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Part III

Department of Labor

**Revisions to the Voluntary Protection
Programs To Provide Safe and Healthful
Working Conditions; Notice**

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****Revisions to the Voluntary Protection Programs To Provide Safe and Healthful Working Conditions**

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of revisions to the program.

SUMMARY: The Occupational Safety and Health Administration, wishing to revise the benchmark injury and illness rates used within its Voluntary Protection Programs (VPP), published proposed changes and requested comments from the public (**Federal Register** notice 68 FR 44181, July 25, 2003). The Agency now publishes a discussion of those comments and its final VPP revisions. The revisions change the way OSHA uses Bureau of Labor Statistics industry injury and illness rates to determine whether VPP applicants and participants meet the rate requirements for the VPP Star Program. The revisions also apply to construction applicants' qualification for the Merit Program. No other VPP requirements are changed. Participants will continue to undergo rigorous OSHA assessment to ensure that only worksites with excellent, effective safety and health management systems qualify for VPP Star.

EFFECTIVE DATE: December 8, 2003.

FOR FURTHER INFORMATION CONTACT: Cathy Oliver, Director, Office of Partnerships and Recognition, Occupational Safety and Health Administration, Room N-3700, 200 Constitution Ave. NW., Washington, DC 20210, telephone (202) 693-2213.

SUPPLEMENTARY INFORMATION:**I. Introduction***A. Background*

The Voluntary Protection Programs (VPP), adopted by OSHA in **Federal Register** notice 47 FR 29025, July 2, 1982, have established the efficacy of cooperative action among government, industry, and labor to address worker safety and health issues and expand worker protection. VPP participation requirements center on comprehensive management systems with active employee involvement to prevent or control the safety and health hazards at the worksite. Employers who qualify generally view OSHA standards as a minimum level of safety and health performance and set their own more stringent standards where necessary for effective employee protection.

One way that OSHA determines the qualification of applicants and the continuing qualification of participants in the VPP Star Program, the most challenging participation category, is to compare their injury and illness rates to industry rates—benchmarks—published annually by the Bureau of Labor Statistics (BLS). For Star eligibility, rates must be below the benchmark BLS rates. This notice changes the benchmark rates that OSHA employs.

Until now, the benchmarks have been two rates obtained from the most recent year's BLS industry averages for nonfatal injuries and illnesses. These are the industry average incidence rate for nonfatal injuries and illnesses (at the most precise level available), and the industry average incidence rate for cases involving days away from work and restricted work activity. OSHA has been concerned for some time about the effect on some VPP applicants and participants of substantial fluctuations from year to year in a limited number of these BLS industry rates. These fluctuations, statistical anomalies related to BLS sampling, have resulted in the creation of an unpredictable moving target. In any particular year, the fluctuating rate may not fairly represent the injury and illness situation in an industry. There is no easy solution to this problem. Injury and illness rates are useful tools in judging how well a worksite is protecting its employees. OSHA believes, however, that the goals of VPP are not well served when worksites that have established excellent protective systems and that are steadily improving their injury and illness rates fail to obtain Star approval because of statistical anomalies in national rates.

In a July 25, 2003 **Federal Register** notice (68 FR 44181), OSHA proposed a change in the VPP Star benchmark rates and requested public comment. After careful consideration, including analysis of comments received, OSHA has decided to adopt its original proposal. To qualify for Star, applicants' and participants' rates will need to be below the two BLS industry rates for at least 1 of the 3 most recent years published. This change also will apply to construction applicants' qualification for the Merit Program.

No other initial application requirements or ongoing requirements for continued participation are changed. Participants will continue to undergo rigorous OSHA assessment to ensure that only worksites with excellent, effective safety and health management systems qualify for VPP Star.

B. Statutory Framework

The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources * * *."

Section 2(b) specifies the measures by which the Congress would have OSHA carry out these purposes. They include the following provisions that establish the legislative framework for the Voluntary Protection Programs:

* * * (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

* * * (4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

* * * (5) * * * by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

* * * (13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

II. Discussion of the Comments

This section includes a review of the public comments submitted to OSHA in response to its July 25, 2003 notice. OSHA received comments from 21 respondents. These included seven VPP participating companies, three companies attempting to qualify for VPP, one labor organization, four trade associations, two private consultants, two other occupational safety and health professionals, the Voluntary Protection Programs Participants' Association, and one respondent contacting OSHA on a matter unrelated to VPP.

