



July 5, 2022

Douglas Parker

Assistant Secretary for Occupational Safety and Health

U.S. Department of Labor

200 Constitution Ave., N.W.

Washington, DC 20210

Re: Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and the Revocation (Docket No. OSHA-2021-0012; Document ID: OSHA-2021-0012-0001)

Dear Mr. Parker:

The AFL-CIO welcomes the opportunity to comment on OSHA's proposed rule to take initial oversight on Arizona's state OSHA plan. The state federation of Arizona represents more than 140,000 union members in Arizona, across industries, such as construction, transportation, manufacturing and food processing, health care and many other service sectors. Nationally, the AFL-CIO represents 12.5 million members under 57 national unions across the country, who are affected by OSHA coverage and the effectiveness of this agency.

The AFL-CIO has long advocated for stronger oversight of OSHA-approved state plans and for federal OSHA to meet its statutory requirements under the law. We support federal OSHA's proposal to implement concurrent jurisdiction with Arizona OSHA to protect Arizona's workers from occupational injury, illness and death.

I. Federal OSHA is required to monitor and oversee all federally-approved state OSHA plans.

Federal OSHA has been required to approve and oversee state OSHA plans as a mandatory duty under the law for more than 50 years. Under the OSH Act, state OSHA plans must be “at least as effective as” the federal program and must cover public workers in their states, in order to receive federal funding for their plan. This also means that nothing prevents state OSHA plans from going beyond the protections of federal OSHA (*i.e.*, passing stronger standards and laws).

Currently, 21 states and one territory have state OSHA plans that cover both private and public sector workers and five states and one territory have a state OSHA plan that only covers state and local government (public sector) workers. Massachusetts has also recently submitted an application to establish a federally approved public sector OSHA program.

Section 18 of the Occupational Safety and Health of 1970 (OSH Act) governs the state jurisdiction and state plans under OSHA. The status of initial approval of a state plan is specifically governed under section 18(e) and final approval under 18(f). Section 18(f) describes the duty of the U.S. Secretary of Labor through OSHA on evaluation of approved state OSHA plans:

The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

Section 23 of the OSH Act governs federal OSHA funding toward state OSHA plans, which can be funded up to 50% with federal OSHA grant monies and the state pays the balance. Specifically, section 23(g) states:

The Secretary is authorized to make grants to the States to assist them in administering and enforcing programs for occupational safety and health contained in State plans approved by the Secretary pursuant to section 18 of this Act. The Federal share for each State grant under this subsection may not exceed 50 per centum of the total cost to the State of such a program. The last sentence of subsection (f) shall be applicable in determining the Federal share under this subsection.

A. OSHA has initiated oversight actions when other state OSHA plans have not performed at least as effectively as federal OSHA.

Over the 50 years of its existence, federal OSHA has not fully exercised its authority on oversight of approved state OSHA plans to the extent it is required to do under the OSH Act. However, the federal agency regularly monitors state plans, has conducted some oversight, and has intervened in certain cases where the state programs fail to be at least as effective.

For example, on September 11, 1991, after the fire in Hamlet, NC, the AFL-CIO petitioned federal OSHA to withdraw the North Carolina occupational safety and health plan. The tragic Hamlet fire on September 3, 1991, killed 25 poultry workers in a plant that had never been inspected by the state OSHA program, despite high injury and illness rates in the poultry processing industry, which placed it in “high hazard” operations, giving it a high priority for inspection. North Carolina had consistently failed to enforce standards effectively, repeatedly failed to provide adequate personnel to effectively implement that program and otherwise did not have a sufficient number of inspectors on staff. Just weeks later, on October 24, 1991, federal OSHA issued a notice to terminate the operational status agreement for the North Carolina plan.¹ In December 1991, Representative William D. Ford [D-MI] developed a report for the House Committee on Education and Labor on the “Tragedy at Imperial Food Products,” outlining the failures of the state program.²

