



FEDERAL REGISTER

Vol. 76

Friday,

No. 171

September 2, 2011

Part II

Department of Labor

Wage and Hour Division

29 CFR Parts 570 and 579

Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations; Civil Money Penalties; Proposed Rule

DEPARTMENT OF LABOR**Wage and Hour Division****29 CFR Parts 570 and 579**

RIN 1235-AA06

Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties**AGENCY:** Wage and Hour Division, Labor.**ACTION:** Notice of proposed rulemaking and request for comments.

SUMMARY: The Department of Labor (Department or DOL) is proposing to revise the child labor regulations issued pursuant to the Fair Labor Standards Act, which set forth the criteria for the permissible employment of minors under 18 years of age in agricultural and nonagricultural occupations. The proposal would implement specific recommendations made by the National Institute for Occupational Safety and Health, increase parity between the agricultural and nonagricultural child labor provisions, and also address other areas that can be improved, which were identified by the Department's own enforcement actions. The proposed agricultural revisions would impact only hired farm workers and in no way compromise the statutory child labor parental exemption involving children working on farms owned or operated by their parents.

In addition, the Department proposes to revise the exemptions which permit the employment of 14- and 15-year-olds to perform certain agricultural tasks that would otherwise be prohibited to that age group after they have successfully completed certain specified training. The Department is also proposing to update the General Statements of Interpretation to incorporate all the regulatory changes to the agricultural child labor provisions made since they were last revised.

Finally, the Department is proposing to revise its civil money penalty regulations to incorporate into the regulations the processes the Department follows when determining both whether to assess a child labor civil money penalty and the amount of that penalty.

DATES: Comments are due on or before November 1, 2011.**ADDRESSES:** You may submit comments, identified by RIN 1235-AA06, by either one of the following methods:

Electronic comments: through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, NW., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name (Wage and Hour Division) and Regulatory Information Number identified above for this rulemaking (1235-AA06). All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Consequently, prior to including any individual's personal information such as Social Security Number, home address, telephone number, e-mail addresses and medical data in a comment, the Department urges commenters carefully to consider that their submissions are a matter of public record and will be publicly accessible on the Internet. It is the commenter's responsibility to safeguard his or her information. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Arthur M. Kerschner, Jr., Division of Enforcement Policy and Procedures, Branch of Child Labor and Special Employment, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-0072 (this is not a toll free number). Copies of this notice of proposed rulemaking may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693-0023. TTY/TDD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the Wage and

Hour Division's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: <http://www.dol.gov/whd/america2.htm>.

SUPPLEMENTARY INFORMATION:**I. Electronic Access and Filing Comments**

Public Participation: This notice of proposed rulemaking is available through the **Federal Register** and the <http://www.regulations.gov> Web site. You may also access this document via the Department's Web site at <http://www.dol.gov/federalregister>. To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1235-AA06). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at <http://www.regulations.gov>, or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

II. Background

The Department is committed to helping youth enjoy positive and challenging work experiences—both in agricultural and nonagricultural employment—that are so important to their development and transition to adulthood. The Federal child labor provisions were enacted to ensure that when young people work, the work is safe, age appropriate, and does not jeopardize their schooling. This Notice of Proposed Rulemaking continues the Department's tradition of encouraging compliance with the child labor provisions and fostering permissible and appropriate job opportunities for working youth that are healthy, safe, and not detrimental to their education.

A. Child Labor Provisions for Employment in Nonagriculture

The child labor provisions of the Fair Labor Standards Act (FLSA) establish a minimum age of 16 years for employment in nonagricultural occupations, but the Secretary of Labor is authorized to provide by regulation for 14- and 15-year-olds to work in

suitable occupations other than manufacturing or mining, and during periods and under conditions that will not interfere with their schooling or health and well-being. The FLSA provisions permit 16- and 17-year-olds to work in the nonagricultural sector without hours or time limitations, except in certain occupations found and declared by the Secretary to be particularly hazardous, or detrimental to the health or well-being of such workers.

The regulations concerning nonagricultural hazardous occupations are contained in subpart E of 29 CFR part 570 (29 CFR 570.50–.68). These Hazardous Occupations Orders (HOs) apply on either an industry basis, specifying the occupations in a particular industry that are prohibited, or an occupational basis, irrespective of the industry in which the work is performed. The seventeen nonagricultural HOs were adopted individually during the period of 1939 through 1963. Seven of these HOs, specifically HOs 5, 8, 10, 12, 14, 16, and 17, contain limited exemptions that permit the employment of 16- and 17-year-old apprentices and student-learners under particular conditions to perform work otherwise prohibited to that age group. The terms and conditions for employing such apprentices and student-learners are detailed in § 570.50(b) and (c).

Because of changes in the workplace, improved occupational injury surveillance, Wage and Hour Division investigation findings, the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing Federal and state standards, and divergent views on how best to balance scholastic requirements and work experiences, the Department has long been reviewing the criteria for permissible child labor employment. A detailed discussion of the Department's review was included in the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on April 17, 2007 (*see* 72 FR 19339). That NPRM led to a Final Rule that was published in the **Federal Register** on May 20, 2010 (*see* 75 FR 28404) and became effective on July 19, 2010.

In furtherance of that review, the Department provided funds to NIOSH in 1998 to conduct a comprehensive review of scientific literature and available data in order to assess current workplace hazards and the adequacy of the current youth employment HOs to address them. This study was commissioned to provide the Secretary

with another tool to use in the ongoing review of the child labor provisions, and of the hazardous occupations orders in particular. Its report, entitled *National Institute for Occupational Safety and Health (NIOSH) Recommendations to the U.S. Department of Labor for Changes to Hazardous Orders* (hereinafter referred to as the NIOSH Report or the Report), was issued in July of 2002. The Report makes 35 recommendations concerning the existing nonagricultural HOs, makes 14 recommendations concerning the existing agricultural hazardous occupations orders (Ag H.O.s), and recommends the creation of 17 new HOs. The Department places great value on the information and analysis provided by NIOSH.

As an adjunct to its review of these issues, the Department contracted with a private consulting firm, SiloSmashers, Inc., to construct a model that, using quantitative analysis, would help determine the costs and benefits associated with implementing, or not implementing, each of the Report's recommendations. The SiloSmashers report, *Determination of the Costs and Benefits of Implementing NIOSH Recommendations Relating to Child Labor Hazardous Orders*, was completed in November 2004 and covers 34 of the NIOSH HO recommendations in agricultural and nonagricultural occupations, as well as several occupations or activities not presently addressed by an existing HO. Because of the data limitations and flaws in methodology, the Department does not consider the individual analyses prepared by SiloSmashers to be influential for rulemaking purposes.

Both the NIOSH Report and the SiloSmashers analysis are available for review on the Department's *YouthRules!* Web site at <http://www.youthrules.dol.gov/resources.htm>. A thorough discussion of the history and merits of both the NIOSH Report and the analysis prepared by SiloSmashers was contained in the 2007 NPRM (*see* 72 FR 19340–19341).

In response to the 2002 NIOSH recommendations concerning the nonagricultural HOs, the Department issued a Final Rule in 2004, both a Notice of Proposed Rulemaking (NPRM) and an Advance Notice of Proposed Rulemaking (ANPRM) in 2007, and a Final Rule in 2010. Taken together, these documents addressed all the NIOSH recommendations for the existing nonagricultural HOs. Because very little substantive information was received, the Department withdrew the ANPRM on February 24, 2010, and no proposed rule will result directly from

that information collection effort. The comments submitted in response to the ANPRM may be reviewed at the Federal eRulemaking Portal at <http://www.regulations.gov>.

In this NPRM, the Department proposes to create two new nonagricultural HOs, one concerning the employment of youth in certain facilities within farm-product raw materials wholesale trade industries, as recommended by NIOSH in its 2002 Report, and another addressing the use of electronic devices, including communication devices, while operating or assisting to operate certain power-driven equipment, including motor vehicles. As discussed later in this preamble, the high incidence of injuries and deaths experienced by workers employed in the farm-product raw materials wholesale trade industries, or who use electronic devices while operating or assisting to operate certain power-driven equipment, warrant the creation of these new HOs.

B. Child Labor Provisions for Employment in Agriculture

The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, since its enactment in 1938, has applied child labor standards to the employment of youth in agriculture that differ from those applied to youth employed in nonagricultural occupations. FLSA section 3(f) defines agriculture as including “farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of [U.S.C.] Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” The Department's regulations at 29 CFR part 780 explain the meaning of these terms, including a description of what constitutes primary agriculture and secondary agriculture under section 3(f).

FLSA section 3(l) defines the term *oppressive child labor* and establishes a minimum age of 16 years for employment, but authorizes the Secretary of Labor (Secretary) to provide by regulation for 14- and 15-year-olds to work in suitable occupations other than

manufacturing or mining during periods and under conditions that will not interfere with their schooling or health and well-being. The FLSA also permits 16- and 17-year-olds to work, without hours or time limitations, except in certain occupations found and declared by the Secretary to be particularly hazardous or detrimental to the health or well-being of such workers.

FLSA section 3(l) also provides a limited parental exemption, which permits a parent or a person standing in place of a parent to employ his or her child or child in his or her custody under the age of 16 years in any occupation other than manufacturing, mining, or an occupation found by the Secretary to be particularly hazardous or detrimental to the health or well-being of children between the ages of 16 and 18 years (*see* 29 CFR 570.126). These provisions have remained relatively unchanged since the adoption of the FLSA and are still applicable to the employment of young workers in nonagricultural occupations.

The FLSA when enacted, however, also included a broad exemption from the child labor provisions for youth under 16 years of age employed in agriculture. FLSA section 13(c) originally stated that the child labor provisions of the Act “shall not apply with respect to any employee employed in agriculture while not legally required to attend school.” Under the original Act, youth of any age could be employed in all phases of agriculture, even hazardous work, whenever the applicable state compulsory school-attendance law did not require the minor to attend school.

The objective of the section 13(c) exemption was to permit agricultural work that otherwise would have been prohibited, only so long as such work did not infringe upon the opportunity of children to obtain an education. But as Secretary of Labor Maurice J. Tobin later reflected in a letter to Congressman Walter Rogers dated November 7, 1951, “[o]ver ten years’ experience with the original provisions proved it to be of little value in achieving this objective.”

Under the exemption, the application of the child labor provisions to agricultural employment varied greatly from state to state depending upon the particular school attendance requirements of each state law. Some states actually amended their school attendance requirements to accommodate the staffing needs of agricultural employers. Other state statutes declared employment in agriculture, in and of itself, a valid excuse for nonattendance of school. In those states, the child labor provisions

of the FLSA gave no protection whatsoever to children engaged in such work. In other states, school officials had such wide discretionary powers to excuse children from school that these officials, in practice, determined the extent of the application and effectiveness of the Federal child labor provisions. Other state school-attendance laws were applied only to the children of parents who were legal residents of the state. In those states, there was no minimum age for the employment of children of migrant workers in agriculture.

Thus, under the original child labor provisions of the FLSA, children under 16 were assured the full opportunity to attend school only in those states where the school-attendance laws were so protective that practically all children under 16 were legally required to attend school for the full term.

Congress addressed this issue in 1949 by amending the FLSA and narrowing the exemption contained in FLSA section 13(c) (63 Stat. 917). This amendment modified the exemption from the child labor requirements with respect to the employment of children in agriculture so that it applied only to periods of time that were outside of school hours *for the school district where the children lived while so employed*. The legislative intent of the amendment was to close the loopholes in the original agricultural provision and foster attendance at school.

In addition, the legislative history indicates that Congress had the transient status of the children of migrant agricultural workers in mind when it revised the exemption. As Senator Paul Douglas of Illinois noted, “[t]his provision permits children to work outside of school hours and during school vacations on any farm, commercial as well as family. But they cannot be hired out to work during school hours for someone who is not their parent. This not only protects the children of migratory laborers from excessive work, but it also encourages states and school districts to get more of the children in school. It thus removes the present discrimination against rural children by giving them the same freedom to attend school which is given to city youngsters” (*see* Congressional Record, 95th Congress, page 12490, August 30, 1949).

The Department recognized that the scope of permitted agricultural employment of minors under 16 years of age after the amendment largely depended upon the interpretation of the phrase “school hours for the school district where such employee is living while he is so employed.” The

Department provided guidance, that was eventually incorporated into 29 CFR 570.123, that “school hours” must generally be determined by the opening and closing of the school for the district which the child attends or would normally attend and the daily hours it is in session (for example, *see* Secretary of Labor Maurice Tobin’s letter of December 20, 1950 to Harold D. Cooley, Chairman of the House of Representatives Committee on Agriculture). It further opined that the phrase “where such employee is living while he is so employed” refers to the physical location where the minor lives at the time of the employment irrespective of whether he or she may be living there temporarily or permanently.

The Department also noted that section 13(c) spoke of school hours “for the school district” rather than for the individual child. Thus, it did not matter whether the youth was home-schooled, attended a private school, or, for whatever reason, did not attend any school. In addition, the application of the provision did not depend upon the individual student’s requirements for attendance at school. For example, if an individual student was excused from his or her studies for a day or a part of a day by the superintendent or school board, the exemption would not apply for that minor if the school was in session during the minor’s excused absence (*Id.*). Nor did the application of the exemption depend upon the availability of classroom facilities for an individual or group of minors. The Department determined “school hours for the school district” to be those that are maintained for the children in the district generally, regardless of a refusal to enroll specially-situated individuals, such as migrant children (*see* Secretary of Labor Maurice Tobin’s letter of December 20, 1950 to Harold D. Cooley, Chairman of the House of Representatives Committee on Agriculture). This guidance provided by the Department in response to the 1949 amendment still applies to the employment of young workers in agriculture today.

Although the 1949 amendment somewhat limited the amount of time hired farm worker youth could be employed, it did nothing to proscribe the types of dangerous or hazardous work such youth could perform when working outside of the hours of the local school district. The hazardous occupations orders (HOs) established by the Secretary pursuant to FLSA section 3(l) only applied to young farm workers when they were already employed illegally—that is, during school hours. In addition, the existing HOs were

specifically designed to address hazards in nonagricultural employment and often had little applicability to farm work.

In 1966, Congress again amended the FLSA and, among other things, authorized the Secretary to create Agricultural Hazardous Occupations Orders (Ag H.O.s) (Pub. L. 89-601, § 203). The newly enacted FLSA section 13(c)(2) stated that “[t]he provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in any occupations that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person.” It is important to note that the amendment created a minimum age of 16 for the permissible performance of hazardous work in agricultural occupations, although 18 remained the minimum age for the performance of hazardous work in nonagricultural employment. This statutory difference remains to this day.

The Department issued an “interim” Hazardous Occupations Order in Agriculture on November 1, 1967, which listed 16 Ag H.O.s (see 32 FR 15479). Secretary of Labor Willard Wirtz, in his statement which accompanied the Order, wrote “[i]n issuing this Order, the Labor Department enters a new field of regulation—safety for youth employed in agriculture. According to the National Safety Council figures, the death rate for agricultural workers is exceeded only by those for miners and construction workers. The agricultural revolution of the past thirty years has mechanized the farm and increased the use of chemicals. Today the farm has many, if not more, hazards than industry.”

The Interim Order was effective from January 1, 1968 to January 1, 1970. The Interim Order was prepared in consultation with farm organizations, farm business groups, farm safety experts, Federal and state government agencies, and agricultural colleges. A public hearing on the Order was held on May 18, 1967 and written and oral comments were received and reviewed.

The Interim Order prohibited the employment of farm workers under 16 years of age in the following activities: handling or using explosives or certain farm chemicals; serving as a flagman for aircraft; driving vehicles on public roads or driving buses; operating, driving, or riding farm tractors or hooking up their power accessories with the motor

running; doing certain jobs on specified farm tilling, handling, harvesting, and processing equipment; operating power post-hole diggers and post drivers; working with power-saws; engaging in timbering operations on trees over a 6-inch diameter; working from ladders or scaffolds at more than 20 feet; working in certain gas-tight enclosures or in silos with their top unloaders in the operating position; and performing any work in confined areas with stud horses, dairy bulls, and boars.

The Interim Order noted that minors under 16 who were employed by a parent or by a person acting in place of a parent on a farm owned or operated by such parent or person were exempt from the Ag H.O.s. It also created an exemption for student-learners under the age of 16 who were enrolled in a bona fide cooperative vocational program in agriculture under certain conditions.

