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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

[Docket ID. OSHA 2012-0029]

[RIN 1218-AC78]

Hawaii State Plan for Occupational Safety and Health; Proposed Modification of 18

(e) Plan Approval

AGENCY: Occupational Safety and Health Administration (OSHA),
Department of Labor.

ACTION Notice of Opportunity to Request Informal Public Hearing;. Request
for Written Comments

SUMMARY: Hawaii administers an occupational safety and health state plan approved by federal OSHA. During the past three years, the state plan has faced significant budgetary constraints and staffing challenges, and has requested federal OSHA assistance to ensure that workers are afforded adequate worker protection during this period. The Hawaii Director of Labor and Industrial Relations has requested a temporary modification of the state plan's approval status from final approval to initial

approval, to permit exercise of supplemental federal enforcement and to allow Hawaii sufficient time and assistance to strengthen and improve its state plan performance. Hawaii has pledged to accomplish the necessary corrective action to regain final approval status in a timely manner. OSHA is soliciting written comments to ensure that all relevant information, views and data are available to the Assistant Secretary during this proceeding. Members of the public may also submit requests for an informal hearing, which will be scheduled if the Assistant Secretary finds that substantial issues are raised that necessitate a hearing.

DATES: Comments and requests for an informal hearing must be received by [INSERT DATE 35 DAYS FROM PUBLICATION IN FEDERAL REGISTER]

ADDRESSES: Written comments: You may submit comments, identified by docket number OSHA-2012-0029, or regulatory information number (RIN) 1218-AC78, by any of the following methods:

Electronically: You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions; or

Fax: If your submission, including attachments, does not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693-1648; or

U.S. mail, hand delivery, express mail, messenger or courier service: You must submit your comments and attachments to the OSHA Office, Docket Number OSHA-2012-0029, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693-2350 (OSHA's TTY number is (877) 889-5627). Deliveries (hand, express mail, messenger and courier service) are accepted during

the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. - 4:45 p.m., EDT.

Instructions for submitting comments: All submissions must include the docket number (Docket No. OSHA-2012-0029) or the RIN number (RIN 1218-AC78) for this rulemaking. Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand delivery, express delivery and messenger or courier service.

All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>. Therefore, OSHA cautions you about submitting personal information such as social security numbers and birthdates.

Docket: To read or download submissions in response to this Federal Register notice, go to docket number OSHA-2012-0029, at <http://www.regulations.gov>. All submissions are listed in the <http://www.regulations.gov> index, however some information (e.g., copyrighted material) is not publicly available to read or download through that webpage. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

Electronic copies of this Federal Register document are available at <http://www.regulations.gov>. This document as well as news releases and other relevant information, is available at OSHA's webpage at <http://www.osha.gov>. A copy of the documents referenced in this notice may be obtained from: Office of State Programs, Directorate of Cooperative and State Programs, Occupational Safety and Health

Administration, Room N3700, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 693-2244, fax (202) 693-1671; Office of the Regional Administrator, Occupational Safety and Health Administration, San Francisco Federal Building, 90 7th Street, Suite 18-100, San Francisco, California 94103, (415) 625-2546, fax (415) 625-2526; and the Hawaii Department of Labor and Industrial Relations, HIOSH, 830 Punchbowl Street, Suite 425, Honolulu, Hawaii 96813, (808) 586-9100, fax (808) 586-9104. Other information about the Hawaii State Plan is posted on the state's Web site at <http://hawaii.gov/labor/hiosh>.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Francis Meilinger, OSHA Office of Communications, Room N-3647, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 693-1999; email: meilinger.francis2@dol.gov.

For general and technical information: Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, Room N-3700, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210; telephone: (202) 693-2200; email: kalinowski.doug@dol.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 18 of the Occupational Safety and Health Act of 1970 (the Act, 29 U.S.C. 667) provides that states that desire to assume responsibility for the development and enforcement of occupational safety and health standards may do so by submitting, and obtaining federal approval of a state plan. Procedures for state plan approval are set forth in the regulations at 29 CFR Part 1902. If the Assistant Secretary, applying the criteria

set forth in section 18(c) of the Act and OSHA regulations, finds that the plan provides or will provide for state standards and enforcement that are “at least as effective as” federal standards and enforcement, initial approval is granted pursuant to section 18(b) of the Act (29 U.S.C. 667(b)). A state may commence operations under its plan after this determination is made, but the Assistant Secretary retains enforcement authority during the initial-approval period, as provided by section 18(e) of the Act, which states, “[a]fter the Secretary approves a State plan submitted under subsection (b), he may, but shall not be required to, exercise his authority under sections 8, 9, 10, 13, and 17 with respect to comparable standards promulgated under section 6,” for the specified period. The Hawaii State Plan received initial federal OSHA plan approval on December 28, 1973 (39 FR 1010). The Hawaii Occupational Safety and Health Division (HIOSH) of the Hawaii Department of Labor and Industrial Relations is designated as the state agency with responsibility for administering the state plan.

