OSHA Reform: Rulemaking Petitions & Manditory Standards

THE WHITE HOUSE

WASHINGTON

January 6, 1994

MEMORANDUM FOR OSHA REFORM WORKING GROUP

FROM: Ellen Seidman

SUBJECT: Summary of tasks from this morning's meeting

I want to thank all of you -- especially Joe, John, Steve and Ann -- for the good work in preparation for and at this morning's meeting. I think we're getting somewhere. Here's a summary of the tasks, according to my notes. Everything is due by two weeks from today, January 20, with a preference for doing it earlier if possible. Please either send things to me and ask me to distribute them, or distribute them directly (better), using the attached phone and fax list, and let me know you've done the distribution.

Rulemaking petitions and deadlines

1. Joe Woodward will take the lead drafting a version with dates, review standards, and flexibility that would be acceptable if the Administration position is to agree to support any type of deadlines. Joe will work with John to reach agreement before circulating the draft.

2. John and Bill will develop a few cogent bullet points on why, as a matter of principle, the Administration should not support deadlines.

3. If still needed, I will put together a short two-option paper for EOP principals.

Mandated standards

1. Joe Woodward will go through the ergonomics and surveillance standards parts of the bill with a view to redrafting the specific requirements to maintain maximum flexibility. If Joe and John can reach agreement before circulating the draft, that would be great.

2. Joe will also draft a provision to require rulemaking, but with some limitations, on PELs for construction, agriculture and maritime. Same thing on OMB coordination.

3. Joe Dear will figure out the ideal deadline, within reasonable limits, for the surveillance standard.

4. PELs update time tables, including perhaps some way for OSHA to determine what NIOSH must provide and to control the clock, has been added to the issue list. Joe Dear will take the lead in developing an OSHA position. If this can be done by circulating paper without further discussion, fine; if we need to put in on the agenda, we will. (What do we do about NIOSH's views?)

OSHA REFORM WORKING GROUP

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Mike Silverstein	DOL, OSHA	219-8021	219-4383
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January 6, 1994

OSHA Reform Group 1-6-94

Rulemaking Petitions & Manditory Standards

- Rulemaking Petitions

proposal
- 3 months to answer Petition
- 12 " to file rule
- 18 " to put rule into Practice

current law - ~~no~~ time deadlines not enforced, Gen. APA deadlines apply - standard of reasonableness

- time deadlines silly

` In some ways, proposed deadlines more liberal than current timeframes, but time frames ignored by courts.

→ hope that proposed standards timeframes will have more teeth.

` OSHA currently takes long time to issue rules/standards.

` Some indications that some allowance could be given for "reasonableness" of particular issues.

3 Problems with current OSHA Standards

why rules take so long
1. political pressure against regulations (Regan - Bush)
2. Bad Management in OSHA
3. Difficult Technical Issues

Problem w/strict deadlines: many rules have very complex issues to be worked out -- need more time.

Question - ① Should Administration be supporting ~~time~~ deadlines that limit it's own flexibility?

② lots of new stuff in this Reform bill - will take time for OSHA to adjust, may not realistically be able to meet deadlines in short-term.

③ Must take into account role of Judicial review -- courts can hold up rules for years -- also rules can be challenged

④ Idea of "negotiated rulemaking" takes longer than usual.

- Executive vs Legislative?
- How much response is enough? Will it interfere with priority-setting process at OSHA?

⑤ - Will OSHA priority-setting process be able to serve as justifiable reason to deny or postpone petition? OSHA Thinks so.

Ellevir Question - Could OSHA be required to publish its priority list, write in that OSHA can't reasonably use priority list as reason for denying petition.

- Could we change Judicial Review Standards to make deadlines more reasonable?

- New deadlines don't take into account Negotiated rulemakings, complex rulemakings, etc. -- maybe we should leave current deadlines alone

- Politically, can't go up to Hill arguing for no deadlines, so we should concentrate on what is reasonable.

OSHA folks -- begin to write the kind of flexible & reasonable standards they think they need.

Issue of whether or not philosophically to support standards will be decided by higher level staff. We should give alternative if we decide not to oppose

II <u>Mandated Standards</u>

- Generic standards that Congress mandates.

<u>2 main sets</u> (Title IV of Bill)

1. Ergonomics Hazards
2. Permissible Exposure limits (PELs)

1 - Within 2 years, OSHA must issue standards on ergonomic hazards (carpal-Tunnel syndrome, re-occuring back injuries from ~~lifting~~ lifting, etc)

<u>3 Questions</u>

- should standards be mandated at all
- if so, should 2 yrs be timeframe
- are these the right standards?

<u>Mandate at all?</u>

- philosophical issue: micromanagement?

