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Title 29 → Subtitle B → Chapter XVII → Part 1902

Title 29: Labor

## PART 1902—STATE PLANS FOR THE DEVELOPMENT AND ENFORCEMENT OF STATE STANDARDS

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SOURCE: 36 FR 20751, Oct. 29, 1971, unless otherwise noted.

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## Subpart A—General

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### §1902.1 Purpose and scope.

(a) This part applies the provisions of section 18 of the Williams-Steiger Occupational Safety and Health Act of 1970 (hereinafter referred to as the Act) relating to State plans for the development and enforcement of State occupational safety and health standards. The provisions of the part set forth the procedures by which the Assistant Secretary for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary) under a delegation of authority from the Secretary of Labor (Secretary's Order No. 12-71, 36 FR 8754, May 12, 1971) will approve or reject State plans submitted to the Secretary. In the Act, Congress declared it to be its purpose and policy “\* \* \* to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources” by, among other actions and programs, “\* \* \* encouraging the State to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws. Section 18(a) of the Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which a Federal standard has been issued under section 6 of the Act. However, section 18(b) provides that any State that desires to assume responsibility for the development and enforcement therein of occupational safety and health standards relating to issues covered by corresponding standards promulgated under section 6 of the Act shall submit a plan for doing so to the Assistant Secretary.

(b) Section 18(c) of the Act sets out certain criteria that a plan which is submitted under section 18(b) of the Act must meet, either initially or upon modification, if it is to be approved. Foremost among these criteria is the requirement that the plan must provide for the development of State standards and the enforcement of such standards which are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6 of the Act which relate to the same issues.

(c)(1) If the Assistant Secretary approves a State plan submitted under section 18(b), he may, but is not required to, exercise his enforcement authority with respect to Federal standards corresponding to standards approved under the plan until he determines, in accordance with section 18(e) of the Act, on the basis of actual operations under the plan, that the State is applying the criteria of section 18(c) of the Act. The Assistant Secretary shall not make this determination (i) for at least 3 years after initial approval of the plan, and (ii) in the case of a developmental plan approved under §1902.2(b), until the State has completed all the steps specified in its plan which are designed to make it at least as effective as the Federal program and the Assistant Secretary has had at least 1 year in which to evaluate the program on the basis of actual operations. After the determination that the State is applying the criteria of section 18(c) of the Act, the Assistant Secretary's enforcement authority shall not apply with respect to any occupational safety or health issue covered by the plan. Notwithstanding plan approval and a determination under section 18(e) that the section 18(c) criteria are being followed, the Assistant Secretary shall make a continuing evaluation, as provided in section 18(f) of the Act, of the manner in which the State is carrying out the plan.

(2) Federal enforcement authority which must be retained by the Assistant Secretary until actual operations prove the State plan to be at least as effective as the Federal program, will be exercised to the degree necessary to assure occupational safety and health. Factors to be considered in determining the level of Federal effort during this period include:

(i) Whether the plan is developmental (i.e., approved under §1902.2(b)) or complete (i.e., approved under §1902.2 (a)).

(ii) Results of evaluations conducted by the Assistant Secretary.

(3) Whenever the Assistant Secretary determines, after giving notice and affording the State an opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the plan or any assurance contained therein, he shall withdraw approval of such plan in whole or in part, and upon notice the State shall cease operations under any disapproved plan or part thereof, except that it will be permitted to retain jurisdiction as to any case commenced before withdrawal of approval whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(4) A determination of approval of a State plan under section 18(e) does not affect the authority and responsibility of the Assistant Secretary to enforce Federal standards covering issues not included under the State plan.

(d) The policy of the Act is to encourage the assumption by the States of the fullest responsibility for the development and enforcement of their own occupational safety and health standards. This assumption of responsibility is considered to include State development and enforcement of standards on as many occupational safety and health issues as possible. To these ends, the Assistant Secretary intends to cooperate with the States so that they can obtain approval of plans for the development and enforcement of State standards which are or will be at least as effective as the Federal standards and enforcement.

(e) After the Assistant Secretary has approved a plan, he may approve one or more grants under section 23(g) of the Act to assist the State in administering and enforcing its program for occupational safety and health in accordance with appropriate instructions or procedures to be promulgated by the Assistant Secretary.

[36 FR 20751, Oct. 29, 1971, as amended at 61 FR 9230, Mar. 7, 1996]

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**§1902.2 General policies.**

(a) *Policy.* The Assistant Secretary will approve a State plan which provides for an occupational safety and health program with respect to covered issues that in his judgment meets or will meet the criteria set forth in §1902.3. Included among these criteria is the requirement that the State plan provide for the development and enforcement of standards relating to issues covered by the plan which are or will be at least as effective in providing safe and healthful employment and places of employment as standards promulgated and enforced under section 6 of the Act on the same issues. In determining whether a State plan satisfies the requirement of effectiveness, the Assistant Secretary will measure the plan against the indices of effectiveness set forth in §1902.4.

(b) *Developmental plan.* A State plan for an occupational safety and health program may be approved although, upon submission it does not fully meet the criteria set forth in §1902.3, if it includes satisfactory assurances by the State that it will take the necessary steps to bring the State program into conformity with these criteria within the 3-year period immediately following the commencement of the plan's operation. In such case, the State plan shall include the specific actions it proposes to take and a time schedule for their accomplishment not to exceed 3 years, at the end of which the State plan will meet the criteria in §1902.3. A developmental plan shall include the date or dates within which intermediate and final action will be accomplished. If necessary program changes require legislative action by a State, a copy of a bill or a draft of legislation that will be or has been proposed for enactment shall be submitted, accompanied by (1) a statement of the Governor's support of the legislation and (2) a statement of legal opinion that the proposed legislation will meet the requirements of the Act and this part in a manner consistent with the State's constitution and laws. On the basis of the State's submission the Assistant Secretary will approve the plan if he finds that there is a reasonable expectation that the State plan will meet the criteria in §1902.3 within the indicated 3-year period. In such case, the Assistant Secretary shall not make a determination under section 18(e) of the Act that a State is fully applying the criteria in §1902.3 until the State has completed all the developmental steps specified in its plan which are designed to make it at least as effective as the Federal program, and the Assistant Secretary has had at least 1 year to evaluate the plan on the basis of actual operations. If at the end of 3 years from the date of commencement of the plan's development, the State is found by the Assistant Secretary, after affording the State notice and opportunity for a hearing, not to have substantially completed the developmental steps of the plan, the Assistant Secretary shall withdraw the approval of the plan.

(c) *Scope of State plan.* (1) A State plan may cover any occupational safety and health issue with respect to which a Federal standard has been promulgated under section 6 of the Act. An "issue" is considered to be an industrial, occupational or hazard grouping which is at least as comprehensive as a corresponding grouping contained in (i) one or more sections in subpart B or R of part 1910 of this chapter, or (ii) one or more of the remaining subparts of part 1910. However, for cause shown the Assistant Secretary may approve a plan relating to other industrial, occupational or hazard groupings if he determines that the plan is administratively practicable and that such groupings would not conflict with the purposes of the Act.

(2) Each State plan shall describe the occupational safety and health issue or issues and the State standard or standards applicable to each such issue or issues over which it desires to assume enforcement responsibility in terms of the corresponding Federal industrial, occupational or hazard groupings and set forth the reasons, supported with appropriate data, for any variations the State proposes from the coverage of Federal standards.

(3) The State plan shall apply to all employers and employees within the affected industry, occupational or hazard grouping unless the Assistant Secretary finds that the State has shown good cause why any group or groups of employers or employees should be excluded. Any employers or employees so excluded shall be covered by applicable Federal standards and enforcement provisions in the Act.

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## **Subpart B—Criteria for State Plans**

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### **§1902.3 Specific criteria.**

(a) *General.* A State plan must meet the specific criteria set forth in this section.

(b) *Designation of State agency.* (1) The State plan shall designate a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State.

(2) The plan shall also describe the authority and responsibilities vested in such agency or agencies. The plan shall contain assurances that any other responsibilities of the designated agency shall not detract significantly from the resources and priorities assigned to administration of the plan.

(3) A State agency or agencies must be designated with overall responsibility for administering the plan throughout the State. However, political subdivisions of the State may have the responsibility and authority for the development and enforcement of standards, provided that the State agency or agencies are given adequate authority by statute, regulation, or agreement, to insure that the commitments of the State under the plan will be fulfilled.

