



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

Docket No. OSHA-2021-0012

RIN 1218-AD43

Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation

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

ACTION: Proposed rule; request for written comments; notice of informal public hearing.

SUMMARY: On June 20, 1985, the Federal Occupational Safety and Health Administration (OSHA) granted Arizona's occupational safety and health plan (State Plan) final approval under Section 18(e) of the Occupational Safety and Health Act of 1970 (the OSH Act). In this notice, OSHA proposes to revoke its affirmative determination granting final approval to the State Plan. If revocation is determined to be appropriate, the Arizona State Plan will revert to initial approval and Federal authority for discretionary concurrent enforcement would resume, allowing Federal OSHA to ensure that private sector employees in Arizona are receiving protections that are at least as effective as those afforded to employees covered by Federal OSHA.

DATES: *Written comments:* Comments and requests for a hearing must be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Informal public hearing: Any interested person may request an informal hearing concerning the proposed revocation. OSHA will hold such a hearing if the Assistant

Secretary of Labor for Occupational Safety and Health (Assistant Secretary) finds that substantial objections have been filed. To allow for this possibility, the agency has tentatively scheduled an informal public hearing on this proposal, beginning August 16, 2022, at 10:00 a.m., ET. If necessary, the hearing will continue from 10:00 a.m. until 6:00 p.m., ET, on subsequent days. The hearing will be held virtually on WebEx. Additional information on how to access the informal hearing will be posted when available at <https://www.osha.gov/stateplans>.

Stakeholders should be aware that if, after reviewing the comments received during the written comment period, the Assistant Secretary finds that no substantial objections have been filed, then this informal public hearing will be cancelled. OSHA will provide notice in advance of the hearing date if the public hearing will not be held.

Notice of intention to appear to provide testimony or question witnesses at the hearing: Interested persons who intend to present testimony or question witnesses at the hearing must submit a notice of their intention to do so by [INSERT DATE 20 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Please note that a notice of intention to appear at the hearing is not the same as a substantial objection. To determine whether a substantial objection has been filed, the Assistant Secretary will consider the substance of the written comments submitted.

Hearing testimony and documentary evidence: Interested persons who request more than 5 minutes to present testimony or who intend to submit documentary evidence at the hearing must submit the full text of their testimony and all documentary evidence by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. See “Public Participation” below for details on how to file a notice of intention to appear, submit documentary evidence at the hearing, and request an appropriate amount of time to present testimony.

Publication in Arizona: No later than 10 days following the date of publication of

this notification in the *Federal Register*, Arizona shall publish, or cause to be published, reasonable notice within the State containing the same information contained herein.

ADDRESSES: *Written comments.* You may submit written comments and requests for an informal hearing electronically at www.regulations.gov, which is the Federal e-Rulemaking Portal. Follow the online instructions for making electronic submissions.

Instructions. All submissions must include the agency's name and the docket number for this rulemaking (Docket No. OSHA-2021-0012).¹ All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at www.regulations.gov. Therefore, OSHA cautions commenters about submitting information they do not want made available to the public or submitting materials that contain personal information (either about themselves or others), such as Social Security Numbers and birthdates. Submissions must clearly identify the issues addressed and the positions taken.

Informal public hearing: The hearing, if necessary, will be held virtually on WebEx.

Notice of intention to appear, hearing testimony, and documentary evidence: You may submit your notice of intention to appear, hearing testimony, and documentary evidence, identified by the agency's name and the docket number (Docket No. OSHA-2021-0012) electronically at www.regulations.gov. Follow the online instructions for making electronic submissions.

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA-2021-0012 at www.regulations.gov. All comments and submissions are listed in the www.regulations.gov index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that

¹ Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code.

website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693-2350 (TTY number: (877)889-5627) or <https://www.osha.gov/contactus/byoffice/dtsem/technical-data-center> for assistance in locating docket submissions. Other information about the Arizona State Plan is posted on the State's website at <https://www.azica.gov/divisions/adosh> or <https://www.osha.gov/stateplans/az>.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Contact Frank Meilinger, OSHA Office of Communications, U.S. Department of Labor; telephone (202) 693-1999; email meilinger.francis2@dol.gov.

For general and technical information: Contact Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, U.S. Department of Labor; telephone (202) 693-2200; email: kalinowski.doug@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 18 of the Occupational Safety and Health Act of 1980, 29 U.S.C. 651 et seq. (OSH Act), provides that states which 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 submission and approval are set forth in regulations at 29 CFR part 1902. If the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) finds that the State Plan satisfies, or will satisfy, the criteria set forth in Section 18(c) of the OSH Act and 29 CFR 1902.3 and 1902.4, "initial approval" is granted (29 CFR 1902.2(a)).²

² Section 18(c) provides that the Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement: designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State; provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing

A state may commence operations under its Plan after the initial approval determination is made, but the Assistant Secretary retains discretionary concurrent Federal authority over occupational safety and health issues covered by the Plan during the initial approval period as provided by Section 18(e) of the OSH Act (29 U.S.C. 667(e); see also, e.g., 29 CFR 1902.32(a), 1954.1(c)). OSHA regulations provide that in states with initially approved Plans, OSHA and the state enter into an operational status agreement describing the division of responsibilities between them, as deemed appropriate (29 CFR 1954.3).

