020 EEO-1 data.

Third, the U.S. Bureau of Labor Statistics publishes an Annual Survey with data regarding the incidence of nonfatal occupational injuries and illnesses by industry.¹² We used

⁸ United States Census Bureau, *North American Industry Classification System: 445 – Food and Beverage Retailers*, (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=445&year=2022&details=445>.

⁹ United States Census Bureau, *North American Industry Classification System: 455 – General Merchandise Retailers*, (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=455&year=2022&details=455>.

¹⁰ United States Census Bureau, *North American Industry Classification System: 493 – Warehousing and Storage*, (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=493&year=2022&details=493>.

¹¹ United States Census Bureau, *North American Industry Classification System: 722 – Accommodation and Food Services*, (last visited Mar. 31, 2023), <https://www.census.gov/naics/?input=722&year=2022&details=722>.

¹² See U.S. Bureau of Labor Statistics, *Injuries, Illnesses, and Fatalities* (last visited Mar. 31, 2023), <https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/table-1-injury-and-illness-rates-by-industry-2021-national.htm>.

this data to assess the degree to which SC OSHA's programmed inspections correspond to the incidence of injuries and illness in various industries. For purposes of this complaint, USSW used the 2021 BLS Annual Survey.

Finally, to determine whether South Carolina was an outlier in its neglect of industries employing disproportionate numbers of black workers, we also examined inspection data from the DOL website for six other states: California, Georgia, Michigan, North Carolina, Pennsylvania, and Tennessee. We picked these states to provide a representative cross-section of states to compare to South Carolina: three are other southern states, one is northeastern, one midwestern, and one western. Four of the states have state OSHA plans (California, Michigan, North Carolina, and Tennessee), and two do not (Georgia and Pennsylvania).

USSW will separately provide a spreadsheet with its analysis to the Civil Rights Center.

II. Racial discrimination by SC OSHA in violation of Title VI

A. Title VI and implementing regulations

Title VI of the Civil Rights Act provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

As a recipient of Federal financial assistance from DOL, SC OSHA is also bound by the regulations DOL has promulgated pursuant to Title VI, which prohibit a recipient from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.” 31 C.F.R. § 31.3(b)(2).

This regulation prohibits recipients of DOL funding from engaging in practices that have a disparate impact on racial minorities, even in the absence of any discriminatory intent. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974).

B. Disparate impact in SC OSHA programmed inspections

SC OSHA engages in egregious discrimination based on race. As shown by USSW's analysis, SC OSHA disproportionately excludes black workers from the protection of its programmed inspections. Indeed, SC OSHA has engaged in a pattern of conducting almost *no* programmed inspections in four key industries with disproportionate numbers of black employees. While neglecting these industries, SC OSHA concentrates its resources in industries that employ far smaller percentages of black workers. Data regarding the four relevant industries is set forth in the chart below.

Industry	% of SC workforce	% black workers in industry	# SC OSHA programmed inspections, 2018-2022
Food/beverage retailers (NAICS 445)	2.4%	28.5%	0
General merchandise retailers (NAICS 452, 453, 455)	2.7%	45.3%	0
Food service (NAICS 722)	9.6%	41.4%	1
Warehousing and Storage (NAICS 493)	1.3%	60.8% ¹³	1
TOTAL	16%	41.7%¹⁴	2

As shown in the chart, these four industries collectively employ 16% of the South Carolina workforce. Further, they employ disproportionate numbers of black South Carolinians, collectively 41.7%. This is far higher than the percentage of black residents in South Carolina, approximately 27%.¹⁵

Yet, while employing large numbers of black South Carolinians, these industries received only *two* programmed inspections during the relevant time period.

By contrast, SC OSHA does the vast majority of its programmed inspections in the construction and specialty trade contractor industries. These industries employ far fewer South Carolinians than the industries described above, and their workers are disproportionately white. These industries make up more than 70% of SC OSHA's programmed inspections. Data for these industries is shown below:

¹³ There is no EEO-1 data available for the Warehousing and Storage industry in South Carolina. Consequently, for purposes of this complaint, we used the data for that industry in the neighboring state of Georgia. There is good reason to believe that the demographics are similar in the two states. For example, in other industries of interest, South Carolina and Georgia have very similar proportions of black workers, including specialty trade contractors (20.3% black in South Carolina, 17.6% black in Georgia) and food service (41.4% black in South Carolina, 39.1% black in Georgia).

¹⁴ This is a weighted average of the percentage of black workers in the relevant industries. The average is weighted based on QCEW employment numbers for each industry.

¹⁵ U.S. Census Bureau, Quick Facts: South Carolina (last visited Mar. 31, 2023), <https://www.census.gov/quickfacts/SC>.

Industry	% of SC workforce	% black workers in industry	# SC OSHA programmed inspections, 2018-2022
Construction (NAICS 236)	1.2%	8.9%	237
Specialty Trade Contractors (NAICS 238)	3.0%	20.3%	262
TOTAL	5.4%	17.5%	499

To summarize, SC OSHA neglects key industries whose workforce is 42% black employees, while focusing the vast majority of its programmed inspections on industries made up of only 18% black workers.

The vast disparity in SC OSHA programmed inspections cannot be fully explained by a difference in the dangers faced by workers in the different industries. Workers in the industries neglected by SC OSHA face a significant risk of injury and illness. For instance, since 2017, federal OSHA has issued \$15 million in fines against Dollar General.¹⁶ Yet, in South Carolina, workers at Dollar General and similar businesses have been systematically excluded from the protection of SC OSHA's programmed inspections.