Overview of Comments

Of the 20 relevant responses, 11 fully supported OSHA's proposal. These included current VPP Star participants, companies seeking VPP approval, and other organizations. A twelfth respondent wrote that the proposal was a "step in the right direction" (Manuel (Mel) Rosas, Safety and Health Consultant, Carolinas Associated General Contractors) and suggested OSHA go further by welcoming into VPP any employer that applies and then mentoring those who need help to meet program requirements. OSHA agrees

that all companies willing to make the effort to achieve VPP recognition deserve the opportunity and the help they may need. OSHA, VPP participants, and others offer outreach, mentoring, VPP application workshops, and training opportunities to interested employers. OSHA is in the process of launching new pilot initiatives designed to assist and recognize incremental improvements in the safety and health management systems of employers willing to commit to the VPP process.

A general theme among the nine respondents who opposed the proposed change was concern that OSHA maintain the high standards of its premier recognition program. Many of the nine interpreted OSHA's proposal as a weakening of VPP eligibility requirements that, as one respondent put it, "would allow substandard applicants [to] achieve the most prestigious safety designation in the United States, that being a VPP Star facility." (James J. Mercurio, CSP.) See II.I. below for a discussion of this concern.

Several respondents took this opportunity to make other suggestions—not related to the benchmark rate issue—for improving VPP. OSHA appreciates this input and intends to consider these suggestions in its continuing effort to improve the program.

What follows is a discussion of alternative proposals put forward by respondents.

A. Address Root Cause of the Rate Fluctuations

One respondent noted that OSHA's proposal did not address the root cause of the rate fluctuations. Bureau of Labor Statistics (BLS) yearly injury and illness rates fluctuate because of the limited size of the sample and the different establishments surveyed each year. Any attempt to eliminate the substantial fluctuations encountered in some industries would require BLS to survey a much larger sample of employers each year. BLS has no plans to change its sampling methodology at this time.

B. Alternative Use of BLS Average Rates

Two respondents favored use of a "rolling average" derived from 3 or 5 years of Bureau of Labor Statistics industry average rates. A site's 3-year rates would have to be below this multiple-year industry average to qualify for Star. Before issuing its proposal, OSHA considered and rejected this approach. A rolling average of, for example, 3 years of BLS industry averages would be meaningful only if the hours worked were roughly equal

for each year. However, hours worked in an industry vary from year to year, depending on the economy. It is possible, using unpublished BLS data, to calculate legitimate 3-year averages. Because VPP spans so many industries, however, this would be a costly, time-consuming task. Each year new 3-year averages would need to be calculated and published. OSHA does not consider this a reasonable solution.

C. Alternative To Using National Statistics

One respondent objected to using national statistics when judging a company's qualification for Star. The respondent suggested that OSHA "put the pressure on the companies to really keep the employees safe. Use a hard gauge as a standard. For example, zero deaths, no lost workdays, or no broken bones." The agency has no problem supporting a goal of zero deaths. It believes, however, that setting the injury and illness rate standard for VPP qualification as high as the respondent suggests would be counter-productive. Fewer worksites, particularly those in traditionally hazardous industries, would be willing to commit to the VPP process, a process that has proven its value as a feasible and flexible way to reduce injuries, illnesses, and fatalities substantially. The number of qualifying worksites would drop drastically. Fewer sites would enjoy the benefits of VPP participation, not least of which are the prestige and national recognition that invigorate a site's efforts to continuously improve worker protection. Industries would lose models that currently demonstrate VPP's successful, systematic approach to safety and health management and generously share their expertise and resources by mentoring other companies. As one corporation with sites in the program and a corporate-wide commitment to VPP noted, "The purpose of VPP is to form a partnership between employees, OSHA, and company management to ensure a safe working environment." An unduly restrictive standard for qualification "is not in the best interest of the company and, most importantly, the employees." (Kerry A. Shaffar, Safety Director, Lozier Corporation.)