(c) *Standards.* (1) The State plan shall include or provide for the development or adoption of, and contain assurances that the State will continue to develop or adopt, standards which are or will be at least as effective as those promulgated under section 6 of the Act. Indices of the effectiveness of standards and procedures for the development or adoption of standards against which the Assistant Secretary will measure the State plan in determining whether it is approvable are set forth in §1902.4(b).

(2) The State plan shall not include standards for products distributed or used in interstate commerce which are different from Federal standards for such products unless such standards are required by compelling local conditions and do not unduly burden interstate commerce. This provision, reflecting section 18(c)(2) of the Act, is interpreted as not being applicable to customized products or parts not normally available on the open market, or to the optional parts or additions to products which are ordinarily available with such optional parts or additions. In situations where section 18(c)(2) is considered applicable, and provision is made for the adoption of product standards, the requirements of section 18(c)(2), as they relate to undue burden on interstate commerce, shall be treated as a condition subsequent in light of the facts and circumstances which may be involved.

(d) *Enforcement.* (1) The State plan shall provide a program for the enforcement of the State standards which is, or will be, at least as effective as that provided in the Act, and provide assurances that the State's enforcement program will continue to be at least as effective as the Federal program. Indices of the effectiveness of a State's enforcement plan against which the Assistant Secretary will measure the State plan in determining whether it is approvable are set forth in §1902.4(c).

(2) The State plan shall require employers to comply with all applicable State occupational safety and health standards covered by the plan and all applicable rules issued thereunder, and employees to comply with all standards, rules, and orders applicable to their conduct.

(e) *Right of entry and inspection.* The State plan shall contain adequate assurance that inspectors will have a right to enter and inspect covered workplaces which is, or will be, at least as effective as that provided in section 8 of the Act. Where such entry or inspection is refused, the State agency or agencies shall have the authority, through appropriate legal process, to compel such entry and inspection.

(f) *Prohibition against advance notice.* The State plan shall contain a prohibition against advance notice of inspections. Any exceptions must be expressly authorized by the head of the designated agency or agencies or his representative and such exceptions may be no broader than those authorized under the Act and the rules published in part 1903 of this chapter relating to advance notice.

(g) *Legal authority.* The State plan shall contain satisfactory assurances that the designated agency or agencies have, or will have, the legal authority necessary for the enforcement of its standards.

(h) *Personnel.* The State plan shall provide assurance that the designated agency or agencies have, or will have, a sufficient number of adequately trained and qualified personnel necessary for the enforcement of the standards. For this purpose qualified personnel means persons employed on a merit basis, including all persons engaged in the development of standards and the administration of the State plan. Conformity with the Standards for a Merit System of Personnel Administration, 45 CFR part 70, issued by the Secretary of Labor, including any amendments thereto, and any standards prescribed by the U.S. Civil Service Commission pursuant to section 208 of the Intergovernmental Personnel Act of 1970 (Pub. L. 91-648; 84 Stat. 1915) modifying or superseding such standards, will be deemed to meet this requirement.

(i) *Resources.* The State plan shall contain satisfactory assurances through the use of budget, organizational description, and any other appropriate means that the State will devote adequate funds to the administration and

enforcement of the program. The Assistant Secretary will make periodic evaluations of the adequacy of the State resources devoted to the plan.

(j) *Employer records and reports.* The State plan shall provide assurances that employers covered by the plan will maintain records and make reports to the Assistant Secretary in the same manner and to the same extent as if the plan were not in effect.

(k) *State agency reports to the Assistant Secretary.* The State plan shall provide assurances that the designated agency or agencies shall make such reasonable reports to the Assistant Secretary in such form and containing such information as he may from time to time require. The agency or agencies shall establish specific goals, consistent with the goals of the Act, including measures of performance, output and results which will determine the efficiency and effectiveness of the State program, and shall make periodic reports to the Assistant Secretary on the extent to which the State, in implementation of its plan, has attained these goals. Reports will also include data and information on the implementation of the specific inspection and voluntary compliance activities included within the State plan. Further, these reports shall contain such statistical information pertaining to work-related deaths, injuries, and illnesses in employments and places of employment covered by the plan as the Assistant Secretary may from time to time require.

(Approved by the Office of Management and Budget under control number 1218-0004)

[36 FR 20751, Oct. 29, 1971, as amended at 54 FR 24333, June 7, 1989; 80 FR 49901, Aug. 18, 2015]

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#### **§1902.4 Indices of effectiveness.**

(a) *General.* In order to satisfy the requirements of effectiveness under §1902.3 (c)(1) and (d)(1), the State plan shall:

(1) Establish the same standards, procedures, criteria and rules as have been established by the Assistant Secretary under the Act, or;

(2) Establish alternative standards, procedures, criteria, and rules which will be measured against each of the indices of effectiveness in paragraphs (b) and (c) of this section to determine whether the alternatives are at least as effective as the Federal program with respect to the subject of each index. For each index the State must demonstrate by the presentation of factual or other appropriate information that its plan is or will be at least as effective as the Federal program.

(b) *Standards.* (1) The indices for measurement of a State plan with regard to standards follow in paragraph (b)(2) of this section. The Assistant Secretary will determine whether the State plan satisfies the requirements of effectiveness with regard to each index as provided in paragraph (a) of this section.

(2) The Assistant Secretary will determine whether the State plan:

(i) Provides for State standards with respect to specific issues which are or will be at least as effective as the standards promulgated under section 6 of the Act relating to the same issues. In the case of any State standards dealing with toxic materials or harmful physical agents, they should adequately assure, to the extent feasible, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life, by such means as, in the development and promulgation of standards, obtaining the best available evidence through research, demonstrations, experiments, and experience under this and other safety and health laws.

(ii) Provides an adequate method to assure that its standards will continue to be at least as effective as Federal standards, including Federal standards relating to issues covered by the plan, which become effective subsequent to any approval of the plan.

(iii) Provides a procedure for the development and promulgation of standards which allows for the consideration of pertinent factual information and affords interested persons, including employees, employers and the public, an opportunity to participate in such processes, by such means as establishing procedures for consideration of expert technical knowledge, and providing interested persons, including employers, employees, recognized standards-producing organizations, and the public an opportunity to submit information requesting the development or promulgation of new standards or the modification or revocation of existing standards and to participate in any hearings. This index may also be satisfied by such means as the adoption of Federal standards, in which case the procedures at the Federal level before adoption of a standard under section 6 may be considered to meet the conditions of this index.

(iv) Provides authority for the granting of variances from State standards, upon application of an employer or employers which correspond to variances authorized under the Act, and for consideration of the views of interested parties, by such means as giving affected employees notice of each application and an opportunity to request and participate in hearings or other appropriate proceedings relating to applications for variances.

(v) Provides for prompt and effective standards setting actions for the protection of employees against new and unforeseen hazards, by such means as the authority to promulgate emergency temporary standards.

(vi) Provides that State standards contain appropriate provision for the furnishing to employees of information regarding hazards in the workplace, including information about suitable precautions, relevant symptoms, and emergency treatment in case of exposure, by such means as labeling, posting, and, where appropriate, medical examination at no cost to employees, with the results of such examinations being furnished only to appropriate State officials and, if the employee so requests, to his physician.

(vii) Provides that State standards, where appropriate, contain specific provision for the protection of employees from exposure to hazards, by such means as containing appropriate provision for use of suitable protective equipment and for control or technological procedures with respect to such hazards, including monitoring or measuring such exposure.

(c) *Enforcement.* (1) The indices for measurement of a State plan with regard to enforcement follow in paragraph (c)(2) of this section. The Assistant Secretary will determine whether the State plan satisfies the requirements of effectiveness with regard to each index as provided in paragraph (a) of this section.

(2) The Assistant Secretary will determine whether the State plan:

(i) Provides for inspection of covered workplaces in the State, including inspections in response to complaints, where there are reasonable grounds to believe a hazard exists, in order to assure, so far as possible, safe and healthful working conditions for covered employees, by such means as providing for inspections under conditions such as those provided in section 8 of the Act.

(ii) Provides an opportunity for employees and their representatives, before, during, and after inspections, to bring possible violations to the attention of the State agency with enforcement responsibility in order to aid inspections, by such means as affording a representative of the employer and a representative authorized by employees an opportunity to accompany the State representative during the physical inspection of the workplace, or where there is no authorized representative, by providing for consultation by the State representative with a reasonable number of employees.

