

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

[Docket ID. OSHA 2014-0019]

RIN 1218-AC92

Arizona State Plan for Occupational Safety and Health

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Rejection of State initiated plan change.

SUMMARY: This document announces the Occupational Safety and Health Administration's (OSHA's) decision to reject Arizona's standard for fall protection in residential construction. OSHA is deferring decision on the simultaneously proposed action of reconsidering the Arizona State Plan's final approval status, pending Arizona's expected repeal of the rejected standard, by operation of law, and subsequent enforcement of a standard that is at least as effective as OSHA's standard on fall protection in residential construction.

DATES: Effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

Arizona State Plan

Arizona administers an OSHA-approved State Plan to develop and enforce occupational safety and health standards for private sector and state and local government employers, pursuant to the provisions of Section 18 of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 667) (“the Act”). The Arizona State Plan received initial OSHA approval on November 5, 1974 (39 FR 39037), and the Arizona Occupational Safety and Health Division (ADOSH) of the Industrial Commission of Arizona is designated as the state agency responsible for administering the State Plan. Pursuant to Section 18(e) of the Act, OSHA granted Arizona “final approval” effective June 20, 1985 (50 FR 25561). Final approval under Section 18(e) requires, among other things, a finding by the Assistant Secretary for Occupational Safety and Health (“Assistant Secretary”) that the plan, in actual operation, provides worker protection “at least as effective as” that provided by OSHA.

OSHA’s Residential Construction Fall Protection Standard

OSHA issued its current federal construction fall protection standard on August 9, 1994 (29 CFR part 1926, subpart M, 59 FR 40672). In general, subpart M requires that an employee exposed to a fall hazard at a height of six feet or more (hereinafter referred to as a “trigger height”) be protected by conventional fall protection, specifically a guardrail system, safety net system, or personal fall arrest system. Subpart M creates an

exception allowing a residential construction employer who can demonstrate that it is infeasible or creates a greater hazard to use these systems, to develop and implement a fall protection plan instead. OSHA's standard requires that fall protection plans conform to specific criteria, including that they be site-specific and specify the alternative measures that will be taken to eliminate or reduce the possibility of a fall. (29 CFR 1926.502(k)(1)). As set forth in subpart M, there is a presumption that use of conventional fall protection is feasible and implementation will not create a greater hazard, and the employer has the burden of proving otherwise. It should be noted that OSHA rarely encounters real-world situations where conventional fall protection is truly infeasible.

In response to questions raised by the residential construction industry about the feasibility of subpart M, on December 8, 1995, OSHA issued interim fall protection procedures (STD 3.1) for residential construction employers that differ from those in subpart M. OSHA instruction STD 03-00-001 (a plain language rewrite and renumbering of STD 3.1) set out an interim compliance policy that permitted employers engaged in certain residential construction activities to use specified alternative procedures instead of conventional fall protection. OSHA never intended STD 03-00-001 to be a permanent policy; in issuing the Instruction, OSHA stated that the guidance provided therein would remain in effect until further notice or until completion of a new rulemaking effort addressing these concerns.

On July 14, 1999, OSHA initiated the evaluation of STD 03-00-001 by publishing an Advanced Notice of Proposed Rulemaking (ANPR) (64 FR 38078) seeking comments and data to support claims that fall protection requirements for certain construction

activities were infeasible. In the ANPR, OSHA stated that the conventional fall protection requirements and six foot trigger height set forth in subpart M were established as reasonably necessary and appropriate to protect workers, and as technologically and economically feasible for employers. OSHA noted that since the promulgation of subpart M, there had been additional advances in the types and capability of commercially available fall protection equipment and, therefore, OSHA intended to rescind STD 03–00–001 unless persuasive evidence of infeasibility or significant safety hazard was presented.

After considering all comments submitted on the record, OSHA concluded that, overall, there was no persuasive evidence to show that employers in residential construction would be unable to find a safe and feasible means of protecting workers from falls in accordance with subpart M (29 CFR 1926.501(b)(13)). Therefore, on December 16, 2010, OSHA’s Compliance Guidance for Residential Construction (STD 03–11–002) canceled OSHA’s interim enforcement policy (STD 03–00–001) on fall protection for certain residential construction activities, and required employers engaged in residential construction to fully comply with 29 CFR 1926.501(b)(13). This new guidance informed State Plans that, in accordance with the Act, they must each have a compliance directive on fall protection in residential construction that, in combination with applicable State Plan standards, resulted in an enforcement program that is at least as effective as OSHA’s program (75 FR 80315, Dec. 22, 2010).

