



July 5, 2022

The Honorable Doug Parker  
Assistant Secretary  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20001

RE: Docket No. OSHA – 2021-0012 [RIN 1218 – AD43]  
Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and  
Revocation: Proposed Rule – Request for Comments

Dear Assistant Secretary Parker,

The National Roofing Contractors Association appreciates the opportunity to submit comments on behalf of its members on the Occupational Safety and Health Administration's proposed rule and request for comments on the Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation, published in the *Federal Register* on April 21, 2022.

Established in 1886, NRCA is one of the nation's oldest trade associations and the voice of roofing professionals. NRCA's nearly 4,000 member companies represent all segments of the industry, including contractors, manufacturers, distributors, consultants and other employers in all 50 states and internationally, including numerous members across the state of Arizona. NRCA members are typically small, privately held companies with the average member employing 45 people and attaining sales of \$4.5 million per year. The U.S. roofing industry is an essential \$100 billion sector with nearly one million employees that provides critical materials and services to ensure home and business safety.

NRCA is very concerned about OSHA's proposal to revoke its final approval of the State Plan for Arizona and revert to the initial approval and Federal authority to resume discretionary concurrent enforcement. As an interested and active stakeholder in this regulatory activity, NRCA would like to present its views on the proposal and respectfully submits the following comments.

## **I. Introduction**

As provided for in Section 18 of the Occupational Safety and Health Act of 1970 (the OSH Act), states are permitted to develop and operate their own workplace safety and health plans. In approximately half of the states under the OSH Act, federal OSHA sets and enforces worker safety and health standards. Furthermore, the OSH Act allows for and encourages states to develop and enforce safety and health standards within their respective states, and

currently 27 states have OSHA-approved state occupational safety and health plans, including the State of Arizona. Within the states with approved state plans, 22 states have comprehensive state plans covering private and public employers, while five states have state plans covering state and local government workers.<sup>1</sup>

Arizona is one of the 22 states administering an OSHA-approved State Plan to provide development and enforcement of safety and health standards for private and public employers. Arizona's state plan was granted initial approval by OSHA on November 5, 1974 and was granted final approval effective June 20, 1985. Almost fifty years have passed since the State of Arizona received initial approval and began development and enforcement under its own state plan. In that time, the Arizona Division of Occupational Safety and Health (ADOSH) has worked to protect countless private and public workers, in part by building cooperative relationships with employers, including within the roofing industry. NRCA is aware that roofing contractors in Arizona believe that ADOSH is very effective in establishing safety and health measures that protect roofing workers, especially with respect to heat stress and silica exposure.

According to OSHA's proposal for the reconsideration and revocation of Arizona's state plan issued on April 21, 2022, OSHA has determined that the State of Arizona has not met the requirements of its responsibility "to maintain a program which meets the requirements of Section 18(c) of the OSH Act and is *at least as effective* [emphasis added] as Federal program operations."<sup>2</sup> OSHA further states in their proposal that it also includes as a requirement "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." Section 18(f) of the OSH Act requires OSHA to "make a continuing evaluation" of the State Plan following final approval, to ensure that it continues to meet all of its obligations.<sup>3</sup>

OSHA identified the following as concerns in its proposal asserting that Arizona has not met its obligations under its state plan:

- Arizona's 2012 Fall Protection Requirements for residential construction;
- Not adopting two national emphasis programs for Amputations in Manufacturing Industries and Respirable Crystalline Silica;
- Not adopting penalty levels that are at least as effective as Federal OSHA's penalty levels;
- The lack of proper documentation for the adoption of standards; and,
- Not adopting the COVID-19 Healthcare Emergency Temporary Standard (ETS).

## **II. OSHA's Assertion that Arizona's State Plan is not "at least as effective" as Federal OSHA's Program**

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<sup>1</sup> OSHA-Approved State Occupational Safety and Health Plans (available at: <https://www.osha.gov/stateplans/>).

<sup>2</sup> Occupational Safety and Health Administration. Federal Register 87 FR 23783, Docket No. OSHA-2021-0012: *Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation*. April 21, 2021

<sup>3</sup> 29 U.S.C. 667(f)

OSHA is asserting that the State of Arizona and ADOSH program have not met the requirements of “at least as effective” as Federal OSHA. In 2011, the Dept. of Labor Office of the Inspector General (OIG) issued a report where the OIG determined that OSHA has not determined whether state OSH programs are at least as effective as Federal OSHA’s program in improving workplace safety and health. The OIG found in its report that OSHA “has not yet designed a method to examine the impact of State OSH programs to ensure they are at least as effective as Federal programs. State officials generally believed their programs were effective, but there was no quantifiable data to demonstrate effectiveness.” The report continues that “OSHA officials acknowledged that effectiveness measures would be desirable, but difficult to develop.”<sup>4</sup>

The 2011 OIG report further cited OSHA’s lack of “critical information needed to make informed decisions,” and highlighted four areas including the inability to define effectiveness, measure effectiveness, establish minimum criterion, and monitor effectiveness of state programs.<sup>5</sup> When describing OSHA’s lack of qualitative factors to define effectiveness, the report stated that OSHA needed to be able to define when State programs were failing in their performance in order that OSHA would have a basis to use its “ultimate authority to revoke State Plan approval.”<sup>6</sup> OSHA’s performance criteria used to evaluate State Plans is based on processes and outputs, or activities such as the number of inspections conducted, to act as an indication of effectiveness rather than an outcome-based approach where states could actually have a framework with which to measure and show whether their efforts improved workplace safety and health.