D. Data From Worker's Compensation System as Alternative Benchmark

One respondent suggested that VPP adopt as its Star benchmark the workers' compensation insurance experience modification rate (EMR), asserting that this is a more reliable indicator of an employer's safety and health experience. The respondent proposed an EMR of less than 1.0 as the rate

criterion for Star qualification. OSHA has considered using EMRs for various purposes in the past and has concluded that, for most purposes, EMRs are not as reliable an indicator of industry and worksite conditions as the data the agency currently employs. For example, experience modifications differ from state to state. Using such data for a national program such as VPP poses numerous difficulties. Moreover, workers' compensation system data reflect claims made for compensation, a different universe of injuries and illnesses than OSHA recordables.

As OSHA noted when it issued its final rule revising the recordkeeping requirements " * * * the injury and illness information compiled pursuant to Part 1904 [which BLS uses to calculate its industry rates] is much more reliable, consistent and comprehensive than data from any available alternative data source * * * This is the case because, although some State workers' compensation programs voluntarily provide injury and illness data to OSHA for various purposes, others do not. Further, workers' compensation data vary widely from state to state. Different state workers' compensation laws and administrative systems have resulted in large variations in the content, format, accessibility, and computerization of that system's data. In addition, workers' compensation databases often do not include injury and illness data from employers who elect to self-insure." (66 FR 5923-4, January 19, 2001)

E. Median or Other Distributional Statistic as Alternative Benchmark

One respondent argued that average rates are appropriate only when data follow a normal distribution, with half the sample having values above and half below the median or midpoint of the distribution. The respondent pointed to BLS published data that show injury and illness rates to be skewed, with average rates well above the median. Instead of using an average rate, the respondent argued for OSHA to "designate what fraction of worksites would be considered 'exemplary,' and then set a percentile recorded injury and illness rate based on that * * *". The 75th percentile recorded injury illness rate is readily accessible and would be a minimal criterion." OSHA does not view this approach as a solution. So long as OSHA uses a single year BLS rate as its benchmark—whether that be an industry average rate or an industry 75th percentile rate—the problem of rate fluctuations will remain.

F. Greater Use of Merit Program

One respondent interpreted the proposed change as a way to increase the number of sites participating in VPP and suggested that, rather than change Star requirements, OSHA should admit a company to the VPP Merit program when the applicant's rates do not qualify it for Star. In fact, OSHA currently offers Merit participation to applicants with good safety and health management systems but lower-than-Star-standard rates. The Agency also is piloting a program designed to offer VPP participation to sites not ready for Merit. OSHA desires and expects to expand program participation. However, when a substantial BLS rate fluctuation—a fluctuation that does not appear to reflect a genuine industry trend—is the only reason a site fails to qualify in a particular year for Star and its attendant prestige, OSHA does not view this as a fair and consistent way to operate VPP. It is not unusual for applicants, once they make the commitment to seek Star recognition, to spend years developing and improving their safety and health management systems. The majority of new VPP approvals are to the Star program precisely because most applicants wait until they are operating excellent programs with rates well below their industry average. For a fluctuating industry rate to stymie employees' and managers' efforts to gain Star approval can be frustrating and demoralizing, as attested by numerous applicants, including respondents to this proposal who have gone through this experience.

An applicant, nonetheless, can temporarily enter the Merit program and look forward to gaining Star approval. No such solution exists for the worksite that gains Star approval and continues to provide its employees with exemplary protection, only to have its participation jeopardized by a subsequent substantial one-year drop in the BLS rate. See G. below.

G. Two-Year Rate Reduction Plan

One respondent wrote that OSHA already has a model for addressing the fluctuation in rates: the 2-year rate reduction plan that a Regional Administrator may provide, on a case-by-case basis, to a Star participant whose rate fails to stay below the latest BLS national average. The agency does not view this existing mechanism as a solution to the problem of fluctuating rates. If the site is operating a comprehensive safety and health management system, if there is no indication of problems with the system or the site's performance, if the site's

rates are stable or decreasing, and if the site is demonstrating continuous improvement as required, then it is OSHA's position that the site deserves continued, unconditional Star participation.

H. Impact of NAICS on Benchmark Rates

Two respondents suggested postponing any change until more is known about the impact of the changeover from SIC codes to NAICS. OSHA's Office of Statistics and economists we consulted in BLS do not expect the transition to NAICS to produce a different situation with respect to rate fluctuations and benchmarking. No purpose would be served by postponing a solution to this problem.