Arizona’s Residential Construction Fall Protection Standard

On June 16, 2011, ADOSH adopted STD 03–11–002, but on June 17, 2011, the Industrial Commission of Arizona (ICA) immediately stayed the enforcement of this

directive. Then on November 30, 2011, the ICA lifted the stay, effective January 1, 2012. On March 27, 2012, a new bill, SB 1441, was signed into legislation, requiring conventional fall protection in residential construction whenever an employee is working at a height of 15 feet or more or whenever a roof slope is steeper than 7:12, and creating an exception where implementation of conventional fall protection is infeasible or creates a greater hazard. SB 1441 was codified as Arizona Revised Statute, Title 23, Ch. 2, Art 13(A.R.S. 23–492), which sets forth fall protection requirements for residential construction work in the state. ADOSH then adopted the requirements of A.R.S.23–492 as a state standard (Ariz. Admin. Code R20–5–601.01). In most instances, state standards are adopted by the designated state occupational safety and health agency, and are forwarded to OSHA as supplements to the State Plan (29 CFR 1953.4). However, in this instance the legislature itself provided the standard (Ariz. Admin. Code R20–5–601.01). Accordingly, the State Plan supplement at issue in this Federal Register document is referred to as the “state statute” rather than “standard” or “supplement,” the terms used in OSHA’s procedural regulations.

After a series of discussions with the state, on March 19, 2014, OSHA sent Arizona a letter to show cause why a proceeding to reject the state statute and reconsider the state’s final approval status should not be commenced. OSHA’s main point of contention was the 15-foot trigger height for the use of conventional fall protection. On May 1, 2014, Arizona submitted its response, pointing to the passage of SB 1307, a new bill signed on April 22, 2014, which makes certain revisions to A.R.S. 23–492. This revised version of the state statute makes some relatively minor changes to its fall protection requirements, but does not alter the 15-foot trigger height for conventional fall

protection. The revisions in SB 1307 do mandate fall protection for heights above six feet, but in most situations, allow this protection to be in the form of a fall protection plan and do not require conventional fall protection. Further, Arizona’s requirements for a fall protection plan allow employers to “develop a single fall protection plan covering all construction operations,” but require that a qualified person develop a supplement to the general plan for additional fall hazards at specific sites, not already included in the plan. (A.R.S. 23–492.07(A)(1)), (SB 1307 Secs. 5(A)(1), (5)). The Arizona state statute requires that the plan “reduces or eliminates hazards,” but does not provide specific guidance on what measures are enough to meet this threshold, and allows for only a safety monitoring system in most situations. (A.R.S. 23–492.07(A)(8)).

Finally, SB 1307 also contains a conditional repeal provision stating that if OSHA does reject the state statute, and publishes that decision in the Federal Register pursuant to 29 CFR 1902.23, then A.R.S. 23-492 is repealed by operation of law (SB 1307 Sec. 7).

Comparison of OSHA Standards and Arizona’s Residential Construction Fall Protection Statute

The OSH Act requires that State Plans develop and enforce standards that are at least as effective as OSHA’s standards (29 USC 667(c)(2)). OSHA’s standard for fall protection in residential construction (subpart M, 29 CFR 1926.501(b)(13)) generally requires conventional fall protection (fall arrest systems, safety nets, or guardrails) any time employees are working at heights of six feet or greater. In contrast, Arizona’s state statute generally requires very limited, if any, fall protection for employees working between six and 15 feet. The 2014 revision of the Arizona statute includes a mandate for fall protection for heights above six feet, but in most situations, allows for that fall

protection to be in the form of a fall protection plan only. As discussed below in response to the comments, OSHA has found that conventional fall protection is a more effective means of protecting workers than implementation of a written plan. Arizona and OSHA's requirements for a fall protection plan differ significantly.

