

# THE INDUSTRIAL COMMISSION OF ARIZONA



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February 9, 2017

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*Re: Response to December 9, 2016 CASPA*

Dear Mr. Barnett:

I am writing to respond to the Occupational Safety and Health Administration's ("OSHA") December 9, 2016 Complaints About State Program Administration (the "CASPA").

For the reasons set forth below, the Industrial Commission of Arizona (the "Commission" or "ICA") disputes OSHA's contention that the Commission is "reclassifying and/or reducing penalties for a significant number of Arizona Division of Occupational Safety and Health ("ADOSH") proposed citations without following the guidelines of the Arizona Field Operations Manual." The Commission also strongly disagrees with the suggestion that the operation of Arizona's State Plan is not "as effective as" Federal OSHA. As you know, the Commission is wholly committed to occupational safety and health and to the effective operation of ADOSH. The Commission welcomes any cooperative assistance from OSHA to further the objectives of Arizona's State Plan.

## Federal OSHA Has Offered Minimal Guidance on the "As Effective As" Standard Under the Occupational Safety and Health Act

The CASPA suggests that Arizona's State Plan may not be "as effective as" Federal OSHA because the Commission may – after careful consideration of information presented in a public Commission meeting – alter a yet-to-be issued citation and/or proposed penalty formulated by ADOSH. During the Commission meeting held on October 13, 2016, you addressed the Commission and raised this issue, noting that OSHA recognized the Commission's "history of oversight *throughout the entire body of ADOSH and its existence*" and stating that OSHA "appreciates the ICA and what the ICA does." (Emphasis added.) However, you then expressed concern that the ADOSH program may not be "as effective as" Federal OSHA because of the very oversight that you purported to praise.

### *1. Federal OSHA's refusal to define "as effective as" makes compliance a moving target.*

The Commission remains very concerned with OSHA's refusal to define or provide reasonable guidance as to what constitutes "as effective as" for purposes of state plan operations. The Commission is being asked to comment on the effectiveness of the Commission's oversight of particular ADOSH cases, yet OSHA has not adopted or articulated any criteria by which to judge effectiveness in this context. In 2011, the Office of Inspector General ("OIG") reported that "OSHA has not defined effectiveness in the context

of state plan programs. Without qualitative factors defining effectiveness, OSHA cannot ensure that state plans are operating in an effective manner.” OSHA Monitoring of State OSH Effectiveness, Report No. 02-11-201-10-105 p. 5. Despite OIG’s conclusions, OSHA continues to apply a “moving target” approach to measuring the effectiveness of state plans. This results in a lack of clear expectations and unwarranted pressure on state plans to make changes that may not increase effectiveness.

Following your October 13 presentation, Commissioner Robin Orchard respectfully requested clarification on the “as effective as” standard. You characterized her question as a “fair question,” but complained that the question was “very difficult” to answer. You went on to explain that, if OSHA believes that any single element of a state plan is not “as effective as” OSHA, the entire state plan would be in jeopardy.

The December 9, 2016 CASPA takes this “moving target” definition to an entirely new level by essentially asserting that the “as effective as” standard applies on a citation-by-citation or penalty-by-penalty basis. OSHA’s position appears to be that an OSHA representative’s disagreement with the Commission’s handling of any given citation or proposed penalty places the entire State Plan in danger of not being “as effective as” Federal OSHA. This cannot be the law. Such unfettered discretion and micromanagement of state plans is inconsistent with the plain language and intent of the Occupational Safety and Health Act of 1970 (“OSH Act”).

*2. State Plans are to be “laboratories for experimenting,” not a monolithic superimposed Federal system.*

The OSH Act was intended to encourage state plans to implement different approaches to dealing with hazards in the work environment. In his recent letter to Chairman James Krueger of OSHSPA, Dr. David Michaels, former Assistant Secretary of Labor, confirmed that “the ‘as effective as’ standard *does not* require State Plans to be identical to OSHA.” (Emphasis added.) Moreover, during the November 17, 2016 Commission Meeting, Patricia Gaydos, Assistant Regional Administrator, complimented Arizona’s OSH program and acknowledged that state plans are “laboratories for experimenting.”