If, after a period of no less than three years, the Assistant Secretary determines that the State Plan has satisfied and continues to meet all criteria in Section 18(c) of the OSH Act, the Assistant Secretary may make an affirmative determination under Section 18(e) of the OSH Act (referred to as “final approval” of the State Plan), which results in the relinquishment of concurrent Federal authority in the state with respect to occupational safety and health issues covered by the Plan (29 U.S.C. 667(e)). Procedures for Section 18(e) determinations are found in 29 CFR part 1902, subpart D. In general, in order to be granted final approval, actual performance by the state must be at least as effective as the Federal OSHA program in all areas covered under the State Plan.

Upon receiving final approval, a state’s ongoing retention of that approval is conditioned on its continued ability to maintain a program which meets the requirements

safe and healthful employment and places of employment as the standards promulgated under section 6 which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce; provides for a right of entry and inspection of all workplaces subject to the OSH Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections; contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards; gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards; contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan; requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect; and provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require (29 U.S.C. 667(c)).

of Section 18(c) of the OSH Act and is at least as effective as Federal program operations (29 CFR 1902.32(e); 29 CFR 1902.44(a)). As discussed in more detail below, this includes a requirement that, when Federal OSHA makes a program change that renders its program more effective, the State Plan must timely adopt a corresponding change in order to maintain a safety and health program that is at least as effective as Federal OSHA (Id.). After a State Plan receives final approval, Section 18(f) of the OSH Act requires OSHA to “make a continuing evaluation” of the State Plan, to ensure that it continues to meet all its obligations (29 U.S.C. 667(f)).

As noted above, one of Section 18(c)’s requirements is that State Plans must be at least as effective as Federal OSHA in their development and enforcement of occupational safety and health standards (29 U.S.C. 667(c)(2)). When OSHA promulgates a new safety and health standard, or adopts an enforcement policy that it determines necessary for the enforcement of such standards, State Plans are obligated to timely adopt identical or at least as effective standards or enforcement policies if they do not already have existing at least as effective measures in place (see 29 CFR 1953.4(b); 29 CFR 1953.5). This requirement also includes adoption of any emergency temporary standard (ETS) promulgated by Federal OSHA (29 CFR 1953.5(b)). State Plans must generally adopt standards and other Federal program changes that have an impact on the “at least as effective” status of the State Plan within six months of the Federal promulgation date for standards, or from the date of notification for other Federal program changes (29 CFR 1953.4(b); 29 CFR 1953.5(a)). Given the emergency nature of an ETS, State Plans must notify Federal OSHA of the action they will take with respect to adoption of the ETS within 15 days of its promulgation and complete adoption of the ETS within 30 days (29 CFR 1953.5(b)).

State Plans are aware of these obligations. They commit to meeting these obligations as part of the State Plan approval process (see, e.g., 50 FR 25561, 25562,

25570 (June 20, 1985)). They also are regularly reminded of these obligations by Federal OSHA in Federal Register notices announcing new standards and through OSHA's State Plan Application (SPA). SPA is an electronic system designed to track State Plan adoption of OSHA standards and directives (among other items). OSHA enters each Federal standard and directive into SPA, which then generates a notice to all users, including State Plan users, reiterating the State Plan adoption requirements contained in the preamble or State Plan impact section of the standard or directive, and including the specific due dates for response and adoption. In addition, State Plans receive communication and reminders of adoption requirements in regular meetings and discussions with Federal OSHA, and as part of the Federal Annual Monitoring and Evaluation (FAME) process. Further, State Plans annually recommit to meeting these requirements as part of their applications for Federal grants (see, e.g., Fiscal Year (FY) 2021 Instructions for 23(g) State Plan Grants, available at:

www.osha.gov/sites/default/files/enforcement/directives/CSP_02-20-01.pdf ("In addition to its strategic and performance goals, each State Plan must continue to satisfy the mandated activities of the OSH Act and 29 CFR Parts 1902 or 1956 (e.g., standards, enforcement program, prohibition against advance notice, etc.) and so certify in its application and demonstrate in actual performance.")).

State Plans are also well aware of the potential consequences if they do not meet their obligations. Specifically, each grant of final approval specifies that the Assistant Secretary may revoke all or part of an affirmative 18(e) determination if a State does not continue to meet its obligations as a State Plan (see 29 CFR 1902.43(a)(4); 29 CFR 1902.44(b); see also 50 FR 25561, 25570 (June 20, 1985) (Arizona State Plan final approval discussing the possibility of revocation if the State fails to maintain a program which is at least as effective as operations under the Federal program, or if the State does

not submit program change supplements to the Assistant Secretary as required by 29 CFR Part 1953)).