Hawaii proceeded to the next phase of federal plan approval in 1984, when the state plan received “final approval” under section 18(e) of the Act. Final approval under section 18(e) requires, among other things, a finding by the Assistant Secretary that the plan, in actual operation, provides worker protection “at least as effective as” that provided by federal OSHA. A final approval determination results in the relinquishment of federal concurrent enforcement authority in the state with respect to occupational safety and health issues covered by the plan, 29 U.S.C. 667(e). Hawaii was granted final approval effective April 30, 1984 (49 FR 19182).

Current Situation in Hawaii

During the past three years, the Hawaii State Plan has faced major budgetary and hiring restraints that have significantly affected its program. Impacts on the state plan are clearly reflected in the deficiencies identified throughout recent OSHA monitoring reports. Joint efforts were made by federal OSHA and Hawaii to address these issues, yet Hawaii continues to face severe programmatic, staffing and training issues. As of March 1, 2012, the HIOSH program employed five safety inspectors and five health inspectors, which falls short of the required nine (9) safety inspectors and nine (9) health inspectors as determined by benchmarks established pursuant to a federal court order entered in AFL-CIO v. Marshall, C.A. No. 74-406 (D.D.C. 1978)(order implementing AFL-CIO v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978).) This reduced staffing level has resulted in a significant decrease in enforcement activities. Added to the state's economic situation is the loss of institutional knowledge with the recent retirement of the program administrator. With the ongoing task of training a new program administrator, as well as hiring and training new enforcement and administrative staff, Hawaii has requested assistance from federal OSHA. Hawaii's proactive efforts demonstrate a commitment to ensuring that workers are afforded adequate protection during this period of program strengthening and improvement.

Joint efforts by federal OSHA and HIOSH to address Hawaii's worker protection needs during this period, necessitate a greater enforcement presence by OSHA in the state. In order for federal OSHA to be able to provide this assistance, Hawaii's plan approval status must be modified from final approval to initial approval. During the

phase of initial state plan approval status, federal OSHA regains authority to enforce federal OSHA requirements as a supplement to state plan enforcement.

Dwight Takamine, Hawaii's Director of Labor and Industrial Relations, has committed the state to making Hawaii's workplaces safe and healthful and to working "diligently toward restoring [the state's] 18(e) status as soon as possible." OSHA notes that the 3-year evaluation requirement for final approval following initial approval (see section 18(e), second sentence) does not apply in this instance. Hawaii received initial approval in 1974, and the structural features of the state plan remain completely intact.

Procedures for OSHA's Proposed Modification to Hawaii Plan Approval

Today's notice proposes a modification to the Hawaii State Plan's status from final approval to initial approval in order to allow for federal OSHA to provide inspection and enforcement assistance to Hawaii. OSHA intends to make this modification in keeping with procedures at 29 CFR 1902.47 et seq. Relevant materials, including all public comments, relevant federal monitoring reports, a copy of the federal court's order under which state staffing benchmarks are established, and other pertinent documentation will be publically available in OSHA's docket office, as well as through various federal OSHA and state offices as described above. At the close of the public comment period initiated today, OSHA will review all comments submitted; will review any hearing requests; and will schedule an informal hearing if required to resolve substantial issues raised in any such requests. The Assistant Secretary's final decision will thereafter be published in the *Federal Register* and will include the appropriate revisions to 29 CFR 1952 if the Hawaii State Plan's status is changed.

Effect of Modifying Hawaii's Status

As discussed above, modifying the Hawaii State Plan's status from final to initial approval would authorize OSHA to carry on an enforcement program to supplement that of HIOSH, including independent federal or joint state and federal inspections resulting in issuance of appropriate federal citations. However, modifying Hawaii's final approval status would not affect Hawaii's basic plan approval and would not affect Hawaii's legal authority to enforce state occupational safety and health standards in the state's workplaces. This modification would leave Hawaii's federally-approved state plan completely in place, and would simply reinstate federal OSHA's authority to supplement state enforcement during this difficult period.

Pending a final decision in the proceeding instituted today, OSHA will continue to exercise federal authority over safety and health issues excluded from coverage under the state plan; monitoring inspections including accompanied visits; and other federal authority not affected by the 1984 final approval decision.

Operational Status Agreement

OSHA regulations provide that in states with initially-approved plans, OSHA and the state may enter into an agreement describing the division of responsibilities between them (29 CFR 1954.3). OSHA and HIOSH are developing such an agreement, which in this case would also include a timetable for remedial action to make state operations "as least as effective" and to ensure state compliance with applicable personnel staffing benchmarks. Notice will be provided in the *Federal Register* of this agreement, which

OSHA intends will be effective on the date of a final decision in the modification proceeding initiated today.

AUTHORITY AND SIGNATURE

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, D.C., authorized the preparation of this notice. OSHA is issuing this notice under the authority specified by Section 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor’s Order No. 1-2012 (76 FR 3912), and 29 CFR part 1905.

Signed at Washington, DC, on _July 11_____, 2012.

David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health.

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