

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210



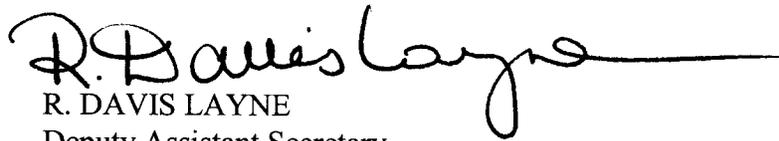
Reply to the Attention of:

JAN 23 2004

MEMORANDUM FOR:

REGIONAL ADMINISTRATORS
STATE DESIGNEES

FROM:


R. DAVIS LAYNE
Deputy Assistant Secretary

SUBJECT:

Appendix A to CPL 02-00-051, Enforcement Exemptions
and Limitations under the Appropriations Act

OSHA traditionally revises Appendix A of CPL 02-00-051 (formerly numbered CPL 2-0.51J), Enforcement Exemptions and Limitations under the Appropriations Act, in accordance with the latest Bureau of Labor Statistics (BLS) lost workday injury (LWDI) data to update the list of exempt industries in Standard Industrial Classification (SIC) codes having an LWDI rate below the national, private sector rate. However, this year the appendix cannot be updated due to changes in OSHA's recordkeeping rule that affect the manner in which BLS reports occupational injuries.

In view of the revised recordkeeping rule, the LWDI rate specified in the Appropriations Act is no longer published by BLS. Rather, BLS now publishes the Days Away from Work, Restriction, or Job Transfer (DART) rate, which also includes illnesses. The relevant Appropriations Act language specifically requires use of the most recent LWDI rate, as published by BLS. Steps are being taken to advise Congress of the changes in the published rates, but, until the Appropriations Act language is changed, OSHA is obligated to use the 2001 LWDI data. Thus, in planning and conducting inspections, OSHA Area Offices should continue to use the information contained in Appendix A, effective date, January 7, 2003.

If you have any questions please contact Helen Rogers in the Office of General Industry Enforcement (202) 693-1867.

January 7, 2003

[Strikeout correction February 6, 2003]

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE DESIGNEES

FROM: JOHN L. HENSHAW
Assistant Secretary

THROUGH: R. DAVIS LAYNE
Deputy Assistant Secretary

GARY VISSCHER
Deputy Assistant Secretary

SUBJECT: Replacement: Appendix A to CPL 2.51J

Attached is the most recent listing of the Standard Industrial Classification (SIC) codes ~~and the North American Industrial Classification System (NAICS) codes~~ for industries with a Lost Workday Injury (LWDI) rate below the national private sector rate of 2.6 for 2001. This new Appendix A to OSHA Instruction CPL 2.51J, Enforcement Exemptions and Limitations under the Appropriations Act, will be effective as of the date of this memorandum. It will also be added to the electronic version of CPL 2.51J on the OSHA Website.

A new directive has been drafted and is currently going through final National Office review. The new directive will be OSHA Instruction CPL 2-0.128 and will incorporate this new Appendix A.

If you have any questions please contact Helen Rogers in the Directorate of Enforcement Programs, Office of General Industry Enforcement at (202) 693-1867.

Attachment



OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 2-0.51J

EFFECTIVE DATE: May 28, 1998

SUBJECT: Enforcement Exemptions and Limitations under the Appropriations Act.

ABSTRACT

Purpose: Explains the limits on inspection activities under the Appropriations Act.

Scope: OSHA-wide.

References: CPL 2.103 -Field Inspection Reference Manual,
CPL 2.115 -Complaint Policy and Procedures,
STP 2.22A -State Plan Policies and Procedures Manual.

Cancellations: CPL 2-0.51I, Dated October 15, 1997.

State Impact: See Paragraph VI.

Action Offices: National, Regional, and Area Offices.

Originating Office: Directorate of Compliance Programs.