The rules regarding revocation are spelled out in OSHA's regulations. In short, these regulations provide that the Assistant Secretary may revoke all or part of an affirmative 18(e) determination if a State does not continue to meet its obligations as a State Plan (see 29 CFR 1902.32(e)-(f); 29 CFR 1902.44(b)). Specifically, the Assistant Secretary may initiate revocation proceedings if a State Plan does not maintain its commitment to provide a program for employee safety and health protection that meets the requirements of Section 18(c) of the OSH Act and is at least as effective as the Federal OSHA program in providing employee safety and health protection at covered workplaces (29 CFR 1902.32(e)-(f); 1902.44(a)-(b)). Again, maintaining such a program includes timely adopting plan changes when Federal OSHA makes program changes that add to or enhance existing protections or requirements (such as new standards or enforcement policies) (29 CFR 1902.32(e); 29 CFR 1902.44(a); 29 CFR 1953.4(b); 29 CFR 1953.5).

In addition to revocation of a State Plan's final approval, OSHA may consider, if necessary, pursuing complete withdrawal of a State Plan's approval upon finding that there is a "failure to comply substantially" with the State Plan (29 U.S.C. 667(f); 29 CFR 1902.44(b); see also 29 CFR part 1955). OSHA's regulations permit the Assistant Secretary to use the revocation procedure to reinstate Federal enforcement authority in conjunction with plan withdrawal proceedings in order to ensure that there is no serious gap in the Assistant Secretary's commitment to ensure safe and healthful working conditions so far as possible for every employee (29 CFR 1902.32(f)).

When OSHA determines that a State Plan's failures warrant revocation of the State Plan's final approval, OSHA may initiate proceedings to revoke final approval and reinstate Federal concurrent authority over occupational safety and health issues covered

by the Plan (see 29 CFR 1902.32; 29 CFR 1902.44(b); 29 CFR 1902.47-.48). After reconsideration and revocation are complete, concurrent Federal enforcement and standards authority will be reinstated within the state “for a reasonable time” until Federal OSHA determines whether to restore final approval status or withdraw the State Plan’s approval, in total or in part (29 CFR 1902.52(b)). During this period of concurrent authority, an operational status agreement will delineate the areas of Federal and state coverage. Procedures for reconsideration and revocation of final approval are found at 29 CFR 1902.47-.53.

II. A History of Shortcomings in the Arizona State Plan

Arizona administers an OSHA-approved State Plan to develop and enforce occupational safety and health standards for public and private sector employers, pursuant to the provisions of Section 18 of the OSH Act (29 U.S.C. 667). OSHA granted the Arizona State Plan initial approval on November 5, 1974 (39 FR 39037). The Arizona Division of Occupational Safety and Health (ADOSH) is designated as the state agency responsible for administering the State Plan. Pursuant to Section 18(e) of the OSH Act, OSHA granted Arizona final approval effective June 20, 1985 (50 FR 25561).

As noted above, after a State Plan receives final approval, Section 18(f) of the OSH Act requires OSHA to “make a continuing evaluation” of the State Plan to ensure that it continues to meet all of its obligations (29 U.S.C. 667(f)). OSHA’s continued evaluation of Arizona’s State Plan has revealed that over the past decade, the State Plan has routinely failed to maintain its commitment to provide a program that is at least as effective as the Federal OSHA program in providing employee safety and health protection at covered workplaces, as required by Section 18(c) of the Act.

As discussed more fully below, OSHA became concerned with Arizona’s State Plan in 2012 with the Arizona legislature’s passage of a bill which implemented residential construction fall protection requirements that were clearly less effective than

the Federal requirements. Arizona did not remedy this issue until after OSHA initiated revocation proceedings in 2014 and formally rejected Arizona's fall protection requirements in 2015. Furthermore, in every FAME report since FY 2015, OSHA has included a finding regarding Arizona's failure to respond and/or adopt standards and directives in a timely manner. In addition, as OSHA has noted in recent FAME reports, Arizona has not yet fulfilled its State Plan obligation to adopt penalty levels that are at least as effective as Federal OSHA's, which were raised and tied to the Consumer Price Index in accordance with the Federal Civil Penalties Inflation Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on November 2, 2015. The State Plan also failed to satisfy its obligation to adopt requirements at least as effective as OSHA's June 21, 2021 COVID-19 ETS applicable to the healthcare industry (Healthcare ETS), and its handling of the ETS issue has raised questions for OSHA about whether the State Plan actually has the required authority to promulgate ETSs more generally. Together, this lengthy series of shortcomings in the Arizona program demonstrates fundamental deficiencies in the Arizona State Plan, and this has prompted OSHA to reconsider and propose revocation of its Section 18(e) determination until OSHA receives satisfactory assurances that these deficiencies have been addressed and that Arizona remains committed to providing a program meeting the requirements of section 18(c). The remainder of this section discusses this history of shortcomings in greater detail.

