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Title 29: Labor

PART 1956—STATE PLANS FOR THE DEVELOPMENT AND ENFORCEMENT OF STATE STANDARDS APPLICABLE TO STATE AND LOCAL GOVERNMENT EMPLOYEES IN STATES WITHOUT APPROVED PRIVATE EMPLOYEE PLANS

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AUTHORITY: Section 18 (29 U.S.C. 667), 29 CFR parts 1902 and 1955, and Secretary of Labor's Order No. 1-2012 (77 FR 3912, Jan. 25, 2012).

SOURCE: 41 FR 12429, Mar. 4, 1977, unless otherwise noted.

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Subpart A—General

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§1956.1 Purpose and scope.

(a) This part sets forth procedures and requirements for approval, continued evaluation, and operation of State plans submitted under section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (hereinafter called the Act) for the development and enforcement of State standards applicable to State and local government

employees in States without approved private employee plans. Although section 2(b) of the Act sets forth the policy of assuring every working man and woman safe and healthful working conditions, State and local government agencies are excluded from the definition of "employer" in section 3(5). Only under section 18 of the Act are such public employees ensured protection under the provisions of an approved State plan. Where no such plan is in effect with regard to private employees, State and local government employees have not heretofore been assured any protections under the Act. Section 18(b), however, permits States to submit plans with respect to any occupational safety and health issue with respect to which a Federal standard has been promulgated under section 6 of the Act. Under §1902.2(c) of this chapter, an issue is defined as "any * * * industrial, occupational, or hazard grouping that is found to be administratively practicable and * * * not in conflict with the purposes of the Act." Since Federal standards are in effect with regard to hazards found in public employment, a State plan covering this occupational category meets the definition of section 18 and the regulations. It is the purpose of this part to assure the availability of the protections of the Act to public employees, where no State plan covering private employees is in effect, by adapting the requirements and procedures applicable to State plans covering private employees to the situation where State coverage under section 18(b) is proposed for public employees only.

(b) In adopting these requirements and procedures, consideration should be given to differences between public and private employment. For instance, a system of monetary penalties applicable to violations of public employers may not in all cases be necessarily the most appropriate method of achieving compliance. Further, the impact of the lack of Federal enforcement authority application to public employers requires certain adjustments of private employer plan procedures in adapting them to plans covering only public employees in a State.

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§1956.2 General policies.

(a) *Policy.* The Assistant Secretary of Labor for Occupational Safety and Health (hereinafter referred to as the Assistant Secretary) will approve a State plan which provides an occupational safety and health program for the protection of State and local government employees (hereinafter State and local government employees are referred to as public employees) that in his judgment meets or will meet the criteria set forth in §1956.10. Included among these criteria is the requirement that the State plan for public employees (hereinafter such a plan will be referred to as the plan) provides for the development and enforcement of standards relating to hazards in employment covered by the plan which are or will be at least as effective in providing safe and healthful employment and places of employment for public employees as standards promulgated and enforced under section 6 of the Act. In determining whether a plan satisfies the requirement of effectiveness, the Assistant Secretary will measure the plan against the indices of effectiveness, set forth in §1956.11.

(b) *Developmental plan.* (1) A State plan for an occupational safety and health program for public employees may be approved although, upon submission, it does not fully meet the criteria set forth in §1956.10, if it includes satisfactory assurances by the State that it will take the necessary steps to bring the program into conformity with these criteria within the 3-year period immediately following the commencement of the plan's operation. In such a case, the plan shall include the specific actions the State proposes to take, and a time schedule for their accomplishment which is not to exceed 3 years, at the end of which the plan will meet the criteria in §1956.10. A developmental plan shall include the dates within which intermediate and final action will be accomplished. Although administrative actions, such as stages for application of standards and enforcement, related staffing, development of regulations may be developmental, to be considered for approval, a State plan for public employees must contain at time of plan approval basic State legislative and/or executive authority under which these actions will be taken. If necessary program changes require further implementing executive action by the Governor or supplementary legislative action by the State, a copy of the appropriate order, or the bill or a draft of legislation that will be or has been proposed for enactment shall be submitted, accompanied by:

(i) A statement of the Governor's support of the legislation or order and

(ii) A statement of legal opinion that the proposed legislation or executive action will meet the requirements of the Act and this part in a manner consistent with the State's constitution and laws.

(2) 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 plan for public employees will meet the criteria in §1956.10 within the indicated 3 year period. In such a case, the Assistant Secretary shall not make a determination that a State is fully applying the criteria in §1956.10 until the State has completed all the developmental steps specified in the plan which are

designed to make it at least as effective as the Federal program for the private sector, and the Assistant Secretary has had at least 1 year to evaluate the plan on the basis of actual operations following the completion of all developmental steps. If at the end of 3 years from the date of commencement of the plan's operation, the State is found by the Assistant Secretary, after affording the State notice and an opportunity for a hearing, not to have substantially completed the developmental steps of the plan, he shall withdraw the approval of the plan.