Contact: Don Kallstrom(202) 219-8031
Office of General Industry Compliance Assistance; FPB - N3107
200 Constitution Avenue, NW
Washington, DC 20210

Special Notice: Appendix A contains time sensitive information. OSHA will automatically update the information in Appendix A after it is received from the Bureau of Labor Statistics.

By and Under the Authority of
Charles N. Jeffress
Assistant Secretary

~~Change effective 1-15-99 - Appendix A~~

~~Change effective 2-7-00 - Appendix A~~

~~Change effective 2-9-01 - Appendix A~~

~~Change effective 1-2-02 - Appendix A~~

Change effective 1-7-03 - Appendix A

TABLE OF CONTENTS

I.	<u>Purpose.</u>	1
II.	<u>Scope.</u>	1
III.	<u>References.</u>	1
IV.	<u>Cancellation.</u>	1
V.	<u>Action.</u>	1
VI.	<u>Federal Program Change.</u>	2
VII.	<u>Background.</u>	2
VIII.	<u>Key Terms.</u>	2
IX.	<u>General Enforcement Guidelines.</u>	2
	Table 1 (Exceptions and Limitations)	3
X.	<u>Enforcement Guidance for Small Farming Operations.</u>	3
XI.	<u>Enforcement Guidance for Small Employers in low-hazard industries.</u>	5
XII.	<u>Late Discovery of Exemption.</u>	6
XIII.	<u>IMIS.</u>	7
	Appendix A	A-1
	INDEX	Index-1

- I. Purpose. This instruction explains the limits (exemptions and limitations) for the Occupational Safety and Health Administration's (OSHA) enforcement activity under the Appropriations Act. This funding measure's riders and this instruction focus on limiting the inspection of those employers who employ ten or fewer employees.
- II. Scope. This instruction applies OSHA-wide and where applicable, to those Employment Standards Administration (ESA) offices enforcing OSHA's Field Sanitation and Temporary Labor Camp standards in agricultural settings. The restrictions to OSHA's enforcement activity apply to places of employment (farms and establishments who's Standard Industrial Classification code is listed in Appendix A) who employ 10 or fewer employees.
- III. References.
 - A. OSHA Instruction STP 2.22A, May 14, 1986, the State Plan Policies and Procedures Manual
 - B. OSHA Instruction CPL 2.103, September 26, 1994, the Field Inspection Reference Manual (FIRM)
 - C. Secretary's Orders 5-96 and 6-96, December 27, 1996, Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration and the Assistant Secretary for Occupational Safety and Health.
 - D. OSHA Instruction CPL 2.115, June 14, 1996, Complaint Policies and Procedures
- IV. Cancellation. OSHA Instruction CPL 2.51I, October 15, 1997, is canceled.
- V. Action. OSHA Regional Administrators and Area Directors are to ensure that they schedule and conduct enforcement activities following the guidelines set forth in this instruction. They shall insure distribution of these guidelines to Employment Standards Administration, Wage and Hour Division District offices who are responsible for enforcing the OSHA field sanitation and temporary labor camp standards pursuant to Secretary's Orders 5-96 and 6-96. These guidelines are in effect until superseded or amended.

The Directorate of Administrative Programs will ensure that the updated Appendix A appears on the OSHA Internet site as soon as possible after receiving it from the Directorate of Compliance Programs. The version of Appendix A which appears on OSHA's Internet Web Page is the one currently being applied. The date Appendix A is updated will be noted on the Abstract.

- VI. Federal Program Change. This instruction describes a Federal program change which affects State programs. Under OSHA's Appropriations Act, States cannot be reimbursed for any share of funds expended for activities prohibited by these exemptions and limitations and must be able to demonstrate that no Federal funds have been used for prohibited activities. The States shall respond via the two-way memorandum to the Regional Office as soon as the State's intention regarding the enforcement activity limitations and exemptions is known, but no later than 60 calendar days after the date of

transmittal from the Directorate of Federal-State Operations. If a State plans to fund the prohibited activities, it shall provide a brief description of its alternative funding approach in the Comment Section of the two-way memorandum and maintain appropriate accounting procedures for assuring that no 23(c) funds are expended for these activities.