- but mandate would make it easier for OSHA to issue standard.

~~Time limit~~
- realistic? Standards are broad, very complex.
  - 2 yrs seems tight

Are these the right standards?

(2) PELs
- 1989, OSHA passed rule to ~~reduce ...~~ list general ~~standards~~ exposure limit for 400 contaminants listed under PEL Rules.
  - Court nixed rules, said OSHA had not properly justified action.

(a) General Industry Standards – Full rulemaking process

(b) Construction Industry Standards – not full rulemaking

(1)
- "Principle" issue: should we (admin) be supporting mandated standards at all?
- 2 yrs is unrealistic
- Standard areas seem reasonable, but worry is whether they would apply to every business? Paperwork burden? Need to clarify

② PELs

- General standards approach is good -- more cost effective
- Risk finding for Gen. Industry should not be applied automatically to Construction/Maritime

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2 yr deadline

work has been ongoing on these since 1988 -- more of a "time it takes to finish these" deadline

specific to these standards --

- 2 yrs is tight -- hearings, etc must be held before rule is final.

Topics are OK -- scope of coverage (how many businesses, who, covered) and flexibility on deadlines is the issue

as rigid requirements applicable to all industries, it isn't a good idea.

How do we write in needed flexibility on scope & deadlines.

Alternatives

- a modified 1 ? - 1(b)
- issue of flexibility & scope

- Support, ~~some~~ amending some of the specific criteria
- go thru line by line, see which ones make sense & which ones don't.
- Technical drafting issue -- work with committee

PELs

- has significant risk been found for construct?
- Scope Question?
- 50 ppm standard promulgated by Congress -- feasible? realistic? ~~Construct~~ outdoor vs. indoor work?

OSHA draft Const./Maritime PEL that they could live with. / will review

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Deadline issue - ergonomics deadline is not worth arguing, but for PEL's it IS.

3 year update deadline on PELs ?
unrealistic ?

OSHA Appropriations Language

- Doesn't apply to farming Industries
- " " " Companies with ~~[illegible]~~ fewer than 11 employees

DOL wants to strike these exemptions (their historic position)

40% of fatalities occur in businesses of less than 10 employees

Construction is real issue -- why not just target them?

RULEMAKING PETITIONS, DEADLINES, AND MANDATORY STANDARDS

The legislation contains several provisions related to issuance of health and safety standards. Two sets of provisions are discussed here: (1) provisions standardizing procedures for rulemaking petitions and establishing deadlines for responding to petitions and for conducting rulemakings; and (2) provisions directing the agency to issue particular standards.

I. Petitions/ Deadlines

The legislation provides that within 90 days of receiving a petition from an interested person requesting issuance of a standard (or of receiving a recommendation from an advisory committee, EPA, or HHS), the agency shall publish a response in the Federal Register stating whether it intends to issue a proposed rule. A decision against a proposal is subject to judicial review. Within 12 months of a decision to proceed with a proposal, the agency shall publish the proposed standard. Within 18 months of publication of the proposal, the agency shall publish a final standard or determination against a standard.

Any person adversely affected by failure to meet a deadline may seek judicial review. The agency's desire to confer with any other Executive branch official is generally not a defense to failure to meet the statutory deadline.

Except for the deadlines, the legislation is primarily a codification of existing practice under the OSH Act and the Administrative Procedure Act. The APA authorizes petitions for agency action and provides that courts on review may compel agency action unlawfully withheld or unreasonably delayed. Parties not infrequently petition OSHA to issue standards, and if OSHA denies the petition, seek review in the court of appeals. Most review is sought in the D.C. Circuit, which has case law governing such review; by codifying the applicable procedures, the legislation would probably increase the number of challenges filed in other circuits. Similarly, the bill adopts the arbitrary and capricious standard of review which has customarily been applied to such challenges under the APA.

The legislation's deadlines differ from current law. The OSH Act contains no time limit for responding to rulemaking petitions; such responses instead are subject to the APA's reasonableness standard. The OSH Act does contain certain very tight time limits for conducting rulemakings: the agency is to publish a proposal within 60 days of receipt of an advisory committee's recommendation and a final standard within 60 days of the closing of the public record on the proposal. The courts have held, however, that these deadlines are not mandatory. They have instead applied a general requirement of reasonableness, with particular attention to failure to meet the agency's own projected schedules for conducting a rulemaking.

In practice, OSHA rulemakings have commonly consumed years. The recently issued confined spaces standard, for example, was in rulemaking for 17 years. Explanations that have been offered for rulemaking delay include political pressure from anti-regulatory administrations, poor management within the agency, and the need to meet heavy burdens of proof imposed by court decisions. The committee report accompanying last year's legislation focuses on political pressures, and implicitly acknowledges managerial failure to set clear priorities, as sources of delay.