1. Arizona's 2012 Fall Protection Requirements.

In 2012, the Arizona legislature passed SB 1441, which implemented residential construction fall protection requirements that were clearly less effective than the Federal requirements, including, notably, that they only required employers to implement fall protection for workers at 15 feet where OSHA's requirements required fall protection at heights of 6 feet (79 FR 49465 (August 21, 2014)). OSHA officials conducted several

meetings with Arizona between 2012 and 2014 to explain and illustrate how Arizona's fall protection requirements were not at least as effective as OSHA's, but Arizona continued to refuse to adopt at least as effective fall protection requirements.

In 2014, after more than two years of negotiations with Arizona, OSHA issued a Federal Register Notice similar to this one, reconsidering and proposing to revoke Arizona's final approval. It was only after OSHA initiated the revocation proceedings in 2014 and formally rejected Arizona's fall protection requirements in 2015 (80 FR 6652 (February 6, 2015)) that Arizona finally came into compliance with its State Plan obligations on fall protection. Specifically, the Arizona legislature passed SB 1307, which required repeal of the State's weaker fall protection requirements *if* OSHA formally rejected them. This Bill was approved by the Governor on April 22, 2014, and it eventually forced the state to revert to Federal OSHA's fall protection requirements. Given that change, OSHA withdrew its reconsideration of the Arizona State Plan's final approval (84 FR 35989 (July 26, 2019)). Although Arizona finally reverted to a fall protection standard that is at least as effective as Federal OSHA's standard, employees doing residential construction work in Arizona were not as protected as workers covered by Federal OSHA during the several years when Arizona's fall protection requirements were in effect.

2. Issues With Plan Effectiveness Dating Back to 2015.

Since 2015, Arizona has also been delinquent in responding to and/or adopting several other items that require adoption in order for the State Plan to remain at least as effective as Federal OSHA. In every FAME report since FY 2015, OSHA has included a finding regarding Arizona's failure to respond to and/or adopt standards and directives in a timely manner (see, e.g., FY 2015 Comprehensive FAME Report; FY 2016 Follow-up FAME Report; FY 2017 Comprehensive FAME Report; FY 2018 Follow-up FAME Report; FY 2019 Comprehensive FAME Report; FY 2020 Follow-up FAME Report, all

documenting Arizona’s failure to adopt standards and/or directives.) The failures included in these reports include, for example, Arizona’s failure to adopt two important national emphasis programs as part of its State Plan—the National Emphasis Program on Amputations in Manufacturing Industries, CPL 03-00-022 (adoption due June 10, 2020), and the National Emphasis Program on Respirable Crystalline Silica, CPL 03-00-023 (adoption due August 4, 2020)—and the failure to adopt at least two occupational safety and health standards: the Beryllium Standard for Construction and Shipyards (adoption due February 27, 2021) and the Standards Improvement Project – Phase IV (adoption due November 14, 2019) (<https://www.osha.gov/stateplans/adoption/standards/2020-08-31>; <https://www.osha.gov/stateplans/adoption/standards/2019-05-14>). In addition, some of the standards that the State Plan *has* adopted over the years were adopted long after their due dates³, and, in some cases, Arizona failed to provide OSHA with the required documentation of adoption. For example, although the State Plan advised OSHA that it had adopted the National Emphasis Program on Trenching and Excavation, CL-00-161 (adoption due April 5, 2019), OSHA’s records indicate that any such adoption was completed past the deadline, and the State Plan has not provided OSHA with the required documentation of the adoption (see also, FY 2020 Follow-up FAME Report) (stating: “OSHA discussed the list of outstanding items [not adopted] during each quarterly meeting and reached out via email several times during the year to request updates. However, [the Arizona State Plan] did not provide a formal transmittal, updated web links, or SPA updates to close out any pending [Federal Program Changes (FPC)] during FY 2020. [The Arizona State Plan] must adopt and/or provide a plan change supplement [i.e., the required documentation] (transmittal) for 14 FPCs to become current.”)).

³ For example, on February 12, 2020, Arizona adopted the Final Rule on Walking-Working Surfaces and Personal Protective Equipment and the Final Rule on Crane Operator Certification Requirements, well after the respective due dates of May 18, 2017, and May 9, 2019.

Furthermore, Arizona has not yet fulfilled its State Plan obligation to adopt penalty levels that are at least as effective as Federal OSHA's, which were raised and tied to the Consumer Price Index in accordance with the Federal Civil Penalties Inflation Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 on November 2, 2015 (FY 2015 Comprehensive FAME Report; FY 2017 Comprehensive FAME Report; FY 2019 Comprehensive FAME Reports; FY 2016 Follow-up FAME Report; FY 2018 Follow-up FAME Report; FY 2020 Follow-up FAME Reports). Although Arizona recently developed a plan of action for accomplishing the legislative change necessary for adoption of OSHA's maximum penalties and minimum willful violation penalty level, the State has not yet adopted the levels and has failed to be at least as effective as Federal OSHA in this area for more than six years.

3. The 2021 Healthcare ETS.

The Arizona State Plan also recently failed to adopt OSHA's Healthcare ETS, which OSHA issued on June 21, 2021, to protect healthcare and healthcare support service workers from occupational exposure to COVID-19 (86 FR 32376). Because the Healthcare ETS was published on June 21, 2021, the deadline for State Plans to communicate their intended actions to OSHA was July 6, 2021, and the due date for State Plan adoption of the ETS or of an at least as effective alternative was July 21, 2021. Arizona failed to meet both of these deadlines.