(iii) Provides for the notification of employees, or their representatives, when the State decides not to take compliance action as a result of violations alleged by such employees or their representatives and further provides for informal review of such decisions, by such means as written notification of decisions not to take compliance action and the reasons therefor, and procedures for informal review of such decisions and written statements of the disposition of such review.

(iv) Provides that employees be informed of their protections and obligations under the Act, including the provisions of applicable standards, by such means as the posting of notices or other appropriate sources of information.

(v) Provides necessary and appropriate protection to an employee against discharge or discrimination in terms and conditions of employment because he has filed a complaint, testified, or otherwise acted to exercise rights under the Act for himself or others, by such means as providing for appropriate sanctions against the employer for such actions and by providing for the withholding, upon request, of the names of complainants from the employer.

(vi) Provides that employees have access to information on their exposure to toxic materials or harmful physical agents and receive prompt information when they have been or are being exposed to such materials or agents in concentrations or at levels in excess of those prescribed by the applicable safety and health standards, by such means as the observation by employees of the monitoring or measuring of such materials or agents, employee access to the records of such monitoring or measuring, prompt notification by an employer to any employee who has been or is being exposed to such agents or materials in excess of the applicable standards, and information to such employee of corrective action being taken.

(vii) Provides procedures for the prompt restraint or elimination of any conditions or practices in covered places of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided for in the plan, by such means as immediately informing employees and employers of such hazards, taking steps to obtain immediate abatement of the hazard by the employer, and where appropriate, authority to initiate necessary legal proceedings to require such abatement.

(viii) Provides adequate safeguards to protect trade secrets, by such means as limiting access to such trade secrets to authorized State officers or employees concerned with carrying out the plan and by providing for the issuance of appropriate orders to protect the confidentiality of trade secrets.

(ix) Provides that the State agency (or agencies) will have the necessary legal authority for the enforcement of standards, by such means as provisions for appropriate compulsory process to obtain necessary evidence or testimony in connection with inspection and enforcement proceedings.

(x) Provides for prompt notice to employers and employees when an alleged violation of standards has occurred, including the proposed abatement requirements, by such means as the issuance of a written citation to the employer and posting of the citation at or near the site of the violation; further provides for advising the employer of any proposed sanctions, by such means as a notice to the employer by certified mail within a reasonable time of any proposed sanctions.

(xi) Provides effective sanctions against employers who violate State standards and orders, such as those set forth in the Act, and in 29 CFR 1903.15(d).

(xii) Provides for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties and for employees or their representatives to have an opportunity to participate in review proceedings, by such means as providing for administrative or judicial review, with an opportunity for a full hearing on the issues.

(xiii) Provides that the State will undertake programs to encourage voluntary compliance by employers and employees by such means as conducting training and consultation with employers and employees.

(d) *State and local government employee programs.* (1) Each approved State plan must contain satisfactory assurances that the 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.

(2) This criterion for approved State plans is interpreted to require the following elements with regard to coverage, standards, and enforcement:

(i) *Coverage.* The program must cover all public employees over which the State has legislative authority under its constitution. The language in section 18(c)(6) which only requires such coverage to the extent permitted by the State's law specifically recognizes the situation where local governments exclusively control their own employees, such as under certain home rule charters.



(ii) *Standards.* The program must be as effective as the standards contained in the approved plan applicable to private employers. Thus, the same criteria and indices of standards effectiveness contained in §§1902.3(c) and 1902.4(a) and (b) would apply to the public employee program. Where hazards are unique to public employment, all appropriate indices of effectiveness, such as those dealing with temporary emergency standards, development of standards, employee information, variances, and protective equipment, would be applicable to standards for such hazards.

(iii) *Enforcement.* Although section 18(c)(6) of the Act requires State public employee programs to be as effective as standards contained in the State plan, minimum enforcement elements are required to ensure an effective and comprehensive public employee program as follows:

(A) Regular inspections of workplaces, including inspections in response to valid employee complaints;

(B) A means for employees to bring possible violations to the attention of inspectors;

(C) Notification to employees, or their representatives, of decisions that no violations are found as a result of complaints by such employees or their representatives, and informal review of such decisions;

(D) A means of informing employees of their protections and obligations under the Act;

(E) Protection for employees against discharge of discrimination because of the exercise of rights under the Act;

(F) Employee access to information on their exposure to toxic materials or harmful physical agents and prompt notification to employees when they have been or are being exposed to such materials or agents at concentrations or levels above those specified by the applicable standards;

(G) Procedures for the prompt restraint or elimination of imminent danger situations;

(H) A means of promptly notifying employers and employees when an alleged violation has occurred, including the proposed abatement requirements;

(I) A means of establishing timetables for the correction of violations;

(J) A program for encouraging voluntary compliance; and

(K) Such other additional enforcement provisions under State law as may have been included in the State plan.

(3) In accordance with §1902.3(b)(3), the State agency or agencies designated to administer the plan throughout the State must retain overall responsibility for the entire plan. Political subdivisions may have the responsibility and authority for the development and enforcement of standards: *Provided*, that the designated State agency or agencies have adequate authority by statute, regulation, or agreement to insure that the commitments of the State under the plan will be fulfilled.

(e) *Additional indices.* Upon his own motion or after consideration of data, views and arguments received in any proceeding held under subpart C of this part, the Assistant Secretary may prescribe additional indices for any State plan which shall be in furtherance of the purpose of this part, as expressed in §1902.1.

[36 FR 20751, Oct. 29, 1971, as amended at 80 FR 49901, Aug. 18, 2015; 81 FR 43452, July 1, 2016]

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**§1902.5 Intergovernmental Cooperation Act of 1968.**

This part shall be construed in a manner consistent with the Intergovernmental Cooperation Act of 1968 (42 U.S.C. 4201-4233), and any regulations pursuant thereto.

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#### **§1902.6 Consultation with the National Institute for Occupational Safety and Health.**

The Assistant Secretary will consult, as appropriate, with the Director of the National Institute for Occupational Safety and Health with regard to plans submitted by the States under this part.

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#### **§1902.7 Injury and illness recording and reporting requirements.**

(a) Injury and illness recording and reporting requirements promulgated by State-Plan States must be substantially identical to those in 29 CFR part 1904 on recording and reporting occupational injuries and illnesses. State-Plan States must promulgate recording and reporting requirements that are the same as the Federal requirements for determining which injuries and illnesses will be entered into the records and how they are entered. All other injury and illness recording and reporting requirements that are promulgated by State-Plan States may be more stringent than, or supplemental to, the Federal requirements, but, because of the unique nature of the national recordkeeping program, States must consult with OSHA and obtain approval of such additional or more stringent reporting and recording requirements to ensure that they will not interfere with uniform reporting objectives. State-Plan States must extend the scope of their regulation to State and local government employers.

(b) A State may not grant a variance to the injury and illness recording and reporting requirements for private sector employers. Such variances may only be granted by Federal OSHA to assure nationally consistent workplace injury and illness statistics. A State may only grant a variance to the injury and illness recording and reporting requirements for State or local government entities in that State after obtaining approval from Federal OSHA.

(c) A State must recognize any variance issued by Federal OSHA.

(d) As provided in section 18(c)(7) of the Act, State Plan States must adopt requirements identical to those in 29 CFR 1904.41 in their recordkeeping and reporting regulations as enforceable State requirements. The data collected by OSHA as authorized by §1904.41 will be made available to the State Plan States. Nothing in any State plan shall affect the duties of employers to comply with §1904.41.

[80 FR 49902, Aug. 18, 2015, as amended at 81 FR 29694, May 12, 2016]

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#### **§1902.8 Variations and variances.**

(a) The power of the Secretary of Labor under section 16 of the Act to provide reasonable limitations and variations, tolerances, and exemptions to and from any or all provisions of the Act as he may find necessary and proper to avoid serious impairment of the national defense is reserved.

(b) No action by a State under a plan shall be inconsistent with action by the Secretary under this section of the Act.

(c) Where a State standard is identical to a Federal standard addressed to the same hazard, an employer or group of employers seeking a temporary or permanent variance from such standard, or portion thereof, to be applicable to employment or places of employment in more than one State, including at least one State with an approved plan, may elect to apply to the Assistant Secretary for such variance under the provisions of 29 CFR part 1905.

(d) Actions taken by the Assistant Secretary with respect to such application for a variance, such as interim orders, with respect thereto, the granting, denying, or issuing any modification or extension thereof, will be deemed prospectively an authoritative interpretation of the employer or employers' compliance obligations with regard to the State standard, or portion thereof, identical to the Federal standard, or portion thereof, affected by the action in the employment or places of employment covered by the application.