The solution envisioned in the legislation is judicially enforceable deadlines, liberalized from those in the current statute to make them more realistic. The committee report notes that OSHA has been successful in completing rulemakings on a faster track when compelled to do so by special legislation or court order. It is not clear from the legislation whether the agency would be held to literal compliance, or could defend failure to meet a deadline on the ground that it was reasonable in the circumstances. The committee report sends mixed signals on this point. In conversations with committee staff, they have referred to the timeframes as establishing a rebuttable presumption that delay beyond the period set forth in the statute is unreasonable.

The letter from the Secretary to Sen. Kennedy and Rep. Ford identifies statutory deadlines for standards as one of the areas in the legislation that appears to require changes. The basic questions are whether the Act should contain specific judicially enforceable time limits for rulemaking, and if so, what those time limits should be, and what circumstances if any should excuse failure to meet them. Of course, the amount of time that a rulemaking reasonably should require will vary with the scope and complexity of the issues presented, and with the rulemaking's relative priority in commanding agency resources. Considered as a general guideline, however, 18 months from proposal to final does not appear unreasonable. On the other hand, there is broad agreement in the Department that 90 days is too short a period to make a final decision on many of the rulemaking petitions that the Department receives. Similarly, based on past experience, 12 months to prepare, review, and publish a proposed standard would be insufficient for most complex rules. If such a provision were included, we would want clear language indicating that it establishes a rebuttable presumption, rather than a rigid rule.

<u>Alternatives</u>

1) Support strict deadlines for standards actions
    a) support timelimits in current bill
    b) support longer deadlines

<u>pros</u>

* puts maximum pressure on OSHA to proceed in timely fashion
* makes it clear to agency and public what is to occur

cons

* one size fits all approach does not take account of different circumstances of individual rulemakings
* excessive time pressure could result in inadequately developed rule

2) Support presumptive guidelines for pace of standards actions, allowing deviation where reasonable
   a) support timeframes in current bill
   b) support longer timeframes

pros

* provides remedy for record of excessive delays
* gives realistic congressional guidance for rulemakings, replacing current time limits
* retains flexibility to proceed at different pace where reasonable

cons

* puts burden of explanation on OSHA where agency misses statutory schedule
* may be difficult to find one time period that is even presumptively appropriate, given variety of rulemakings

3) Oppose statutory timeframes for standards actions

pros

* leaves agency maximum flexibility to conduct rulemakings
* dissatisfied petitioners can still invoke general APA requirement of reasonableness

cons

* does not address record of delay in agency rulemakings
* leaves current unrealistic time limits on the books
* gives no guidance to agency, public, or reviewing courts

II. Mandated Standards

The legislation includes provisions requiring OSHA to promulgate generic standards requiring exposure monitoring and health surveillance for employees exposed to toxic materials and harmful physical agents; to promulgate a standard addressing ergonomic hazards; and to promulgate, as an interim final rule applicable to all industry sectors, the PELs (permissible exposure limits for air contaminants) that had been issued for general industry in 1989 and which were subsequently vacated by the Eleventh Circuit. The PELs had been issued as a proposed rule for the construction, agricultural, and maritime industries in 1992, but final action was not taken on the proposal in the light of the

Eleventh Circuit's decision.

Philosophical objections have been made to these provisions on the ground that the decision whether to regulate in a particular area should be an executive branch prerogative, and that it is inappropriate for Congress to "micromanage" the government by including such detailed requirements in legislation. On the other hand, an agency undertaking rulemaking is by definition exercising delegated legislative authority, and it is arguably reasonable and appropriate for Congress to circumscribe that delegation to reflect its legislative intent more precisely. In any event, this type of provision is often included in laws.

As a practical matter, each of these rulemaking items is already high on OSHA's agenda and has fairly broad support among OSHA's "stakeholders" in labor and industry. Nonetheless, under current law OSHA will have to devote a large amount of resources to demonstrating the need for the standards. If Congress directs their promulgation, that will make it much easier for OSHA to complete the rulemakings in a timely and economical manner, and to defend them if they are later challenged.

The legislation specifies the kinds of provisions that should be included in the ergonomics, exposure assessment, and health surveillance standards and the timetable for their promulgation. The two-year time limit to complete all three rulemakings is tight and should be liberalized. The provisions specified are, with fine-tuning, the kind that OSHA would intend to include in its rules. OIRA believes that it is inappropriate for the legislation to direct the kind of provisions that should be in the standards; that should be left to the rulemaking.