As illustrated in the chart below, the industries neglected by SC OSHA have a significant incidence of injuries and illnesses according to the BLS Annual Survey, often greater than that of the industries frequently inspected by SC OSHA.

Industry	2021 nonfatal injury/illness incidence rate
Construction (NAICS 236)	2.5
Specialty Trade Contractors (NAICS 238)	2.8
Food/beverage retailers (NAICS 445)	4.5
General merchandise retailers (NAICS 452, 453, 455)	5.6
Food service (NAICS 722)	2.6
Warehousing and Storage (NAICS 493)	5.5

¹⁶ Michael Corkery, *Dollar General Is Deemed a 'Severe Violator' by the Labor Dept.*, N.Y. Times, March 28, 2023, <https://www.nytimes.com/2023/03/28/business/dollar-general-osh-fines.html>.

Moreover, SC OSHA's neglect of these disproportionately black worker-staffed industries is not typical of other states. The following table shows how many inspections were conducted in South Carolina, as compared to six other representative states, in the four industries:

State	# programmed inspections in food/beverage retail, general merchandise retail, food service, and warehousing, 2018-2022	Inspections per 100,000 workers in food/beverage retail, general merchandise retail, food service, and warehousing, 2018-2022
South Carolina	2	0.6
California	785	33.2
Georgia	105	15.2
Michigan	502	93.5
North Carolina	62	9.6
Pennsylvania	65	8.5
Tennessee	34	7.5

In each of these states—with the exception of South Carolina—there have been at least seven programmed inspections in the relevant industries per 100,000 workers, and as many 93 inspections per 100,000 workers in Michigan. Yet, in South Carolina, there was less than one inspection per 100,000 workers in these industries. This chart shows that South Carolina's neglect of the industries is not ordinary or inevitable.¹⁷

In sum, the data shows a clear pattern: SC OSHA selects sites for programmed inspections in a manner resulting in the disparate exclusion of black workers. Moreover, this discrimination leaves thousands of low-wage black workers vulnerable to preventable injury and illness. DOL's Title VI regulations do not tolerate such discrimination.

C. Inadequate Responses to Complaints Filed by Black Workers

In addition to the stark pattern of racial discrimination revealed in the data concerning SC OSHA's programmed inspections, USSW has observed a pattern of inadequate responses to complaints filed by black workers in the state. To illustrate this pattern, we provide two examples below.

1. Dollar General

In February 2023, USSW acted as the employee representative for a black worker at a Dollar General in Irmo, South Carolina, who filed a complaint about mold in the store, a rat infestation, and merchandise boxes consistently blocking aisles and exits. When Dollar General

¹⁷ The seven states referenced in this chart are the only ones for which USSW has collected data; we have not cherry-picked states to make South Carolina look like more of an outlier.

filed a response with SC OSHA which included photos of a *different* Dollar General location, SC OSHA closed the complaint. Furthermore, hazardous conditions persist at the store. Not only does the store continue to pack the aisles with boxes, blocking the exists, but employees are now subject to a new hazard at the store as a result of the wire mesh on store equipment sticking out, causing employees to seriously cut themselves. Not only does the store lack any first aid equipment to treat these injuries, but the store management finds these injuries to be a source of amusement.

2. McDonald's

On August 4, 2022, USSW acted as the employee representative of a black worker at a McDonald's in Columbia, South Carolina, who filed a complaint with SC OSHA after the air conditioning unit at the fast food restaurant broke, requiring her to work in extremely high temperatures. In addition, her complaint alleged that the employer did not allow her to take water breaks to allow her body to cool down while working for long periods of time in high heat. At the time the worker filed the complaint, she was about five months pregnant.

SC OHSA did not respond to the complaint for two months. On October 3, 2022, SC OHSA requested additional information from the employee representative, which USSW provided within two days of the request. Then on November 3, 2022, three months after the complaint was filed, the worker received a letter notifying her that her complaint would be treated as an informal complaint and not result in an on-site investigation because her complaint failed to comply with technical requirements. By this time, the worker had already resigned from her job at McDonald's out of concern for her health and safety and the danger posed to her pregnancy.

Three months after the complaint was filed, on November 3, 2022, well past the extreme temperatures of the summer months, SC OSHA did nothing more than inform the employer of the health and safety hazards asserted in the complaint. The worker was never informed whether the store even responded to SC OSHA's letter.

III. Relief Requested

USSW requests that DOL CRC promptly and comprehensively investigate the allegations in this complaint and take all actions necessary to ensure that SC OSHA complies with the law. USSW also requests that the Civil Rights Division of the Department of Justice play an active role in coordinating this federal investigation and any enforcement actions, consistent with the mission of the Federal Coordination and Compliance Section.

USSW requests that SC OSHA be brought into full compliance by requiring the agency to comprehensively revise its criteria for scheduling programmed inspections to ensure SC OSHA regularly inspects industries disproportionately made up of black workers and respond appropriately to complaints filed by black workers, including by initiating unprogrammed inspections.

While the focus of this complaint is disparate impact, USSW SEIU requests that DOL CRC also assess and investigate whether the facts in this complaint give rise to intentional discrimination.

If SC OSHA does not come into compliance voluntarily, USSW requests that DOL suspend or terminate financial assistance to SC OSHA and take steps to revoke approval of the state plan and directly regulate and enforce health and safety standards in South Carolina's private sector.

USSW can be reached through its authorized representative, Mary Joyce Carlson, whose contact information is set forth below.

SC OSHA can be reached by contacting its Administrator, Gwen Thomas, whose phone number and email information is also set forth below.

Sincerely,

/s/ Mary Joyce Carlson

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