(e) Nothing herein shall affect the option of an employer or employers seeking a temporary or permanent variance with applicability to employment or places of employment in more than one State to apply for such variance either to the Assistant Secretary or the individual State agencies involved. However, the filing with, as well as granting, denial, modification, or revocation of a variance request or interim order by, either authority (Federal or State) shall preclude any further substantive consideration of such application on the same material facts for the same employment or place of employment by the other authority.

(f) Nothing herein shall affect either Federal or State authority and obligations to cite for noncompliance with standards in employment or places of employment where no interim order, variance, or modification or extension thereof, granted under State or Federal law applies, or to cite for noncompliance with such Federal or State variance action.

[80 FR 49902, Aug. 18, 2015]

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#### **§1902.9 Requirements for approval of State posters.**

(a)(1) In order to inform employees of their protections and obligations under applicable State law, of the issues not covered by State law, and of the continuing availability of Federal monitoring under section 18(f) of the Act, States with approved plans shall develop and require employers to post a State poster meeting the requirements set out in paragraph (a)(5) of this section.

(2) Such poster shall be substituted for the Federal poster under section 8(c)(1) of the Act and §1903.2 of this chapter where the State attains operational status for the enforcement of State standards as defined in §1954.3(b) of this chapter.

(3) Where a State has distributed its poster and has enabling legislation as defined in §1954.3(b)(1) of this chapter but becomes nonoperational under the provisions of §1954.3(f)(1) of this chapter because of failure to be at least as effective as the Federal program, the approved State poster may, at the discretion of the Assistant Secretary, continue to be substituted for the Federal poster in accordance with paragraph (a)(2) of this section.

(4) A State may, for good cause shown, request, under 29 CFR part 1953, approval of an alternative to a State poster for informing employees of their protections and obligations under the State plans, provided such alternative is consistent with the Act, §1902.4(c)(2)(iv) and applicable State law. In order to qualify as a substitute for the Federal poster under this paragraph (a), such alternative must be shown to be at least as effective as the Federal poster requirements in informing employees of their protections and obligations and address the items listed in paragraph (a)(5) of this section.

(5) In developing the poster, the State shall address but not be limited to the following items:

- (i) Responsibilities of the State, employers and employees;
- (ii) The right of employees or their representatives to request workplace inspections;
- (iii) The right of employees making such requests to remain anonymous;
- (iv) The right of employees to participate in inspections;
- (v) Provisions for prompt notice to employers and employees when alleged violations occur;

(vi) Protection for employees against discharge or discrimination for the exercise of their rights under Federal and State law;

(vii) Sanctions;

(viii) A means of obtaining further information on State law and standards and the address of the State agency;

(ix) The right to file complaints with the Occupational Safety and Health Administration about State program administration;

(x) A list of the issues as defined in §1902.2(c) which will not be covered by State plan;

(xi) The address of the Regional Office of the Occupational Safety and Health Administration; and

(xii) Such additional employee protection provisions and obligations under State law as may have been included in the approved State plan.

(b) Posting of the State poster shall be recognized as compliance with the posting requirements in section 8(c)(1) of the Act and §1903.2 of this chapter, provided that the poster has been approved in accordance with subpart B of part 1953 of this chapter. Continued Federal recognition of the State poster is also subject to pertinent findings of effectiveness with regard to the State program under 29 CFR part 1954.

[80 FR 49902, Aug. 18, 2015]

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### **Subpart C—Procedures for Submission, Approval and Rejection of State Plans**

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#### **§1902.10 Submission.**

(a) An authorized representative of the State agency or agencies responsible for administering the plan shall submit one copy of the plan to the appropriate Assistant Regional Director of the Occupational Safety and Health Administration, U.S. Department of Labor. The State plan shall include supporting papers conforming to the requirements specified in the subpart B of this part, and the State occupational safety and health standards to be included in the plan, including a copy of any specific or enabling State laws and regulations relating to such standards. If any of the representations concerning the requirements of subpart B of this part are dependent upon any judicial or administrative interpretations of the State standards or enforcement provisions, the State shall furnish citations to any pertinent judicial decisions and the text of any pertinent administrative decisions.

(b) Upon receipt of the State plan the Assistant Regional Director shall make a preliminary examination of the plan. If his examination reveals any defect in the plan, the Assistant Regional Director shall offer assistance to the State agency and shall provide the agency an opportunity to cure such defect. After his preliminary examination, and after affording the State agency such opportunity to cure defects, the Assistant Regional Director shall submit the plan to the Assistant Secretary.

(c) Upon receipt of the plan from the Assistant Regional Director, the Assistant Secretary shall examine the plan and supporting materials. If the examination discloses no cause for rejecting the plan, the Assistant Secretary shall follow the procedure prescribed in §1902.11. If the examination discloses cause for rejection of the plan, the Assistant Secretary shall follow the procedure prescribed in §1902.17.

[36 FR 20751, Oct. 29, 1971, as amended at 80 FR 49903, Aug. 18, 2015]

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## PROCEDURE FOR PROPOSED OR POSSIBLE APPROVAL OF PLAN

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### §1902.11 General notice.

(a) Upon receipt of a State plan submitted by an Assistant Regional Director under §1902.10 whenever the Assistant Secretary proposes to approve the plan, or to give notice that such approval is an issue before him, he shall publish in the FEDERAL REGISTER a notice meeting the requirements of the remaining paragraphs of this section. No later than 5 days following the publication of the notice in the FEDERAL REGISTER, the applying State agency shall publish, or cause to be published, within the State reasonable notice containing the same information.

(b) The notice shall indicate the submission of the plan and its contents, and any proposals, subjects, or issues involved.

(c) The notice shall provide that the plan, or copies thereof, shall be available for inspection and copying at the office of the Director, Office of State Programs, Occupational Safety and Health Administration, office of the Assistant Regional Director in whose region the State is located, and an office of the State which shall be designated by the State for this purpose.

(d) The notice shall afford interested persons an opportunity to submit in writing, data, views, and arguments on the proposal, subjects, or issues involved within 30 days after publication of the notice in the FEDERAL REGISTER. Thereafter the written comments received or copies thereof shall be available for public inspection and copying at the office of the Director, Office of State Programs, Occupational Safety and Health Administration, office of the Assistant Regional Director in whose region the State is located, and an office of the State which shall be designated by the State for this purpose.

(e) Upon his own initiative, the Assistant Secretary may give notice of an informal or formal hearing affording an opportunity for oral comments concerning the plan.

(f) In the event no notice of hearing is provided under paragraph (e) of this section it shall be provided that any interested person may request an informal hearing concerning the proposed plan, or any part thereof, whenever particularized written objections thereto are filed within 30 days following publication of the notice in the FEDERAL REGISTER. If the Assistant Secretary finds that substantial objections have been filed, he shall afford a formal or informal hearing on the subjects and issues involved under §1902.13 or §1902.14, or shall commence a proceeding under §1902.17.

[36 FR 20751, Oct. 29, 1971, as amended at 80 FR 49903, Aug. 18, 2015]

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### §1902.12 Opportunity for modifications and clarifications.

The Assistant Secretary may afford the State an opportunity to modify or clarify its plan on the basis of any comments received under §1902.11 or §1902.13, before commencing a proceeding to reject the plan. In this connection, the State may informally discuss any issues raised by such comments with the staff of the Office of Federal and State Operations. The Assistant Secretary may afford an additional opportunity for public comment, particularly when such an opportunity would not unduly delay final action on the plan and when the comments could be expected to elicit new relevant matter.

[38 FR 12605, May 14, 1973]

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### §1902.13 Informal hearing.

Any informal hearing shall be legislative in type. The procedures for informal hearings may take a variety of forms. The appropriateness of any particular form will turn largely upon the proposals, subjects, or issues involved. The rules of procedure for each hearing shall be published with the notice thereof.

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#### **§1902.14 Formal hearing.**

Any formal hearing provided for under §1902.11 (e) and (f) shall be commenced upon the publication of reasonable notice in the FEDERAL REGISTER and similar notice by the State. The hearing shall conform with the requirements of 5 U.S.C. 556 and 557. The terms for filing proposed findings and conclusions and exceptions to any tentative decision, or objections to a tentative decision, shall be set forth in the notice.