OSHA had a number of communications with Arizona over the months following issuance of the Healthcare ETS. These conversations were unfruitful, however; the Arizona State Plan never adopted an ETS or other comprehensive standard to protect healthcare workers in the State from COVID-19.⁴ Moreover, during the period in which

⁴Although Arizona failed to adopt the Healthcare ETS in its entirety, as required, it informed OSHA that it did adopt two of the rule's provisions eight months after issuance of the Healthcare ETS when advised that

OSHA was working to address this issue with the State Plan, the Industrial Commission of Arizona held a meeting in which it suggested that the State Plan might not even have the appropriate authority to adopt ETSs based on OSHA’s finding of “grave danger” and “necessity,” as required by the OSH Act and OSHA regulations. Rather, the Commission maintained that Arizona Revised Statutes (A.R.S.) only authorizes the State Plan to adopt an ETS by making its own independent findings on “grave danger” and “necessity” (Industrial Commission of Arizona Meeting Minutes, dated October 7, 2021).

Specifically, § 23-414(A) provides that “[t]he *Commission* may provide for emergency temporary standards or regulations to take immediate effect upon filing with the secretary of state, if *it* determines that employees are exposed to grave danger . . . and that such emergency standard or regulation is necessary /to protect employees from such danger” (emphasis added).

OSHA considered those provisions to be permanent regulations under Section 8 of the OSH Act. OSHA adopted the recordkeeping and reporting provisions of the Healthcare ETS (29 CFR 1910.502(q) and (r)) under two sections of the OSH Act: Section 6(c), 29 U.S.C. 655(c) (which empowers the Secretary to issue emergency temporary standards), and Section 8, 29 U.S.C. 657 (which authorizes the Secretary to engage in certain activities related to recordkeeping and reporting, including issuing regulations). As to the issuance of these provisions under Section 8, OSHA found good cause to forgo notice and comment in light of the grave danger presented by the pandemic. On February 9, 2022, OSHA advised State Plans at an Occupational Safety and Health State Plan Association (OSHSPA) meeting that State Plans must revise their State regulations to either adopt the recordkeeping requirements related to the COVID-19 log (i.e., the requirements at 29 CFR 1910.502(q)(2)(ii) and (q)(3)(ii)-(iv)) and reporting (i.e., 29 CFR 1910.502(r)) as a permanent regulation or demonstrate that such a change is unnecessary because their State Plan already has requirements that are the same as or at least as effective as the Federal OSHA requirements. OSHA notified State Plans of this obligation in SPA on February 14, 2022. Arizona informed OSHA that it subsequently adopted the COVID-19 log and reporting provisions effective February 16, 2022, and provided documentation for OSHA’s review.

As has been explained in greater detail elsewhere in this proposal, the Arizona State Plan is required by Section 18(c) of the OSH Act to provide for the development of standards that are at least as effective as Federal OSHA's standards, and this includes an obligation to timely adopt *all* standards, including any ETS, issued by Federal OSHA (see 29 CFR 1953.4(b); 29 CFR 1953.5). This obligation does not give the State Plan discretion to determine *which* Federal standards to adopt or to independently evaluate the need for such a standard. Accordingly, OSHA specifically invites comment from the Arizona State Plan to clarify how its state law complies with the Federal OSHA requirement that a State Plan adopt a Federal ETS within 30 days of its promulgation. And OSHA separately invites the Arizona State Plan to include in its comment an explanation of why that process was not followed for adoption of the Healthcare ETS.

III. Reconsideration and Proposed Revocation of Section 18(e) Determination

The OSH Act obligates OSHA to ensure, so far as possible, safe and healthful working conditions for every working person in the Nation (29 U.S.C. 651(b)). The agency carries out this mission, in part, by encouraging States to assume the fullest responsibility for the administration and enforcement of their own occupational safety and health laws (29 U.S.C. 651(b)(11)). Where, as in Arizona, it appears that a State Plan has not maintained its commitment to provide a program for employee safety and health that meets the requirements of Section 18(c) of the OSH Act and is at least as effective in protecting workers as the Federal OSHA program, then the Assistant Secretary may reconsider their decision to grant an affirmative 18(e) determination (see 29 CFR 1902.32(e)-(f); 29 CFR 1902.44(a); 29 CFR 1902.47(a)).

OSHA's decision to move forward with reconsideration and proposed revocation at this time is based on its continuing evaluation of Arizona's State Plan, the history of shortcomings described above, and the numerous areas where the State Plan continues to

be less effective than OSHA (including on penalty levels and important emphasis programs). OSHA is concerned that, together, the State Plan's actions suggest that Arizona is either unable or unwilling to maintain its commitment to provide a program for employee safety and health protection that meets the requirements of Section 18(c) of the OSH Act and is at least as effective as the Federal OSHA program in providing employee safety and health protection at covered workplaces.