I. Is This Change a Weakening of VPP Standards?

Among the comments opposing the benchmarking change, one theme stood out: This change will weaken VPP eligibility standards. This is neither OSHA's intent nor its expectation. Central to VPP's eligibility standards is the complex requirement that a site demonstrate it has a safety and health management system that effectively protects employees. Injury and illness rates have always been one of many performance criteria that OSHA uses when assessing a worksite's qualification for VPP Star.

The benchmark change will have the greatest impact on those industries that show significant injury and illness rate variation year to year. Most industries show small trend changes on a year-to-year basis and will be impacted in a small way. Other criteria, including the expectation of continuous improvement, remain unchanged.

One respondent predicted that, under the proposal, a site could potentially have 3 consecutive years of significantly declining performance as measured by rates and still meet the qualification criteria. OSHA cannot imagine a situation where an applicant or participant with such experience would meet the criteria of continuous improvement. Applicants to VPP undergo a lengthy, rigorous review of their safety and health management system and their performance. Once approved, participants continue to undergo OSHA scrutiny. Each year they must submit to OSHA a detailed evaluation of their performance, progress, and plans for improvement that the OSHA Regional VPP Manager then reviews. In addition, OSHA periodically sends a team of safety and health specialists onsite to perform a

critical assessment, issue a report, and make a recommendation about continued participation. None of this will change.

In its response to the proposal, the Voluntary Protection Programs Participants' Association (VPPPA), a long-time and vocal advocate for maintaining VPP's high standards, wrote, "The VPPPA believes OSHA's proposal would have the desired effect of normalizing in a fair and equitable manner the benchmarking rates by adjusting for unreasonably divergent rates that may occur in any one particular year." The respondent acknowledged that a "sudden inexplicably large increase in a particular industry rate may make it easier for a worksite to meet the VPP Star requirements." It nonetheless gave its support to the benchmarking change, concluding, "The Association is certain the many other stringent requirements and numerous elements of the VPP certainly continue to ensure that only the worksites with excellent safety and health management systems will gain VPP Star approval, thus maintaining the quality and integrity of the VPP."

OSHA has carefully considered the comments submitted. All clearly were offered in the spirit of protecting and improving a remarkable program that has had a strongly positive impact on worker safety and health. The agency's analysis of the varied alternatives offered, with their potential advantages and disadvantages, has strengthened OSHA's confidence in its original proposal.

Therefore, OSHA is making the following changes to the Voluntary Protection Programs. These changes apply to the latest full version of VPP, published as **Federal Register** notice 65 FR 45650, July 24, 2000.

II. Changes to the VPP

A. The Star Rate Requirement

The following language is substituted for the first sentence of III.F.4.a.(1): For site employees—Two rates reflecting the experience of the most recent 3 calendar years must be below at least 1 of the 3 most recent years of specific industry national averages for nonfatal injuries and illnesses at the most precise level published by the Bureau of Labor Statistics (BLS). OSHA will compare the two site rates against the single year that is most advantageous to the site out of the last 3 published years." The two site rates referenced here are the 3-year total recordable case incidence rate (a single rate that reflects 3 years of total recordable injuries and illnesses), and the 3-year incidence rate for cases

involving days away from work and restricted work activity.

B. The Alternative Rate Calculation for Qualifying Small Businesses

The following language is substituted for III.F.4.a.(2)(a):

“To determine whether the employer qualifies for the alternative calculation method, do the following:

- Using the most recent employment statistics (hours worked in the most recent calendar year), calculate a hypothetical total recordable case incidence rate for the employer assuming that the employer had two cases during the year;

- Compare that hypothetical rate to the 3 most recently published years of

BLS combined injury/illness total recordable case incidence rates for the industry; and

- If the hypothetical rate (based on two cases) is equal to or higher than the national average for the firm’s industry in at least 1 of the 3 years, the employer qualifies for the alternative calculation method.”

C. Construction Applicants’ Qualification for Merit

The following language is substituted for the first sentence of III.H.2.b.(2):

“For construction, if the incidence rates for the applicant site are not below the industry averages as required for Star, the applicant company must demonstrate that the company-wide 3-

year rates are below at least 1 of the 3 most recently published years of BLS rates for the industry, at the most precise published level. OSHA will compare the two company-wide rates against the single year that is most advantageous to the applicant out of the last 3 published years.”

Signed at Washington, DC, this 2nd day of December 2003.

John L. Henshaw,

Assistant Secretary of Labor for Occupational Safety and Health.

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BILLING CODE 4510–26–P