Section 29 U.S.C. § 667(c) of the OSH Act sets forth the criteria by which the Secretary must review a plan submitted by a state for the state’s development of occupational safety and health standards and the enforcement of such standards. Specifically, the state plan must:

provide[] for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) 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 which relate to the same issues . . . .

29 U.S.C. § 667(c)(2). Congress’ desire to encourage states to develop and enforce their own standards is evident in Section 23, which provides grants to states to develop state plans under Section 18. 29 U.S.C. § 672. Moreover, a review of the OSH Act’s legislative history reveals that Congress did not intend for states to adopt Federal standards and enforcement procedures wholesale. *See* House Resolution 1218 (September 22, 1970), 91st Cong., 2d Sess. (1970), reprinted in Subcommittee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print 1971) at 1026 (“The 3-year concept of these grants is designed in the virtual certainty that practically all States will, in the next few years, require Federal Assistance to provide quality programs of occupational safety and health. *But they are, as you see, to be their State programs, and not a monolithic superimposed Federal system.*” (emphasis added)). Congress’ design of the OSH Act contemplated that states could approach occupational safety and health hazards in different ways. The statute refers to “standards” and “enforcement of []

standards” as a whole, as opposed to requiring that each individual citation and proposed penalty be managed exactly in the same way that OSHA would have managed it.

In sum, and pursuant to the OSH Act, a state program’s effectiveness should be viewed in its totality, not piecemeal – and certainly not at the individual citation or penalty level.

**A CITATION-BY-CITATION OR PENALTY-BY-PENALTY APPROACH TO APPLYING THE “AS EFFECTIVE AS” STANDARD IS NOT SUPPORTED BY OSHA’S REGULATIONS**

A citation-by-citation or penalty-by-penalty approach to applying the “as effective as” standard is also not supported by OSHA’s own regulations governing the operation of state plans. To the extent that OSHA has established parameters against which to judge whether a state plan is “as effective as” Federal OSHA, they are found in 29 C.F.R. 1902.4. That section – “Indices of Effectiveness” – describes those elements of a state plan that OSHA will examine in determining plan eligibility and competence. Paragraph (c) of that section lists “indices for measurement of a State plan with regard to enforcement.” 29 C.F.R. 1902.4(c)(2). These indices include whether a plan provides for: (1) inspection of covered worksites; (2) the legal authority to enforce standards; (3) a right of review of violations; and (4) 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.

Of particular relevance to the CASPA, the regulations provide that a state plan must “[p]rovide effective sanctions against employers who violate State standards and orders.” 29 C.F.R. 1902.4(c)(2)(xi). The regulations do not require that a particular sanction or penalty in any particular case be identical to what Federal OSHA, or any other state plan, would propose. Instead, the sanction must be “effective” at addressing violations of safety and health rules. Simply because a state plan may apply a different classification or penalty to a set of facts than OSHA would does not mean that the classification and/or penalty adopted by the state plan is ineffective at addressing violative conduct or encouraging an employer to adopt proactive safety and health measures.

In fact, in many of the instances identified in the CASPA, adjustments in classification and penalties were made after lengthy discussions of safety and health measures implemented by an employer to address the issues involved in the matter, as well as other appropriate considerations. In these scenarios, OSHA has not (and cannot) point to any evidence that the sanctions ultimately proposed were not “effective” in addressing employer behavior or improving workplace safety and health.