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#### **§1902.15 Certification of the record of a hearing.**

Upon completion of any formal or informal hearing, the transcript thereof, together with written submissions, exhibits filed during the hearing, and any post-hearing presentations shall be certified by the officer presiding at the hearing to the Assistant Secretary.

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#### **§1902.16 Partial approval of State plans.**

(a) The Assistant Secretary may partially approve a plan under this part whenever:

- (1) The portion to be approved meets the requirements of this part;
- (2) The plan covers more than one occupational safety and health issue; and
- (3) Portions of the plan to be approved are reasonably separable from the remainder of the plan.

(b) Whenever the Assistant Secretary approves only a portion of a State plan, he may give notice to the State of an opportunity to show cause why a proceeding should not be commenced for disapproval of the remainder of the plan under subpart C of this part before commencing such a proceeding.

[80 FR 49903, Aug. 18, 2015]

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#### **PROCEDURE FOR PROPOSED OR POSSIBLE REJECTION OF PLAN**

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#### **§1902.17 The proceeding.**

Whenever as a result of (a) an initial examination of a plan, or (b) written or oral comments concerning a plan submitted in an informal rulemaking proceeding concerning a proposed approval of a plan or any subject or issue concerning the plan, the Assistant Secretary proposes to reject a plan or rejection remains in issue for any reason, he shall follow the procedures prescribed in the remaining sections of this subpart.

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### **§1902.18 Previous hearing or other opportunity for comment on plan.**

(a) Whenever an informal hearing has been held under §§1902.11 and 1902.13, any evidence submitted in such a hearing shall be considered and may be relied upon whenever it is found that no party will be prejudiced thereby because

(1) Of a lack of an opportunity for cross-examination afforded in the informal hearing on the issues involved, or

(2) The veracity and demeanor of witnesses are not important with respect to the type of evidence involved (e.g., extensive technical or statistical data), or

(3) For any other reason.

(b) Any written comments received in response to a notice issued under §1902.11 shall be a part of the record of the proceeding.

(c) Whenever a formal hearing has been held under §1902.14 the Assistant Secretary shall hold no additional hearing, and shall proceed to issue a tentative decision under §1902.21.

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### **§1902.19 Notice of hearing.**

(a) Whenever the Assistant Secretary has issued no previous notice concerning the plan, or only informal rule making proceedings have been conducted concerning the plan, the Assistant Secretary shall publish in the FEDERAL REGISTER an appropriate notice concerning the plan and provide an opportunity for formal hearing and decision on the possible rejection of the plan and on any subsidiary issues. The notice also shall set forth such rules as may be necessary so as to assure compliance with 5 U.S.C. 556 and 557 in the conduct of the proceeding. The time for filing proposed findings and conclusions and exceptions to any tentative decision shall be set forth in the notice.

(b) Not later than 5 days following the publication of the notice in the FEDERAL REGISTER, required by paragraph (a) of this section, the applying State agency shall publish, or cause to be published, within the State reasonable notice containing the same information.

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## **DECISIONS**

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### **§1902.20 Decision following informal proceeding.**

(a) This section deals with a situation where the Assistant Secretary has

(1) Afforded interested persons an opportunity to submit written data, views, or arguments concerning a proposal, subject, or issue concerning a plan; or

(2) Has in addition provided an informal hearing concerning a proposal, subject, or issue concerning a plan.

(b)(1)(i) After consideration of all relevant information which has been presented, if the Assistant Secretary approves a plan he shall issue a decision to that effect.

(ii) In the event the plan is approved under §1902.2(b), the decision shall state that the plan does not fully meet the criteria set forth in §1902.3, and shall summarize the schedule and any other measures for bringing the plan up to the level of such criteria.

(iii) The decision shall also reflect the Assistant Secretary's intention as to continued Federal enforcement of Federal standards in areas covered by the plan. Provisions for continued Federal enforcement shall take into consideration:

- (a) Whether the plan is approved under §1902.2(a) or §1902.2(b);
- (b) The schedule for coming up to Federal standards in any §1902.2(b) plan; and
- (c) Any other relevant matters.

(2) After consideration of all relevant information contained in any written or oral comments received in any informal proceeding, if the Assistant Secretary proposes to disapprove a plan, or the disposition of a subject or issue permits the possible disapproval of a plan, he shall publish a notice to that effect, and commence a proceeding meeting the requirements of §1902.19.

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#### **§1902.21 Tentative decision following formal proceeding.**

(a) On the basis of the whole record of any hearing held under §1902.14 or §1902.19, the Assistant Secretary shall issue a tentative decision either approving or disapproving the plan. The tentative decision shall include a statement of the findings and conclusions and reasons or bases therefor on all material issues of fact, law, or discretion which have been presented. The tentative decision shall be published in the FEDERAL REGISTER.

(b) The State agency and other interested persons participating in the hearing may waive the tentative decision. In such event the Assistant Secretary shall issue a final decision under §1902.22.

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#### **§1902.22 Final decision following formal proceeding.**

(a) Except when interested persons participating in the hearing have waived the tentative decision under §1902.21(b) interested persons participating in the hearing shall have an opportunity to file exceptions to a tentative decision and objections to such exceptions within periods of time to be specified in the tentative decision. An original and four copies of any exception or objections shall be filed.

(b)(1) Thereafter the Assistant Secretary shall issue a final decision ruling upon each exception and objection filed. The final decision shall be published in the FEDERAL REGISTER.

(2) Any final decision approving a plan shall contain the provisions prescribed in §1902.20(b)(1)(iii) concerning Federal enforcement in areas covered by the plan.

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#### **§1902.23 Publication of decisions.**

All decisions approving or disapproving a plan shall be published in the FEDERAL REGISTER.

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### **Subpart D—Procedures for Determinations Under section 18(e) of the Act**

SOURCE: 40 FR 54782, Nov. 26, 1975, unless otherwise noted.



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## GENERAL

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### §1902.30 Purpose and scope.

This subpart contains procedures and criteria under which the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary) under a delegation of authority from the Secretary of Labor (Secretary's Order 12-71, 36 FR 8754) will make his determination on whether to grant final approval to State plans in accordance with the provisions of section 18(e) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter referred to as the Act).

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### §1902.31 Definitions.

As used in this subpart, unless the context clearly indicates otherwise:

*Act* means the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*)

*Affirmative 18(e) determination* means an affirmative determination under section 18(e) of the Act that the State plan or any modification thereof, is in actual operation meeting the criteria and indices of section 18(c) of the Act and subpart B of this part so as to warrant the withdrawal of the application of discretionary Federal enforcement and standards authority from issues covered by the plan, or by any modification thereof.

*Assistant Regional Director* means the Assistant Regional Director for Occupational Safety and Health for the region in which a State is located.

*Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health.

*Commencement of a case* under section 18(e) of the Act means, for the purpose of retaining Federal jurisdiction despite an affirmative 18(e) determination, the issuance of a citation, and in the case of an imminent danger, the initiation of enforcement proceedings under section 13 of the Act.

*Commencement of plan operations* means the beginning of operations under a plan following the approval of the plan by the Assistant Secretary and in no case may be later than the effective date of the initial funding grant provided under section 23(g) of the Act.

*Development step* includes, but is not limited to, those items listed in the published developmental schedule, or any revisions thereof, for each plan. A developmental step also includes those items specified in the plan as approved under section 18(c) of the Act for completion by the State, as well as those items which under the approval decision were subject to evaluations and changes deemed necessary as a result thereof to make the State program at least as effective as the Federal program within the 3 years developmental period. (See 29 CFR 1953.4(a)).

*Initial approval* means approval of a State plan, or any modification thereof, under section 18(c) of the Act and subpart C of this part.

*Person* means any individual, partnership, association, corporation, business trust, legal representative, organized group of individuals, or any agency, authority or instrumentality of the United States or of a State.

*Separable portion of a plan* for purposes of an 18(e) determination generally means more than one industrial, occupational or hazard grouping as defined in §1902.2(c)(1) which is administratively practicable and reasonably separable from the remainder of the plan. (See 29 CFR 1952.6(a).)