On June 6, 1968, the Department modified the Interim Order to permit 14- and 15-year-olds to drive tractors and operate other farm machinery provided they completed a formal training program in the safe use of such equipment coordinated by the U.S. Department of Agriculture's Federal Extension Service and its cooperative units. The modification was published in the **Federal Register** on June 11, 1968 (see 33 FR 8542). The Interim Order was again amended on June 27, 1969 to permit 14- and 15-year-old vocational-agricultural students to operate tractors and certain other farm equipment after completing training in the safe use of such equipment. This exemption was requested by the Division of Vocational and Technical Education, Office of Education, U.S. Department of Health, Education, and Welfare. This modification was published in the **Federal Register** on July 4, 1969 (see 34 FR 11263).

During the two-year period the Interim Order was in effect, the Department evaluated every activity covered by each of the Ag H.O.s. To assist in this endeavor, the Department hired two nationally recognized experts in the field of agriculture safety and established an Agricultural Advisory Committee of approximately 50 persons representing industry, labor, management, government associations, and youth.

As a result of its extensive review, the Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on October 9, 1969 (34 FR 15655) to amend the agricultural child labor provisions which, at that time, were contained in 29 CFR part 1500. Although the NPRM used the

Interim Order as a template, it did propose certain changes. The major changes involved a proposed reorganization and recombining of the original 16 Ag H.O.s into a more coherent arrangement and a revision of the exemptions provided for vocational-agriculture students and youth who received training from the Federal Extension Service.

The Department published a final rule in the **Federal Register** on January 7, 1970 (35 FR 221), which became effective on February 6, 1970. The Ag H.O.s established by that final rule have never been revised and are identical to the current Ag H.O.s now contained in 29 CFR 570.71. Unlike their nonagricultural counterparts contained in Subpart E of 29 CFR 570, the Ag H.O.s have traditionally been referenced by their regulatory citation, and not by a numbering system such as HO 1, HO 2, etc.

The Ag H.O.s prohibit the employment of otherwise nonexempt hired youth under the age of 16 years in the following agricultural occupations:

(1) Operating a tractor of over 20 power take-off (PTO) horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor (§ 570.71(a)(1)).

(2) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines: corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyor, the unloading mechanism of a nongravity-type self-unloading wagon or trailer, power post-hole digger, power post driver, or nonwalking type rotary tiller (§ 570.71(a)(2)).

(3) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines: trencher or earthmoving equipment, fork lift, potato combine, or power-driven circular, band, or chain saw (§ 570.71(a)(3)).

(4) Working on a farm in a yard, pen, or stall occupied by a bull, boar, stud horse maintained for breeding purposes, sow with suckling pigs, or cow with newborn calf (with umbilical cord present) (§ 570.71(a)(4)).

(5) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than six inches (§ 570.71(a)(5)).

(6) Working from a ladder or scaffold (painting, repairing, or building

structures, pruning trees, picking fruit, *etc.*) at a height of over 20 feet (§ 570.71(a)(6)).

(7) Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper (§ 570.71(a)(7)).

(8) Working inside a fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere; an upright silo within two weeks after silage has been added or when a top unloading device is in operating position; a manure pit; or a horizontal silo while operating a tractor for packing purposes (§ 570.71(a)(8)).

(9) Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 *et seq.*) as Category I of toxicity, identified by the word "poison" and the "skull and crossbones" on the label; or Category II of toxicity, identified by the word "warning" on the label (§ 570.71(a)(9)).

(10) Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord (§ 570.71(a)(10)).

(11) Transporting, transferring, or applying anhydrous ammonia (§ 570.71(a)(11)).

Section 570.71(b) states that in applying machinery, equipment, or facility terms used in § 570.71(1), the Wage and Hour Division (WHD) will be guided by the definitions contained in the current edition of *Agricultural Engineering*, a dictionary and handbook (Interstate Printers and Publishers, Danville, IL). Although the regulations state that copies of this dictionary and handbook are available for examination in Regional Offices of the WHD, this document has been out of publication since at least 1972.

The 1970 Final Rule also expanded and clarified the exemptions to the Ag H.O.s that were established by the Interim Rules. Section 570.72 allowed certain youth to perform work otherwise prohibited by the Ag H.O.s when enrolled in student-learner programs (*see* § 570.72(a)), Federal Extension Service Programs (*see* § 570.72(b)), or vocational agricultural training programs (*see* § 570.72(c)).

A youth enrolled in an agricultural vocational education training program under a recognized state or local educational authority, or in a substantially similar program conducted by a private school, may generally perform limited work otherwise

prohibited by § 570.71(a)(1)–(6) (the first six Ag H.O.s). Such student-learner must be employed under a written agreement which provides that the work of the student-learner in the occupations declared particularly hazardous is incidental to his or her training; that such work shall be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person; that safety instruction shall be given by the school and correlated by the employer with on-the-job training; and that a schedule of organized and progressive work processes to be performed on the job have been prepared. It is unknown how many youth qualify for this exemption. This student-learner exemption is similar to the exemption created for 16- and 17-year-olds by § 570.50(c) that applies to certain nonagricultural hazardous occupations orders. Both exemptions require that the student-learner be enrolled in a formal course of training or study and that the youth be employed under a written agreement that not only limits his or her exposure to hazardous work but details a schedule of progressive training, and provides for the student-learner to safely acquire needed skills.

Section 570.72(b) permits a youth who is at least 14 years of age, who has successfully completed specified training under the auspices of the 4-H, to generally perform agricultural work otherwise prohibited by § 570.71(a)(1) and/or (a)(2), the first two Ag H.O.s, which involve the operation of tractors and certain farm machinery. Minors must document their successful completion of the training by passing both a written and practical exam.

4-H reports on its Web site (<http://www.4-h.org/about/youth-development-organization/>) that it is a youth organization that has more than 6 million young people across America learning leadership, citizenship and life skills. 4-H is the nation's largest youth development organization. The 4-H community includes 3,500 staff, 540,000 volunteers and more than 60 million alumni. 4-H operates under the auspices of the U.S. Department of Agriculture's (USDA) National Institute of Food and Agriculture (NIFA) which was formerly the Cooperative State Research, Education, and Extension Service (CSREES).

Employers wishing to take advantage of the exemption made available for the employment of youth properly trained under the 4-H programs must first obtain and keep on file for each youth a copy of the appropriate *Certificate of Training* (WHD Form WH-5). The certificate must be signed by both the

leader who conducted the training program and the Extension Agent of the Cooperative Extension Service.

Vocational agriculture training students who are at least 14 years of age and have successfully completed one or more training programs specified in § 570.72(c)(1) or (c)(2) may, under certain conditions, perform work otherwise prohibited by § 570.71(a)(1) and/or (a)(2), the first two Ag H.O.s. Minors document their successful completion of the training by passing both written and practical tests described in the regulations. Employers wishing to take advantage of the exemption made available for the employment of youth who have successfully completed the vocational agriculture training described in § 570.72(c) must first obtain and retain a copy of the *Certificate of Training* (WHD Form WH-5), signed by the vocational agriculture teacher who conducted the program.

WHD created and disseminates the Form WH-5, but does not maintain statistics on the number of youth trained under the auspices of the Federal Extension Service (*see* § 570.72(b)) or as vocational agricultural students (*see* § 570.72(c)). The WHD is not involved in the actual delivery of the training, nor does it audit the quality or effectiveness of the training except during an investigation, and then, it does so on a case-by-case basis.

The three programs by which minors may perform certain agricultural work otherwise prohibited by the Ag H.O.s must comport with all the applicable provisions of § 570.72, but otherwise operate relatively independently of the Department. The Department's role in this process has been limited to the issuance of the Form WH-5, the interpretation of and dissemination of the regulatory requirements, and the conducting of investigations to determine the appropriateness of the use of the exemption by individual agricultural employers on a case-by-case basis.

It is important to note that, unlike the student-learner exemption contained in § 570.72(a), the exemptions created for 14- and 15-year-old farm workers through the Federal Extension Service (§ 570.72(b)) and those who have received vocational agriculture training (§ 570.72(c)) do not require extensive or ongoing training. These two exemptions require only that the youth possess a certificate that documents that the required training has been satisfactorily completed. There are no such avenues to immediate and complete exemption from the nonagricultural hazardous

occupations orders available to 16- and 17-year-olds (*see* § 570.50(b) and (c)).

The same 1966 amendments to the FLSA that authorized the Secretary to issue the Ag H.O.s also clarified the parental exemption, addressed the minimum age standards for employment in agriculture, and brought many agricultural workers under the Act's minimum wage provisions for the first time. Under section 3(l) of the Act, children under the age of 16 who are employed by their parents or person(s) standing in place of their parents may be employed at any time and in any occupation other than manufacturing, mining, or an occupation found by the Secretary to be particularly hazardous for youth between the ages of 16 and 18. Section 13(c) of the Act expanded the parental exemption as it applies to agricultural employment in two ways. First, the parental exemption in 13(c)(1)(A) applies not only to youth who are employed by their parents or persons standing in place thereof on a farm that is owned by such individuals, but to youth who are employed by their parents or persons standing in place thereof on farms that are operated by, but not owned by, those individuals. Youth who are working pursuant to this "operated by" exemption must be employed outside of school hours. Second, section 13(c)(2) permits youth who are employed by their parents or persons standing in place thereof on farms owned or operated by those individuals to work in occupations that have been deemed by the Secretary to be hazardous to the employment of children under the age of 16. This exemption is much broader than the parental exemption in nonagricultural employment where the restrictions regarding the employment of youth in the 17 nonagricultural hazardous occupations orders remain until the age of 18.

The parental exemptions in the FLSA, which permit children to be employed by their parents in some otherwise prohibited occupations, were not predicated on the belief that the children of business owners and/or farmers were more physically or mentally advanced, more safety conscious, or in possession of more cautious work habits than their peers. Instead, these exemptions were granted in recognition of, and continue to rely upon, the concept that a parent's natural concern for his or her child's well-being will serve to protect the child. Congress, as evidenced by discussion on the floor of the House of Representatives (*see* Congressional Record, 75th Congress, page 1693, December 16, 1937) intended that the parental exemptions be applied

quite narrowly, limiting their application to parents and those standing in place of a parent.

Accordingly, application of the parental exemption in agriculture has been for over forty years limited to the employment of children exclusively by their parent(s) on a farm owned or operated by the parent(s) or person(s) standing in their place. Any other applications would render the parental safeguard ineffective. Only the owner or operator of a farm is in a position to regulate the duties of his or her child and provide guidance. Where the ownership or operation of the farm is vested in persons other than the parent, such as a business entity, corporation or partnership (unless wholly owned by the parent(s)), the child worker is responsible to persons other than, or in addition to, his or her parent, and his or her duties would be regulated by the corporation or partnership, which might not always have the child's best interests at heart. As Solicitor of Labor Richard F. Schubert advised Congressman Walter B. Jones in his letter of September 12, 1972, "[e]mployment by a partnership or a corporation would not fulfill the [parental] exemption requirement unless the partnership was comprised of the child's parents only or the corporation was solely owned by the parent or parents."

The Department has, for many years, considered that a relative, such as a grandparent or aunt or uncle, who assumes the duties and responsibilities of the parent to a child regarding all matters relating to the child's safety, rearing, support, health, and well-being, is a "person standing in the place of" the child's parent (*see* letter of Charles E. Wilson, Agricultural Safety Officer, Division of Youth Standards of April 7, 1971 to Mr. Floyd Wiedmeier). It does not matter if the assumption of the parental duties is permanent or temporary, such as a period of three months during the summer school vacation during which the youth resides with the relative (*Id.*). This enforcement position does not apply, however, in situations where the youth commutes to his or her relative's farm on a daily or weekend basis, or visits the farm for such short periods of time (usually less than one month) that the parental duties are not truly assumed by that relative. The Department also interprets the term "parent or person standing in the place of the parent" to mean a human being and not an institution or facility, such as a corporation, business, partnership, orphanage, school, church, or a farm dedicated to the rehabilitation of delinquent children.

The Department interprets "operated by" the parent or person standing in the place of the parent to mean that he or she exerts active and direct control over the operation of the farm or ranch by making day-to-day decisions affecting basic income, work assignments, hiring and firing of employees, and exercising direct supervision of the farm or ranch work. A ranch manager, therefore, who meets these criteria could employ his or her own children under 16 years of age on the ranch he or she operates without regard to the agricultural hazardous occupations orders, even if the ranch is not owned by the parent or a person standing in the place of the parent, provided the work is outside school hours.

It is important to note that a child who is exempt from the Ag H.O.s when employed on his or her parent's farm would generally lose that exempt status (not be exempt) when employed on a farm owned or operated by a neighbor or non-parental relative. This is true even if the youth is operating equipment owned by his or her parent.

None of the revisions proposed in this NPRM in any way change or diminish the statutory child labor parental exemption in agricultural employment contained in FLSA section 13(c)(1). The child labor provisions of the FLSA, just like the Act's minimum wage and overtime provisions, apply only when an employment relationship exists between an employer and a young worker. The concept of an *employment relationship, which is the same for agricultural and nonagricultural employment*, is well established under the FLSA and discussed in detail in Chapter 10 of the WHD Field Operations Handbook (FOH), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf and in 29 CFR part 776.

The 1974 FLSA amendments also amended section 13(c) to permit the employment of the following *young hired farm workers* (the term used to describe youth under the age of 16 who do not fall within the parental exemption) to work outside of school hours in non-hazardous agricultural occupations: (1) One who is 14 or 15 years of age; (2) one who is 12 or 13 years of age and employed on the same farm as his or her parent or person standing in the place of his or her parent, or with the written consent of his or her parent or person standing in the place of his or her parent; and (3) one who is less than 12 years of age and employed with the consent of his or her parent or person standing in the place of his or her parent on a small farm where no employee is required to be paid the minimum wage because of the

exception provided by FLSA section 13(a)(6)(A). The Department interprets the term *consent* to mean *written consent*. These provisions remain the basic minimum age standards for agricultural employment. Again, it is important to note that the FLSA provides no similar “take your children to work” exemption for the children of workers employed in nonagricultural employment. Parents cannot waive the nonagricultural child labor provisions for their children unless the parent is the employer; and then, only certain provisions may be waived.

The Fair Labor Standards Amendments of 1977, Public Law 95–151, § 8, added section 13(c)(4). This section allows the Secretary of Labor to consider granting requests for waivers to employers that would permit local minors 10 and 11 years of age to be employed outside of school hours in the hand harvesting of short season crops under certain conditions. The Department issued regulations at 29 CFR part 575 (*Waiver of Child Labor Provisions for Agricultural Employment of 10 and 11 Year Old Minors in Hand Harvesting of Short Season Crops*) in 1978 and a few waivers were actually granted in the early years. But the Department was enjoined from issuing such waivers in 1980 because of issues involving exposure, or potential exposure, to pesticides (*see National Ass’n of Farmworkers Organizations v. Marshall*, 628 F.2d 604 (DC Cir. 1980)). Therefore, no waivers have been granted under FLSA section 13(c)(4) for thirty years.

The Department is committed to ensuring that the agricultural youth employment provisions of the FLSA balance the benefits of employment opportunities with the necessary and appropriate safety protections. Changes in the nature, size, and technology of agricultural workplaces, along with the high incidences of occupational injury and death suffered by agricultural workers of all ages, warrant an ongoing review of the youth employment provisions. Before addressing the changes to the agricultural youth employment provisions the Department is proposing in this NPRM, it is important to discuss the demographics of the young workers impacted by the proposed changes and the occupational safety and health issues they confront.

Because the parental exemption for agricultural employment is so broad, allowing exempt youth to perform any work at any age (except in manufacturing and mining) and at any time of the day, the Federal child labor provisions generally apply only to youth who are hired farm workers. Although

articles and studies concerning young hired farm workers have been issued by many diverse groups, including the Department, the USDA, the Government Accountability Office (GAO), the National Institute for Occupational Safety and Health (NIOSH), the Human Rights Watch, the Farmworkers Justice Fund, Inc., and the Census Bureau, there is consensus that estimating the number of young hired farm workers is difficult because of the gaps in available data. Adequate data concerning younger hired farm workers does not exist.

Some surveys, such as the Current Population Survey (CPS) conducted by the Bureau of Labor Statistics and Census Bureau, exclude all children under the age of 15. The National Agricultural Workers Survey (NAWS), conducted by the Department, only surveys crop production workers—excluding those employed in the raising and care of livestock. Differences in findings also result from different methods of counting children who live and work on their family farms.