(3) Where a State plan approved under part 1902 of this chapter is discontinued, except for its public employee component, or becomes approved after approval of a plan under this part, the developmental period applicable to the public employee component of the earlier plan will be controlling with regard to any such public employee coverage. For good cause, a State may demonstrate that an additional period of time is required to make adjustments on account of the transfer from one type of plan to another.

(c) *Scope of a State plan for public employees.* (1) A State plan for public employees must provide for the coverage of both State and local government employees to the full extent permitted by the State laws and constitution. The qualification "to the extent permitted by its law" means only that where a State may not constitutionally regulate occupational safety and health conditions in certain political subdivisions, the plan may exclude such political subdivision employees from coverage.

(2) The State shall not exclude any occupational, industrial, or hazard grouping from coverage under its plan unless the Assistant Secretary finds that the State has shown there is no necessity for such coverage.

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Subpart B—Criteria

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§1956.10 Specific criteria.

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

(b) *Designation of State agency.* (1) The plan shall designate a State agency or agencies which will be 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 the administration of the plan.

(3) A State agency or agencies must be designated with overall responsibility for administering the plan throughout the State. Subject to this overall responsibility, enforcement of standards may be delegated to an appropriate agency having occupational safety and health responsibilities or expertise throughout the State. Included in this overall responsibility are the requirements that the designated agency have, or assure the provision of necessary qualified personnel, legal authority necessary for the enforcement of the standards and make reports as required by the Assistant Secretary.

(c) *Standards.* The State plan for public employees shall include, or provide for the development or adoption of, standards which are or will be at least as effective as those promulgated under section 6 of the Act. The plan shall also contain assurances that the State will continue to develop or adopt such standards. Indices of the effectiveness of standards and procedures for the development or adoption of standards against which the Assistant Secretary will measure the plan in determining whether it is approvable are set forth in §1956.11(b).

(d) *Enforcement.* (1) The State plan for public employees shall provide a program for the enforcement of the State standards which is, or will be, at least as effective in assuring safe and healthful employment and places of employment as the standards promulgated by section 6 of the Act; and provide assurances that the State's enforcement program for public employees will continue to be at least as effective in this regard as the Federal program in the private sector. Indices of the effectiveness of a State's enforcement plan against which the Assistant Secretary will measure the plan in determining whether it is approvable are set forth in §1956.11(c).

(2) The plan shall require State and local government agencies to comply with all applicable State occupational safety and health standards included in 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 plan shall contain adequate assurances that inspectors will have a right to enter covered workplaces which is at least as effective as that provided in section 8 of the Act for the purpose of inspection or monitoring. Where such entry is refused, the State agency or agencies shall have the authority through appropriate legal process to compel such entry.

(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) *Personnel.* The plan shall provide assurances that the designated agency or agencies and all government agencies to which authority has been delegated, have, or will have, a sufficient number of adequately trained and qualified personnel necessary for the enforcement of 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 plan. Subject to the results of evaluations, 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, modifying or superseding such standards, and guidelines on "at least as effective as" staffing derived from the Federal private employee program will be deemed to meet this requirement.

(h) *Resources.* The 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 public employee program. The Assistant Secretary will make the periodic evaluations of the adequacy of the resources the State has devoted to the plan.

(i) *Employer records and reports.* The plan shall provide assurances that public employers covered by the plan will maintain records and make reports on occupational injuries and illnesses in a manner similar to that required of private employers under the Act.

(j) *State agency reports to the Assistant Secretary.* The 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 for public employees, 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 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.

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§1956.11 Indices of effectiveness.

(a) *General.* In order to satisfy the requirements of effectiveness under §1956.10 (c)(1) and (d)(1), the State plan for public employees 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 for private employees, where applicable, 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

for public employees will, to the extent practicable, be at least as effective as the Federal program for private employees.

(b) *Standards.* (1) The indices for measurement of a State plan for public employees with regard to standards follow in paragraph (b)(2) of this section. The Assistant Secretary will determine whether the State plan for public employees 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 for public employees:

(i) Provides for State standards which are or will be at least as effective as the standards promulgated under section 6 of the Act. 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, demonstration, experiments, and experience under this and any 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 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 a public 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. Such authority is particularly appropriate for those situations where public employees are exposed to unique hazards for which existing standards do not provide adequate protection.

(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 labelling, posting, and, where appropriate, results of medical 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 the 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 for public employees with regard to enforcement follow in paragraph (c)(2) of this section. The Assistant Secretary will determine whether the 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 for public employees:

(i) Provides for inspection of covered workplaces in the State by the designated agency or agencies or any other agency which is duly delegated authority, 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 representative, before, during, and after inspections, to bring possible violations to the attention of the State or local 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 inspector during the physical inspection of the workplace, or where there is no authorized representative, provide for consultation by the inspector with a reasonable number of employees.