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### **§1902.32 General policies.**

(a) Sections 18 (e) and (f) of the Act provide for the continuing evaluation and monitoring of State plans approved under section 18(c) of the Act. The Assistant Secretary's decision whether to grant an affirmative 18(e) determination will be based, in part, on the results of these evaluations. Section 18(e) provides that a period of not less than 3 years shall have passed before the Assistant Secretary may make a determination that the State program in actual operations is applying the criteria of section 18(c) of the Act. In the case of a developmental plan, §1902.2(b) of this part requires that the Assistant Secretary must have at least one year in which to evaluate the plan's actual operations following the completion of all developmental steps specified in the plan. Thus, to be considered for an 18(e) determination, at least three years shall have passed following commencement of operations after the initial approval of a State's occupational safety and health plan by the Assistant Secretary. In the case of a developmental plan, at least one year shall have passed following the completion of all developmental steps, but, in any event, at least three years must have passed following initial approval of the plan before discretionary Federal enforcement authority and standards may be withdrawn from issues covered by an approved plan.

(b) In making an 18(e) determination, the Assistant Secretary will determine if actual operations under a State's plan, or under a separable portion of the plan, indicate that the State is applying the criteria of section 18(c) of the Act and the indices of effectiveness of subpart B of this part in a manner which renders operations under the plan "at least as effective as" operations under the Federal program in providing safe and healthful employment and places of employment within the State. In making this determination, the Assistant Secretary may consider such information which he deems appropriate for an informed decision.

(c) If the Assistant Secretary makes an affirmative 18(e) determination, the Federal enforcement provisions of sections 5(a) (2), 8 (except for the purposes of continuing evaluations under section 18(f) of the Act), 9, 10, 13 and 17 and standards promulgated under section 6 of the Act shall not apply with respect to those occupational safety and health issues covered under the plan which have been given an affirmative 18(e) determination. However, the Assistant Secretary may retain jurisdiction over proceedings commenced under sections 9, 10 and 13 of the Act before the date of his determination. In addition, the Assistant Secretary shall retain his jurisdiction under the anti-discrimination provisions of section 11(c) of the Act.

(d) If the Assistant Secretary determines that a State plan, or any portion thereof, has not met the criteria for an 18(e) determination, he shall retain his authority under the enforcement provisions of sections 5(a) (2), 8, 9, 10, 13, and 17 and his standards authority under section 6 of the Act in the issues found ineligible for an 18(e) determination. In addition, his decision may result in the commencement of proceedings for withdrawal of approval of the plan, or any separable portion thereof, under 29 CFR part 1955.

(e) Once a State's plan, or any modification thereof, has been given an affirmative 18(e) determination, the State is required to maintain a program which will meet the requirements of section 18 (c) and will continue to be "at least as effective as" the Federal program operations in the issues covered by the determination. As the Federal program changes and thereby becomes more effective, the State is correspondingly required to adjust its program at a level which would provide a program for workplace safety and health which would be "at least as effective as" the improvements in the Federal program. A failure to comply with this requirement may result in the revocation of the affirmative 18(e) determination and the resumption of Federal enforcement and standards authority and/or in the commencement of proceedings for the withdrawal of approval of the plan, or any portion thereof, pursuant to 29 CFR part 1955.

(f) The Assistant Secretary may reconsider and, if necessary, rescind or revoke all or a separable portion of an affirmative 18(e) determination and reinstate concurrent Federal enforcement authority if he finds that a State does not maintain its commitment to provide a program for employee safety and health protection meeting the requirements of section 18(c) of the Act. This authority is designed to be used in instances where operations under a State program are found to be less effective than under the Federal program because of unusual circumstances which are temporary in nature. The Assistant Secretary may also use this procedure to reinstate Federal enforcement authority in conjunction with plan withdrawal proceedings in order to ensure that there is no serious gap in his commitment to assure safe and healthful working conditions so far as possible for every employee.

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## COMPLETION OF DEVELOPMENTAL STEPS—CERTIFICATION

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### §1902.33 Developmental period.

Upon the commencement of plan operations after the initial approval of a State's plan by the Assistant Secretary, a State has three years in which to complete all of the developmental steps specified in the plan as approved. Section 1953.4 of this chapter sets forth the procedures for the submission and consideration of developmental changes by OSHA. Generally, whenever a State completes a developmental step, it must submit the resulting plan change as a supplement to its plan to OSHA for approval. OSHA's approval of such changes is then published in the FEDERAL REGISTER.

[80 FR 49904, Aug. 18, 2015]

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### §1902.34 Certification of completion of developmental steps.

(a) Upon the completion of all of the developmental steps in a State's plan, which is to be accomplished not later than three years following commencement of plan operations after approval of the plan by the Assistant Secretary under section 18(c), the Assistant Regional Director shall certify, as provided in paragraph (b) of this section, that all developmental steps in the plan have been met and that the State's program is to be evaluated on the basis of its eligibility for an 18(e) determination after at least one year of evaluations of the plan.

(b) Upon determining that a State has completed all of its developmental steps, the Assistant Regional Director shall prepare a certification which he shall promptly forward to the Assistant Secretary. The certification shall include, but shall not be limited to, the following;

(1) A list of all developmental steps or revisions thereof, plan amendments or changes which result in the completion of the steps or revisions thereof, and the dates the Assistant Secretary's or the Assistant Regional Director's approval of each change was published in the FEDERAL REGISTER;

(2) Substantive changes, if any, in the State program which were approved by the Assistant Secretary and their dates of publication in the FEDERAL REGISTER;

(3) Documentation that the legal basis for the applicable State merit system has been approved by the U.S. Civil Service Commission and that the actual operations of the State merit system has been found acceptable by the Occupational Safety and Health Administration with the advice of the U.S. Civil Service Commission; and

(4) A description of the issues which are covered by the State plan. Where applicable, the certification shall include a description of those separable portions of the plan which have been certified for 18(e) evaluation purposes as well as those portions of the plan which were not certified by the Assistant Regional Director.

(c) After a review of the certification and the State's plan, if the Assistant Secretary finds that the State has completed all the developmental steps specified in the plan, he shall publish the certification in the FEDERAL REGISTER.

[40 FR 54782, Nov. 26, 1975, as amended at 80 FR 49904, Aug. 18, 2015]

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### §1902.35 Effect of certification.

Publication of the certification acknowledging the completion of all of the developmental steps in a State's plan will automatically initiate the evaluation of a State's plan for the purposes of an 18(e) determination. Evaluation for the purposes of an 18(e) determination will continue for at least one year after the publication of the certification in the FEDERAL REGISTER. Federal enforcement authority under sections 5(a)(2), 8, 9, 10, 11(c), 13, and 17 of the Act and Federal standards authority under section 6 of the Act will not be relinquished during the evaluation period. Evaluation conducted for 18(e) determination purposes will be based on the criteria set forth in §§1902.37 and 1902.38.

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## **BASIS FOR 18(e) DETERMINATIONS**

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### **§1902.36 General provisions.**

(a) In making his evaluation of the actual operations of a State's plan for the purposes of an 18(e) determination, the Assistant Secretary shall consider all relevant data which will aid him in making an effective determination. In his evaluation he shall consider whether the requirements of section 18(c) of the Act and the criteria for State plans outlined in subpart B of this part as well as those in §1902.37 are being applied in actual operations for a reasonable period of time in a manner which warrants the termination of concurrent Federal enforcement authority and standards in issues covered under the plan.

(b) The Assistant Secretary's evaluation for an 18(e) determination will be addressed to consideration of whether the criteria and indices in §1902.37(a) are being applied by the State in such a manner as to render its program in operation at least as effective as operations under the Federal program. In considering the question of such application, the Assistant Secretary shall also consider the factors provided under §1902.37(b). The Assistant Secretary's evaluation may include such other information on the application of the criteria and indices in §1902.37 such as information developed from comments received from the public and the results of any hearings which may have been held under §1902.40 concerning the proposed 18(e) determination.

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### **§1902.37 Factors for determination.**

(a) The Assistant Secretary shall determine if the State has applied and implemented all the specific criteria and indices of effectiveness of §§1902.3 and 1902.4 of this part.

(b) In determining whether a State has applied the criteria and indices of effectiveness in paragraph (a) of this section in actual operations, the Assistant Secretary will, among other things related to the application of the criteria and indices, consider whether:

(1) The State has a sufficient number of adequately trained and competent personnel to discharge its responsibilities under the plan.

(2) The State has adhered to the procedures which it has adopted and which have been approved either under the State plan or in State plan changes or under any other procedures for approval authorized by the Assistant Secretary.

(3) The State has timely adopted all Federal standards, and amendments thereto, for issues covered under the plan or has timely developed and promulgated standards which are at least as effective as the comparable Federal standards and amendments thereto.