Subsequently, on Jan. 8, 1992, the Secretary of Labor Lynn Martin gave North Carolina 90 days to improve their job safety and health program: to make corrections or show “significant improvement” in seven major parts of the program, or that their state program status would be withdrawn and OSHA would ultimately resume federal jurisdiction. The seven deficient areas in need of improvement were: standards, staffing, reports and information, financial management, enforcement program and procedures, identifying and classifying hazards, and discrimination. As the Secretary stated in her news release:³

I want to go on record as fully supporting the concept of state programs for worker safety and health. Such programs provide a great amount of local flexibility and the opportunity for a considerable amount of innovation in protecting workers on the job. But OSHA cannot allow a state to operate a program that is below standard.

On March 9, 1992, the AFL-CIO expressed strong support of OSHA’s withdrawal of North Carolina’s final approval status in the public record. Through this process, federal OSHA and North Carolina agreed to “limited concurrent jurisdiction to the degree necessary to assure occupational safety and health protection to employees of the State of North Carolina” to “assist the [state]” while it continued to operate its own program. Federal enforcement was exercised in specifically defined areas, including safety and health complaints and referrals brought to OSHA’s attention, referrals from the North Carolina governor’s hot line, and all currently

¹ 29 CFR 1952. Vol. 56, No. 206.

² U.S. House of Representatives. The Tragedy at Imperial Food Products. December 1991 [Committee Print]. Serial No. 102-N.

³ U.S. Department of Labor, Occupational Safety and Health Administration. News Release: Secretary Martin gives North Carolina 90 Days to Improve State Job Safety and Health Program. Jan. 8, 1992, 11:00 am. USDL: 92-8. Attached.

pending and new discrimination complaints under 11(c) of the OSH Act. Federal OSHA also retained the right to intervene under other enforcement authorities, such as where employers refused entry to the Arizona plan, where the state has not yet adopted a federal standard, and other areas.

There have been other recent examples of federal OSHA oversight of state OSHA plans.

In 2009, after 25 workplace deaths in Nevada from January 2008 through June 2009, federal OSHA released a report on Nevada's occupational safety and health program that revealed a number of serious concerns with the program's operation, including failure to issue appropriate willful and repeat citations, poorly trained inspectors and lack of follow-up to determine whether hazards were abated.⁴ The comprehensive evaluation of the Nevada OSHA plan pointed to an urgent need for corrections in oversight and changes in all phases of its workplace safety and health program.

Those deaths, in addition to extensive media coverage revealing Nevada OSHA's poor handling of the fatality investigations and several serious complaints filed with federal OSHA about Nevada's state plan administration, compelled OSHA's investigation. The Nevada investigation led to OSHA strengthening the oversight, monitoring and evaluation of all state programs.

In 2011, South Carolina eliminated its whistleblower program, a core requirement to maintain for states running their own OSHA programs. When federal OSHA warned that it would terminate their state plan, the state relented. In 2012, federal OSHA stepped in when the Hawaii state OSHA plan underfunded its state OSHA plan, neglected to hire the staff needed and were not adequately enforcing standards. Federal OSHA temporarily resumed jurisdiction for some specific sectors.

In 2014, the U.S. Virgin Islands, which operates a state OSHA plan only for its public employees, was put on probation by federal OSHA because it was not performing effectively as required under the OSH Act. The Virgin Islands was designated a "high risk" program, whereby federal OSHA and the state plan mutually agreed to certain goals which must be met before being provided federal funding and then reporting on the program's progress. (29 CFR 97.12, pay on reimbursement basis).

As discussed below in Section B, OSHA has previously conducted oversight on the Arizona plan.

⁴ U.S. Department of Labor, Occupational Safety and Health Administration, "Review of the Nevada Occupational Safety and Health Program," October 2009.

B. The Arizona occupational safety and health plan has a history and pattern of neglect to its workers, despite its statutory obligation.