In the limited circumstances where conventional fall protection is infeasible or creates a greater hazard, OSHA requires the employer to implement a written, site-specific fall protection plan that specifies the alternative measures that will be taken to eliminate or reduce the possibility of a fall (29 CFR 1926.501(b)(13); STD 03-11-002). (1307 Sec. 2(A) and 5(A)). In contrast, the Arizona statute generally requires that the plan "reduces or eliminates hazards," but does not provide specific guidance on what measures are enough to meet this threshold, and allows for only a safety monitoring system in most situations. (A.R.S. 23-492.07(A)(8)). In addition, the Arizona state statute allows employers to develop a single fall protection plan that can cover multiple worksites. In an apparent effort to make the single fall protection plan more site-specific, the 2014 revision of the Arizona statute requires that a qualified person develop a supplement to the general plan for additional fall hazards not already included in the plan. (SB 1307 Secs. 5(A)(1), (5)). However, the state statute contains no guidance about the required level of detail of the plan, which leaves open the possibility that single plans could be general enough to meet the statutory requirement for almost all situations. Further, there is no requirement to review the plan at each site to ensure that it meets the statutory requirement of eliminating or reducing the possibility of a fall.

Finally, Arizona's statute contains several exceptions to the general requirement for conventional fall protection that will result in many circumstances in which

conventional fall protection is not required, and the use of other alternative methods, e.g. “eave barriers” and parapet walls is allowed. (SB 1307 Secs. 1(6), 3(G)(2), 4(A) and 4(B)).

After reviewing the provisions of both versions of the state statute, OSHA has concluded that the Arizona statute is not at least as effective as OSHA’s standard, the most notable problematic differences being Arizona’s 15-foot trigger height for using conventional fall protection as opposed to OSHA’s six-foot trigger height, Arizona’s single fall protection plan for all worksites, and Arizona’s exceptions to the requirement for conventional fall protection. On the basis of these concerns, OSHA is rejecting Arizona’s statute on fall protection in residential construction.

Initial Federal Register Document and Discussion of Comments

OSHA published a Federal Register document proposing to reject the Arizona fall protection statute and reconsider the state’s final approval on August 21, 2014 (79 FR 49465). The agency requested comments by September 25, 2014. OSHA received a total of ten comments on both rejection of the state statute and reconsideration of final approval status. OSHA has reviewed and considered the comments, and the following discussion summarizes the issues raised and OSHA’s responses.

Comments were received from representatives of the American Society for Safety of Engineers (ASSE), National Safety Council (NSC), Home Builders Association of Central Arizona, (HBACA), National Association of Home Builders (NAHB), Subcontractors Association of Arizona (ASA)¹, members of the Arizona State Senate, Greater Phoenix Chamber of Commerce, Safirst Corporation, Grand Canyon State

¹ Late comment.

Electric Cooperative Association, and the Industrial Commission of Arizona (ICA). Commenters provided mixed feedback on both the proposed rejection of the Arizona statute and proposed reconsideration of Arizona's final approval status. ASSE and NSC supported OSHA in reconsidering final approval at this time, while the Greater Phoenix Chamber of Commerce, Safirst Corporation, HBACA, NAHB, ICA, ASA, members of the Arizona State Senate, and Grand Canyon State Electric Cooperative Association all opposed reconsideration of final approval. Most of the arguments against reconsideration included a request to delay the action in order to allow the conditional repeal within SB 1307 to take effect upon rejection of the statute. OSHA has agreed to defer its decision on reconsideration of final approval status and will monitor Arizona's response to the rejection of the state statute and subsequent implementation and enforcement of residential fall protection requirements. Further discussion of the comments on reconsideration can be tabled until such time that OSHA decides whether or not to move forward on that action.