VII. Background. In providing funding for OSHA, Congress has placed restrictions on enforcement activities regarding two categories of employers: small farming operations and small employers in low-hazard industries. The Appropriations Act contains limits for OSH Act activities on a year-by-year basis.

VIII. Key Terms. Definitions pertinent to this Directive are the following:

A "**farming operation**" means any operation involved in the growing or harvesting of crops, the raising of livestock or poultry, or related activities conducted by a farmer on sites such as farms, ranches, orchards, dairy farms or similar farming operations. These are employers engaged in businesses that have a two digit Standard Industrial Classification (SIC) of 01 (Agricultural Production - Crops), 02 (Agricultural Production - Livestock and Animal Specialties), and four digit SIC 0711 (Soil Preparation Services), 0721 (Crop Planting, Cultivating, and Protecting), 0722 (Crop Harvesting, Primarily by Machine), 0761 (Farm Labor Contractors and Crew Leaders), and 0762 Farm Management Services).

A "**temporary labor camp**" means farm housing directly related to the seasonal or temporary employment of farm workers.

"**Housing**" includes both permanent and temporary structures located on or off the property of any employer who meets the above definition.

"**Lost Workday Injury Rate Below the National Average**" is an occupational lost workday injury (LWDI) rate which is lower than the national average rate for the private industry sector, as most recently published by the Bureau of Labor Statistics, at the most precise (SIC) code for which such data is published, using the 1987 manual.

IX. General Enforcement Guidelines. Before initiating enforcement activities OSHA will decide whether the appropriation rider prohibits OSHA enforcement. Where this determination cannot be made beforehand, the CSHO will determine the status of the small farming operation or a small employer in a low-hazard industry upon arrival at the workplace. If the prohibition applies, the inspector must immediately discontinue the inspection activities and leave the premises as soon as possible. Table No. 1 provides an at-a-glance reference to our activities under the funding measure.

Table 1
(Exceptions and Limitations)

TLC = Temporary Labor Camp EES = Employees ERS = Employer

OSHA Activity	Farm with 10 or fewer EES and no TLC activity within 12 mo.	Farm with more than 10 EES or a farm with an active TLC within 12 Mo.	Non-farm ERS with 10 or fewer EES in a SIC listed in Appendix A
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Programmed Safety Inspections	Not Permitted	Can Inspect	Cannot Inspect
Programmed Health Inspections	Not Permitted	Can Inspect	Can Inspect
Employee Complaint	Not Permitted	Can Inspect	Can Inspect (See limits on Citations and Penalties)
FAT/CAT and Accidents	Not Permitted	Can Inspect	Can Inspect
Imminent Danger	Not Permitted	Can Inspect	Can Inspect
11C	Not Permitted	Can Inspect	Can Inspect
Consultation & Technical Assistance	Not Permitted	Permitted	Permitted
Education and Training	Not permitted	Permitted	Permitted
Conduct Surveys & Studies	Not Permitted	Permitted	Permitted

X. Enforcement Guidance for Small Farming Operations. The Appropriations Act exempts small farming operations from enforcement of **all** rules, regulations, standards or orders under the Occupational Safety and Health Act.

A. A farming operation is **exempt** from **all** OSHA activities if it:

1. Employs 10 or fewer employees currently and at all times during the last 12 months; and
2. Has not had an active temporary labor camp during the proceeding 12 months.

Note: Family members of farm employers are not counted when determining the number of employees.

B. A farming operation with 10 or fewer employees that maintains a temporary labor camp or has maintained a temporary labor camp within the last twelve months **is not** exempt from inspection. For OSHA, the inspection may include all working conditions covered by OSHA standards except for Field Sanitation, 29 CFR 1928.110, and except as noted, Temporary Labor Camps, 29 CFR 1910.142, which are being enforced by the Wage and Hour Division under Secretary of Labor Order 6-96.