Arizona received its initial approval as an occupational safety and health plan on November 5, 1974, its state plan certification on September 18, 1981 and its final approval on June 20, 1985.⁵ In recent years, the Arizona OSHA plan has resisted adoption of federal OSHA standards, a requirement for the program to be “at least as effective” as federal OSHA. This has left Arizona workers at greater risk of work-related injuries, illnesses and death due to dangerous working conditions.

For some time, the Arizona OSHA plan has not been in compliance with federal OSHA’s minimum requirements, as required under the law. As noted in OSHA’s proposal, Arizona OSHA has received negative evaluation reports from federal OSHA since 2015. In addition to our comments below, OSHA does a thorough job in its proposal of thoroughly explaining other shortcomings of the state plan in recent years.

This year is not the first time federal OSHA has had to intervene on the Arizona OSHA plan. In 2012, the Arizona legislature passed a law that failed to adopt fall protection standards in residential construction that were much less protective than those in place under federal OSHA. Federal OSHA initiated a multi-year process to assume enforcement in Arizona’s construction sector, but did not finalize the action because the state adopted the stronger requirements at the last minute. This oversight by federal OSHA changed the course of a dangerous, lower bar for construction employers in Arizona to ensure workers had effective protections.

In 2021, Arizona refused to adopt the federal emergency temporary standard (ETS) for COVID-19 in health care. (State plans had 30 days to adopt this standard after it was issued on June 21, 2021.) Arizona was the only state plan in the country that refused to adopt this standard and put its health care workers’ lives at risk. Nationally, this standard was estimated to prevent at least 776 COVID-19 deaths and 295,284 COVID-19 infections among workers in health care over six months.

On December 27, 2021, when federal OSHA announced the ETS for COVID-19 in health care was no longer in effect, OSHA stated it would still enforce the recordkeeping provisions of the standard, specifically for healthcare employers to maintain and make available a COVID-19 log (paragraphs 502(q)(2)(ii) and (q)(3)(ii)-(iv)) and to report to OSHA all COVID-19-related fatalities and hospitalizations (paragraph 502(r)), which were promulgated under Section 8 of the OSH Act, rather than under the emergency powers in Section 6(c).^{6,7} On February 14, federal OSHA announced to the state plans they had six months to adopt these requirements. As of the date of this submission, Arizona has not adopted these requirements.

Federal OSHA is currently promulgating a permanent standard to protect workers in health care from COVID-19, and as with all standard adoption under the OSH Act, Arizona will be required

⁵ 39 FR 39037; 46 FR 46322; 50 FR 25561.

⁶ See 86 FR 32559, 32608.

⁷ Occupational Safety and Health Act of 1970. Section 8, 29 USC 657: Inspections, Investigations, and Recordkeeping.

to adopt the final standard within six months. Without an effective state plan, Arizona workers will remain at significant risk from COVID-19 infection and death because of their job.

For these reasons and others, on October 1, 2021, National Nurses United filed a formal complaint about State plan administration, which is permitted under 29 CFR 1954 Subpart C.^{8,9}

Penalties issued by Arizona OSHA continue to be lower than the national average:

- Average penalty per serious OSHA violation, FY 2021:¹⁰
 - Arizona average: \$1,029
 - National average: \$3,315
- Median OSHA penalty per workplace fatality, FY 2021:
 - Arizona median: \$1,080
 - National median in states with state OSHA plan coverage: \$5,825
 - National median in states with federal OSHA coverage: \$9,753

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Adjustment Act), was enacted by Congress.¹¹ This act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890 (the 1990 Inflation Adjustment Act), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Inflation Adjustment Act required agencies to issue a final rule by August 1, 2016, to adjust the level of civil monetary penalties with an initial “catch-up” adjustment and to annually adjust these monetary penalties for inflation by January 15 of each subsequent year. These inflation-adjusted penalties for serious and willful violations are issued when employers break the law and place workers’ lives at risk. The latest adjustment, effective Jan. 14, 2022, increased the maximum OSHA penalty to \$14,502 for serious violations to \$145,027 for willful and repeat violations. Even though state OSHA plans are required under the OSH Act to adopt these federal OSHA changes within six months, the Arizona plan only recently (February 16, 2022) adopted them after increased pressure and in anticipation of this formal proposal for increased oversight from OSHA.