(4) If the State has adopted Federal standards, the State's interpretation and application of such standards have been consistent with the applicable Federal interpretation and application. Where the State has developed and promulgated its own standards, such standards have been interpreted and applied in a manner which is at least as effective as the interpretation and application of comparable Federal standards. This requirement acknowledges that

State standards may have been approved by the Assistant Regional Director, but emphasizes the requirement that the standards are to be at least as effective as the comparable Federal standards in actual operations.

(5) If any State standard, whether it is an adopted Federal standard or a standard developed by a State, has been subject to administrative or judicial challenge, the State has taken the necessary administrative, judicial or legislative action to correct any deficiencies in its program resulting from such challenge.

(6) In granting permanent variances from a standard the State has assured that the employer provides conditions of employment which are as safe and healthful as those which would prevail if he complied with the standard.

(7) In granting temporary variances from a standard, the State has ensured that the recipient of the variance has come into compliance with the standard as early as possible.

(8) The State inspection program is being implemented in a manner which allows a sufficient allocation of resources to be directed toward target industries and target health hazards as designated by the State while providing adequate attention to all other workplaces covered under the plan, or any modification thereof.

(9) The State exercises the authority through appropriate means, to enforce its right of entry and inspection wherever such right of entry or inspection is refused.

(10) Inspections of workplaces are conducted by State inspectors in a competent manner, following approved enforcement procedures. This includes a requirement that the inspectors obtain adequate information to support any citations which may be issued.

(11) The State issues citations, proposed penalties and notices for failure to abate in a timely manner.

(12) The State proposes penalties in a manner at least as effective as under the Federal program, including the proposing of penalties for first instance violations and the consideration of factors comparable to those required to be considered under the Federal program.

(13) The State ensures the abatement of hazards for which a citation has been issued, including the issuance of notices of failure to abate and appropriate penalties.

(14) Wherever appropriate, the State agency has sought administrative and judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.

(15) Insofar as it is available, analysis of the annual occupational safety and health survey by the Bureau of Labor Statistics, as well as of other available Federal and State measurements of program impact on worker safety and health, which analysis also takes into consideration various local factors, indicates that trends in worker safety and health injury and illness rates under the State program compare favorably to those under the Federal program.

[40 FR 54782, Nov. 26, 1975; 40 FR 58143, Dec. 15, 1975]

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#### **PROCEDURES FOR 18(e) DETERMINATION**

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#### **§1902.38 Evaluation of plan following certification.**

(a) Following the publication in the FEDERAL REGISTER under §1902.34 of the certification acknowledging the completion of all developmental steps specified in the plan, or any portion thereof, the Assistant Secretary will

evaluate and monitor the actual operations under the State plan for at least 1 year before determining whether the State is eligible for an 18(e) determination. The evaluation will assess the actual operation of the State's fully implemented program in accordance with the criteria in §1902.37 and take into account any information available to the Assistant Secretary affecting the State's program.

(b) The Assistant Regional Director shall prepare a semi-annual report of his evaluation of the actual operations under the State plan or any portion thereof in narrative form. The Assistant Regional Director's evaluation report will be transmitted to the Assistant Secretary who will then transmit the report to the State. The State shall be afforded an opportunity to respond to each evaluation report.

[40 FR 54782, Nov. 26, 1975, as amended at 42 FR 58746, Nov. 11, 1977]

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### **§1902.39 Completion of evaluation.**

(a) After evaluating the actual operations of the State plan, or any portion thereof, for at least 1 year following publication of the certification in the FEDERAL REGISTER under §1902.34, the Assistant Secretary shall notify the State whenever he determines that the State will be eligible for an 18(e) determination. In addition, a State may request an 18(e) determination following the evaluation period noted above. In no case shall this determination of eligibility be later than 2 years following the publication of the certification of the completion of developmental steps in the FEDERAL REGISTER under §1902.34. In the case of a plan which was not developmental, the determination of eligibility shall not be sooner than 3 years following the date of commencement of operations under the plan.

(b) After it has been determined that a State will be eligible for an 18(e) determination, the Assistant Regional Director shall prepare a final report of his evaluation of the actual operations under a State's plan or portion thereof which may be subject to the 18(e) determination. The Assistant Regional Director's report shall be transmitted to the Assistant Secretary. The Assistant Secretary shall transmit such report to the State and the State shall have an opportunity to respond to the report.

(c) Whenever it has been determined that a State's plan, or separable portion thereof, is eligible for an 18(e) determination, the Assistant Secretary shall publish a notice in the FEDERAL REGISTER. The notice shall meet the requirements of the remaining paragraphs of this section. No later than 10 days following the publication of the notice in the FEDERAL REGISTER, the affected State agency shall publish, or cause to be published, within the State, reasonable notice containing the same information.

(d) The notice shall indicate that the plan, or any separable portion thereof, is in issue before the Assistant Secretary for a determination as to whether the criteria in section 18(c) of the Act are being applied in actual operation, and indicate the particular substantive issues, if any, for consideration in making such determination. Where a portion of a plan is in issue for such a determination, the notice shall specify such portions of the plan as well as those portions of the plan which are not in issue for the determination.

(e) The notice shall afford interested persons an opportunity to submit in writing, data, views, and arguments on the proposed 18(e) determination, and the affected State an opportunity to respond to such submissions.

(f) The notice shall also state that any interested person or the affected State may request an informal hearing concerning the proposed 18(e) determination whenever particularized written objections thereto are filed within 35 days following publication of the notice in the FEDERAL REGISTER.

(g) If the Assistant Secretary finds that substantial objections are filed which relate to the proposed 18(e) determination, the Assistant Secretary shall, and in any other case may, publish a notice of informal hearing in the FEDERAL REGISTER not later than 30 days after the last day for filing written views or comments. The notice shall include:

(1) A statement of the time, place and nature of the proceeding;

(2) A specification of the substantial issues which have been raised and on which an informal hearing has been requested;

(3) The requirement for the filing of an intention to appear at the hearing, together with a statement of the position to be taken with regard to the issues specified, and of the evidence to be adduced in support of the position;

(4) The designation of a presiding officer to conduct the hearing; and

(5) Any other appropriate provisions with regard to the proceeding.

(h) Not later than 10 days following the publication of the notice in the FEDERAL REGISTER, required by paragraph (g) of this section, the affected agency shall publish, or cause to be published, within the State reasonable notice containing the same information.

EFFECTIVE DATE NOTE: At 43 FR 11196, Mar. 17, 1978, §1902.39(a) was suspended indefinitely, effective Jan. 20, 1978.

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#### **§1902.40 Informal hearing.**

(a) Any hearing conducted under this section shall be legislative in type. However, fairness may require an opportunity for cross-examination on pertinent issues. The presiding officer is empowered to permit cross-examination under such circumstances. 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.

(b) Although the hearing shall be informal and legislative in type, this section is intended to provide more than the bare essentials of informal proceedings under 5 U.S.C. 553. The additional requirements are the following:

(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

(2) The presiding officer shall provide an opportunity for cross-examination on pertinent issues.

(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

(c) The officer presiding at a hearing shall have all the power necessary or appropriate to conduct a fair and full hearing, including the powers:

(1) To regulate the course of the proceedings;

(2) To dispose of procedural requests, objections, and comparable matters;

(3) To 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;

(4) To regulate the conduct of those present at the hearing by appropriate means;

(5) To 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;

(6) In his discretion, to 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.



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

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#### **§1902.41 Decision.**

(a) Within a reasonable time generally within 120 days after the expiration of the period provided for the submission of written data, views, and arguments on the issues on which no hearing is held, or within a reasonable time, generally not to exceed 120 days after the certification of the record of a hearing, the Assistant Secretary shall publish his decision in the FEDERAL REGISTER. His decision shall state whether or not an affirmative 18(e) determination has been made for the State plan or any separable portion thereof, or whether he intends to withdraw approval of the plan or any portion thereof pursuant to part 1955 of this chapter. The action of the Assistant Secretary shall be taken after consideration of all information, including his evaluations of the actual operations of the plan, and information presented in written submissions and in any hearings held under this subpart.

(b) Any decision under this section shall incorporate a concise statement of its grounds and purpose and shall respond to any substantial issues which may have been raised in written submissions or at the hearing.

(c) All decisions concerning the Assistant Secretary's determination under section 18(e) of the Act shall be published in the FEDERAL REGISTER.