1. OSHA, however, retains inspection responsibility for those camps of employees engaged in eggs or poultry production (SIC 025) or red meat production (SIC 021) or engaged in the post-harvest processing of agricultural or horticultural commodities. Generally, post-harvest processing can be thought of as changing the character of the product (canning, making cider or sauces, etc.) or a higher degree of packaging (washing, bundling and bagging carrots) versus field sorting in a shed for size.
- C. The Wage and Hour Division, ESA, will also exercise responsibility for enforcement in agriculture of OSHA field sanitation and temporary labor camp standards, except as noted in “b” above, in nine States operating OSHA-approved State plans which have elected to follow the jurisdictional transfer of authority as effected by Secretary’s Orders 5-96 and 6-96. These States are: Alaska, Indiana, Iowa, Kentucky, Minnesota, South Carolina, Utah, Virgin Islands, and Wyoming.

In the fourteen (14) other States operating OSHA-approved State plans, enforcement of field sanitation and temporary labor camp standards in agriculture will not transfer to ESA and will continue as a State responsibility. These States are: Arizona, California, Hawaii, Maryland, Michigan, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, Tennessee, Vermont, Virginia, and Washington.

XI. Enforcement Guidance for Small Employers in low-hazard industries. The Appropriations Act exempts small employers in low-hazard industries from **programmed safety inspections.**

- A. No programmed safety inspections are permitted of a small employer if:
1. It employs 10 or fewer employees currently and at all times during the last 12 months; and
 2. The lost workday case rate for its primary SIC work activity is below the all-industry national average. (See Appendix A for listings.)
- B. The Appropriations Act allows several OSHA activities in establishments of small (10 or fewer employees) low-hazard rate employers that are exempt from programmed safety inspections. All OSHA Offices are allowed to:
1. Provide consultation and technical assistance as well as educational and training services. It can also conduct surveys and studies authorized by the OSHA.
 2. Investigate or schedule inspections in response to an employee complaint in accordance with current complaint procedures in CPL 2.115. The only complaint inspections which are permitted under the rider are those from current employees.
 - a. Citations may be issued for any violation found during a complaint inspection whether or not the violative condition is a subject of the

complaint. But:

b. Penalties may only be assessed when the violations are classified as willful violations or failure to abate notifications and when such violations and failure to abate notifications are related to the original complaint.

3. Take any action authorized by the Act with respect to alleged imminent danger situations.

4. Take any action authorized by the Act with respect to **health hazards**.

a. Health inspections are to be scheduled, observed health hazards cited, and penalties assessed for all classifications of violations in accordance with current procedures.

b. Apparent safety violations noted during a health inspection of an establishment exempted from programmed safety inspections shall not be cited or referred for later inspection unless such violations create an imminent danger.

c. If this inspection is a health-related complaint, the procedures in paragraph XI. B. 4. take precedence over the procedures in paragraph XI. B. 2.

Note: A Compliance Officer can discuss non-citable violations during the closing conference and provide information relating to consultation services.

5. Take any action authorized by the Act with respect to employment accidents involving a fatality of one or more employees or hospitalization of two or more employees. All apparent violative conditions involving safety or health may be cited and penalties proposed related to the accident.

Note: The reporting requirements of 29 CFR 1904.8 have not changed. Employers are not obligated to report accidents involving overnight hospitalization of fewer than three employees. However, OSHA is allowed to conduct any accident investigation of a small, non-farming, employer once we become aware that an accident as described above has occurred. Where OSHA learns of such accidents, we can inspect or investigate.

6. Take any action authorized by the Act with respect to alleged discrimination against employees.

XII. Late Discovery of Exemption. If it becomes clear after an inspection that the employer was exempt from inspection at the time of the inspection, the Area Director shall ensure that no citations are issued or penalties proposed contrary to the provisions of this instruction.