But it is known that the number of hired farm workers who are under the age of 16, and thereby subject to the prohibitions of the Ag H.O.s, is relatively small. The USDA’s National Agricultural Statistics Service (NASS) reported that, in 2006, there were approximately 1.01 million hired farm workers, which made up a third of the three million people employed in agriculture in the United States (*see USDA, Profile of Hired Farmworkers, A 2008 Update*, Economic Research Report Number 60). The USDA went on to report that approximately 15.1 percent of those workers, which equates to about 152,500 individuals, were between the ages of 15 and 21 years. Of this number, only a small portion—those under 16 years of age—would be subject to the Federal Ag H.O.s.

The NAWS has reported similar findings which apply only to crop production workers. In addition, NAWS notes that the number of young hired crop workers relative to all hired crop workers is declining. For the period of 1994 through 1997, NAWS reported that 8.62 percent of all hired crop workers were 14 to 17 years of age; that same cohort constituted 3.65 percent of all hired crop workers during the period of 2002 through 2005. Of this number, NAWS reported that only one-quarter were under the age of 16 (*see NAWS Public Data available at <http://www.doleta.gov/agworker/naaws.cfm>*). Unpublished NAWS data reflect that for the period of 2006 through 2009, the percentage for the 14 to 17 cohort had fallen to just below three percent. Using an estimated 1.8 million hired crop

workers, a figure provided by the NAWS, the data suggest that there were about 54,000 young workers aged 14 to 17 working in crop production during 2006–2009 and that 13,500 were under the age of 16 and, thus, subject to the Ag H.O.s, some of whom could qualify for the limited exemptions under § 570.72.

It is important to recognize certain inherent limitations of NAWS. NAWS is a survey rather than a census and workers under the age of 14 years are not interviewed in the NAWS. In addition, NAWS interviewers are required to obtain the employer’s permission to conduct interviews. In recent years, the Department has reported that 65 percent of all growers who employed workers when they were contacted by an interviewer agreed to cooperate with the survey. Information on the demographic characteristics of workers on farms where the growers do not participate is not obtainable. But the data reported by NAWS complements that of the NIOSH Childhood Agriculture Injury Survey (CAIS).

The NIOSH CAIS estimates that, in 2006, there were 14,395 youth under the age of 14 who were directly hired by a farm operator and, of that number, less than 1,800 were reported to have operated a tractor. This number is rather high considering that none of those youth under the current Federal agricultural child labor provisions could legally be employed to operate a tractor unless a parent owned or operated the farm. CAIS also estimates that in 2006, 41,476 youth 14 or 15 years of age were directly hired by a farm operator, and of that number, 7,565 were reported to have operated a tractor as part of their employment. This latter group could legally operate certain tractors only if employed in compliance with the provisions of § 570.72 (this information is unpublished data from the NIOSH 2006 Childhood Agricultural Injury Survey provided by NIOSH and approved by the USDA National Agricultural Statistics Survey on February 26, 2009, available at <http://www.regulations.gov>, docket number WHD–2011–0001). Combining the above two estimates, the data would indicate that there were fewer than 56,000 hired farm workers under the age of 16 in 2006. NIOSH notes that the above estimates do not include contracted farm workers and that they are a head count of youth who did any farm work regardless of the length of employment. The estimates were reported by the farm operator at a single point in time, which could lead to some under-reporting.

Although there is some disagreement as to the numbers of hired farm workers

employed in agriculture, data from a broad variety of sources shows that agricultural work is difficult and dangerous. The National Safety Council's 2009 edition of *Injury Facts* ranks agriculture as our nation's most dangerous industry with 28.6 deaths per 100,000 adult workers (see *Injury Facts 2009 Edition* available at <http://www.nsc.org>). The agricultural industry is broad in terms of occupational categories; the work is often seasonal, meaning that farm workers perform a wide variety of tasks depending on the production cycle. This wide diversity of tasks does not allow specialization among workers and creates special challenges when training and developing a safe agricultural workforce. Not surprisingly, the agriculture, forestry, and fishing sector, which employed less than two percent of the U.S. workforce, accounted for 13 percent of all fatal occupational injuries between 1996 and 2001 (see Loh K, Richardson S [2004]. *Foreign-born Workers: Trends in Fatal Occupational Injuries, 1996–2001*. Monthly Labor Review (June): 42–53, 2004). NIOSH reports on its Web site that in 2008, 456 farmers and farm workers died doing farm work in the U.S., and that every day about 243 agricultural workers suffer lost-work time injuries. About five percent of the injuries result in permanent impairment (see <http://www.cdc/niosh/topics/aginjury>).

For youth, the hazards are also significant. Agriculture has the second highest fatality rate among young workers (aged 15 to 24) at 21.3 per 100,000 full-time equivalents compared to 3.6 per 100,000 across all industries (see *Occupational Injuries and Deaths Among Younger Workers—United States, 1998–2007*. *Journal of the American Medical Association*, 304(1), 33–35 (2010)).

The Bureau of Labor Statistics (BLS) provides data on occupational fatalities for youth under 18 through its National Census of Fatal Occupational Injuries (CFOI), and on nonfatal injuries and illnesses requiring time off from work for recuperation through its Survey of Occupational Injuries and Illnesses (SOII). NIOSH estimates youth injuries for 14- to 17-year-olds based on the National Electronic Injury Surveillance System (NEISS) maintained by the Consumer Product Safety Commission. Using data from the CFOI, the GAO reported that 613 youths aged 17 and under were killed at work from 1992 to 2000, and during each of those years, between 62 and 73 young workers died from injuries sustained while working (see GAO Report 98–193, *Child Labor in Agriculture*, August 1998, pp. 22–23).

GAO reported that, during the 1990s, while only about four percent of all working youth were employed in agriculture, they experienced over 40 percent of the youth occupational fatalities. GAO notes that for these data, the agriculture sector includes not only crop production, agricultural services, and livestock, but forestry and fishing as well.

BLS further reported that agricultural workers aged 15 to 17 have a risk of fatality that is 4.4 times as great as the risk for the average 15- to 17-year-old worker. Moreover, the risk of occupational fatality for these young agricultural workers is about the same as for adults aged 25 to 44 working in agriculture, despite the fact that 15-year-olds are not permitted to perform work in any of the hazardous occupations (see BLS Report on the Youth Labor Force [2000], p. 60 available at <http://www.bls.gov/opub/rylf/rylfhome.htm>).

In analyzing the characteristics of youth occupational fatalities, approximately three-quarters of all deaths to young workers under the age of 15 occurred in agriculture. Where establishment size was reported, ninety percent of the young farm workers killed while working were employed by an agricultural employer with ten or fewer employees (see GAO Report 98–193, *Child Labor in Agriculture*, August 1998, pp. 26–27). In addition, BLS found that fatalities among young people working in agriculture are most likely to occur among the very youngest workers. BLS also reports that about three-fourths of occupational fatalities in self-employed jobs were in agriculture and more than half the deaths in agriculture occurred in family businesses (see BLS Report on the Youth Labor Force [2000], p. 58).

The deaths of agricultural workers, both young and adult, occurred primarily in crop production and often involved motor vehicles. NIOSH reports in its Science Blog *Preventing Death and Injury in Tractor Overturns with Roll-Over Protective Structures*, available at http://www.cdc.gov/niosh/blog/nsb010509_rops.html, that tractor overturns are the leading cause of occupational agricultural deaths in the United States. “Between 1992 and 2005, 1,412 workers on farms died from tractor overturns.” David Hard and John Myers have reported similar findings involving young agricultural workers, noting that machinery and vehicles were the primary sources of fatalities, each accounting for 38% of the deaths. “However, tractors were the single largest source of fatalities, accounting for 42.9% of the vehicle deaths and 17.6% of all deaths to the youngest of

the young agricultural workers” (see Hard D, Myers J, [2006]. *Fatal Work-Related Injuries in the Agriculture Production Sector Among Youth in the United States, 1992–2002*. *Journal of Agromedicine*, Vol. 11(2), available at <http://ja.haworthpress.com>).

The most common cause of occupational deaths among young agricultural workers, according to the BLS, was from farm machinery. Nationally, between 1992 and 1997, nearly a third of the deaths of youth in agriculture could be attributed to involvement with tractors—in about half of these cases, the tractor overturned on the youth (see BLS Report on the Youth Labor Force [2000], p. 60). These statistics are compelling, given that Department of Labor regulations, with some exceptions, prohibit hired farm workers under the age of 16 from operating a tractor of over 20 horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.

The data regarding agricultural injuries to young farm workers are just as bleak as those for fatalities. Farm workers experience a high incidence of work-related injuries and these injuries tend to be more severe than those suffered by nonagricultural workers. The SOII reported that the rate of all injuries and illnesses in agriculture in 1997 was 8.4 per 100 workers. This rate was higher than any other industry except manufacturing and construction. In its study of farm injuries to youth, NIOSH estimated that working youth under 20 years of age suffered 14,590 farm injuries in 1998. Of that number, 2,127 were experienced by hired farm workers. NIOSH notes that the leading causes of these injuries were falls, off-road transportation incidents, and being struck by objects (see NIOSH publication 2004–172 *Injuries Among Youths on Farms in the United States 1998*, page 10, available at <http://www.cdc.gov/niosh/childag/pdfs/2001154.pdf>).

In addition, the exposure of young workers to pesticides is a serious and widespread concern for young agricultural workers. The health effects of pesticides on children, as opposed to the adult worker population, have not been adequately studied and data is limited. NIOSH cites some studies that suggest children exposed to pesticides may suffer chronic problems relating to stamina, hand-eye coordination, and cognitive ability (see NIOSH Report, page 95).

The demographics of hired farm workers under 16 years of age are such that they are relatively few in number, but work in an industry with one of the

highest incidences of occupational fatalities and of injuries and illnesses involving days away from work, according to the BLS (*see* Report on the Youth Labor Force, p. 56). Although these incidences exceed those of experienced young workers employed in nonagricultural sectors, they are significantly fewer than those experienced by their peers who are not hired farm workers but perform work on their families' farms. NIOSH, in its *NIOSH Childhood Agricultural Injury Prevention Initiative, Progress and Proposed Future Activities* [2009], p. 8, available at <http://www.cdc.gov/niosh/review/public/145/>, notes that "[y]outh living on farms accounted for the most farm injuries in 2006 (approximately 11,800 injuries), followed by visitors (approximately 5,600 injuries), and hired workers (approximately 1,400 injuries)."

As mentioned above, the Department has been conducting an ongoing review of the criteria for permissible child labor employment. Because of changes in agricultural workplaces, the high incidences of occupational injury and death occurring in agriculture, and the introduction of new processes and technologies, the review of the agricultural child labor provisions is of heightened importance. Part of this review includes a comparison of the child labor provisions established for agricultural employment and those established for nonagricultural employment. The Department believes that several of the prohibitions established by Child Labor Regulation No. 3 (Subpart C of 29 CFR 570, §§ 570.31–.37) to ensure the safe employment of youth 14 and 15 years of age in nonagricultural employment could positively impact the employment of hired farm workers of that same age group.

In furtherance of that review, as discussed earlier in this preamble, the Department provided funds to NIOSH in 1998 to conduct a comprehensive review of scientific literature and available data in order to assess current workplace hazards and the adequacy of the current youth employment HOs to address them. The NIOSH Report makes 14 recommendations concerning the existing agricultural hazardous occupations orders (Ag H.O.s). The Department proposes, in this NPRM, to address all 14 of the NIOSH recommendations concerning the Ag H.O.s. The Department is continuing to review all of the remaining NIOSH Report recommendations. Their absence from this current round of rulemaking is not an indication that the Department believes them to be of less importance

or that they are not being given the same level of consideration as the recommendations addressed in this NPRM.

C. The Assessment of Child Labor Civil Money Penalties

The Fair Labor Standards Amendments of 1974 (Pub. L. 93–259, 88 Stat. 55) amended section 16 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 216, to provide for the imposition of civil money penalties for violations of the child labor provisions. The amendments provided that "[a]ny person who violates the provisions of section 12, relating to child labor, or any regulations issued under that section, shall be subject to a civil money penalty not to exceed \$1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered." This process of assessing civil money penalties is the same whether the youth is employed by an agricultural employer or a nonagricultural employer.

Prior to the enactment of these provisions, the Secretary enforced the child labor provisions primarily through actions for injunctive relief and criminal sanctions. Child labor civil money penalties were implemented, as reported by the Supreme Court in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 244 (1980), because Congress, having found injunctive relief "to be an inadequate or insufficiently flexible remedy for violations of the law," amended the FLSA accordingly.

The Department published proposed rules in the **Federal Register** on December 26, 1974 that created the original parts 579 and 580 of Title 29 (*see* 39 FR 44702). Final Rules governing the child labor civil money penalty assessment process were published in the **Federal Register** on June 18, 1975 (*see* 40 FR 25792) and became effective on July 18, 1975.

Part 579 describes the violations for which civil money penalties may be imposed, establishes rules for the issuance of notices of penalty assessments, delineates the factors to be considered by the Secretary or the Secretary's authorized representative in determining the amount of the penalty, and outlines the methods provided by the Act for collection of the civil money penalties after their final determination. In addition to the statutory requirements regarding the size of the business of the person charged and the gravity of the violation, part 579 also lists other related factors that WHD shall consider

when determining the amount of the civil money penalty and assessing that penalty.

These other factors, which are detailed in § 579.5(d), include: The investigation history of the person charged and the degree of willfulness involved in the violation; whether the violation is de minimis; whether the person so charged has given credible assurance of future compliance; whether the person so charged had no previous history of child labor violations; whether the violations themselves involved intentional or heedless exposure of any minor to any obvious hazard or detriment to the child's health or well-being; whether the violations were inadvertent; and whether a civil penalty under the circumstances is necessary to achieve the objectives of the FLSA. The Department is not proposing to change any of the above regulatory considerations.

Part 580 sets forth the rules of practice governing administrative proceedings to be conducted when exceptions to notices of penalty are filed. These proceedings, as required by the Act, afford an opportunity for hearing in accordance with section 554 of Title 5, United States Code, before an administrative law judge. This part remains in effect today, although it has been updated over the years to incorporate the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary of Labor at 29 CFR part 18, and to accommodate the administrative processing of civil money penalties assessed because of repeated and/or willful violations of FLSA sections 6 and 7. As noted above, the Department's procedures for assessing and processing child labor civil money penalties have also remained the same regardless of whether the violations occurred in agricultural or nonagricultural employment.

Congress has authorized increases in the maximum amounts of child labor civil money penalties that may be assessed under the FLSA three times. The Omnibus Budget Reconciliation Act of 1990, Public Law 101–508, § 3103, increased the amount of the maximum civil money penalty that may be assessed for each child labor violation from \$1,000 to \$10,000. The Department applied the \$10,000 maximum penalty to assessments for violations that occurred after November 5, 1990. Second, the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), authorized the Department to increase the maximum civil money penalty that may be assessed for each

child labor violation to \$11,000, which it did effective January 7, 2002 (*see* 66 FR 63501, December 7, 2001). Third, Congress enacted the Genetic Information Nondiscrimination Act of 2008 (GINA) (Pub. L. 110-233, 122 Stat. 881), which amended FLSA section 16(e) to incorporate into the statute the \$11,000 maximum penalty per violation that the Department had administratively adopted in 2002. GINA also allows for a civil money penalty of up to \$50,000 for each child labor violation that causes the death or serious injury of any employee under the age of 18, and provides that such penalty may be doubled—up to \$100,000—when that violation is determined to be repeated or willful.

When the FLSA was first amended to authorize the assessment of civil money penalties for violations of the Act's child labor provisions in 1974, the Department developed the Child Labor Civil Money Penalty Report (Form WH-266) as a tool for managers to use when determining the initial amount of child labor civil money penalties that could be assessed an employer for violations. This "grid-like" document took into consideration both the statutory and regulatory factors contained in § 579.5 that WHD is required to take into account when making assessments. After manually completing the grid, the WHD manager making the assessment conducted a final review of the initial assessment and, if necessary, using his or her discretion, adjusted the initial assessment amount to ensure it comported with both the FLSA and the applicable regulations.