The 1989 PELs for general industry achieved broad but not universal acceptance upon promulgation. The PELs were based on limits that had been established earlier by expert private organizations or by NIOSH. The Eleventh Circuit vacated the standard on the ground that the agency had not adequately explained its findings in light of the court's interpretation of the statutory requirements. Repromulgating the PELs through rulemaking proceedings would be a massive and problematic undertaking in light of the level of evidence required by the ruling as justification. From the agency's point of view, there is therefore considerable benefit to be derived from legislative adoption of the limits.

The requirement that the PELs proposed for the construction, agriculture, and maritime industry be adopted without rulemaking is problematic. OSHA has not made any determination that these standards are feasible for these industries, and a wholesale adoption could appear unjust and might create enforcement difficulties. A rulemaking limited to the feasibility of the general industry limits for these industries could ameliorate these concerns. OIRA may wish to raise the question of including issues relating to significant risk in the rulemaking.

Alternatives

1) Support provisions requiring promulgation of standards including specific criteria
   a) support provisions in current bill
   b) support amending some of the specific criteria

   pros

   * these projects are already on OSHA's agenda, and inclusion in the legislation will ease burden of promulgating and defending the standards
   * makes clear to agency and public what is to occur

   cons

   * deprives agency of discretion to determine after rulemaking that some regulatory provisions are inappropriate
   * dilutes agency's discretion to set own policy agenda

2) Support provisions requiring promulgation of standards, but not those including specific criteria

   pros

   * the projects are already on OSHA's agenda, and this will leave that agency with appropriate discretion to determine their scope and content
   * allows maximum public input into final standards

   cons

   * OSHA may have to spend significant additional resources demonstrating and defending need for some provisions it wishes to promulgate
   * a congressional policy judgment that a standard should be issued anturally includes some decision as to the standard's content

3) Oppose mandated standards

   pros

   * retains maximum Executive Branch flexibility to set priorities and policy

   cons

   * increases agency burden in promulgating and defending rules it has already decided are appropriate
   * opposition could harm OSHA's credibility in saying it already intends to promulgate these standards

OSH Act

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed

rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, 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. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided,* That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in

such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

(Pub.L. 91-596, § 6, Dec. 29, 1970, 84 Stat. 1593; Pub.L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

Historical Note

References in Text. The effective date of this chapter, referred to in subsec. (a), is the effective date of Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, which is 120 days after Dec. 29, 1970, see section 34 of Pub.L. 91-596, set out as an Effective Date note under section 651 of this title.

This chapter referred to in subsecs. (b)(1) and (e), was in the original "this Act", meaning Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 651 of this title and Tables volume.

Change of Name. "Secretary of Health and Human Services" was substituted for "Secretary of Health, Education, and Welfare" in subsecs. (b)(1), (6)(C), (7), and (g) pursuant to section 509(b) of Pub.L. 96-88 which is classified to section 3508(b) of Title 20, Education.

Effective Date. Section effective 120 days after Dec. 29, 1970, see section 34 of Pub.L. 91-596, set out as an Effective Date note under section 651 of this title.

Termination of Advisory Committees. Advisory committees in existence on January 5, 1973, to terminate not later than the expiration of the two-year period following January 5, 1973, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law, see section 14 of Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 770, set out in Appendix 2 to Title 5, Government Organization and Employees.

Legislative History. For legislative history and purpose of Pub.L. 91-596, see 1970 U.S. Code Cong. and Adm.News, p. 5177.

Cross References

Appointment of advisory committee to assist Secretary in standard-setting function, see section 656 of this title.

Assertion of State standards in absence of applicable Federal standards, see section 667 of this title.

Civil and criminal penalties, see section 666 of this title.

Grounds to issue citations, see section 658 of this title.

Loans to farmers or ranchers to comply with applicable standards of this section, see section 1942 of Title 7, Agriculture.

Maintenance of records on employee exposure to toxic materials, see section 657 of this title.

Responsibility of head of each Federal agency to establish and maintain effective and comprehensive occupational safety and health program, see section 668 of this title.

Submission by Secretary of Health and Human Services to Secretary of Labor of studies indicating existence of potentially toxic substance not covered by occupational safety or health standard, see section 669 of this title.

Federal Practice and Procedure

Review of administrative decisions in courts of appeals, see Wright, Miller, Cooper & Gressman: Jurisdiction § 3941.

West's Federal Forms

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.

West's Federal Practice Manual

Standards, generally, see § 10421 et seq.

Code of Federal Regulations

Advisory committees, functions of, see 29 CFR 1912.1 et seq.

Agriculture, see 29 CFR 1928.1 et seq.

Construction workers, standards applicable, variances, etc., see 29 CFR 1926.1 et seq.

Identification, classification, and regulation of potential occupational carcinogens, see 29 CFR 1990.101 et seq.