OSHA faced similar criticism as far back as 1988 in a General Accounting Office (GAO) report in which the GAO highlighted that OSHA, in defining the effectiveness of state programs, gave “little attention to determining what characteristics of state programs have contributed to the reduction (or lack of reduction) in workplace injuries and illnesses so that program improvements could be made.”<sup>7</sup>

Instead, by using a framework based on outputs rather than outcomes, OSHA cannot define nor measure effectiveness in its own Federal program, let alone other State Plans, and when brought to its attention by the OIG report in 2011, it indicated these measurements would be “difficult to develop.” Having made no improvements in nearly a decade to define whether a state plan is at least as effective as Federal OSHA, the Agency continues to hold State Plan states accountable, specifically Arizona, to inadequate process-based outputs and metrics that have not resulted in the ability to measure effectiveness of a state plan.

By using inspections, citations, and fines as benchmarks to determine the effectiveness of a state plan rather than actual on-the-ground results, OSHA pulls the focus away from the

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<sup>4</sup> Office of Inspector General—Office of Audit, U.S. Dept. of Labor, Report No. 02-11-201-10-105, *OSHA Has Not Determined if State OSH Programs Are at Least as Effective in Improving Workplace Safety and Health as Federal OSHA’s Programs*, (2011 OIG Report) (available at <http://www.oig.dol.gov/public/reports/oa/2011/02-11-201-10-105.pdf>) (last visited June 29, 2022).

<sup>5</sup> 2011 OIG Report, 2-3

<sup>6</sup> 2011 OIG Report, 3-4

<sup>7</sup> 2011 OIG Report, 4

ultimate goal of the OSH Act which is to protect workers from injuries and illnesses in the workplace.

### **III. Not Adopting National Emphasis Programs for Amputations in Manufacturing Industries and Respirable Crystalline Silica**

One of the areas of concerns cited by OSHA in this proposal involves Arizona not adopting national emphasis programs in a timely manner or not at all. OSHA provides this as additional evidence of its assertion that Arizona's State Plan is not at least as effective as the Federal OSHA program.

In September 2016, the OIG issued a report on its findings as to whether OSHA knew if Special Emphasis Programs (SEP) have long-term industry-wide effect. The OIG concluded not only could OSHA “not demonstrate whether its [Special Emphasis Programs] were effective in improving safety and health conditions for workers in high-hazard industries and occupations,” OSHA’s strategy for measuring performance “lacked outcome metrics related to reducing the rate of injuries, illnesses and fatalities, lessening levels of exposure to health risks, and/or decreasing the frequency of catastrophic events.”<sup>8</sup>

Like the 2011 report, the OIG again identified OSHA lacked outcome-based performance metrics for its Special Emphasis Programs. In the same September 2016 report, the OIG showed on average only 61% of states had adopted the non-mandatory SEPs, including Silica and Amputations. 59% of states had adopted the SEP on Amputations in Manufacturing Industries and 70% of states had adopted the SEP for Respirable Crystalline Silica.

Furthermore, there is no Congressional mandate requiring all states adopt all emphasis programs, rather the states are given latitude to develop and enforce their own programs designed for their unique needs.

### **IV. Revocation of Arizona’s State Plan – Unprecedented Action with a Chilling Effect on Other State Plan States**

Nearly fifty years have passed since Arizona received its initial approval to develop and enforce and State OSH plan, and nearly forty years since receiving final approval from Federal OSHA. The revocation of the final approval of the Arizona state plan would be unprecedented by OSHA and make Arizona the first state to lose its final approval.

Such an action would no doubt bring a chilling effect on other State Plan states, stifling creativity, limiting opportunities for building credible relationships with employers and employees, and developing new resources and strategies to improve workplace safety and health. All ultimately prevent injuries, illnesses, and fatalities, which is first and foremost OSHA’s charge.

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<sup>8</sup> Office of Inspector General—Office of Audit, U.S. Dept. of Labor, Report No. 02-16-201-10-105, OSHA Does Not Know If Special Emphasis Programs Have Long-Term Industrywide Effect. (2016 OIG Report) (available at <https://www.oig.dol.gov/public/reports/oa/2016/02-16-201-10-105.pdf>) (last visited June 29, 2022).

It is of further concern that OSHA has chosen to attempt to limit public comments in this matter by deeming the following outside of the scope of this proposal:

- Any comment criticizing the regulatory and statutory requirements imposed on State Plans as a condition of its 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.

87 Fed. Reg. at 23,787 – 23,788.

## V. Conclusion

NRCA believes that the employers and workers of the State of Arizona would be best served by OSHA devoting the Agency's otherwise limited resources to a more cooperative approach to assist ADOSH in improving its program versus an adversarial approach as indicated in this proposal. Furthermore, we strongly encourage OSHA to establish a clear results-based approach to evaluating State Plan states, thus establishing an adequate measurement to determine effectiveness going forward. NRCA stands willing to engage with OSHA and other stakeholders in efforts to develop consensus on a results-based approach that advances workplace safety and health for workers in Arizona and across the U.S.

NRCA opposes OSHA's proposed rule to revoke the Arizona State Plan for Occupational Safety and Health and urges OSHA to withdraw this action.

Sincerely,



McKay Daniels  
Chief Executive Officer