The WH-266 became a part of the investigation file and employers were able to review the document during the administrative procedure authorized by part 580. The WH-266 became an important element of the assessment process that helped to ensure WHD's child labor civil money penalty assessments comported with both the FLSA and the applicable regulations, and it was recognized as such by administrative law judges, the Department's Administrative Review Board (ARB), and Federal courts. For example when affirming a decision of the Department's ARB a Federal district court stated, "[l]ike the ARB, the Court finds that Form WH-266 incorporates the mandatory regulatory factors into its penalty schedule, and consequently is appropriately utilized to calculate penalties for child labor violations." *Thirsty's, Inc. v. United States Department of Labor*, 576 F. Supp. 2d 431, 436-37 (S.D. Tex. 1999).

WHD discontinued the manual completion of the WH-266 in 1999

when it implemented a new electronic information management system. Since that implementation, the WHD investigator enters the violation data and investigation findings into the system and the supervising manager then uses the system to generate a condensed version of the WH-266. Thus, WHD continues to apply the principles and mandatory mitigating and/or aggravating factors to determine appropriate amounts of child labor civil money penalties during the assessment process. The initial civil money penalty amounts generated by the "old" grid and the new computerized format are identical, and they comport with the requirements of the FLSA and the applicable regulations.

Except for the incorporation of increases in the maximum amounts of civil money penalties WHD was authorized to assess as directed by Congress, and the migration from the manual completion of the WH-266 to an electronic platform, the process WHD uses to determine the amount of the penalties has not varied since 1974. Enactment of GINA, effective May 21, 2008, impacted the assessment of child labor civil money penalties in several ways. First, as noted above, it incorporated into the statute the \$11,000 maximum penalty per violation that the Department administratively adopted in 2002. Secondly, GINA allows for a significantly higher civil money penalty for each child labor violation that caused the death or serious injury of any employee under the age of 18, and such penalty may be doubled when that violation is determined to be repeated or willful.

GINA also, for the first time, authorizes the assessment of a civil penalty for a child labor violation that caused the death or serious injury of any employee under 18 years of age—even when the minor who was killed or seriously injured was not the minor whose employment was in violation of the FLSA (29 U.S.C. 216(e)(1)(A)(ii)). For example, if a 16-year-old was illegally employed to drive a truck in violation of Hazardous Occupations Order No. 2 (§ 570.52) (*Occupation of motor-vehicle driver and outside helper*), and was involved in an accident that resulted in the death of his 17-year-old co-worker who was riding in the vehicle as a passenger at that time, WHD could assess a child labor civil money penalty under GINA because the violation involving the employment of the 16-year-old caused the death of an employee under the age of 18. That penalty could be as high as \$50,000, and could be doubled, up to \$100,000, if WHD determined the violation was

repeated or willful. The Department incorporated the statutory provisions of GINA into parts 570 and 579 via a Final Rule published on May 20, 2010 (*see* 75 FR 28444).

Shortly after the enactment of GINA, the WHD amended its child labor civil money penalty process to accommodate GINA. Civil money penalty assessments have been made under this new process for over two years. On January 20, 2010, WHD issued Field Assistance Bulletin (FAB) 2010-1, *Assessment of Child Labor Civil Money Penalties*, to advise the public of WHD's child labor civil money assessment process. This document, which is available on WHD's Web site, at <http://www.dol.gov/whd/FieldBulletins/index.htm>, describes the criteria used by the WHD's electronic information management system and the assessing official to determine the amount of the civil money penalty.

III. Proposed Regulatory Revisions—General

As discussed in Section IV, the Department is proposing the creation of two new nonagricultural hazardous occupations orders: *Occupations in farm-product raw materials wholesale trade industries (HO 18)* and *The use of electronic devices, including communication devices, while operating power-driven equipment (HO 19)*.

The Department is also proposing to revise § 570.2(b) to clarify the Department's regulations. Section 570.2(b), as currently written, notes that a minor 12 or 13 years of age may be employed in agriculture to perform nonhazardous work outside of school hours with the written consent of his or her parent or person standing in place of the parent, or may work on a farm where the parent or such person is also employed. That section also states that a minor under 12 years of age may be employed with the consent of a parent or person standing in place of a parent on a farm where all employees are exempt from the minimum wage provisions by virtue of FLSA section 13(a)(6)(A). The Department has always interpreted the term *consent*, as it applies to all hired farm workers under the age of 14 years, to mean *written consent*. This interpretation is supported by § 579.3(b)(3)(ii)(A) and (4)(ii) which, when listing the violations for which child labor civil money penalties may be assessed, requires that the parental consent for all hired farm workers under 14 years of age be in writing. In order to provide clarification, the Department proposes to revise § 570.2(b) by changing *consent* to *written consent*. In addition, the proposal changes the cross-reference

from Subpart E-1 to Subpart F, as discussed below.

The Department is proposing to redesignate the current Subpart E—Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16—as Subpart F, which is currently *reserved*. The Department is also proposing to redesignate and revise all three sections of the current Subpart E-1: § 570.70, which addresses the purpose and scope of the subpart; § 570.71, which contains the current Ag H.O.s; and § 570.72, which contains the existing exemptions that permit certain 14- and 15-year-old hired farm workers to perform certain otherwise prohibited work. Because the Department proposes to place the section addressing exemptions from the Ag H.O.s before the actual Ag H.O.s, as is done in Subpart E of 29 CFR part 570 dealing with the nonagricultural hazardous occupations orders, the revisions to § 570.72 will be discussed before § 570.71. As all the Ag H.O.s share the identical regulatory inception and history which was discussed earlier in this preamble, the Department will not repeat that history when discussing the proposed revisions to the individual Ag H.O.s. In addition, the Department proposes to number each of the Ag H.O.s in a manner similar to the system used for the nonagricultural hazardous occupations orders.

The Department is also proposing to revise § 570.123 of Subpart G—*General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended*, to incorporate the changes to the agricultural child labor provisions since the last revision of that subpart.

Finally, the Department is including in this proposed rulemaking revisions to part 579, *Child labor violations—civil money penalties*, to provide additional transparency to its child labor civil money penalty assessment process by incorporating the most significant provisions of the Wage and Hour Division's Field Assistance Bulletin 2010-1.

IV. Proposed Regulatory Revisions—Nonagricultural Hazardous Occupations Orders—29 CFR Part 570

A. Farm-Product Raw Materials Wholesale Trade Industries

The NIOSH Report recommends that the Department establish a new nonagricultural HO prohibiting the employment of youth under 18 years of age in the farm-product raw materials wholesale trade industry, Standard Industrial Code (SIC) 515 (see Report, page 112). NIOSH notes that “[w]orkers

in the farm-product raw materials industry have high rates of work-related fatalities. Work in this industry presents a wide range of hazards, including grain entrapments, rail and vehicle accidents, and contact with large animals. Many of the hazardous activities in this industry are equivalent to tasks currently prohibited for youth working in other industry sectors such as agricultural production” (see Report, page 112). NIOSH does not recommend that the Department provide exemptions from this proposed HO for student-learners or apprentices because of the diversity of hazards in these industries.

The farm-product raw materials wholesale trade industry classification (SIC 515) is quite broad and contains three subdivisions or sub-classifications. SIC 5153, *Grain and Field Beans*, covers establishments primarily engaged in the buying and/or marketing of grain (such as corn, wheat, oats, barley, and unpolished rice); dry beans; soy beans, and other inedible beans. Also included in SIC 5153 are country grain elevators primarily engaged in buying or receiving grain from farmers, as well as terminal elevators and other merchants marketing grain.

SIC 5154, *Livestock*, covers establishments primarily engaged in buying and/or marketing cattle, hogs, sheep, and goats. Also included in SIC 5154 are establishments that operate livestock auction markets.

SIC 5159, *Farm-Product Raw Materials, Not Elsewhere Classified*, involves establishments primarily engaged in buying and/or marketing farm products, not contained in the other two sub-classifications.

Not included in SIC 515 are establishments primarily engaged in the wholesale distribution of field and garden seeds, milk, or live poultry.

Since the publication of the NIOSH Report, the Bureau of Labor Statistics (BLS) has shifted away from using Standard Industrial Codes and now uses North American Industry Classification System (NAICS) industry identifiers. Because the SIC and NAICS industry groupings may differ somewhat, comparing industry injury and fatality data compiled using SICs with that using the NAICS is sometimes problematic and often requires explanation.

The NIOSH Report notes (see Report, page 112) that the farm-product raw materials wholesale trade industry classification (SIC 515) had a lifetime risk of fatal occupational injuries of 5.7 per 1,000 full-time workers for the years 1990–1991. In its publication entitled *Fatal Injuries to Civilian Workers in the United States, 1980–1995* (available at

<http://www.cdc.gov/niosh/docs/2001-129/pdfs/ntof2fbc.pdf>), NIOSH reports that the national incidence rate (per 100,000 workers) of traumatic occupational fatalities in this industry classification was 4.6 in 1990 and 4.5 in 1991. NIOSH also states that the Census of Fatal Occupational Injuries (CFOI) identified 86 fatalities among workers of all ages in the farm-product raw materials industry classification for the years 1992–1997, with an industry fatality rate of 17.5 per 100,000 workers (see NIOSH Report, page 112). CFOI reports that the farm-product raw material merchant wholesalers industry—NAICS industry 4245—experienced 14 deaths in 2005, 12 deaths in both 2006 and 2007, and 10 deaths in 2008 (data available at <http://www.bls.gov/iif/oshcfoi.htm>). The most common fatality events for this industry, as noted in the NIOSH Report (see Report, page 112), were being caught in or crushed by collapsing materials, most often grain or beans, and highway accidents, usually involving tractor trailers. In a paper presented to the Department on February 10, 2011, Bill Field, Ed.D, and Steve Riedel of Purdue University advised that there were no less than 51 separate grain entrapments in 2010 with 51% of the cases resulting in death. This is the highest number of cases ever recorded in a single year. Six of the incidents (12% of the total) involved youth under the age of 16 (see Field B, Riedel S, [2011]. 2010 Summary of Grain Entrapments in the United States available at <http://www.regulations.gov>, docket number WHD-2011-0001). The number of occupational fatalities that occurred in cattle feed lots or feed yards (NAICS industry 112112), as reported by CFOI, was also quite large—totaling 18 for the years 2006–2009 (data available at <http://www.bls.gov/iif/oshcfoi1.htm>).

Workers in the farm-product raw materials wholesale trade industry (SIC 515) also experienced a high level of nonfatal injuries and illnesses requiring days away from work—NIOSH reported an estimated 2,320 of these injuries in 1997 (see NIOSH Report, page 112). BLS reports that this industry, as NAICS industry 4245, experienced an incidence of injury and illness rate of 6.4 per 100 full-time workers in 2008. The national rate for all private industry that year was only 3.9 (see Incidence rates—detailed industry level—2008 available at <http://www.bls.gov/iif/oshwc/osh/os/ostb2071>).

Livestock auctions are an integral part of NAICS 4245, along with grain elevators and other wholesalers of farm-product raw materials. The NIOSH Report specifically recommended that

youth not be employed in livestock auction operations, noting the hazards associated with contact with large animals.

NIOSH reports that, similar to farmers and farm workers, “workers in the wholesale trade of farm-product raw materials, such as grains and livestock, are exposed to a variety of organic and inorganic dusts and substances associated with adverse health effects. Grain dust may contain many substances, including vegetable products, insect fragments, animal dander, bird and rodent feces, pesticides, microorganisms, endotoxins, and pollens. The most serious respiratory effects associated with grain handling include farmer’s hypersensitivity pneumonitis (farmer’s lung), silo filler’s disease [], organic dust toxic syndrome, and other inflammatory and asthma-like respiratory disorders” (see NIOSH Report, pages 112–113).

NIOSH also references a review of worker’s compensation data in Washington State that found the wholesale trade industry in farm product raw materials to have one of the ten highest incidence rates of occupational skin disorders (see NIOSH Report, page 113). NIOSH notes “[o]ther hazards to workers in this industry include exposures to pesticides. Pesticides, in addition to being used on grain in the field, are also applied to harvested grain during storage and transport. Dust generated by abrasion from grain handling operations is composed primarily of the outer layer of the grain kernels, where pesticides have been applied. Grain dust has been shown to have a higher concentration of pesticide residue than is found in bulk grain []. Pesticide exposure is associated with acute and long-term health risks, and developing adolescents may have increased risk of adverse health outcomes” (*Id.*).

The injury rates for workers in beef cattle ranching and farming, which includes feedlots (NAICS industry 112112), was reported by BLS to be 9.4 per 100 full-time workers in 2006, 8.7 per 100 full-time workers in 2007, and 7.2 per 100 full-time workers in 2008 (data available at <http://www.bls.gov/iif/oshsum.htm#08Summary%20Tables>). These incidence rates are almost twice the national average for all private industry during the sample years. The 2008 injury rate for workers in *support activities for transportation* (NAICS 4889), which includes stockyards primarily involved with the transportation of animals and not the fattening of animals, was 8.9 per 100 full-time workers (data available at <http://www.bls.gov/iif/>

[oshsum.htm#08Summary%20Tables](http://www.bls.gov/iif/oshsum.htm#08Summary%20Tables)). This rate is, again, more than twice the national private industry rate of 3.9 per 100 full-time workers.

The enforcement experience of the Department’s WHD is consistent with the fatality and injury data discussed above. In 2010, WHD investigated the death of a 14-year-old and a 19-year-old who were employed by a grain elevator enterprise in Illinois. The youth, who were working inside of a large bin used to store corn, died when they were engulfed by corn. In 2009, the WHD investigated an employer that operates large grain elevators in Colorado after the death of a 17-year-old who was engulfed in grain. Since 2000, the WHD has investigated at least 13 such establishments, and several of these investigations were initiated because of the death or injury of a working minor. Investigations of youth employed by feed lots and animal auctions have also been conducted.

The Department most recently has investigated the serious injury of a 15-year-old female who was pressed against a metal corral by a stampeding calf. The minor was employed to herd livestock in and out of pens in preparation for sale and/or transport. The young worker, who was knocked down and then stomped by hooves, suffered a life-threatening laceration of her liver, broken ribs, a cracked femur, and a crushed bile duct. Complications arising from her injuries prolonged her hospital stay to over five weeks. The injured minor’s employment by the livestock auction was already prohibited by CL Reg. 3,—which applies to the nonagricultural employment of 14- and 15-year-olds—because such employment is not specifically permitted by the regulations (see § 570.32) and because it involved the transportation of property by rail, highway, air, water, pipeline, or other means (see § 570.33(n)(1)). The Department, in this NPRM, is proposing to extend these same protections to minors who are 16 or 17 years of age.

WHD’s enforcement experience has been that the workforces at many farm-product raw materials wholesale trade industry establishments tend to be small, often seasonal, and therefore, the nature of the work does not encourage specialization of tasks. The few workers at each establishment tend to do all the tasks. This is especially true for livestock auction establishments as reflected in the Census Bureau findings that NAICS Code 42452 (Livestock Merchant Wholesalers) is composed of only 1,100 establishments with approximately 7,841 employees (see U.S. Census Bureau Industry Statistics

Sampler available at: <http://www.census.gov/econ/census02/data/industry/E424520.HTM>).

With an average workforce of less than 8 workers per establishment, workers in this industry—other than auctioneers and managers—must by necessity perform a variety of tasks. Such tasks include unloading livestock from all types of transportation media, penning the livestock, overseeing the safety of the livestock, separating the livestock for presentation, handling the livestock, loading the livestock onto transportation media. In addition to the obvious risks livestock auction employees face, issues arise from working with and around horses, fork lifts, exposures to biohazards, and increased incidences of sprains/strains and overexertion. As NIOSH noted for all industry segments contained in SIC 515 (see NIOSH Report, page 112), livestock auctions combine aspects of two of the most dangerous industries for youth employment—agriculture and transportation.

The fact that employees of this industry routinely perform a variety of tasks is also evidenced by the number and types of child labor violations that the WHD has documented at grain elevators, feed lots, and animal auctions. WHD has found minors employed within the farm-products raw materials wholesale trade industry working on or in proximity to roofs (in violation of HO 16); operating several types of power-driven woodworking machines (in violation of HO 5); operating several types of power-driven hoisting apparatus, such as forklifts, manlifts, skid loaders, and back hoes (in violation of HO 7); and driving automobiles, trucks, and tractor-trailers (in violation of HO 2). In addition, youth under the age of 16 have routinely been found in these establishments performing work that is prohibited by the occupation standards of Child Labor Regulation No. 3.