Longshoring, see 29 CFR 1918.1 et seq.

Marine terminals, see 29 CFR 1917.1 et seq.

National standards, establishment of, see 29 CFR 1910.1 et seq.

Rules of practice—

- Promulgation, modification, or revocation of standards, see 29 CFR 1911.1 et seq.
- Variances, etc., see 29 CFR 1905.1 et seq.

Shipyard employment, see 29 CFR 1915.1 et seq.

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performed in the Federal nuclear facilities under the control or jurisdiction of the Department of Energy.".

SEC. 304. EXTENSION OF EMPLOYER DUTIES TO ALL EMPLOYEES WORKING AT A PLACE OF EMPLOYMENT.

Section 5(a)(1) (29 U.S.C. 654(a)(1)) is amended—

(1) by striking "each of his employees" and inserting "each employee"; and

(2) by striking "to his employees" and inserting "to employees at the place of employment".

TITLE IV—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

SEC. 401. TIME FRAMES FOR SETTING STANDARDS.

(a) RECOMMENDATIONS AND PETITIONS FOR STANDARDS.—Paragraph (2) of section 6(b) (29 U.S.C. 655(b)(2)) is amended to read as follows:

"(2)(A) If the Secretary receives—

"(i) a recommendation of an advisory committee, the Secretary of Health and Human Services, or the Administrator of the Environmental Protection Agency, or

"(ii) a petition from an interested person which petition sets forth with reasonable particularity the facts which the person claims establish that an occupational safety or health standard should be promulgated, modified or revoked,

the Secretary shall, within 90 days after receipt of the recommendation or petition, publish in the Federal Register a response stating whether the Secretary intends to publish a proposed rule promulgating, modifying or revoking such standard.

"(B) If the Secretary's response states that the Secretary does not intend to publish a proposed rule, the Secretary shall set forth the reasons for that decision. In all other cases, the Secretary shall, within 12 months following the decision, publish in the Federal Register a proposed rule promulgating, modifying, or revoking the standard cited in the petition or recommendation.".

(b) PROCEDURE FOR COMMENT AND HEARING.—Paragraph (3) of section 6(b) (29 U.S.C. 655(b)(3)) is amended—

(1) by designating the present language as subparagraph (B) and by striking out "under paragraph (2)"; and

(2) by inserting at the beginning the following:

"(3)(A) When information developed by the Secretary or submitted to the Secretary indicates that a rule should be proposed promulgating, modifying, or revoking an occupational safety or health standard, the Secretary shall publish such a proposed rule in the Federal Register and shall afford interested persons a period of at least 30 days after publication to submit written data or comments.".

(c) TIME FRAME FOR ISSUING RULES.—Section 6(b)(4) (29 U.S.C. 655(b)(4)) is amended by striking "Within" and all that follows through "paragraph (3)" and inserting "Within 18 months following publication of a proposed rule under paragraph (2)(B)".

(d) REVIEW OF SECRETARY'S FAILURE OR REFUSAL TO ISSUE RULES.—Section 6 (29 U.S.C. 655) is amended by adding at the end the following:

"(h)(1) Any person who may be adversely affected by a determination by the Secretary under subsection (b)(2) not to propose a rule promulgating, modifying, or revoking a standard may at any time prior to the sixtieth day after such determination is published in the Federal Register file a petition seeking review of such determination with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary's determination shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(2) Any person who may be adversely affected by a failure of the Secretary to take any action required by this section within the time period prescribed therefor by this section may at any time after such period of time has elapsed file a petition for review stating that such action has been unlawfully withheld or unreasonably delayed. Such petition may be filed with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The reviewing court shall compel the Secretary to take any action that is found to have been unlawfully withheld or unreasonably delayed. The Secretary's desire to confer with, or to receive approval from any other Federal agency or Federal executive official, shall not justify the withholding or delaying of action by the Secretary, except where such consultation or solicitation of approval is required by statute and has been pursued in a timely fashion.".

(e) JUDICIAL REVIEW.—Section 6(f) (29 U.S.C. 655(f)) is amended by adding at the end the following: "The procedures of this subsection shall be the exclusive means of challenging the validity of any occupational safety and health standard and the validity of any such standard may not be raised in an enforcement action under section 10 or 11.".

SEC. 402. OCCUPATIONAL SAFETY AND HEALTH STANDARD.