As previously noted, OSHA's regulations provide that the Assistant Secretary may at any time reconsider the decision to grant an affirmative 18(e) determination based on results of the continuing evaluation of a State Plan (29 CFR 1902.47). If, as a result of OSHA's reconsideration, OSHA proposes to revoke its affirmative 18(e) determination, OSHA's regulations provide that a notice must be published in the *Federal Register* and interested parties must be provided an opportunity to submit in writing, data, views, and arguments on the proposal within 35 days after publication (29 CFR 1902.48-.49). Further, the regulations provide that any interested person may request an informal hearing, and that OSHA must afford an opportunity for an informal hearing on the proposed revocation if the Assistant Secretary finds that substantial objections have been filed (29 CFR 1902.49(c)).

In order to allow for the submission of informed and specific public comment, OSHA encourages commenters to review the documents contained in Docket No. OSHA-2021-0012, which can be accessed electronically at www.regulations.gov.

In drafting their comments, stakeholders should note that OSHA is not beginning proceedings for the withdrawal of approval of the plan, or any portion thereof, pursuant to 29 CFR part 1955, but rather is only proposing revocation of Arizona's affirmative 18(e) determination at this time. This is because OSHA believes that the issues with Arizona's State Plan discussed above can be temporary in nature if Arizona takes prompt steps to resolve OSHA's concerns and demonstrates a commitment to meet its obligations

in a timely manner in the future.

OSHA further wishes to advise stakeholders that their comments should be directed only to OSHA's proposed revocation and the bases for that revocation (see 29 CFR 1902.49(c) (requiring that OSHA allow for submission of comments "on the proposal" and "particularized written objections" specifically "concerning the proposed revocation")). Accordingly, OSHA will consider comments addressing matters other than the proposed revocation to be beyond the scope of this proposal, and the agency will not consider such comments in assessing whether "substantial objections" have been filed necessitating an informal public hearing, nor in making a final decision on the proposal. OSHA provides here a non-exhaustive list of matters that the agency deems outside of the scope of this proposal:

- Any comment criticizing the regulatory and statutory requirements imposed on State Plans as a condition of their continuous approval to operate a State Plan.
- Any comment directed to the wisdom and/or necessity of the various OSHA standards and directives referenced in this Federal Register Notice.
- Any comment directed to Federal OSHA's legal authority to promulgate the Healthcare ETS, or the advisability of its promulgation, including but not limited to OSHA's findings on Grave Danger and Necessity, and the need for any particular provision or requirement of the Healthcare ETS.
- Any comment related to OSHA's now-withdrawn November 5, 2022, ETS on COVID-19 Vaccination and Testing (see 86 FR 61402; 87 FR 3928) or the litigation that arose out of it.
- Any comment suggesting that OSHA's findings in the Healthcare ETS, or other rulemakings, are not relevant to or do not apply to workers or workplaces in Arizona.

A. Effect of Determination

After review of any written comments received and the results of any informal hearing held, the Assistant Secretary will determine whether Arizona has failed to meet its obligations to provide a program for employee safety and health protection that meets the requirements of Section 18(c) of the OSH Act and is at least as effective as the Federal OSHA program in providing employee safety and health protection at covered workplaces, and, if so, whether the Assistant Secretary's affirmative Section 18(e) determination granting final approval of the Arizona State Plan should be revoked (29 CFR 1902.52). A notice of the Assistant Secretary's determination will be published in the *Federal Register*.

In the event that the Assistant Secretary determines that revocation is appropriate, the Federal Register notice will specify that upon revocation, concurrent Federal enforcement and standards authority will be reinstated within the State for a reasonable time, until the Assistant Secretary has determined whether to withdraw approval of the State Plan, or any separable portion thereof, under 29 CFR 1955, or to reinstate Section 18(e) approval if the State has met the required criteria (29 CFR 1902.52(b)). OSHA notes that the present proposal is to revoke the Arizona State Plan's final approval in full. However, in making a final determination, OSHA may consider instead revoking only a separable portion of the Arizona State Plan's final approval, based on, e.g., changed circumstances or other practical considerations.

OSHA further notes that, as provided by regulation, if the agency were to revoke the Arizona State Plan's final approval, resumption of Federal OSHA's concurrent enforcement and standards setting authority would occur automatically (see 29 CFR 1902.52(b)). Any notice announcing the revocation of the State Plan's final approval would specify the areas of coverage over which OSHA intends to immediately resume and exercise that authority. The agency's final decision on which issues (if any) to resume coverage over will depend on factors including information submitted in response

to this Federal Register Notice, as well as the circumstances at the time the revocation decision is made.