The Department is proposing the creation of a new § 570.69 entitled *Occupations in farm-product raw materials wholesale trade industries (Order 18)*. This proposed HO would prohibit the employment of 16- and 17-year-olds in all occupations in farm-product raw materials wholesale trade industries, and because so many of the occupational injuries and deaths associated with the farm-product raw materials wholesale trade industries are truck and/or transportation related (see NIOSH Report, page 112), the Department proposes to define these industries quite broadly.

The term *all occupations in farm-product raw materials wholesale trade*

industries would include all work performed in conjunction with the storing, marketing, and transporting of farm-product raw materials listed in Standard Industrial Codes 5153, 5154 and 5159. The term would include, but not be limited to, occupations performed at such establishments as country grain elevators, grain elevators, grain bins, silos, feed lots, feed yards, stockyards, livestock exchanges, and livestock auctions. The term would not include work performed in packing sheds where employees clean, sort, weigh, package and ship fruits and vegetables for farmers, sales work that does not involve handling or coming in contact with farm-product raw materials, or work performed solely within offices.

It is important to note that in those rare instances when the farm-products raw material trades wholesale industry establishments are *agricultural* in nature—such as when the feed lot or the grain elevator is operated on a farm by a farmer and handles only livestock or grain produced by that farmer—the young employees of those establishments would generally be subject to the agricultural child labor provisions contained in FLSA sections 13(c)(1) and (2) and the agricultural hazardous occupations orders.

The Department is not proposing an exemption from this HO for student-learners or apprentices.

B. The Use of Electronic Devices, Including Communication Devices, While Operating Power-Driven Machinery

The Department is aware of the growing concern among safety and health experts; Federal, state and local governments; representatives of the insurance industry; parents; and youth advocates over the increased use of wireless electronic communication devices by individuals while operating motor vehicles and other power-driven equipment. The National Safety Council estimates that 28% of all motor vehicle crashes—1.6 million crashes per year—can be attributed to cell phone talking and/or texting while driving (see http://www.nsc.org/safety_road/Distracted_Driving/Pages/distracted_driving.aspx). The Insurance Institute for Highway Safety notes that “[l]aboratory, simulator, and test-track experiments have shown that talking on a cell phone reduces a driver’s reaction time, thus increasing crash risk” (see *Cellphone Use While Driving and Attributable Crash Risk*, available at <http://www.iihs.org>). The U.S. Department of Transportation (DOT) has reported that “the younger,

inexperienced drivers under 20 years old have the highest proportion of distraction-related fatal crashes” (see <http://www.distraction.gov/stats-and-facts>).

Many states are addressing the issue of *distracted driving*. DOT, citing data from the National Council of State Legislatures, reports that as of September 21, 2010, at least 30 states have enacted laws that ban texting while driving, and 26 of those states consider such offenses to be *primary* offenses—actions of sufficient gravity to merit law enforcement intervention (see <http://www.tvworldwide.com/events/rita/100921>).

Although much attention is focused on the use of cell phones while driving automobiles under the banner of *distracted driving*, the problem is much larger, encompassing other types of electronic devices and other power-driven machines. The Department believes that employees, and especially young employees, face similar dangers to their health and well-being when using electronic devices, including communication devices, while operating or assisting in the operation of certain power-driven machinery that is not generally within the classification of *motor vehicle*. Such power-driven equipment as woodworking machines; hoisting machines such as forklifts, backhoes, manlifts, cranes, and work assist platforms; metal forming, punching, and shearing machines; machine tools; and highway construction and excavation equipment all require a level of concentration and continuous safety consciousness that could be compromised by the use of an electronic device. The Department’s concerns are echoed in two recent documents issued by warehouse and distribution center trade associations. In an April 2, 2010 press release issued by the Distribution Center entitled *Is It Time for a No-Cell Phones Rule for Warehouse Forklift Drivers? Safety Expert Says, “Yes”*, distracted forklift drivers are called a distribution center “accident waiting to happen” (see <http://www.distributiongroup.com/press040110.php>). In addition, Joseph Hrinik notes in an April 29, 2008 newsletter issued by ForkliftAction that the common problems associated with using a cell phone while driving—reduced tactile dexterity and driver distraction—are even greater hazards in the “forklift environment” (see http://www.forkliftaction.com/news/forklifts_news_international/MaterialsHandling_5558.aspx).

In addition, workers of all ages are at risk when they drive motor vehicles or operate power-driven equipment when

using earphones or earbuds to listen to electronic devices. In an article entitled *Dangers of Driving with Earphones* (available at <http://ezinearticles.com/?Dangers-of-Driving-With-Earphones&id=4886075>), Denise M. McClelland notes that “driving any vehicle, using earphones, presents many risks, and is illegal in most states. The most obvious reason this is dangerous is that you cannot hear what is happening around you. With headphones on, it becomes very hard to hear emergency vehicles, and other cars that honk to alert you of a pedestrian, another vehicle or potential hazards.” The Department believes that it is equally important that young workers not wear headphones or earbuds to listen to electronic devices when operating power-driven equipment in order to be aware of their surroundings and maintain an appropriate level of safety consciousness.

The Department is proposing to revise § 570.70 and create a new nonagricultural HO entitled *The use of electronic devices, including communication devices, while operating power-driven equipment (Order 19)*. To accommodate this new nonagricultural HO, the Department is proposing to redesignate §§ 570.70–.72 as §§ 570.97–.99 and reserve §§ 570.71–.96. The Department, as discussed later in this preamble, is also proposing similar revisions to the agricultural hazardous occupations orders.

This proposal would prohibit the use of electronic devices, including communication devices, while operating or assisting to operate power-driven equipment. The term *use of electronic devices, including communication devices*, would include, but not be limited to, such things as talking, listening, or participating in a conversation electronically; using or accessing the Internet; sending or receiving messages or updates such as text messages, electronic mail messages, instant messages, “chats,” “status updates,” or “tweets;” playing electronic games; entering data into a navigational device or global positioning system (GPS); performing any administrative functions; or using any applications offered by the communication devices. The Department does not intend to prohibit listening to music or other recorded information on a one-way, non-interactive device such as a radio or iPod™ as long as the device is being operated “hands free” without headphones or earbuds. The proposal would not prohibit a minor from glancing at or listening to a navigational device or GPS that is secured in a

commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device or GPS either before driving or when the vehicle is parked. In addition, the Department does not intend to prohibit the use of a cell phone or other device to call 911 in emergencies; nor does it wish to discourage young workers from using appropriate hearing protection when required by the nature of the job and/or Federal or state occupational safety and health rules or regulations.

The term *power-driven equipment* would include any equipment operated by a power source other than human power, that is designed for: (1) The movement or transportation of people, goods, or materials; (2) the cutting, shaping, forming, surfacing, nailing, stapling, stitching, fastening, punching, or otherwise assembling, pressing, or printing of materials; or (3) excavation or demolition operations.

The term *operating power-driven equipment* would include such duties as supervising or controlling the operation of such machines; setting up, adjusting, repairing, oiling, or cleaning the machine; starting and stopping the machine; placing materials into or removing them from the machine; or any other functions directly involved with the operation of the machine. In the case of power-driven equipment used for the moving or transporting of people, goods, or materials, it would not matter if the equipment is operated on public or private property. *Operating power-driven equipment* would not include periods of time when the machine is not being powered (when it is turned off), and in the case of a motor vehicle, is parked.

The Department is not proposing an exemption from this nonagricultural HO for student-learners or apprentices.

V. Proposed Regulatory Revisions—Agricultural Hazardous Occupations Orders—29 CFR Part 570

A. Purpose and Scope (29 CFR 570.70)

As discussed above, the Department is proposing to revise and redesignate the current §§ 570.70, 570.71, and 570.72 as §§ 570.97, 570.98, and 570.99, respectively. It also proposes to create, and mark as *reserved*, §§ 570.71 through and including § 570.96. The Department is proposing to change the title of paragraph (b) of the current § 570.70, which is currently *Exception*, to *Parental Exception* in order to more accurately reflect the content of that paragraph. In subparagraph (c) of that section, the Department proposes to revise the definitions of the terms

agriculture and *employer* to reflect statutory amendments to the FLSA enacted after the Ag H.O.s were published.

In the proposed definition of *agriculture*, which is taken from section 3(f) of the FLSA, the phrase “section 15(g) of the Agricultural Marketing Act” would be replaced by “section 1141j(f) of [U.S.C.] Title 12”, which is the current citation to the Agricultural Marketing Act’s definition of “agriculture” as codified in the United States Code. In the definition of *employer*, the Department proposes to revise the definition to include public agencies in accordance with the Fair Labor Standards Act Amendments of 1966, as reflected in section 3(d) of the Act. That definition is proposed to read as follows: “*Employer* includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of an officer or agent of such labor organization.”

B. Exemptions From the Agricultural Hazardous Occupations Orders (29 CFR 570.72)

As discussed earlier, when the Ag H.O.s were originally adopted as an Interim Order in 1967, the Interim Order contained an exemption for 14- and 15-year-old student-learners who were enrolled in a bona fide cooperative vocational program in agriculture. In 1968, the Department modified the Interim Order to permit 14- and 15-year-olds to drive tractors and operate other farm machinery provided they completed a formal training program in the safe use of such equipment coordinated by the U.S. Department of Agriculture’s Federal Extension Service. In 1969, the Interim Order was again amended to permit 14- and 15-year-old vocational-agricultural students to operate tractors and certain machinery after completing training in the safe use of such equipment. These three programs were incorporated into the Final Order issued by the Department on January 7, 1970 (*see* 35 FR 221) and have remained unchanged for over forty years. It is important to note that children who are employed on a farm owned or operated by their parents are statutorily exempt from the agricultural hazardous occupations orders and may operate a tractor on a farm owned or operated by their parents without having to meet the requirements of any of the above-mentioned exemptions. The revisions the Department is

proposing in this NPRM do not change that statutory exemption in any way.

Questions regarding the appropriateness and effectiveness of these exemption programs have been raised since their inception. Section 570.72(d), part of the original regulation issued in 1970, continues to state: “The provisions of paragraphs (a), (b), and (c) of this section will be reviewed and reevaluated before January 1, 1972. In addition, determinations will be made as to whether the use of protective frames, crush resistant cabs, and other personal protective devices should be made a condition of these exemptions.” Such a review, though never completed, is as important and relevant today as it was in 1970.

Changes in the agricultural industry over the last four decades—including such things as the size, ownership, labor needs, and available labor pools of farms; agricultural machinery and processes; the types and uses of fertilizers and pesticides; the development of agri-tourism; and the improvement in the reporting of occupational injuries and deaths—have fueled interest in these exemption programs from parties both inside and outside of the government.

Many individuals and organizations have questioned whether it is prudent to allow 14- and 15-year-old hired farm workers—youth who academically are normally in eighth or ninth grade—to perform tasks that present so many hazards to adult workers of every age and experience level. Among these are the Association of Farmworker Opportunity Programs (*see* letter of March 25, 2003 from David Strauss, Executive Director, available at <http://www.regulations.gov>, docket number WHD-2011-0001) and The National Farm Medicine Center (*see* Proposed Changes in the Hazardous Occupations Orders in Agriculture, National Farm Medicine Center [2003], available at <http://www.regulations.gov>, docket number WHD-2011-0001). They note that much farm machinery is very large and powerful, and that all of it is designed for adult operators. Youth as young as 14 and 15 years of age often have not completed the adolescent growth spurt, placing them at additional risk when they operate or assist in the operation of such machinery or attempt to perform tasks that present ergonomic challenges to their age group. Approximately one-third of all deaths to young agricultural workers can be attributed to tractors, and in about one-half of the cases, the tractor overturned on the youth. BLS Report on the Youth Labor Force [2000], p. 60. Further, involvement with machinery and

vehicles each account for 38% of the deaths of young agricultural workers (see Hard, D., Myers, J., [2006], *Fatal Work-Related Injuries in the Agriculture Production Sector Among Youth in the United States, 1992–2002*, *Journal of Agromedicine*, Vol. 11(2), available at <http://ja.haworthpress.com>). Helen Murphy, writing in 2007 as the outreach and education director at the University of Washington Pacific Northwest Agricultural Health and Safety Center, notes that annually, more than 100 children who live on, work on, or visit farms, are killed on U.S. farms, with tractors being responsible for 41 percent of the accidental farm deaths of children under 15 years of age (see *Tractor Safety Advice Saves Lives*, available at http://depts.washington.edu/trsafety/files/P1_Tractor_Advice_Murphy.pdf).

The FLSA does not permit such young workers—14 and 15 years of age—to perform hazardous work with power-driven machinery in nonagricultural employment, and the similar exemptions from the nonagricultural hazardous orders do not apply to anyone under 16 years of age, even if the youth is the child of the employer. In fact, section 13(c)(6) of the FLSA, enacted by Congress in 1998, prohibits any youth under the age of 17 employed in nonagricultural work from driving trucks or automobiles on a public road, and puts strict restrictions on the conditions and amounts of time that 17-year-olds may drive. There are no exemptions from the driving restrictions placed on minors below the age of 17 in nonagricultural employment—and that includes youth who are employed by their parents.

In 2003, the National Farm Medicine Center of Marshfield, Wisconsin, in its comments on the recommendations of the NIOSH Report, advised the Department that no exemptions for hired youth operating tractors should be allowed. “The current 4–H and vocational agriculture tractor and machinery certification programs have not been subjected to sufficient evaluations to confirm their effectiveness in preparing youth to safely operate tractors. Furthermore, state-by-state variability in certification administration makes it inappropriate to base Federal exemptions on this certification” (see *Position Statement: Proposed Changes in the Hazardous Occupations Orders in Agriculture*, National Farm Medicine Center [2003], available at <http://www.regulations.gov>, docket number WHD–2011–0001).

Questions have also been raised as to whether 14- and 15-year-old hired farm workers in general are capable of possessing and practicing the

continuous level of safety awareness that is necessary in such a dangerous occupational environment as agriculture. Many studies have noted that young workers are not “little adults” but human beings at their own unique stage of development. It is well established that several characteristics of youth place adolescent workers at increased risk of injury and death. Lack of experience in the workplace and in assessing risks, and developmental factors—physical, cognitive, and psychological—all contribute to the higher rates of occupational injuries and deaths experienced by young workers. Many of the physical and cognitive limitations of young workers cannot be overcome by training or supervision. See Sudhinaset, M., Blum, R., [2010]. *The Unique Developmental Considerations of Youth-Related Work Injuries*, *International Journal of Environmental Health*; 16–216–22. See also NIOSH Alert *Preventing Deaths, Injuries, and Illnesses of Young Workers*, available at <http://www.cdc.gov/niosh/docs/2003-128/2003128.htm>; NIOSH Report, page 6; Casey B, Getz S, Galvan A, [2007]. *The Adolescent Brain*, available online at <http://www.sciencedirect.com>. These risks associated with employment are heightened when the youth are working in agriculture because the work itself is more dangerous and the ages of permissible employment are so much lower than in nonagricultural employment. For example, there is no minimum age established for employment on small farms not subject to the minimum wage requirements of the Fair Labor Standards Act (see 29 U.S.C. 213(c)(1)).

A study of the effectiveness of tractor certification found that many youth who completed the training in Indiana self-reported that while they felt the training did make them safer operators, they also reported engaging in a number of risky behaviors including not wearing seat belts with roll-over protection structure (ROPS)-equipped tractors and allowing extra riders (see Carrabba Jr. JJ, Talbert BA, Field WE, Tormoehlen R [2001]. *Effectiveness of the Indiana 4–H Tractor Program: Alumni Perceptions*. *Journal of Agricultural Education*, vol. 42, Issue 3). Another study found that some youth working in agriculture, even after acquiring increased safety knowledge, still were dangerous risk takers (see Westaby JD, Lee BC [2003]. *Antecedents of injury among youth in agricultural settings: A longitudinal examination of safety consciousness, dangerous risk taking, and safety knowledge*. *Journal of Safety Research*, 34 [2003] 227–240).

In its Report, NIOSH notes that “[t]he effectiveness of these tractor safety training programs has not been adequately evaluated nationwide” (see Report, page 70). NIOSH does state that the Carrabba study in Indiana to determine the impact of 4–H tractor safety programs on the behavior and attitudes of young tractor operators found that participants demonstrated a greater level of confidence in operating tractors, and that the program appears to have a positive influence on the safe operating procedures of participants. However, as noted above, the Carrabba study also found that, despite the youths’ feelings of confidence, they continued to engage in risky behaviors such as allowing extra riders. NIOSH also mentioned a study in Wisconsin that found that youth who had completed a training program reported an increase in usage of tractors equipped with roll-over protection structures (see NIOSH Report, page 71). These few studies demonstrate the need for a much closer and more thorough examination of the effectiveness of tractor safety training for children. In light of the fatality and injury data demonstrating the hazardous nature of working on tractors and other power-driven equipment, until such information is available, the Department must reconsider whether it is consistent with the Secretary’s statutory mandate to allow certain 14- and 15-year-olds to operate tractors based on the efficacy of such training.