[40 FR 54782, Nov. 26, 1975, as amended at 80 FR 49904, Aug. 18, 2015]

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#### **§1902.42 Effect of affirmative 18(e) determination.**

(a) In making an affirmative 18(e) determination, the Assistant Secretary determines that a State has applied the provisions of its plan, or any modification thereof, in accordance with the criteria of section 18(c) of the Act and that the State has applied the provisions of this part in a manner which renders the actual operations of the State program "at least as effective as" operations under the Federal program.

(b) In the case of an affirmative 18(e) determination of a separable portion(s) of a plan, the Assistant Secretary determines that the State has applied the separable portion(s) of the plan in accordance with the criteria of section 18(c) of the Act in a manner comparable to Federal operations covering such portions and that the criteria of this part are being applied in a manner which renders the actual operations of such separable portion(s) of the State program "at least as effective as" operations of such portions under the Federal program.

(c) Upon making an affirmative 18(e) determination, the standards promulgated under section 6 of the Act and the enforcement provisions of section 5(a)(2), 8 (except for the purpose of continuing evaluations under section 18(f) of the Act), 9, 10, 13 and 17 of the Act shall not apply with respect to those occupational safety and health issues covered under the plan for which an affirmative 18(e) determination has been granted. The Assistant Secretary shall retain his authority under the above sections for those issues covered in the plan which have not been granted an affirmative 18(e) determination.

(d) The Assistant Secretary will retain jurisdiction under the citation and contest provisions of sections 9 and 10 of the Act and the imminent-danger provisions of section 13 where such proceedings have been commenced prior to the date of his determination.

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#### **§1902.43 Affirmative 18(e) decision.**



(a) In publishing his affirmative 18(e) decision in the FEDERAL REGISTER the Assistant Secretary's notice shall include, but shall not be limited to the following:

(1) Those issues under the plan over which the Assistant Secretary is withdrawing his standards and enforcement authority;

(2) A statement that the Assistant Secretary retains his authority under section 11(c) of the Act with regard to complaints alleging discrimination against employees because of the exercise of any right afforded to the employee by the Act;

(3) An amendment to the appropriate section of part 1952 of this chapter;

(4) A statement that the Assistant Secretary is not precluded from revoking his determination and reinstating his standards and enforcement authority under §1902.47 *et seq.*, if his continuing evaluations under section 18(f) of the Act show that the State has substantially failed 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 its plan to the Assistant Secretary as required by 29 CFR part 1953.

[40 FR 54782, Nov. 26, 1975, as amended at 80 FR 49904, Aug. 18, 2015]

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#### **§1902.44 Requirements applicable to State plans granted affirmative 18(e) determinations.**

(a) A State whose plan, or modification thereof, has been granted an affirmative 18(e) determination will be required to maintain a program within the scope of such determination which will be "at least as effective as" operations under the Federal program in providing employee safety and health protection at covered workplaces within the comparable scope of the Federal program. This requirement includes submitting all required reports to the Assistant Secretary, as well as submitting supplements to the Assistant Secretary for his approval whenever there is a change in the State's program, whenever the results of evaluations conducted under section 18(f) show that some portion of a State plan has an adverse impact on the operations of the State plan or whenever the Assistant Secretary determines that any alteration in the Federal program could have an adverse impact on the "at least as effective as" status of the State program. See part 1953 of this chapter.

(b) A substantial failure to comply with the requirements of this section may result in the revocation of the affirmative 18(e) determination and the resumption of Federal enforcement authority, and may also result in proceedings for the withdrawal of approval of the plan or any portion thereof pursuant to part 1955 of this chapter.

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#### **§1902.45 [Reserved]**

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#### **§1902.46 Negative 18(e) determination.**

(a) This section sets out the procedures which shall be followed whenever the Assistant Secretary determines that a State's plan, or any separate portion thereof, has not met the criteria for an affirmative 18(e) determination.

(b) If the Assistant Secretary determines that a State plan, or a separable portion thereof, has not met the criteria of section 18(c) of the Act and that actual operations under the plan, or portion thereof, have not met the criteria for an affirmative determination set forth in §1902.37, he shall retain his standards authority under section 6 of the Act and his enforcement authority under sections 5(a)(2), 8, 9, 10, 13, and 17 of the Act for those issues covered under the plan or such portions of the plan which were subject to his negative determination.

(c) A decision under this section may result in the commencement of proceedings for withdrawal of approval of the plan or any separable portion thereof pursuant to part 1955 of this chapter.

(d) Where the Assistant Secretary determines that operations under a State plan or any separable portion thereof have not met the criteria for an affirmative 18(e) determination, but are not of such a nature as to warrant the initiation of withdrawal proceedings, the Assistant Secretary may, at his discretion, afford the State a reasonable time to meet the criteria for an affirmative 18(e) determination after which time he may initiate proceedings for withdrawal of plan approval. This discretionary authority will be applied in the following manner:

(1) Upon determining that a State shall be subject to a final 18(e) determination, the Assistant Secretary shall notify the agency designated by the State to administer its program, within the State of his decision that the State's program, or a separable portion thereof, shall be subject to a final 18(e) determination. The Assistant Secretary shall give the State a reasonable time, generally not less than 1 year, in which to meet the criteria for an affirmative 18(e) determination.

(2) The Assistant Secretary shall also publish a notice in the FEDERAL REGISTER outlining his reasons for not making an affirmative 18(e) determination at the time. The notice will also set forth the reasonable time the State was granted to meet the criteria for an affirmative 18(e) determination and set forth such conditions as the Assistant Secretary deems proper for the continuation of the State's plan or such portions subject to this action.

(3) The State shall be afforded an opportunity to agree to the conditions of the Assistant Secretary's decision.

(4) Upon the expiration of the time granted to a State to meet the criteria for an affirmative 18(e) determination under paragraph (d)(2) of this section, the Assistant Secretary may initiate proceedings to determine whether a State shall be granted an affirmative 18(e) determination. The procedures outlined in this subpart shall be applicable to any proceedings initiated under this paragraph.

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#### **PROCEDURE FOR RECONSIDERATION AND REVOCATION OF AN AFFIRMATIVE 18(e) DETERMINATION**

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##### **§1902.47 Reconsideration of an affirmative 18(e) determination.**

(a) The Assistant Secretary may at any time reconsider on his own initiative or on petition of an interested person his decision granting an affirmative 18(e) determination.

(b) Such reconsideration shall be based on results of his continuing evaluation of a State plan after it has been granted an affirmative 18(e) determination.

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##### **§1902.48 The proceeding.**

Whenever, as a result of his reconsideration, the Assistant Secretary proposes to revoke his affirmative 18(e) determination, he shall follow the procedures in the remaining sections of this subpart.

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##### **§1902.49 General notice.**

(a) Whenever the Assistant Secretary proposes to revoke an affirmative 18(e) determination, he shall publish a notice in the FEDERAL REGISTER meeting the requirements of the remaining paragraphs of this section. No later than

10 days following the publication of the notice in the FEDERAL REGISTER, the affected State agency shall publish, or cause to be published, reasonable notice within the State containing the same information.

(b) The notice shall indicate the reasons for the proposed action.

(c) The notice shall afford interested persons including the affected State, an opportunity to submit in writing, data, views, and arguments on the proposal within 35 days after publication of the notice in the FEDERAL REGISTER. The notice shall also provide that any interested person may request an informal hearing concerning the proposed revocation whenever particularized written objections thereto are filed within 35 days following publication of the notice in the FEDERAL REGISTER. If the Assistant Secretary finds that substantial objections have been filed, he shall afford an informal hearing on the proposed revocation under §1902.50.

(d) The Assistant Secretary may, upon his own initiative, give notice of an informal hearing affording an opportunity for oral comments concerning the proposed revocation.

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#### **§1902.50 Informal hearing.**

Any informal hearing shall be legislative in type. The rules of procedure for each hearing shall be those contained in §1902.40 and will be published with the notice thereof.

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#### **§1902.51 Certification of the records of a hearing.**

Upon completion of an informal hearing, the transcript thereof, together with written submissions, exhibits filed during the hearing, and any post-hearing presentations shall be certified by the officer presiding at the hearing to the Assistant Secretary.

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#### **§1902.52 Decision.**

(a) 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.

(b) The decision revoking the 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 he has withdrawn his approval of the plan, or any separable portion thereof, pursuant to part 1955 of this chapter or he has determined that the State has met the criteria for an 18(e) determination pursuant to the applicable procedures of this subpart.

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#### **§1902.53 Publication of decisions.**

All decisions on the reconsideration of an affirmative 18(e) determination shall be published in the FEDERAL REGISTER.