Finally, OSHA notes its regulations provide that in states with initially approved plans, OSHA and the state enter into a procedural agreement describing the division of responsibilities between them (29 CFR 1954.3). OSHA typically refers to these types of agreements as “Operational Status Agreements” or OSAs. If the Assistant Secretary decides to revoke Arizona’s affirmative Section 18(e) determination, Federal OSHA’s resumption of coverage will be announced in the final determination notice and the State and OSHA will enter into an OSA that describes the division of responsibilities between them, consistent with any resumption of coverage announced in OSHA’s final determination notice. Such an agreement could also include a timetable for remedial action to make state operations as least as effective in order for OSHA to consider whether to reinstate the State Plan’s final approval status. Notice would be provided in the *Federal Register* of any such agreement.

IV. Documents of Record

All information and data presently available to OSHA relating to this proceeding have been made a part of the record and placed in the OSHA Docket Office. Most of these documents have also been posted electronically at www.regulations.gov, which is the Federal e-Rulemaking Portal; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions are available for inspection and, where permissible, copying at the OSHA Docket Office, U.S. Department of Labor, 200 Constitution Avenue NW, Room N-3508, Washington, DC 20210; telephone: 202-693-2350 (TTY number: 877-889-5627).

V. Public Participation

The Assistant Secretary's decision whether to continue or revoke the Arizona State Plan's affirmative 18(e) determination will be made after careful consideration of all relevant information presented in the rulemaking (29 CFR 1902.52(a)). To aid the Assistant Secretary in making this decision, OSHA is soliciting public participation in this process. Interested parties are encouraged to submit all relevant information, views, data, and arguments related to the indices, criteria, and factors presented in 29 U.S.C. 667(c) and 29 CFR part 1902, as they apply to the Arizona State Plan.

Notice in the State of Arizona: Arizona is required to publish reasonable notice of the contents of this Federal Register notice within the State no later than 10 days following the date of publication of this notice (29 CFR 1902.49(a)).

Written comments: OSHA invites interested persons to submit written data, views, and comments with respect to this reconsideration and proposed revocation of affirmative Section 18(e) determination of the Arizona State Plan. When submitting comments, persons must follow the procedures specified above in the sections titled **"DATES"** and **"ADDRESSES"**. Submissions must clearly identify the issues addressed and the positions taken. Comments received by the end of the specified comment period will become part of the record and will be available for public inspection and, where permissible, copying at the OSHA Docket Office, as well as online at www.regulations.gov (Docket Number OSHA-2021-0012).

Informal public hearing: Pursuant to 29 CFR 1902.49(c), any interested person may request an informal hearing concerning the reconsideration and proposed revocation. To allow for this possibility, the agency has tentatively scheduled a virtual informal public hearing on this proposal. For more information on the timing of the hearing, see the section titled **"DATES"** above.

OSHA will hold the informal hearing if the Assistant Secretary finds that substantial objections have been filed. However, if, after reviewing the comments

received during the written comment period, the Assistant Secretary finds that no substantial objections have been filed, then the informal public hearing will be cancelled. OSHA will provide notice in advance of the hearing date if the public hearing will not be held.

The informal hearing, if held, will be legislative in type (29 CFR 1902.50). The rules of procedure for the hearing will be those contained in 29 CFR 1902.40 (29 CFR 1902.50). The essential intent is to provide an opportunity for participation and comment by interested persons which can be carried out expeditiously and without rigid procedures which might unduly impede or protract the 18(e) determination process (1902.40(a)).

As required by 29 CFR 1902.40(b)(1), the hearing's presiding officer will be a hearing examiner appointed under 5 U.S.C. 3105 (i.e., an Administrative Law Judge (ALJ)). The ALJ will provide an opportunity for cross-examination on pertinent issues (1902.40(b)(2)). The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the ALJ may provide (1902.40(b)(3)). At the hearing, the ALJ will have all the power necessary or appropriate to conduct a fair and full hearing, including the powers to: regulate the course of the proceedings; dispose of procedural requests, objections, and comparable matters; confine the presentation to the issues specified in the notice of hearing, or, where appropriate, to matters pertinent to the issue before the Assistant Secretary; regulate the conduct of those present at the hearing by appropriate means; take official notice of material facts not appearing in the evidence in the record, as long as the parties are afforded an opportunity to show evidence to the contrary; and in the ALJ's discretion, keep the record open for a reasonable and specified time to receive additional written recommendations with supporting reasons and any additional data, views, and arguments from any person who has participated in the oral proceeding (29 CFR 1902.40(c)(1)-(c)(6)).

Notice of intention to appear to provide testimony or question witnesses at the

hearing: Interested persons who intend to present testimony or question witnesses at the hearing must file a notice of intention to appear by using the procedures specified above in the sections titled “**DATES**” and “**ADDRESSES**”. This notice must provide the following information:

- Name, address, email address, and telephone number of each individual who will give oral testimony;
- Name of the establishment or organization each individual represents, if any;
- Occupational title and position of each individual testifying;
- Approximate amount of time required for each individual's testimony;
- A brief statement of the position each individual will take with respect to the issues raised by the reconsideration and proposed revocation; and
- A brief summary of documentary evidence each individual intends to present at the hearing, if any.