The Department is concerned that the training and skill sets that youth must complete in order to receive certification under the limited exemptions contained in § 570.72(b) and (c)—which allow 14- and 15-year-old hired farm workers to operate tractors and several types of farm implements and have not been modified since their creation in 1971—are not sufficiently extensive and thorough to ensure the safety of young hired farm workers. The Federal Extension Service tractor certification requirements, as detailed in § 570.72(b)(1), call for only a ten-hour training program, which includes the completion of “units” that are no longer available. Upon completion of these “units” the minor need only pass a written examination and demonstrate his or her ability to operate a tractor safely with a two-wheeled trailed implement on a course “similar to one of the 4–H Tractor Operator’s Contest Courses.” Under the regulations at § 570.72(b)(2), the youth need only complete an additional ten hours of course work, pass a written examination on tractor and farm machinery safety,

and demonstrate his or her ability to operate a tractor with a two wheeled trailed implement, again, on a course similar to one used in 4-H Contests, in order to qualify for exemption with regard to other farm machinery. Neither program requires any ongoing or periodic supplemental training or instruction. This may be problematic for many reasons, but especially because of the extremely wide variety of sizes, ages, operation protocols, and types of farm equipment and tractors used on American farms. The Department is concerned that twenty hours of classroom training is insufficient to provide a young hired farm worker with the skills and knowledge he or she would need to safely operate the diverse range of agricultural tractors and equipment in use on today's farms. The Department notes that most state graduated motor vehicle driver licensing programs require considerably more training and operating experience—some as much as 96 hours—and that such training is for youth who are at least 16 years of age and only operating a single piece of equipment (see Insurance Institute for Highway Safety *Licensing Systems for Young Drivers* available at <http://www.iihs.org/laws/graduatedlicenseIntro.aspx>; see also <http://www.mva.maryland.gov/Driver-Safety/Young/safety.htm>). Similar requirements and problems exist in regards to the vocational agricultural training exemption, the requirements of which are contained in § 570.72(c).

The Department is also concerned that there has been almost no monitoring by any government agency to ensure the integrity and effectiveness of these certification programs. In an evaluation of the Wisconsin certification process, the authors note that “the evaluation and monitoring of these programs for effectiveness has been nearly nonexistent” (see Schuler RT, Skjolaas CA, Purschwitz MA, Wilkinson TL [1994]. Wisconsin youth tractor and machinery certification programs evaluation. *ASAE Paper No. 94-5503*. St. Joseph, MI.). The 2001 article on the Indiana 4-H Tractor Program (see Carrabba Jr. JJ, *et al.*) also noted that “a review of the literature did not uncover any research that has specifically evaluated the effectiveness of the 4-H Tractor Program, as a safety intervention, at either a state or national level.” The Department believes it would not be consistent with the Secretary's mandate to allow certain 14- and 15-year-olds to operate tractors and farm equipment until the evidence demonstrates that such youth are not at risk and can perform all the associated

tasks safely. The Department asks for comment regarding any data or studies relating to the efficacy of these programs and their impact on the ability of 14- and 15-year-olds to operate tractors and farm equipment safely and to perform the associated tasks safely.

In addition, because the actual certification occurs at the local level, the content and quality of the training is often determined by the instructor who conducts the training (see Carrabba Jr. JJ, *et al.*). The written examinations are not standardized and large differences have been noted in what constitutes a passing grade. Differences also exist in how youth actually perform the required practical demonstration of safe tractor and machinery operation as well as how their performances are evaluated. The Department has also uncovered at least one instance in which youth were issued certificates without receiving the proper training or completing the required testing.

Finally, the Department is aware of concerns that the certification programs may not be reaching young farm workers who need such training to legally be employed in work that would otherwise be prohibited by certain of the Ag H.O.s. Certification programs are not available in many areas of this country because of the lack of such things as interest, need, qualified and available instructors, and resources. A 2006 article reported that extrapolating from 4-H records and Ohio census data, fewer than 1% of the youth in Ohio who were operating tractors or other hazardous machinery had participated in tractor certification training (see Heaney JR, Wilkins III CA, Dellinger W, McGonigle H, Elliot M, Bean TL, Jepsen SD [2006]. Protecting Young Workers in Agriculture: Participation in Tractor Certification Training. *Journal of Agricultural Safety and Health*. 12(3): 181–190). Another study notes that, nationally, the 4-H Tractor program has been one of the smallest 4-H education programs, with less than 21,500 participants enrolled in 1997 (see Carrabba, Jr., JJ, Talbert, BA, Field, WE, Tormoehlen, R [2001]. Effectiveness of the Indiana 4-H Tractor Program: Alumni Perceptions. *Journal of Agricultural Education*. 42: 11).

The Department is requesting comments as to whether 14- and 15-year-old hired farm workers are capable of absorbing, and implementing on a continuous basis, the knowledge necessary to ensure their safety and the safety of others while performing tasks otherwise prohibited by the Ag H.O.s. Therefore it is asking for public comment as to whether the child labor provisions should permit any hired farm

worker under the age of 16 years to operate or assist in the operation of agricultural tractors or agricultural implements.

But if such youth are capable of mastering the skills necessary for safe tractor and implement operation, it would seem that the training that delivers this knowledge must be extensive, thorough, and have immediate relevance to the tasks the youths will be performing once the training is completed. Given the diversity and seasonality of so many farm activities, it would seem that such training would have greater continuous impact if it were ongoing throughout the youth's employment rather than limited to a single demonstration of a single specific task, such as driving a tractor, which may be completed even before the youth is 14 years of age and eligible for employment.

Accordingly, the Department is proposing to remove the exemption for 14- and 15-year-old hired farm workers who have received certification under the auspices of the Federal Extension Services contained at § 570.72(b). It also proposes to remove the exemption for 14- and 15-year-old hired farm workers who have received vocational agricultural training contained at § 570.72(c). The revocation of these two exemptions is intended to place immediate limitations on the employment of 14- and 15-year-old hired farm workers, even if they had completed their certification prior to the effective date of any final rule implementing this proposal, since the exemptions would no longer exist. Such youth could only continue to perform work prohibited by the Ag H.O.s if they were employed by a parent on a farm owned or operated by that parent in accordance with the parental exemption, or as a student-learner employed under the provisions of the proposed § 570.98(b).

In order to foster the continuous and thorough training it believes is necessary to protect young hired farm workers, the Department proposes to both retain and revise the student-learner exemption currently located at § 570.72(a), and move it to a proposed § 570.98(b). Under the Department's proposal, a student-learner must be enrolled in an ongoing vocational education training program in agriculture operated by a state or local educational authority, or in a substantially similar program conducted by a private school. It is the Department's position that the 14- or 15-year-old student-learner must be properly enrolled and participating in the vocational education training

program throughout his or her agricultural employment in order to take advantage of this exemption. Such a program could not be completed prior to the youth's sixteenth birthday and satisfy the conditions of this exemption.

In order to ensure the student-learner has obtained sufficient safety training and practical knowledge before he or she is permitted to be employed as a hired farm worker performing otherwise prohibited work under this exemption, the student-learner must first successfully complete at least 90 hours of systematic school instruction in agricultural education at or above the eighth grade level. It is important to note that not having the prerequisite 90 hours of systematic school instruction in agricultural education would not preclude the employment of a 14- or 15-year-old as a hired farm worker, but it would prohibit that youth from performing any work prohibited by an Ag H.O.

The Department believes that 90 hours is equivalent to an academic semester and that the curriculum would include a combination of classroom, virtual, and hands-on training appropriate to prepare the youth for agriculture as a vocation. It is anticipated that school systems in areas of high demand for agricultural vocational training would provide such vocational training as a part of the school's curriculum, at no cost to the student, or in the case of a private school, no additional cost to the student. The Department welcomes comments from school boards and school systems on the extent to which such training is already included in their curriculum, the extent to which existing agricultural vocational training programs would need to be modified to meet the requirement and whether an academic semester is an appropriate period given the maturity level of the youth in general.

In addition, when employed as a hired farm worker performing otherwise prohibited work under the exemption, the proposal provides that the student-learner must be employed under a written agreement which provides that: (1) The work of the student-learner in the occupations declared particularly hazardous is incidental to his or her training; (2) the work will be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced adult who is at least 18 years of age; (3) safety instruction shall be given by the school and correlated by the employer with on-the-job training; and (4) that a schedule of organized and progressive work processes to be

performed on the job has been prepared and implemented. Such written agreement shall contain the name of the student-learner and be signed by the employer, the parent or guardian of the student-learner, and a person authorized to represent the educational authority. Copies of the signed written agreement shall be kept on file by both the educational authority or school and by the employer before the student-learner may be employed to perform work that would otherwise be prohibited by this subpart.

The Department is also proposing to limit the types of otherwise prohibited work which bona fide student-learners may perform under the authority of the exemption. Currently, such student-learners may be employed to perform work otherwise prohibited by § 570.71(a)(1) through (a)(6) (the first six Ag H.O.s). This proposal would limit the student-learner to the first two Ag H.O.s as revised by this NPRM. The application of the student-learner exemption to each of those revised Ag H.O.s will be discussed in those sections of this preamble dealing with each of those Ag H.O.s.

Despite proposing to remove the limited certification exemptions for hired farm workers, the Department believes such training programs provide important training and safety development opportunities to the young farm workers who are the children of and employed by those who own and/or operate farms. These programs may be the only formal training in such skills that these youth ever receive, as they are exempt from the Federal Ag H.O.s by virtue of the parental exemption contained in FLSA section 13(c)(2). These programs also can continue to provide important training to youth who are not student-learners but who wish to seek employment as hired farm workers and will be able to legally operate such equipment, under current law, once they reach their sixteenth birthday.

The Department is aware that the USDA's National Institute of Food and Agriculture (NIFA), formerly the Cooperative State Research, Education and Extension Service (CSREES), shares many of its concerns and has been working diligently over the last several years to implement changes to the certification process to ensure that young agriculture workers can obtain meaningful and effective safety training. Through its Youth Farm Safety Education Certification Program (formerly Hazardous Occupations Safety Training for Agriculture (HOSTA)), NIFA has funded programs in such areas as identifying the skill-sets needed by youth for non-parental farm

employment; developing a curriculum for the training; exploring various media for delivering such training; creating a model for the development, implementation, and evaluation of an administrative management system for certification; and management of instructor selection, training, and authentication. The Department appreciates the achievements of NIFA and will continue to work with that agency to assist in its efforts.

C. Operating a Tractor of Over 20 PTO Horsepower, or Connecting or Disconnecting an Implement or any of its Parts to or From Such a Tractor (29 CFR 570.71(a)(1))

The NIOSH Report recommends that the Department retain this Ag H.O., but broaden it to remove the 20 power take-off (PTO) horsepower threshold (see page 67). NIOSH also recommends that when a 14- or 15-year-old hired farm worker qualifies for an exemption under the current § 570.72, the tractors operated by such youth must be equipped with rollover protection structures (ROPS) and seat belts, and that the use of seat belts be mandated. In addition, NIOSH recommends that the prohibition against riding on a tractor as a passenger or helper, currently contained in § 570.71(a)(7), not be changed but moved to this Ag H.O. (currently § 570.71(a)(1)).

NIOSH notes that tractor-related incidents are the most common type of agricultural fatality in the U.S., and that tractor roll-overs are the most common event among those fatalities (see NIOSH Report, page 67). NIOSH states that available data sources frequently do not include enough detail to determine the horsepower of tractors or PTOs involved in fatal and non-fatal injuries and that available data do not support the notion that a tractor's horsepower (whether engine or PTO) is related to risk of injury. Finally, NIOSH expresses concern that since PTO horsepower differs from tractor engine horsepower, employers, supervisors, young employees, and WHD inspectors may not be able to easily determine the PTO horsepower, making compliance difficult to attain and document (*Id.*).

The data regarding the effectiveness of ROPS in reducing tractor-related deaths and fatalities are compelling. The National Farm Medicine Center, in its review of the NIOSH Report, advised the Department that "indisputable published evidence demonstrates that ROPS and seat belts prevent fatalities and serious injuries. Under no circumstances should a minor operate a tractor without a ROPS and a seat belt" (see Position Statement: Proposed

Changes in the Hazardous Occupations Orders in Agriculture. National Farm Medicine Center, [2003], available at <http://www.regulations.gov>, docket number WHD-2011-0001). NIOSH reports that “[r]ollover protective structures have been identified as the best means of preventing deaths from overturns.” NIOSH (see Report, page 71) also reports that “[a] study in Sweden, which has implemented regulations requiring ROPS on all tractors, has shown a 92% reduction in tractor rollover fatalities following the intervention. The United States has a tractor rollover lost-life rate 24 times higher than Sweden” (internal citations omitted).

ROPS were first marketed on new tractors in the United States in 1965 (see Iowa State University Fact Sheet Pm-1265d: *Use Tractors with ROPS to Save Lives*. April 1992, available at <http://www.regulations.gov>, docket number WHD-2011-0001). In 1985, tractor manufacturers adopted a voluntary standard that required all new factory tractors to be equipped with ROPS. The ROPS may be part of the cab structure and may not be visible, but the protection will be there if the ROPS has been properly manufactured and installed (*Id.*). However, tractors have long operational lives and some older tractors cannot be easily retrofitted to meet current safety standards. It is extremely important that tractor retrofits for ROPS be properly performed or safety will be compromised. This is because “[a] homemade bar attached to the tractor axle, or simple sun shades, cannot protect the operator if the tractor overturns. Farm operators should not add their own rollover protection devices to tractors manufactured without ROPS. Without proper design and testing, homemade devices offer a false sense of security that can be more dangerous than operating a tractor without ROPS” (*Id.*). The Marshfield Clinic Research Foundation supported these findings when it noted that “[d]ue to the dynamic forces which act upon a ROPS during a tractor rollover, it is imperative that a ROPS be properly designed, manufactured and installed. Proper materials and mounting hardware, as well as engineering design, are necessary to ensure safe performance. A ROPS is not something to be fabricated in the farm shop” (see A Guide to Agricultural Tractor Rollover Protective Structures, Marshfield Clinic Research Foundation, 2009, available at http://www.marshfieldclinic.org/nfmc/default.aspx?page=nfmc_rops_guide).

The NIOSH Report (see page 82) also recommends that the prohibition against youth riding on a tractor as a passenger

or helper currently contained in § 570.71(a)(7) be retained and relocated to § 570.71(a)(1). NIOSH notes (see Report, page 85) that of the 1,421 tractor-related fatalities to agricultural production workers identified by CFOI for 1992–1997, 12 of the victims were clearly riding as passengers. Nonfatal injuries to youth riding on tractors as passengers have also been reported; in 1998, an estimated 417 injuries were incurred by youth under age 16 while riding as a passenger on a farm tractor (see NIOSH Report, pages 85–86). The WHD has conducted investigations of the deaths of young workers riding on tractors. For instance, WHD investigated the death of a 12-year-old in Texas in 2005 who was run over by the tractor upon which he was riding as a passenger. The tractor, which was pulling a shredder, was being driven by a 14-year-old. In addition, in 2002, WHD investigated the death of a 15-year-old on a cotton farm in Mississippi who was killed when he attempted to jump onto a moving tractor being driven by another worker. The minor fell and was run over by the tractor.

The National Farm Medicine Center, in its comments to the Department on the NIOSH Report, also recommended that minors should be required to have a valid motor-vehicle license to operate tractors and other farm machinery on public roads, noting “the paucity of evidence that a child younger than 16 years has the skills and maturity to operate a tractor on a public road, when that same individual is not permitted to drive an automobile on a public road” (available at <http://www.regulations.gov>, docket number WHD-2011-0001).