Section 3(8) (29 U.S.C. 652(8)) is amended to read as follows:

"(8) The term 'occupational safety and health standard' means a standard which addresses a significant risk to the safety or health of employees by requiring conditions, or the adoption or use of one or more practices, means, methods, operations, or processes that most adequately assure, to the extent feasible, safe and healthful employment and places of employment. For purposes of this paragraph, the term 'significant risk' means a risk from an occupational safety or health hazard which may be reasonably anticipated to cause material impairment of health or functional capacity to employees exposed to such safety or health hazard. A risk shall not be considered significant—

"(A) in the case of a toxic substance or harmful physical agent that may cause cancer, if the risk resulting from employee exposure to such substance or agent does not exceed one in a million (as determined by conservative risk assessment models), or

"(B) in the case of an occupational safety or health hazard other than a potential carcinogen, if a condition, practice, or exposure is not reasonably anticipated to cause material impairment of health or functional capacity to employees exposed to such hazard, taking into account an ample margin of safety.".

SEC. 403. RECORDING OF ADVERSE MEDICAL CONDITION.

Section 6(b)(7) (29 U.S.C. 655(b)(7)) is amended by inserting after the third sentence the following: "The standard shall also prescribe requirements for recording or reporting work-related adverse medical conditions determined as a result of medical examinations or tests conducted under the standard.".

SEC. 404. PUBLIC DISCLOSURE OF ALL COMMUNICATIONS ON STANDARDS.

Section 6(b) (29 U.S.C. 655(b)) is amended by adding at the end the following:

"(9) The Secretary shall place all written comments and communications and a summary of all verbal communications with parties outside the Department of Labor (including communications with executive branch officials but not including communications with the President) regarding the promulgation, modification, or revocation of a standard under this section in the public record within 10 working days of the receipt of such communications.".

SEC. 405. REVISION OF PERMISSIBLE EXPOSURE LIMITS.

Section 6 (29 U.S.C. 655) (as amended by section 401(d)) is amended by adding at the end the following:

"(i) In addition to other health and safety standards promulgated under subsection (b), the Secretary shall, in cooperation with the Secretary of Health and Human Services, modify and establish exposure limits for toxic materials and harmful physical agents on a regular basis in the following manner and in accordance with the requirements of subsection (b)(5):

"(1) The Secretary of Health and Human Services, acting through the National Institute for Occupational Safety and Health, shall regularly evaluate available scientific evidence, data, and information to determine if exposure limits for toxic materials and harmful physical agents promulgated under subsections (a) and (b) should be modified or if an exposure limit should be established to protect exposed employees from material impairment of health or functional capacity. Such evaluation shall include a review of the scientific literature, standards of private and professional organizations, national consensus standards, standards adopted by other countries, recommendations of State and Federal agencies, and consideration of whether such toxic materials and harmful physical agents pose a significant risk to employee health or safety.

"(2) At least every 3 years the Secretary of Health and Human Services, acting through the National Institute for Occupational Safety and Health, shall, on the basis of the evaluation under paragraph (1), develop and shall transmit to the Secretary recommendations identifying toxic materials and harmful physical agents, if any, for which exposure limits should be modified or established to protect employees from material impairment of health or functional capacity. For each such material or agent, the recommendation shall include a suggested permissible exposure limit, the basis for the suggested exposure limit, and, where available, information on feasible control measures.

"(3) Within 30 days of receipt of recommendations under paragraph (2), the Secretary shall publish the recommendations on exposure limits in the Federal Register and provide a period of 30 days for public comment. The Secretary shall evaluate the recommendations and public comments and, within 6 months of the receipt of the recommendations, the Secretary shall publish a proposed rule to modify, maintain, or establish exposure limits for each toxic material and harmful physical agent for which the Secretary of Health and Human Services has recommended that such limit should be modified or established. If a proposed exposure limit is not the same as the exposure limit recommended by the Secretary of Health and Human Services, the Secretary shall explain why the recommended limit is not being proposed.

"(4) Within one year of the publication of the proposed exposure limits under paragraph (3), the Secretary shall issue a final standard, which standard shall be subject to the requirements of subsection (b)(5). If a final exposure limit is not the same as the exposure limits recommended by the Secretary of Health and Human Services, the Secretary shall explain why the recommended exposure limit is not being adopted.

"(5) In addition to the periodic review of permissible exposure limits required by paragraph (1), the Secretary shall also establish or modify exposure limits for toxic materials and harmful physical agents whenever such action is warranted, pursuant to subsections (b)(5) and (g).".

SEC. 406. EXPOSURE MONITORING AND HEALTH SURVEILLANCE.

Section 6 (29 U.S.C. 655) (as amended by section 405) is amended by adding at the end the following:

"(j) Within two years after the effective date of the Comprehensive Occupational Safety and Health Reform Act, the Secretary shall promulgate final standards on exposure monitoring and health surveillance programs in the following manner and in accordance with subsection (b).

"(1) The standard on exposure monitoring shall include the following:

"(A) Requirements for a formal exposure assessment where workers may be exposed to toxic materials or harmful physical agents which are subject to standards issued under this section, including toxic materials or harmful physical agents.