OSHA emphasizes that while the hearing is open to the public, only individuals who file a notice of intention to appear may question witnesses and participate fully at the hearing. If time permits, and at the discretion of the ALJ, an individual who did not file a notice of intention to appear may be allowed to testify at the hearing, but for no more than 5 minutes. As noted above, a notice of intention to appear at the hearing is not the same as a substantial objection *and* OSHA will only hold a hearing if the Assistant Secretary finds that substantial objections have been filed. If interested persons believe that they have substantive objections to this proposal and wish to present testimony or question witnesses, they should submit written comments detailing their objections (see more details above on how to submit written comments) and separately file a notice of intention to appear. The Assistant Secretary will consider all written comments submitted when determining whether a substantial objection has been filed.

Hearing testimony and documentary evidence: Individuals who request more than

5 minutes to present their oral testimony at the hearing or who will submit documentary evidence at the hearing must submit the full text of their testimony and all documentary evidence by using the procedures specified above in the sections titled “**DATES**” and “**ADDRESSES**”.

The agency will review each submission and determine if the information it contains warrants the amount of time the individual requested for the presentation. If OSHA believes the requested time is excessive, the agency will allocate an appropriate amount of time for the presentation. The agency also may limit to 5 minutes the presentation of any participant who fails to comply substantially with these procedural requirements, and may request that the participant return for questioning at a later time. Before the hearing, OSHA will notify participants of the time the agency will allow for their presentation and, if less than requested, the reasons for its decision.

VI. Certification of the Hearing Record and Assistant Secretary Final

Determination

Upon the completion of the oral presentations, the transcripts thereof, together with written submissions on the proceedings, exhibits filed during the hearing, and all post-hearing comments, recommendations, and supporting reasons shall be certified by the officer presiding at the hearing to the Assistant Secretary (29 CFR 1902.40(d); 29 CFR 1902.51).

Within a reasonable time after the close of the comment period (if no hearing is held) or after the certification of the record (if a hearing is held), after consideration of all relevant information which has been presented, the Assistant Secretary shall issue a decision on the continuation or revocation of the affirmative 18(e) determination (29 CFR 1902.52(a)). Any decision revoking such determination shall also reflect the Assistant Secretary’s determination that concurrent Federal enforcement and standards authority will be reinstated within the State for a reasonable time until the Assistant Secretary has

withdrawn their approval of the plan, or any separable portion thereof, pursuant to part 1955 of this chapter or has determined that the State has met the criteria for an 18(e) determination pursuant to the applicable procedures of Part 1902, Subpart D (29 CFR 1902.52(b)). The Assistant Secretary's decision will be published in the *Federal Register* (29 CFR 1902.53).

VII. Federalism

Executive Order 13132, "Federalism," emphasizes consultation between Federal agencies and the States and establishes specific review procedures the Federal government must follow as it carries out policies which affect state or local governments. OSHA has included in the Background section of today's request for public comments an explanation of the relationship between Federal OSHA and the State Plans under the OSH Act. Although it appears that the specific consultation procedures provided in section 6 of Executive Order 13132 are not mandatory for final approval-related decisions under the OSH Act (including revocation of final approval), which neither impose a burden upon the state nor generally involve preemption of any state law, OSHA has nonetheless consulted extensively with Arizona on the matter of maintaining its State Plan in compliance with Federal OSHA.

VIII. Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) that this reconsideration and proposed revocation, if finalized, will not have a significant economic impact on a substantial number of small entities. OSHA's decision to reconsider and proposal to revoke the affirmative Section 18(e) determination granting final approval of the Arizona State Plan would not place small employers in Arizona under any new or different requirements beyond what the State Plan was required to adopt to remain at least as effective as OSHA. No additional burden would be placed upon the State government beyond the responsibilities already assumed as part of the

approved plan.

List of Subjects in 29 CFR part 1952

State Plans, Approval

Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC, authorized the preparation of this notice. OSHA is issuing this notice under the authority specified by Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667), Secretary of Labor's Order No. 8-2020 (85 FR 58393 (Sept. 18, 2020)), and 29 CFR parts 1902, 1952, 1953, 1954, and 1955.

Signed in Washington, DC.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated in the preamble, OSHA proposes to amend 29 CFR part 1952 as follows:

PART 1952—APPROVED STATE PLANS FOR ENFORCEMENT OF STATE STANDARDS

1. The authority citation for part 1952 is revised to read as follows:

AUTHORITY: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902; Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), or 8-2020 (85 FR 58393, Sept. 18, 2020), as applicable.

Subpart A—List of Approved State Plans for Private-Sector and State and Local Government Employees

2. Amend § 1952.19 by redesignating paragraph (d) as paragraph (e) and adding a

new paragraph (d) to read as follows:

§ 1952.19 Arizona.

* * * * *

(d) On [DATE OF FINAL DETERMINATION], OSHA modified the State Plan's approval status from final approval to initial approval, and reinstated concurrent Federal authority pending a determination as to whether OSHA will make a new final approval determination or withdraw the State Plan's approval under part 1955. All issues over which OSHA decides to assume enforcement authority, as well as any operational status agreement entered into by OSHA and Arizona, will be announced in the *Federal Register*.

* * * * *

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