In respect to the comments on the proposed rejection of Arizona's statute, ASSE and NSC both generally supported rejection, focusing on the discrepancy in trigger heights and supporting the argument that a law requiring a plan for avoiding hazards does not ensure the same level of safety as a law requiring personal protective equipment when exposure to a hazard does occur. The HBACA, NAHB, ASA, members of the Arizona State Senate, and ICA all generally opposed rejection of the state's statute, with many overlapping arguments. One common contention was that the Arizona statute is "at least as effective" as OSHA's standard because Arizona has a holistic approach to fall protection, emphasizing fall prevention rather than simply focusing on fall protection

once a fall has occurred above certain trigger heights. Commenters argued that Arizona has a more effective fall protection program by requiring the extensive use of written fall protection plans to implement work practices that reduce exposure to fall hazards. OSHA agrees that preventing falls is preferable to arresting them. For example, STD 03-11-002 notes that use of guardrails, where feasible, is preferable to personal fall arrest systems or safety nets. However, OSHA finds that a requirement to have a written fall protection plan in place is not a substitute for the proactive protection provided by guardrails, personal fall arrest systems or safety nets. In general, OSHA has found that conventional fall protection is a more effective means of protecting workers than a written plan to reduce or eliminate fall hazards. OSHA agrees that planning plays an important part in preventing falls and acknowledges that a written fall protection plan contributes to ensuring safety at a workplace, but only if it is combined with the implementation of conventional fall protection. If a worker is exposed to a fall hazard despite the implementation of a plan, that worker must be protected. Moreover, the protection afforded needs to be at least as effective as what would be required under OSHA's standard. Further, as discussed above, OSHA has concerns about Arizona's fall protection plan requirements, on its face. In sum, the state statute lacks specific guidance on the required contents of the plan, essentially allows for a fall protection plan to be a single plan for all sites, and does not require review of the plan at each site.

Commenters also argued that the exceptions to Arizona's general requirement for conventional fall protection were greatly narrowed by SB 1307 and do not undermine the statute. OSHA acknowledges that SB 1307 did limit the exceptions; however, in addition to only requiring a fall protection plan between six and 15 feet in height, there are also

other exceptions above 15 feet in which conventional fall protection is not required by the Arizona statute, but would be required under OSHA's standard.

Another common thread among the comments opposing rejection is that differing trigger heights is not conclusive evidence that the state's standard is not "at least as effective" as OSHA's standard. OSHA's rulemaking on subpart M concluded that a six foot rule was reasonably necessary and appropriate to protect workers and technologically and economically feasible for employers, including employers in residential construction. OSHA recognizes Congressional intent in allowing State Plans to promulgate different standards and to be more effective than OSHA. State Plans are not necessarily required to adopt an identical fall protection standard as long as workers are afforded "at least as effective" protection under the state standard as they would have under OSHA's standard.

Several commenters objected to OSHA making a determination of effectiveness absent a publicized definition of effectiveness and known process for making the determination. The OSH Act requires a State Plan to develop and enforce safety and health standards that are "at least as effective" in providing safe and healthful employment and places of employment as provided by OSHA's standards. At least one commenter asserted that OSHA should rely on outcome performance measures or injury and illness rates as evidence that a State Plan is at least as effective as OSHA. However, OSHA regulations establish that effectiveness is evaluated by comparing state standards to OSHA's standards on a provision by provision basis. OSHA's regulations require that State Plans provide standards with respect to specific issues which will be at least as effective as the standards promulgated by OSHA relating to the same issues. (29 CFR

1902.4(b)(2)). OSHA's indices of effectiveness require that State Plan standards are at least as effective in containing specific provisions for the protection of employees from exposure to hazards. As such, State Plan standards must include appropriate provisions requiring use of suitable protective equipment and control or technological procedures to protect against such hazards. See 29 CFR 1902(b)(2)(vii). As explained above, OSHA's main point of contention with the Arizona statute is that Arizona employers are not required to provide conventional fall protection to workers in residential construction working at heights between six and 15 feet on slopes with a pitch that is less than 7:12, as they would be required to provide if operating in a state covered by OSHA, and the Arizona statute fails to impose any additional or different requirements or administrative controls that entirely eliminate the fall hazard at those heights.