Arizona staffing levels are not currently keeping up with its agreement with federal OSHA. As described in OSHA’s final approval of the Arizona plan:

Under the terms of the 1978 Court Order in *AFL-CIO v. Marshall*, compliance staffing levels (benchmarks) necessary for a "fully effective" enforcement program were required to be established for each State operating an approved State plan. In September 1984, Arizona in conjunction with OSHA, completed a reassessment of the levels initially established in 1980 and proposed revised compliance staffing benchmarks of 9 safety and

⁸ Complaints about State plan administration regarding the failure of Arizona’s State Plan to be “as effective as” Federal OSHA. October 1, 2021.

nationalnursesunited.org/sites/default/files/nnu/documents/NNU_CASPA%20Arizona%20State%20Plan_Covid%20ETS_10012021.pdf

⁹ [osha.gov/laws-regs/regulations/standardnumber/1954/1954.20](https://www.osha.gov/laws-regs/regulations/standardnumber/1954/1954.20).

¹⁰ *Ibid.*

¹¹ [Public Law 114-74](#), 129 Stat. 584.

6 health compliance officers. After opportunity for public comment and service on the AFL-CIO, the Assistant Secretary approved these revised staffing requirements on June 20, 1985.¹²

But current staffing levels for the Arizona OSHA plan are 12 on board inspectors: seven safety and five health—lower than is required by the state’s agreement with the U.S. Department of Labor in 1985, even though the number of establishments and workers under its jurisdiction has only increased over the last 35 years.¹³ The consequences of this understaffing are frightening. According to the current number of workplace safety and health inspections that Arizona conducts, it would take Arizona 129 years to inspect each workplace once under its jurisdiction.¹⁴ According to the International Labor Organization’s benchmark of one inspector for every 1,000 employees, Arizona should have 282 safety and health inspectors to adequately protect workers in the state.¹⁵

II. An Arizona occupational safety and health plan that is not at least as effective as federal OSHA puts workers at additional, significant risk of injury, illness and death.

The OSH Act assures “so far as possible every working man and woman in the nation safe and healthful working conditions.” In Arizona workers face the same hazards as workers across the country protected under the OSH Act and must protect its workers under the law. Without an effective safety and health plan, workers in Arizona will remain at serious risk for injury, illness and death due to their jobs currently and with emerging and worsening hazards.

For instance, injuries and illnesses due to occupational heat exposure have been a significant hazard for decades and are worsening rapidly as temperatures continue to rise year to year. The National Institute for Occupational Safety and Health first recommended that OSHA promulgate a heat standard in the 1970s, and has since updated their recommendation in 1986 and most recently in 2016.¹⁶ OSHA is now undertaking an active rulemaking on occupational heat exposures: the agency published an advanced notice of proposed rulemaking last fall and the comment period closed in January.^{17,18} The AFL-CIO submitted comments to this record.¹⁹

¹² 29 CFR 1952.19.

¹³ AFL-CIO. April 2022. Death on the Job: The Toll of Neglect. A National and State-by-State Profile of Worker Safety and Health in the United States. 31st Ed. AFLCIO.org/reports/death-job-toll-neglect-2022. Page 181.

¹⁴ *Ibid.* Page 73.

¹⁵ *Ibid.* Page 105.

¹⁶ National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention. Criteria for a Recommended Standard: Occupational Exposure to Heat and Hot Environments, 2016. [CDC.gov/niosh/docs/2016-106/default.html](https://www.cdc.gov/niosh/docs/2016-106/default.html).

¹⁷ Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. Advanced notice of proposed rulemaking. Oct. 27, 2021. [regulations.gov/document/OSHA-2021-0009-0001](https://www.regulations.gov/document/OSHA-2021-0009-0001).