**OSHA HAS LONG APPROVED OF ARIZONA’S COMMISSION REVIEW APPROACH**

In 1974, Arizona’s State Plan was given initial OSHA plan approval. 39 Fed. Reg. 39037 (Oct. 29, 1974). Pursuant to Section 18(e) of the OSH Act, OSHA granted Arizona final approval effective June 20, 1985. 50 Fed. Reg. 25561 (June 20, 1985). This final approval included a finding that Arizona’s State Plan provided for “the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective . . . as the standards promulgated under section 6.” 29 U.S.C. § 667(c)(2). With the exception of the fall-protection issue in 2014 (which was resolved to OSHA’s satisfaction) and your recent criticism of Arizona’s program, OSHA has never suggested that Arizona’s State Plan was not “as effective as” Federal standards or Federal OSHA. For over thirty years, Arizona has largely operated its State Plan without concern from Federal OSHA and has done so effectively, boasting some of the lowest state-wide fatality and injury and illness rates across the country.

Furthermore, Commission review of proposed citations and penalties has been a constant fixture of the Arizona State Plan. A.R.S. § 23-418(I) specifically grants *the Commission* broad “authority to assess all civil penalties . . . , giving due consideration to the appropriateness of the penalty with respect to the gravity of the violation, the number of employees employed by the employer, the good faith of the employer and the history of previous violations . . . .” This statutory provision was enacted in Arizona in 1972 and was slightly amended in 1974, before Arizona’s State Plan had even received initial approval by the Department of Labor. The statute had been in effect in Arizona *for over a decade* before OSHA granted Arizona’s State Plan final approval.

Recently, you offered the media criticism of Arizona’s longstanding approach, stating, “We want to make sure these people who are so knowledgeable and trained are the ones that are the *real decision-makers* in ADOSH cases.” (Emphasis added.) With all due respect, your comment ignores the longstanding Commission review process, which you praised during the October 13 Commission meeting. It further inappropriately suggests that the Commission should act as a rubber stamp on ADOSH cases because of mistaken belief that ICA Commissioners are not “knowledgeable” enough to be “real decision makers.” This type of comment by an OSHA Area Director, especially to the media, is unwarranted and unhelpful.

**OSHA’S SUGGESTION THAT THE COMMISSION IS “RECLASSIFYING AND/OR REDUCING PENALTIES FOR A SIGNIFICANT NUMBER OF ADOSH PROPOSED CITATIONS WITHOUT FOLLOWING THE ARIZONA FOM” IS WITHOUT MERIT**

Notwithstanding the above, the CASPA is substantively wrong regarding its suggestion that a significant number of proposed citations and penalties have been reclassified or reduced without following the Arizona Field Operations Manual (“FOM”). In fact, the opposite is true – the vast majority of citations and proposed penalties are approved without amendment by the Commission (as you know).

The CASPA highlights a few instances where the classifications were changed or the penalty reduced, but makes no mention of the number of citations and penalties issued without modification or that were issued with reasonable penalty reductions based on appropriate considerations, such as prompt abatement. The Commission estimates that of the approximately 2,800 violations issued by ADOSH between January 20, 2016, and January 20, 2017, the severity of a violation was modified by the Commission in only 23 instances (approximately .8% of the time). Twenty-three instances over the course of a year are hardly a “significant” number.

Furthermore, even where an amendment to a citation and/or penalty was proposed and accepted, the discussions of the citations and penalties – and the factors specified in A.R.S. § 23-418(I) – were robust and conducted in an open meeting (which were often attended by you or another OSHA representative). In the vast majority of instances, amendments were proposed where employers exhibited a high commitment to an effective safety and health program, an exemplary safety and health track record, and, often, where the employer had acted quickly to abate the hazards at issue.

As you may know, Arizona did not adopt Federal OSHA’s “quick fix” program as part of its State Plan. As a result, whereas OSHA may give an automatic fixed penalty reduction for a quick fix performed to address a hazard, Arizona retains some flexibility to apply appropriate penalty reductions for abatement. The fact that the Commission may consider an employer’s proactive steps in fixing a potential hazard is completely in-line with OSHA’s practices and is, frankly, good for worker safety and health.

Finally, the CASPA wrongly suggests that the Commission is making judgments outside of the parameters of the Arizona FOM. In fact, the discussions and any subsequent amendments to proposed citations and penalties are largely driven by the factors in the Arizona FOM, such as good faith and history of violations.