Three other collateral issues raised by the commenters included a call for action with the other State Plans that have differing standards for fall protection in residential construction; a request for a response to NAHB's previous petition for OSHA to reopen the rulemaking on the fall protection standard; and a concern about lack of outreach to subcontractors during OSHA's discussions with Arizona. In respect to the first issue, OSHA is currently engaged in a dialogue with the other State Plans that have different fall protection trigger heights, just as OSHA engaged in dialogue with Arizona prior to beginning this formal process to reject the state statute. (See 79 FR 49465). OSHA expects these states to take steps in the near future to move forward towards ensuring they are "at least as effective" as OSHA. In respect to the second issue, on September 19, 2014, OSHA released an official denial in response to NAHB's petition to reopen rulemaking on the fall protection standard. In denying the petition, OSHA stated, in part:

OSHA believes that rescinding the interim directive, and enforcing compliance with 29 CFR 1926.501(b)(13), has been effective in reducing the incidence of fatal falls among residential construction workers. OSHA believes this policy change has led to increasing numbers of residential construction employers using conventional fall protection, and expects that residential construction worksites will become even safer as more employers implement these fall protection methods.

In respect to the third issue, OSHA values stakeholder input, and if OSHA's discussions with other states about their fall protection in residential construction standards lead to meetings with industry representatives, OSHA will seek to welcome the involvement of subcontractors, their representatives, and other interested parties. In this proceeding, OSHA outlined its efforts to work with Arizona and other stakeholders in the initial Federal Register document (See 79 FR 49465), and OSHA has met all the procedural requirements for this action. (See 29 CFR 1953.6(e)).

The public comments and questions submitted on the docket have all been addressed in this document and there are no substantial issues raised that necessitate a public hearing. Arizona specifically waived a hearing on the rejection of the state statute, and no other commenter requested a hearing. Arizona also waived the tentative decision by the Assistant Secretary that is provided in the regulations on rejection proceedings. (29 CFR 1902.21) The regulations further provide that when the state waives the tentative decision, the Assistant Secretary "shall issue a final decision." (29 CFR 1902.21(b))

Decision on Rejecting the State's Statute

Pursuant to the procedures set forth in 29 CFR 1953.6(e) and 1902.22-23, the Assistant Secretary has made a final decision to reject the Arizona State Plan's statute for fall protection in residential construction. Thus, the Assistant Secretary rejects the

changes to Arizona's State Plan prescribed by Title 23, chapter 2, article 13, section 01, Arizona Revised Statutes (A.R.S. 23-492.01) under 29 CFR 1953.6(e) and 1902.22, and now publishes that decision in the Federal Register pursuant to 29 CFR 1902.23. This rejection excludes the changes prescribed by A.R.S. 23-492.01 from the Arizona State Plan. The Assistant Secretary is deferring decision on the simultaneously proposed action of reconsidering the State Plan's final approval. This deferral is pending Arizona's expected repeal of the rejected statute and subsequent enforcement of a standard at least as effective as OSHA's standard. The Assistant Secretary's decision to reject the state statute is based upon the facts determined by OSHA in monitoring the Arizona State Plan and a comparative review of Arizona's statute and OSHA's standard, and was reached after opportunity for public comment.

Effect of the Decision

SB 1307 contains a conditional repeal provision stating that if OSHA does reject the state statute, and publishes that decision in the Federal Register pursuant to 29 CFR 1902.23, then A.R.S. 23-492 is repealed by operation of law (SB 1307 Sec. 7). Therefore, the expected effect of the Assistant Secretary's decision to reject Arizona's statute covering fall protection in residential construction is that ADOSH will revert to enforcing 29 CFR part 1926, subpart M. The Assistant Secretary will defer the decision on reconsideration to allow the state time to implement and begin enforcement of STD 03-11-002. OSHA will continue to monitor the State Plan, specifically enforcement activities in residential construction, to confirm that ADOSH is implementing and enforcing subpart M, or an at least as effective alternative, in an at least as effective manner. The lack of any such implementation or enforcement would leave a gap in the

State's enforcement program for construction, but if the State Plan retained its final approval, neither the State Plan nor OSHA could cover that gap. Any such gap in the State Plan's enforcement program would serve as the basis for the Assistant Secretary's reconsideration of 18(e) final approval status. At this time, the Assistant Secretary is deferring the decision on reconsideration pending the state's enforcement of subpart M.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, D.C., authorized the preparation of this document. OSHA is issuing this document under the authority specified by Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667), Secretary of Labor's Order No. 1-2012 (77 FR 3912), and 29 CFR parts 1902 and 1953.

Signed in Washington, DC, on January 30, 2015.

David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

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