The Department proposes to adopt all three of these NIOSH recommendations, with some modifications. The Department also proposes to adopt the recommendation made by the National Farm Medicine Center concerning the licensing of drivers of tractors and other farm machinery on public roads. The Department proposes to revise (existing) § 570.71(a)(1) and (7) and create a new § 570.99(b)(1) entitled *Occupations involving the operation of agricultural tractors* (Ag H.O. 1). The proposed Ag H.O. 1 would prohibit operating and assisting in the operation of an agricultural tractor, with certain limited exceptions for student-learners. *Operating* includes tending, setting up, adjusting, moving, cleaning, oiling, or repairing the tractor; riding on an agricultural tractor as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such a tractor. *Operating* would also include starting, stopping, or any other activity involving physical contact

associated with the operation or maintenance of the tractor.

The Department proposes to define the term *agricultural tractor* to reflect the types of tractors in use on farms today. The proposed definition, which is the same definition used by OSHA in 29 CFR 1928.51, states that an *agricultural tractor* shall mean a wheeled or track vehicle which is designed to furnish the power to pull, carry, propel, or drive implements that are designed for agriculture. The term would include all such equipment, regardless of the date it was manufactured or the amount of engine horsepower, although we also request comment on the use of an alternative to the eliminated 20 PTO threshold, such as a 2,000 pound weight restriction. The term *agricultural tractor* also includes *low profile tractors*. A *low profile tractor* means a wheeled tractor that possesses the following characteristics: (1) The front wheel spacing is equal to the rear wheel spacing, as measured from the centerline of each right wheel to the centerline of the corresponding left wheel; (2) the clearance from the bottom of the tractor chassis to the ground does not exceed 18 inches; (3) the highest point of the hood does not exceed 60 inches; and (4) the tractor is designed so that the operator straddles the transmission when seated. However, the term *low profile tractor* shall not include self-propelled implements, nor shall it include garden-type tractors, lawn tractors, or riding mowers designed primarily for lawn mowing and lawn maintenance—all of which are subject to the provisions of (proposed) § 570.99(b)(2) (Ag H.O. 2) that is discussed later in this preamble.

The Department proposes to allow a partial exemption to Ag H.O. 1 for bona fide student-learners as defined in (proposed) § 570.98(b) to operate certain agricultural tractors under certain conditions, but only if all of the following seven criteria are met:

1. Every agricultural tractor operated by a student-learner must be equipped with both a roll-over protection structure (ROPS) and a seat belt. The tractor operation, the ROPS, and the seat belt must meet the requirements of the U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) standard at 29 CFR 1928.51 established for roll-over protection structures for tractors used in agricultural operations, and the seat belt must be used. These requirements apply to all agricultural tractors operated by a student-learner, even if the tractor is specifically excluded from the requirements by the OSHA standard because of size or date of manufacture.

The Department is aware that this proposal will prevent student-learners from operating certain low-profile tractors, such as those used in green houses and orchards, because such equipment may not be suitable for ROPS retrofitting. The Department believes this prohibition is necessary to protect young farm workers.

By requiring compliance with the OSHA standard, the Department intends to ensure that the operation of the tractor and the ROPS and seat belt—whether factory installed or retrofitted—conform to appropriate safety standards. This standard is widely accepted by industry and easily accessible via OSHA offices and the Internet at <http://www.OSHA.gov>. By going beyond the OSHA standard and requiring ROPS and seatbelts on equipment exempted by that standard when applied to adults, the Department is providing young hired farm workers with the additional safety protection their youth and inexperience demand. It is important to note that the Department's proposal does not require farmers who may otherwise fall outside of OSHA authority to submit to OSHA authority; nor does it require agricultural employers to retrofit tractors with ROPS and seat belts that meet OSHA standards. The provisions of this proposal are relevant only if the employer wishes to employ a 14- or 15-year-old student-learner to operate a tractor or assist in the operation of a tractor. In accordance with its established procedures, WHD may solicit the help of OSHA and/or consult with OSHA when determining an employer's compliance with this provision.

2. When implements, as defined in the proposed § 570.99(b)(2), are being used, both the operation of the implements and the implements themselves must meet the requirements of OSHA's standard at 29 CFR 1928.57 established to prevent hazards associated with moving machinery parts of farm field equipment, farmstead equipment, and cotton gins used in any agricultural operation. As with the operation of tractors discussed above, the Department believes that relying on the OSHA standard for the safe operation of implements and farm field equipment is essential in order to provide safer working environments for all hired farm workers, especially youth. Also, as discussed above, the Department's proposal does not require farmers who may otherwise fall outside of OSHA authority to submit to OSHA authority; nor does it require agricultural employers to retrofit or modify any farm implements to meet

OSHA standards. The provisions of this proposal arise only if the employer wishes to employ a 14- or 15-year-old student-learner to operate or assist in the operation of a farm implement. When determining an employer's compliance with this provision, WHD may solicit the help of OSHA and/or consult with OSHA.

3. The employer must have instructed the student-learner in the use of the seat belt and the student-learner must actually use the seat belt at all times while operating the tractor.

4. The student-learner must have successfully completed his or her school's classroom portion of the educational unit on the safe operation of tractors, and if he or she is connecting, operating, and/or disconnecting an implement to the tractor, the student-learner must have also successfully completed his or her school's classroom portion of the educational unit addressing the safe operation of the particular implement being connected, operated, or disconnected by the student. WHD would determine compliance with this provision by reviewing the written agreement between the employer, the school, and the parent or guardian of the student-learner and by consultation with the school, the student-learner, and/or the parent or guardian of the student-learner.

5. If the student-learner operates the tractor on a public road or highway, he or she must hold a state motor vehicle license valid for the class of vehicle being operated. The Department proposes to define the term *public road or highway* in § 570.99(b)(1)(i) to mean a road or way established and adopted (or accepted as a dedication) by the proper authorities for the use of the general public, and over which every person has a right to pass and to use for all purposes of travel or transportation to which it is adapted and devoted. It does not matter whether the road or highway has been constructed at public or private expense. WHD would determine compliance with this provision by consultation with the state motor vehicle licensing authority, the student-learner, and/or the parent or guardian of the student-learner.

6. The student-learner must not operate any tractor upon which a passenger or helper is riding other than a single passenger over the age of 18 years who is engaged in training the student-learner in the safe operation of the tractor. Such passenger must be seated in a proper seat that is fitted with a seat belt that meets the requirements of the U.S. Department of Labor's Occupational Safety and Health

Administration's (OSHA) standard at 29 CFR 1928.51 established for roll-over protection structures for tractors used in agricultural operations, and the seat belt must be used. The student-learner may not ride on any tractor as a passenger or helper, even if the tractor is equipped with a seat for a passenger.

7. The employer has instructed the student-learner that the use of electronic devices, including communication devices, while operating the tractor or implement is prohibited and the student-learner in fact does not use any electronic device while operating the tractor or implement. The term *use of electronic devices, including communication devices*, would include, but not be limited to, such things as talking, listening, or participating in a conversation electronically; using or accessing the Internet; sending or receiving messages or updates such as text messages, electronic mail messages, instant messages, "chats," "status updates," or "tweets;" playing electronic games; entering data into a navigational device or global positioning system (GPS); performing any administrative functions; or using any applications offered by the communication devices. The Department does not intend to prohibit listening to music or other recorded information on a one-way device such as a radio or iPod™ as long as the device is being operated "hands free" without headphones or earbuds. The proposal would not prohibit a minor from glancing at or listening to a navigational device or GPS that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device or GPS either before the tractor or implement is operated or when the tractor or implement is stopped and in park. The proposal similarly does not prohibit youth from glancing at or listening to other similar electronic devices on the vehicle, such as those that monitor moisture or chemical application monitors, provided that the entering of data or other functions are programmed into the device before the tractor or implement is operated, or when it is stopped and in park. In addition, the Department does not intend to prohibit the use of a cell phone or other device to call 911 in emergencies; nor does it wish to discourage young workers from using appropriate hearing protection when required by the nature of the job and/or Federal or state occupational safety and health rules or regulations. This proposal is in keeping with the proposal made for the nonagricultural

employment of youth earlier in this preamble.

The Department notes that many organizations dedicated to keeping agricultural workers of all ages safe have adopted positions that support many of the electronic device safety provisions that are proposed in this NPRM. See *Toolbox Talks* issued by the Office of Occupational Health and Safety, University of Minnesota available at http://www.ohs.umn.edu/prod/groups/ahc/@pub/@ahc/@ohs/documents/asset/ahc_asset_265063.pdf; see also *Farmsafe* issued by Farm Safety Association Inc. and available at <http://www.farmsafety.ca/farmsafe/vol28-no2.pdf>; and *Tractor Safety and Operation Basics*, an Environmental Health and Safety Fact Sheet issued by the Washington State University and available at <http://www.ehs.wsu.edu/Factsheets/FAQTractorSafety.html>.

D. Operating or Assisting To Operate (Including Starting, Stopping, Adjusting, Feeding, or any Other Activity Involving Physical Contact Associated With the Operation) Several Named Pieces of Power-Driven Machinery (29 CFR 570.71(a)(2), 29 CFR 570.71(a)(3) and 29 CFR 570.71(a)(7))

The current agricultural provisions contained in § 570.71(a)(2) and (3) prohibit youth under 16 years of age from operating certain named pieces of agricultural machinery. Section 570.71(a)(2) specifically bans the operation of the following farm machinery: corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyor, power-post hole digger, power post driver, and nonwalking type rotary tiller. Section 570.71(a)(2)(ii) also prohibits youth from operating or assisting in operating the unloading mechanism of a nongravity-type self-unloading wagon or trailer.

The operation of the following farm machinery is specifically prohibited by § 570.71(a)(3): trencher or earthmoving equipment; fork lift; potato combine; and power-driven circular, band, or chain saws.

The current § 570.71(a)(7) permits hired farm workers under the age of 16 years of age to drive a bus, truck, or automobile when not transporting passengers. NIOSH reports that transportation-related deaths, largely highway incidents, were the most frequently recorded cause of occupational deaths among all youth for the period of 1998 through 2007. "Transportation events included incidents involving all forms of

transportation and powered industrial equipment when the incident resulted in an injury from a collision, loss of vehicle control, sudden vehicle stop, or a pedestrian/worker being struck by a vehicle. Highway incidents occurred on public roadways, shoulders, or surrounding areas (excluding incidents off the highway/street or on industrial, commercial, or farm premises or parking lots.)" (see *Occupational Injuries and Deaths Among Younger Workers—United States, 1998–2007*, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5915a2.htm>). Congress, in 1998, enacted the Drive for Teen Employment Act, Public Law 105–334, which generally prohibits youth under 17 years of age from performing any driving when employed in nonagricultural jobs and substantially limits the times and types of driving that 17-year-olds may perform. The current provision at § 570.71(a)(7) not only places young workers at risk by allowing hired farm workers under the age of 16 to drive motor vehicles, but as the NIOSH Report notes, is inconsistent with many state motor vehicle licensing laws (see NIOSH Report, page 85).

The segregation of the named equipment into either § 570.71(a)(2) or § 570.71(a)(3) by the Department was intentional. The agricultural child labor provisions permit 14- and 15-year-olds who have met the requirements of the Federal Extension Service exemption contained in § 570.72(b) or the vocational agriculture training requirements of § 570.72(c) to, under specific guidelines, operate equipment named in § 570.71(a)(2) but not that equipment named in § 570.71(a)(3). These lists, as the NIOSH Report notes (see page 73), fail to mention several classes of power-driven machines, and under the structure of the Ag H.O.s, their absence generally means hired farm workers of any age could legally, but perhaps not safely, operate and assist to operate that equipment.

In its Report, NIOSH states that work with machinery in agriculture is associated with high numbers of occupational deaths among adults and youth. The current Ag H.O.s "list specific types of machinery, which are prohibited; this is problematic due to the continuing introduction of new types of machinery in agricultural production." NIOSH therefore recommends that the Department combine § 570.71(a)(2) and § 570.71(a)(3), and expand their prohibitions to cover machines by their general functions rather than their specific names (see Report, page 72). For example, the equipment would be listed as harvesting and threshing machinery;

mowing machinery; plowing, planting, and fertilizing machinery; other agricultural and garden machinery; excavating machinery, loaders; wood processing machinery, such as wood chippers and debarkers; sawing machinery, including chain saws; powered conveyors; and mobile equipment, including forklifts.

NIOSH asserts that combining the two HOs into one inclusive machinery HO based on the function performed by the machine would allow more effective tracking of injuries and comprehensive coverage of new types of machinery that may come onto the market. NIOSH also notes that "those machines which 14- and 15-year-olds may be certified to operate under the current HO 2 result in more deaths annually than those listed in HO 3 for which certification is unavailable" (see NIOSH Report, page 72).

The Department was also advised by an Extension Safety Specialist who is on the faculty of the College of Agricultural Sciences of Penn State University, in his comments on the NIOSH Report, that in order to reduce injuries to young hired farm workers resulting from falls and machine functions, such youth should be prohibited from riding as passengers on all farm machines being moved on public roads (see Comments on NIOSH Recommendations for Changes to the Federal Child Labor Regulations. Dennis J. Murphy, Ph.D., CSP, March 19, 2003, available at <http://www.regulations.gov>, docket number WHD–2011–0001).

NIOSH also states (see Report, page 73) that there are a number of types of machines—such as plowing machinery, cultivating machinery, spreaders, front-end loaders and bulldozers—that have contributed to a substantial number of deaths in agriculture, but which do not appear to be encompassed under the existing hazardous occupations orders.

The Department notes that many types of machinery that 14- and 15-year-old hired farm workers may legally operate—either because there is no Ag H.O. prohibiting the operation of the machinery or the operation of such machinery falls under the exemptions contained in § 570.72—generally may not be operated by youth under 18 years of age if employed in nonagricultural occupations. For example, § 570.33(f) prevents minors under 16 years of age from employment as motor vehicle operators or helpers. This prohibition would include cars, trucks, buses, motorcycles, all terrain vehicles, and scooters. Section § 570.52 (HO 2) prohibits youth under 18 years of age from operating tractors and buses on public roads, and it allows 17-year-olds to drive automobiles and trucks on

public roads only under very limited conditions and for very short periods of time. HO 4 (§ 570.54), HO 5 (§ 570.55), and HO 14 (§ 570.65) prohibit youth under 18 years of age from operating power-driven chain saws, and HO 5 also prevents such youth from operating most power-driven woodworking machines. HO 7 (§ 570.58) prohibits workers under 18 years of age from operating power-driven hoisting apparatus, including derricks, cranes, hoists, manlifts, and high-lift trucks, including fork lifts and front-end loaders. HO 8 (§ 570.59) generally prohibits youth under 18 from occupations involved with operating power-driven metal forming, punching, and shearing machines.

In addition, the child labor provisions addressing the employment of 14- and 15-year-olds in nonagricultural occupations—Child Labor Regulations No. 3 (CL Reg. 3) (see 29 CFR 570.31–.37)—have, for many years, contained additional restrictions on the types of work and machinery that such youth may operate. The nonagricultural child labor provisions have generally prohibited youth under 16 years of age from operating, tending, setting up, adjusting, cleaning, oiling, or repairing any power-driven machinery, including motor vehicles but excluding office machines, vacuum cleaners, and floor waxers (see § 570.33(e) and § 570.33(f)). This provision was implemented because of the high number of injuries experienced by young workers when they operate, assist in the operation of, or clean such machines.

The child labor provisions for nonagricultural employment also prohibit minors under 16 years from operating or assisting in the operation of all hoisting apparatus and conveyors—whether the hoists or conveyors are manually operated, operated by gravity, or power-driven (see 29 CFR 570.33(c) and (k)). Certain hand-operated winches and hoists can handle loads of several tons—up to 12 tons for some hoists—placing young workers who operate such equipment at great risks. Likewise, gravity-operated conveyors, such as conveyors consisting of a series of horizontal rollers upon which materials glide, can accommodate items of considerable size and weight. Young workers charged with loading, monitoring, and unloading such equipment are exposed to greater risks than adults from strains and falling items.

These prohibitions of CL Reg. 3 have served youth employed in nonagricultural occupations well over the last seventy years and their positive impact on young worker safety was

recently reaffirmed in a Final Rule issued by the Department on May 20, 2010 (see 75 FR 28404).

The current agricultural provisions contained in § 570.71(a)(2) and § 570.71(a)(3) do not contain such a complete ban on the operation of power-driven machinery, but rather prohibit youth under 16 years of age from operating only certain named pieces of agricultural machinery. There are numerous other examples where stricter safety standards have been applied to the employment of youth in nonagricultural occupations than those applied to their younger peers employed in agriculture. Injury and fatality data, as well as the Department's own enforcement experience, do not support continuation of these different standards. For instance, in 2008 WHD investigated the death of a 15-year-old farm worker in Idaho who was killed when he was thrown from the bucket of a front-end loader in which he was riding. A similar tragedy occurred in 2006 involving a 9-year-old farm worker who died when he fell out of the bucket of a piece of farm equipment upon which he and another child were riding. The equipment, which was being used to help clear stones from a field, was being operated by a 16-year-old.