¹⁸ Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs. Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions. Heat Illness Prevention in Outdoor and Indoor Work Settings. [reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1218-AD39](https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1218-AD39).

¹⁹ AFL-CIO submission to docket OSHA-2021-0009. [regulations.gov/comment/OSHA-2021-0009-0747](https://www.regulations.gov/comment/OSHA-2021-0009-0747).

OSHA also recently announced a national emphasis program on occupational heat exposures, allowing them a more comprehensive and targeted enforcement approach and reach more workplaces on this issue. It is unclear if the Arizona occupational safety and health plan has adopted this program or intends to. When federal OSHA does issue a final heat standard, Arizona would be required to adopt it within six months and if the state continues to refuse to adopt federal standards, Arizona workers will remain at significant risk because their state program has failed to act.

Workers of color and immigrant workers are at especially high risk of dangerous working conditions. Nationwide, Latino and Black workers are more likely to die on the job than all workers. In 2020, the job fatality rate for Latino workers (4.5 per 100,000) increased for the second year in a row and has increased 15% over the past decade. The Latino fatality rate is 32% greater than the overall job fatality rate of 3.4 per 100,000. In 2020, Latino workers accounted for nearly 14% of all injury and illness cases in private industry that led to days away from work.²⁰ In Arizona, 41 Latino workers died in 2020 and many more were seriously injured. This is the highest number of Latino worker deaths in the state for at least 20 years (the date range of our recent report), and possibly ever.²¹

Fatalities among workers of color and immigrant workers continue to be a serious problem. Targeted federal and regional OSHA enforcement and training programs in workplaces and industries with greater density of Latino and immigrant workers have been effective at reducing job fatalities and improved working conditions. But state plans can—and should—go beyond federal OSHA and develop their own targeted programs where needs are the greatest.

III. Joint jurisdiction will ensure protections for workers in Arizona until the state can do so on its own.

The Arizona occupational safety and health plan has failed to protect the safety and health of Arizona workers. We support OSHA's proposal to withdraw the final approval of the Arizona occupational safety and health plan under section 18(f) of the OSH Act. By taking this action, OSHA can promptly move to exercise concurrent jurisdiction in Arizona under section 18(e) of the OSH Act. This move toward concurrent jurisdiction would allow OSHA to work with Arizona OSHA on a mutually agreed upon joint jurisdiction plan, and would allow OSHA to complete final withdrawal of the plan if Arizona does not meet its commitments to its workers. This is a commonsense and reasonable approach. If a state does not dedicate the resources nor have the ability to run its own state plan, it is not protecting its workers.

The AFL-CIO recognizes that if this proposal eventually leads to permanent withdrawal of the state plan, public employees in the state would no longer have OSHA protections since public

²⁰ AFL-CIO. April 2022. *Death on the Job: The Toll of Neglect. A National and State-by-State Profile of Worker Safety and Health in the United States*. 31st Ed. [AFLCIO.org/reports/death-job-toll-neglect-2022](https://aflcio.org/reports/death-job-toll-neglect-2022). Page 54.

²¹ *Ibid.* Page 51.

employees are not covered by federal OSHA (under the OSH Act) and that the state of Arizona could separately create their own mechanisms to ensure public employees' protections remain and are enforced. We strongly urge federal OSHA and the Arizona occupational safety and health plan to create a roadmap that ensures all workers continue to have protection, sets new metrics and adheres to the responsibilities under the OSH Act.

Under the law, Arizona workers are required to have protections as least as effective as those issued at the federal level, but the Arizona occupational safety and health plan has failed its responsibility to its workers and it is time to change course. OSHA should act immediately to withdraw final approval of Arizona's plan and to exercise concurrent jurisdiction. Working people and the families of those who have died on the job in Arizona, whose lives and limbs depend on strong and effective workplace safety and health protections, deserve no less.

Sincerely,

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