Commission proceedings, as you know, regularly focus on employers' efforts to comply with ADOSH standards and broader initiatives to promote workplace safety and health. Allowances for history and good faith are properly considered. In addition, as you have stated, the Commission has the right to review citations for legal sufficiency and whether ADOSH has presented a sufficient prima facie case. The Commission makes every effort to do this in a way that is consistent with the FOM.

Although ICA Commissioners – who are often not OSHA or FOM experts – are provided regular training, the Commission has, since September 2016, placed an increased emphasis on providing supplemental training on the FOM, relevant OSHA standards, and ADOSH procedures. Since September 2016 – in an effort to satisfy your concerns – the Commissioners have received training regarding: (1) ADOSH's citation and penalty procedure; (2) classification of citations; (3) calculation of penalties and reductions; (4) the scope of ADOSH inspections; (5) employer knowledge requirements; (6) enforcement program scheduling; (7) the general duty clause; (8) settlement procedures; and (9) various OSHA standards. The Commission is making every effort to ensure alignment with the FOM.

And the Commission welcomes any assistance OSHA can provide in this respect. You have offered and proposed that there be “educational opportunities and teaching of what the FOM says,” noting that it “certainly wouldn't be [your] expectation that [the Commissioners] know word for word what the FOM says. I wouldn't even wish that on you.” Furthermore, during the November 17, 2016 Commission Meeting, Ms. Gaydos offered to “do everything she can” to assist new Commissioners in understanding “all the ins and outs of what we have to abide by.” With all due respect, rather than suggesting to the media that the Commission should operate as a rubber stamp on ADOSH citations and penalties, Arizona's State Plan would be better served if you would support the longstanding statutory role of the Commission. The Commission welcomes cooperative assistance from you and OSHA in this regard.

**BY ANY REASONABLE MEASURE, ARIZONA'S STATE PLAN AS A WHOLE IS “AS EFFECTIVE AS” FEDERAL OSHA**

The Commission emphasizes that Congress used the word “effective” in the OSH Act when judging state programs. “Effective” is an outcome-based measure. As described above, Congress did not say that procedures, much less decisions in particular cases, need to be “identical” to Federal OSHA, nor that they need to be as “stringent” as Federal OSHA when reviewed from a plain-language perspective. The standards and a state program need only accomplish the goals of the OSH Act as effectively as Federal OSHA. The plain evidence demonstrates that Arizona's State Plan is at least “as effective as” Federal OSHA.

1. *Fatality and injury and illness rates demonstrate that Arizona's State plan is “as effective as” Federal OSHA.*

If there is one overall indicator of the effectiveness of a state plan, it is fatality and injury and illness data. The overall goal of the OSH Act, OSHA, and ADOSH is to prevent injuries, illnesses, and fatalities to workers. The respective organizations' ability to accomplish this goal is a key indicator of effectiveness. By this measure, Arizona is at least, if not more effective, than Federal OSHA. As illustrated below, Arizona's rates are well below national rates for: (1) fatalities; (2) injuries and illnesses; and (3) days away from work.

**Workplace Fatalities** - According to Bureau of Labor Statistics (“BLS”) data, Arizona had 69 workplace fatalities in 2015. The rate per 100,000 workers was 2.4, while the national rate was 3.4. Arizona's fatality rate for all industries has declined significantly since 2013 from 3.5 to 2.4, while the national rate has increased in the same period from 3.3 to 3.4. Only seven other states had lower fatality rates than Arizona

in 2015. While no fatality is acceptable and the Commission works tirelessly to ensure that all workers return home to their families safe and healthy, these statistics provide strong evidence of the effectiveness of Arizona's State Plan.