"(B) Requirements for regular monitoring and measurement of toxic materials or harmful physical agents for which an exposure limit has been established by the Secretary or adopted by the employer if such monitoring and measurements will assist in protecting the health and safety of workers exposed to such toxic materials or harmful physical agents.

"(C) Requirements for a written compliance plan for reducing exposures where exposures are determined to exceed limits established by the Secretary or adopted by the employer.

"(D) Requirements for employees to be notified in writing of exposures to toxic materials or harmful physical agents above exposure limits established by the Secretary or adopted by the employer and the steps the employer is taking to reduce such exposures.

"(E) Requirements for maintenance and access to records of exposure to toxic materials or harmful physical agents.

"(2) The standard on health surveillance programs shall include the following:

"(A) Requirements for an evaluation of employee exposure assessments and exposure monitoring to identify which employees may be at risk of material impairment of health or functional capacity due to exposure to toxic materials or harmful physical agents.

"(B) Requirements for periodic medical examinations for employees identified to be at risk of material impairment of health or functional capacity due to exposure to toxic materials or harmful physical agents where such examinations are appropriate to identify or to prevent material impairment of health or functional capacity.

"(C) Requirements for the evaluation of the results of medical examinations to determine if an employee or a group of employees are exhibiting indications of present or potential material impairment of health or functional capacity due to exposure to toxic substances or harmful physical agents.

"(D) Requirements for the notification of employees of the results of medical examinations in a manner that is understood by the employees.

"(E) Provisions setting forth the qualifications for health care providers who may conduct required medical examinations. Where feasible, the Secretary in cooperation with the Secretary of Health and Human Services shall establish criteria and procedures for the certification of health care providers who conduct medical examinations.

"(F) Provisions to assure the confidentiality of personally identifiable medical information.

"(G) Provisions to prohibit discrimination against employees based on the results of medical examinations, and as appropriate provisions to provide protection of the wages, benefits, and other terms and conditions of employment of employees who are transferred or removed from their jobs due to the result of medical examinations.

"(H) Records developed under this subsection shall be maintained and made available according to regulations published at 29 CFR 1910.20.".

SEC. 407. STANDARD ON ERGONOMIC HAZARDS.

Section 6 (29 U.S.C. 655) (as amended by section 406) is amended by adding at the end the following:

"(k) Within 2 years of the effective date of the Comprehensive Occupational Safety and Health Reform Act the Secretary shall issue a final standard on ergonomic hazards to protect employees from work-related musculskeletal disorders in accordance with subsection (b)(5). The standard shall include the following:

"(1) Requirements for an ergonomics program where employees are exposed to ergonomic hazards which requirements shall include provisions for hazard identification, control measures, medical management, training and education, and employee participation.

"(2) Requirements for an evaluation of job processes, work station design, rate of work, and work methods to identify ergonomic risk factors that cause or are likely to cause musculoskeletal disorders.

"(3) Requirements for control measures to reduce stressors and musculoskeletal disorders, including engineering controls, new equipment, or work organization controls.

"(4) Requirements for an effective medical management program for musculoskeletal disorders, including requirements for qualified health care providers, health surveillance, appropriate diagnosis, treatment, and follow up.

"(5) Requirements for recording musculoskeletal disorders as an illness and reporting such illnesses to the Secretary.

"(6) Requirements for training and education of employees exposed to ergonomic hazards on ergonomic risk factors, control measures, and the employer's medical management program.

"(7) Requirements for employee participation in the establishment and implementation of the employer's ergonomic program through any safety and health committee established under section 28.".

SEC. 408. EMERGENCY TEMPORARY STANDARD.

Section 6(c) (29 U.S.C. 655(c)) is amended—

(1) in paragraph (1), by striking "if he determines" and inserting "if the Secretary determines on the basis of the best available evidence"; and

(2) in paragraph (3), by striking "six months" and inserting "18 months".

SEC. 409. AIR CONTAMINANTS.

Not later than 60 days after the date of the enactment of this Act, The Secretary of Labor shall issue an interim final regulation reducing permissible exposure limits to toxic substances. Such interim final regulation shall include and place into effect—

(1) the final rule on air contaminants published at 54 Federal Register 2332 (January 19, 1989), and

(2) the proposed rule on air contaminants for construction, agriculture, and maritime published at 57 Federal Register 26001 (June 12, 1992).

Such interim final regulation shall take effect upon its issuance (except that such regulation may include a reasonable delay in the effective date of specific provisions) and shall have the legal effect of an occupational safety and health standard issued under section 6 of the Occupational Safety and Health Act of 1970.