(iii) Provides for 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 representative, 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 public 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 State program for public employees for himself or others, by such means as providing for appropriate sanctions against the State or local agency for such actions, and by providing for the withholding, upon request, of the names of complainants from the employer.

(vi) Provides that public 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 a public 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 that the designated agency (or agencies) and any agency to which it has duly delegated authority, 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.

(ix) Provides for prompt notice to public 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 public employer and posting of the citation at or near the site of the violation; further provides for advising the public employer of any proposed sanctions, wherever appropriate, by such means as a notice to the employer by certified mail within a reasonable time of any proposed sanctions.

(x) Provides effective sanctions against public employers who violate State standards and orders, or applicable public agency standards, such as those prescribed in the Act. In lieu of monetary penalties a complex of enforcement tools and rights, such as various forms of equitable remedies available to the designee including administrative orders; availability of employee rights such as right to contest citations, and provisions for strengthened employee

participation in enforcement may be demonstrated to be as effective as monetary penalties in achieving compliance in public employment. In evaluating the effectiveness of an alternate system for compelling compliance, elements of the enforcement educational program such as a system of agency self inspection procedures, and in-house training programs, and employee complaint procedures may be taken into consideration.

(xi) Provides for an employer to have the right of review of violations alleged by the State or any agency to which it has duly delegated authority, abatement periods and proposed penalties, where appropriate, for employees or their representatives to challenge the reasonableness of the period of time fixed in the citation for the abatement of the hazard, and for employees or their representatives to have an opportunity to participate in review, proceedings, by such means as providing for administrative review, with an opportunity for a full hearing on the issues.

(xii) Provides that the State will undertake programs to encourage voluntary compliance by public employers and employees by such means as conducting training and consultation with such employers and employees, and encouraging agency self-inspection programs.

(d) *Additional indices.* Upon his own motion, or after consideration of data, views, and arguments received in any proceedings held under subpart C of this part, the Assistant Secretary may prescribe additional indices for any State plan for public employees which shall be in furtherance of the purpose of this section.

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Subpart C—Approval, Change, Evaluation and Withdrawal of Approval Procedures

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§1956.20 Procedures for submission, approval and rejection.

The procedures contained in subpart C of part 1902 of this chapter shall be applicable to submission, approval, and rejection of State plans submitted under this part, except that the information required in §1902.20(b)(1)(iii) would not be included in decisions of approval.

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§1956.21 Procedures for submitting changes.

The procedures contained in part 1953 of this chapter shall be applicable to submission and consideration of developmental, Federal program, evaluation, and State-initiated change supplements to plans approved under this part.

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§1956.22 Procedures for evaluation and monitoring.

The procedures contained in part 1954 of this chapter shall be applicable to evaluation and monitoring of State plans approved under this part, except that the decision to relinquish Federal enforcement authority under section 18(e) of the Act is not relevant to Phase II and III monitoring under §1954.2 and the guidelines of exercise of Federal discretionary enforcement authority provided in §1954.3 are not applicable to plans approved under this part. The factors listed in §1902.37(b) of this chapter, except those specified in §1902.37(b)(11) and (12), which would be adapted to the State compliance program, provide the basis for monitoring.

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§1956.23 Procedures for certification of completion of development and determination on application of criteria.

The procedures contained in §§1902.33 and 1902.34 of this chapter shall be applicable to certification of completion of developmental steps under plans approved in accordance with this part. Such certification shall initiate intensive monitoring of actual operations of the developed plan, which shall continue for at least a year after certification, at which time a determination shall be made under the procedures and criteria of §§1902.38, 1902.39, 1902.40 and 1902.41, that on the basis of actual operations, the criteria set forth in §§1956.10 and 1956.11 of this part are being applied under the plan. The factors listed in §1902.37(b) of this chapter, except those specified in §1902.37(b)(11) and (12) which would be adapted to the State's compliance program provide the basis for making the determination of operational effectiveness.

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§1956.24 Procedures for withdrawal of approval.

The procedures and standards contained in part 1955 of this chapter shall be applicable to the withdrawal of approval of plans approved under this part 1956, except that (because these plans, as do public employee programs approved and financed in connection with a State plan covering private employees, must cover all employees of State and local agencies in a State whenever a State is constitutionally able to do so, at least developmentally), no industrial or occupational issues may be considered a separable portion of a plan under §1955.2(a)(10); and, as Federal standards and enforcement do not apply to State and local government employers, withdrawal of approval of a plan approved under this part 1956 could not bring about application of the provisions of the Federal Act to such employers as set out in §1955.4 of this chapter.