With respect to the construction industry in particular, Arizona's fatality rate is well below the national rate. In 2015, the national fatality rate per 100,000 workers for the construction industry was 10.1. By comparison, Arizona's rate was 6.3, making the national fatality rate in the construction industry approximately 60% higher than Arizona. Additionally, in 2015 the national fatality rate for the construction industry rose from 9.8 to 10.0, while Arizona's declined from 8.6 to 6.3. This is further evidence that Arizona's State Plan is as effective, if not more effective, than Federal OSHA.

**Non-fatal injuries and illnesses** - Regarding non-fatal injuries and illnesses in 2015, Arizona's rate has been in near-constant decline over the last decade. Arizona's 2015 overall rate for all industries combined is 3.1, which is below the national rate of 3.3. Only three state plans had lower industry combined rates in 2015, Virginia, North Carolina, and South Carolina. Compared to Federal OSHA states, at least nine states had higher rates than Arizona – some of which were significantly higher.

**Days away and job transfer or restrictions** - Finally, Arizona's rate for days away, job transfer or restriction was 1.6, below the national rate of 1.8.

When compared to both Federal plan states and other state plan states, Arizona fares considerably better. Arizona has lower rates in overall workplace fatalities, recordable injuries and illnesses, injuries and illnesses with days away, job transfer or restriction and its construction industry has a significantly lower fatality rate than the national rate. Even with respect to non-fatal injury and illness rates, Arizona's rates are lower than the national rate. Additionally, Arizona maintains lower non-fatal injury and illness rates in various industry sectors. This data illustrates that Arizona's state plan is at least "as effective as" Federal OSHA.

While the CASPA suggests that Arizona's State Plan may not be "as effective as" OSHA, the Commission notes that nowhere and at no time has Federal OSHA even discussed fatality or injury and illness rates, nor analyzed Arizona's record of preventing fatalities, injuries, and illnesses vis-à-vis other Federal states or other state plan states. This is curious in light of OSHA's and ADOSH's shared mission to reduce workplace fatalities, injuries, and illnesses.

*2. The Recent FAME report raises no new major issues of concern regarding the effectiveness of the State Plan.*

OSHA recently released its FY 2015 FAME report for Arizona, which provided limited findings and recommendations for improvement of the State Plan. The Commission appreciates OSHA's review and will take steps to address noted areas for improvement. For the purposes of these comments, however, the Commission emphasizes that OSHA identified no major new issues with respect to the operation of the State Plan. Moreover, over the past three years, the FAME reports reveal significant improvements by the ADOSH program.

In previous FAME reports, Arizona was judged to be very effective in running its State Plan and any opportunities for improvement were promptly addressed. At no time has OSHA ever discussed or expressed concerns over the structure of the Arizona State Plan and the Commission's practice of reviewing proposed citations and penalties. As discussed above, this longstanding approach has worked for decades to effectively promote workplace safety and health in Arizona.

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The evidence shows that Arizona's state plan is as effective – if not more effective – than Federal OSHA. The most important indicators – those related to fatalities and injuries and illnesses – definitively show that Arizona is effective in promoting the safety and health of its workers.

### CONCLUSION

As set forth above, the Commission is not “reclassifying and/or reducing penalties for a significant number of ADOSH proposed citations without following the guidelines of the Arizona Field Operations Manual.” Moreover, despite Federal OSHA's recent adversarial approach, Arizona is operating the ADOSH program “as effective[ly] as” Federal OSHA. Arizona's longstanding Commission review practice is beneficial and fully in line with the OSH Act, OSHA's underlying regulations, and Arizona law. There is no cause or evidence for OSHA to conclude otherwise. Congress' intent in adopting the OSH Act was to encourage states to innovate and develop unique approaches to safety and health hazards. Federal OSHA's actions in pursuing this CASPA serve only to discourage state innovation by attempting to force Arizona to become a monolithic superimposed Federal system.

Sincerely,



Dale L. Schultz  
Chairman  
Industrial Commission of Arizona

cc: Doug Kalinowski, Directorate of Cooperative and State Programs  
Barbara Goto, Regional Administrator, Region IX  
Patricia Gaydos, Assistant Regional Administrator, Region IX  
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