A. If already issued, but not yet contested, any such citation or proposed penalty shall be withdrawn.

- B. If the employer has already filed a notice of intent to contest, the Area Director shall inform the Regional Solicitor who shall take appropriate action to ensure that the case is not pursued before the Occupational Safety and Health Review Commission.
 - C. If such citations and penalties have become a final order, the Area Director shall ensure that no penalties are collected.
- XIII. IMIS. If an inspection is not conducted because of an Appropriations Act rider exemption, the CSHO shall complete an OSHA-1 Form according to current IMIS instructions. Also where the scope of an inspection has been limited, due to restrictions imposed by a rider to the Appropriations Act, it can be so noted in block 42 - Optional Information.

APPENDIX A

SIC CODES FOR INDUSTRIES WITH A LOST
WORKDAY INJURY RATE BELOW THE NATIONAL
PRIVATE SECTOR RATE OF 2.6 FOR 2001

FISHING MINING CONSTRUCTION	MANUFACTURING			TRANSPORTATION PUBLIC UTILITIES	TRADE	FINANCE REAL ESTATE INSURANCE SERVICES
0130*	2047	2591	3519	4140	5040	6000-8900
0160*	2082	2610	3542	4520	5060	EXCEPT
0740	2100	2620	3545	4600	5080	7010
0810	2200	2630	3546	4720	5090	7020
0900	EXCEPT	2655	3559	4730	5110	7030
1300	2240	2700	3565	4740	5120	7040
1530	2253	EXCEPT	3570	4810	5130	7210
	2254	2732	3594	4820	5160	7350
	2262	2752	3613	4830	5190	7630
	2282	2754	3624	4890	5250	7690
	2295	2760	3625	4910	5260	7940
	2296	2770	3629	4920	5270	7990
	2298	2780	3647	4930	5420	8030
	2299	2800	3652		5430	8040
	2311	EXCEPT	3660		5460	8050
	2322	2850	3670		5500	8060
	2323	2890	3699		EXCEPT	8080
	2326	2910	3760		5530	8330
	2329	2951	3795		5600	8360
	2330	2990	3800		5720	8420
	2340	3142	EXCEPT		5730	
	2350	3144	3821		5800	
	2360	3149	3911		5900	
	2371	3275	3915		EXCEPT	
	2389	3295	3944		5930	
	2395	3296	3951		5960	
	2396	3353	3960		5980	
	2493	3489	3996			

NOTE: Those that are EXCEPT can be inspected

* Agriculture employers with 10 or fewer employees, and no temporary labor camp, are exempt from OSHA.

NOTE: SICs with zero in the third or fourth digit include all three and four digit SICs with the same leading two or three digits.

OFFICE OF STATISTICAL ANALYSIS, OSHA, 12/30/02.

INDEX

Accident	6
Agriculture	4, A-1
Appropriation	2
Bureau of Labor Statistics	2
Citation	6
Classification	1, 2
Closing Conference	6
Complaint	1, 3, 5, 6
Consultation	3, 5, 6
CSHO	2, 7
Directive	2
Employee	3, 5
Employer	2, 3, 5, 6
Employment Standards Administration	1
Enforcement	1, 2, 3, 4, 5
ESA	1, 4
Exemptions	1, 2
Failure to Abate	5
Farming operation	2, 3, 4
Federal Program Change	2
Field Inspection Reference Manual	1
Health hazards	5
IMIS	7
Imminent Danger	3, 5, 6
Key terms	2
Labor Camp	1, 2, 3, 4
LWDI	2
Penalties	3, 5, 6
Penalty	6
Review Commission	6
Small Employers in low-hazard industries	2, 5
Small Farming Operations	2, 3
State Plan	1
State Programs	2
Temporary Labor Camp	1, 2, 3, 4
Violation	5