TITLE V—ENFORCEMENT

SEC. 501. NO LOSS OF EMPLOYEE PAY FOR INSPECTIONS.

Section 8(e) (29 U.S.C. 657(e)) (as amended by section 201(b)) is amended by inserting after the first sentence the following: "Time spent by an employee on any such inspection shall be deemed to be hours worked and no employee shall suffer any loss of wages, benefits, and other terms and conditions of employment for having participated in the inspection.".

SEC. 502. TIME FRAME FOR RESPONSE TO COMPLAINTS.

The last sentence of section 8(f)(1) (29 U.S.C. 657(f)(1)) is amended by inserting before the period the following: "within 30 days of receipt of the request for inspection".

SEC. 503. COMPLAINTS.

Section (8)(f)(1) (29 U.S.C. 657(f)(1)) is amended—

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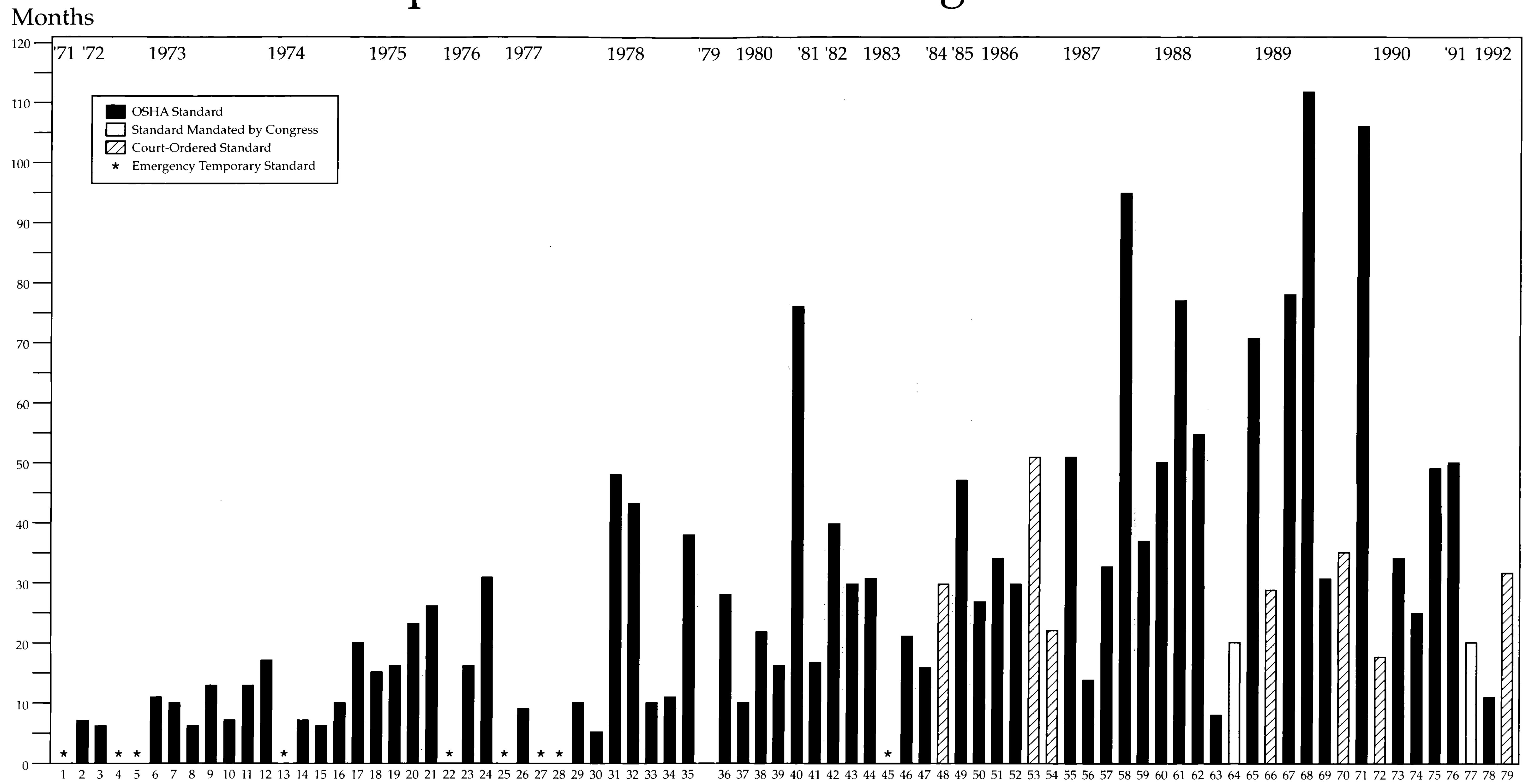

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