The WHD has also investigated injuries involving the use of conveyors and feed grinders. In 2007, WHD investigated the injury of a 9-year-old in Mississippi whose shirt became entangled in a conveyor belt. The minor was employed to clean eggs and place them into cartons. In 2005, the WHD investigated the death of 14-year-old in New York who became entangled in a silo unloader (conveyor-belt). WHD also investigated the death of a 14-year-old farm worker in Ohio who was killed while loading bales into a feed grinder. The minor either slipped or fell into the grinder and died instantly. In 2004, WHD investigated the serious injury of a 15-year-old in South Dakota who lost his right arm, up to his shoulder, when his coat became caught in the rotating shaft of a grain auger.

The Department appreciates the NIOSH recommendations regarding the classification of equipment by function, but believes that adopting general restrictions on the operation of power-driven machinery consistent with those applied to nonagricultural employment, along with revising the student-learner exemption to permit the limited and supervised operation of certain power-driven equipment after proper training has been received, would more adequately protect young hired farm workers.

Accordingly, the Department is proposing to revise and combine § 570.71(a)(2), § 570.71(a)(3), and § 570.71(a)(7) by creating a new § 570.99(b)(2) entitled *Occupations involving the operation of power-driven equipment, other than agricultural tractors (Ag H.O. 2)*. This Ag H.O. will prohibit operating and assisting in the operation of power-driven equipment and contain a limited exemption for student-learners as defined in the proposed § 570.98. The term *operating* includes the tending, setting up, adjusting, moving, cleaning, oiling, repairing, feeding or offloading (whether directly or by conveyor) of the equipment; riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such equipment. *Operating* would also include starting, stopping, or any other activity involving physical contact associated with the operation or maintenance of the equipment.

The Department proposes to define the term *power-driven equipment* to include all machines, equipment, implements, vehicles, and/or devices operated by any power source other than human hand or foot power, except for office machines and agricultural tractors as defined in (proposed) § 570.99(b)(1)(i). The term includes lawn and garden type tractors, and all power-driven lawn mowers that are used for yard mowing and maintenance in agriculture.¹ Garden and lawn tractors are small, light and simple tractors designed for use in home gardens or on lawns. Such equipment is usually designed primarily for cutting grass, being fitted with horizontal rotary cutting decks. Lawn and garden tractors are generally more sturdily built than riding mowers, with stronger frames, axles and transmissions rated for ground-engaging applications. The engines are generally a 1- or 2-cylinder gasoline engine. Front-engined tractor layout machines designed primarily for cutting grass and light towing are called lawn tractors; and heavier duty tractors of the same overall size, often shaft driven, are called garden tractors. The

¹ Child Labor Regulation No. 3, Subpart C of 29 CFR part 570, has prohibited 14- and 15-year-olds employed in nonagricultural industries from operating most power-driven equipment, including lawn and garden type tractors, all power-driven mowers that are used for yard mowing and maintenance, golf carts, and all-terrain vehicles, for almost fifty years. The Department notes that neither the existing prohibition for youth employed in nonagricultural employment nor the proposed prohibition for youth employed in agricultural employment extends to the use of such equipment for recreational or entrepreneurial purposes, such as the youth who uses his family's lawnmower to mow the neighbor's lawn.

term *implements* includes, but is not limited to, items used in agricultural occupations such as farm field equipment and farmstead equipment. *Farm field equipment* means tractors or implements, including self-propelled implements, or any combination thereof used in agricultural operations. *Farmstead equipment* means agricultural equipment normally used in a stationary manner. This includes, but is not limited to, materials handling equipment and accessories for such equipment whether or not the equipment is an integral part of a building.

The Department's broad proposal to prohibit hired farm workers under the age of 16 from operating or tending any power-driven machinery or equipment comports with the child labor standards long applicable to nonagricultural employment. Equipment operated by any source of energy, such as wind, electricity, fossil fuels, batteries, animals, or water, would all be considered "power-driven" under this Ag H.O., as would any farm implement powered or pulled by an animal, a tractor, or other power-driven equipment. The Department also proposes to accept the recommendation that would prohibit all hired farm workers under 16 years of age, including student-workers, from riding as a passenger on any power-driven machinery being moved on a public road, other than certain motor vehicles under specific conditions as discussed later in this preamble.

The Department has always considered the moving of equipment named in § 570.71(a)(3) to be an activity prohibited by the Ag H.O. even when the machine is not "powered," as when farm workers move a grain auger that has been powered-down from one location to another. Such work has been considered to be "contact associated with the operation" of such equipment. In 2005, the Department investigated the death of a youth in Montana who was electrocuted while helping three adults move a grain auger from one grain bin to another. The auger was mounted on a rubber-tired chassis which was being pulled by a truck. The auger tipped over, came in contact with an overhead power-line, and the youth was electrocuted. The three adults were injured. There has been some confusion over the violation status of moving such equipment, because the machine was disconnected from its power source and was not "operating" while it was being relocated. In order to remove this confusion and increase compliance, the Department is proposing to add the task of "moving" equipment to the list of

prohibited activities covered by this Ag H.O.

As with the tractor Ag H.O. proposed above, the Department is proposing an exemption to this Ag H.O. that would allow a bona fide student-learner employed in compliance with the requirements of § 570.98(b) to operate and assist in the operation of certain types of power-driven machinery only after he or she has successfully completed his or her school's classroom portion of the educational unit on the safe operation of that specific piece of power driven machinery. In addition, the student-learner would be prohibited from using electronic devices, including communication devices, while operating or assisting to operate the permitted equipment. This proposal contains prohibitions similar to those contained in the proposed nonagricultural HO 19 and the revisions proposed for Ag H.O. 1.

Determinations as to which types of equipment present less risk to student-learners were based on both the NIOSH Report and stakeholder feedback. In addition, the power-driven machinery being operated must meet, and be operated in accordance with, the requirements of OSHA's standard at 29 CFR 1928.57, if the equipment is the type of farm equipment covered by that standard. The Department, as previously discussed, is not requiring employers to modify any existing equipment to meet the OSHA standard, nor is it attempting to bring otherwise exempt employers under OSHA's protective oversight. But if employers wish to take advantage of the student-learner exemption contained in this proposed Ag H.O., the equipment operated by the student-learner must comply with the OSHA standard, as must its operation. WHD would rely on OSHA to help it determine compliance with OSHA standards.

The Department is also proposing that if the student-learner is operating the machinery on a public road or highway, as defined in § 570.99(b)(1)(i), he or she must hold a state driver's license valid for the type of machinery being operated. In addition, the student-learner may ride as a passenger in or on the power-driven equipment only if all the following conditions are satisfied: (1) The vehicle, machinery, or implement is equipped with an approved seat for each minor that includes a seat belt or appropriate similar restraint that comports with OSHA's standard at 29 CFR 1928.51(b)(2); (2) the minor has been instructed to use, and actually uses, the seat belt or similar restraint; (3) the machinery is not being operated on a

public road as defined in § 570.99(b)(1)(i); and (4) the operator of the vehicle, or any vehicle pulling, moving or towing the machinery or implement, is at least 16 years of age and holds a state motor vehicle license valid for the vehicle being operated.

The Department is proposing that a bona fide student-learner, employed in compliance with the provisions of § 570.98(b) and the provisions discussed above, be permitted to operate and assist in the operation of only the following power-driven machines: harvesting and threshing machinery, including balers; grain combines; reapers; plowing machinery; planting machinery; spreading machinery; mowing and swathing machinery; power post hole diggers; power post drivers; and nonwalking type rotary tillers. When the machine or equipment is being powered or pulled by a tractor as defined in § 570.99(b)(1)(i), the student-learner must also be employed in accordance with the provisions of § 570.99(b)(1)(ii).

Such student-learners would not be permitted to operate or assist in the operation of any other power-driven machinery. The proposal would specifically prohibit student-learners from operating or assisting in the operation of many types of equipment which are already prohibited for youth under 18 years of age when employed in nonagricultural employment. The proposal would expressly prohibit student-learners from operating the following types of power-driven equipment: automobiles, buses, or trucks, including serving as an outside helper on such motor vehicles; all terrain vehicles, scooters, and motorcycles; trenching or earthmoving equipment, including back hoes and bulldozers; loaders, including skid steer loaders, front end loaders, and Bobcats; milking equipment; potato combines; hoisting equipment, including cranes, derricks, highlift trucks, fork lifts, hoists, and manlifts as defined in § 570.58; woodworking machines as defined in § 570.55; feed grinders; circular, reciprocating, band, and chain saws as defined in § 570.65; wood chippers and abrasive cutting discs as defined in § 570.65; metal forming, punching, and shearing machines as defined in § 570.59; welding equipment; augers; auger conveyors; conveyors; irrigation equipment; rotary tillers, walking type; crop dryers; and the unloading mechanism of a nongravity-type self-unloading wagon or trailer.

In designating the equipment that would fall within or outside of the student-learner exemption, the Department looked to both the historical composition of the agricultural and

nonagricultural hazardous occupations, the classifications recommended by NIOSH, occupational injury and fatality data, and recommendations from experts in the field. For example, a study of 988 worker's compensation claims among dairy farms in Colorado found that milking parlor tasks represented 48% of injuries among dairy workers and indicated the worker was performing a milking activity at the time of the injury (*see* Douphrate D, Rosecrance C, Stallones L, Reynolds S, Gilkey D [2008]. NORA Symposium 2008: Public Market for Ideas and Partnerships; The Use of Workers' Compensation Data to Investigate Livestock-Handling Injuries in Agriculture; available at <http://www.cdc.gov/niosh/nora/symp08/posters/006.html>). "More specifically, 21% involved the worker being kicked while performing a milking task and 10% involved the worker attaching a milking unit to a cow's udder when he/she was kicked" (*Id.*). Another 10% of these injuries indicated the worker was stepped on when performing a milking task (*Id.*).

Accordingly, the Department is proposing to prohibit hired farm workers under 16 years of age from operating or assisting in the operation of power-driven milking equipment because of hazards associated with the weight of the machines, the postures required of the young workers when operating such equipment, and the dangers associated with working so closely with large animals. The Department believes that this proposal NPRM will provide much needed safety protection for young farm workers within the confines of the current statutory agricultural child labor provisions while continuing to permit important training and employment opportunities for 14- and 15-year-old student-learners. In addition, the revised format of Ag H.O. 2, as proposed by the Department, also comports with the NIOSH recommendation to classify farm equipment by "function." However, the Department emphasizes that the list of equipment that falls outside the student-learner exemption simply provides examples of the most commonly occurring types of prohibited equipment; the general prohibition against hired farm workers under the age of 16 from operating all power-driven equipment applies unless the requirements for the student-learner exemption have been satisfied for a particular piece of equipment authorized in § 570.99(b)(2)(ii)(A).

It is not the Department's intention that this proposed Ag H.O. prohibit young hired farm workers from riding as

passengers inside of all motor vehicles. The Department proposes to provide in § 570.99(b)(2)(ii)(C) that, notwithstanding the definition of *operating* in § 570.99(b)(2)(i), minors under 16 years of age may ride as passengers in automobiles, trucks, and buses, on public roads and private property, *provided* all of the following are met: (1) Each minor riding as a passenger in a motor vehicle must have his or her own seat in the passenger compartment; (2) each seat must be equipped with a seat belt or similar restraining device, the employer must instruct the minors that such belts or other restraining device must be used while riding, and the minor actually uses the seat belt or other restraining device while riding; and (3) each driver transporting the young workers must hold a state driver's license valid for the type of driving involved and, if the driver is under the age of 18, his or her employment must comply with the provisions of § 570.52. Section 570.52, which is nonagricultural HO 2, *Occupations of motor-vehicle driver and outside helper*, prohibits any youth under the age of 17 from driving motor-vehicles on public roads. Seventeen-year-olds may perform limited driving of certain trucks and automobiles (but not buses) under very stringent conditions that govern such things as the size of the vehicle; the time the driving may take place; the purpose, number, frequency, and distances of the trips involved; whether passengers are being transported; and the driving record of the 17-year-old at the time of hire. These provisions of this proposal are similar to those that govern the transporting of 14- and 15-year-old workers employed in nonagricultural occupations (*see* § 570.34(o)).

The Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 *et seq.*), administered by the WHD, protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures, and recordkeeping. Under MSPA, any non-exempt person who uses, or causes to be used, a vehicle to transport migrant or seasonal agricultural workers must comply with certain vehicle safety standards. Those standards are either the Department's standards or the Department of Transportation (DOT) standards incorporated by the Department into the MSPA regulations (*see* subpart D of 29 CFR part 500). These standards address such issues as state safety inspections; the lighting, fuel, exhaust, ventilation, and braking systems of the vehicles; the tires; the

doors; the seats; the windshields and windshield wipers; and the safe loading of the vehicles. Although these standards protect many migrant and seasonal agricultural workers, MSPA exempts certain workers, which may include young hired farm workers, from these transportation safety standards. The Department is specifically seeking comment from the public as to whether the child labor in agricultural provisions discussed in this proposed rule should be revised to require that all vehicles used to transport young hired farm workers meet or exceed the vehicle safety standards imposed by MSPA, even if the employment of the youth is not subject to MSPA.

Because the proposed Ag H.O. 2 addresses only power-driven equipment and would not prevent hired farm workers under the age of 16 from operating non-power-driven hoists and conveyors, the Department is also proposing to create a new Ag H.O. at § 570.99(b)(3) entitled *Occupations involving the operation of non-power-driven hoisting apparatus and conveyors* (Ag H.O. 3). The proposed Ag H.O. would prohibit hired farm workers under 16 years of age from operating and assisting in the operation of hoisting apparatus and conveyors that are not power-driven but run on human power or gravity, including manlifts and boatswain-chair-type devices often used in grain storage operations. The term *operating* includes the tending, setting up, adjusting, moving, cleaning, oiling, repairing, of the equipment; riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such equipment. *Operating* would also include starting, stopping, or any other activity involving physical contact associated with the operation or maintenance of the equipment. The prohibitions of this Ag H.O. would also prevent such minors from serving as "safety spotters" directing the operator of the hoisting apparatus or conveyor as to the proper operation of the equipment.

E. Working on a Farm in a Yard, Pen, or Stall Occupied by a: Bull, Boar, or Stud Horse Maintained for Breeding Purposes; or Sow With Suckling Pigs, or Cow With Newborn Calf (With Umbilical Cord Present) (29 CFR 570.71(a)(4))

The NIOSH Report recommends that the Department retain this current Ag H.O. as written. NIOSH cites several studies that demonstrate animals are one of the most common sources of injuries to children on farms and notes that, in 1998, it estimated that 20% of all injuries to youth under the age of 20

occurring on farms were animal-related. NIOSH notes that animal-related farm injuries are a problem for farm workers of all ages, and that the dangers farm animals present are numerous.

Livestock-handling injuries are among the most severe of agricultural injuries; they are more costly and result in more time off work than other causes of agricultural injuries (see Doupbrate D, Rosecrance C, Stallones L, Reynolds S, Gilkey D [2008]. NORA Symposium 2008: Public Market for Ideas and Partnerships; The Use of Workers' Compensation Data to Investigate Livestock-Handling Injuries in Agriculture; available at <http://www.cdc.gov/niosh/nora/symp08/posters/006.html>). Dangerous situations presented by farm animals include: "territorial protection, maternal instincts, social relationships, or simply an interruption of their normal habits" (see NIOSH Report, page 76). NIOSH has also expressed concerns about the dangers farm workers face when vaccinating animals (see NIOSH Update: Recommendations to Prevent Unintended Self-Injection, Other Risks from Animal Antibiotic Micotil 300®, May 17, 2007, available at <http://www.cdc.gov/niosh/updates/upd-05-17-07.html>).

WHD has conducted investigations involving injuries to young farm workers who came in contact with these animals. In 2003, WHD investigated the serious injury of a 14-year-old in Pennsylvania who was unable to work for 30 days when he was knocked down and head-butted by a bull maintained for breeding purposes. Also, in 2007, WHD investigated the serious injury of a 15-year-old farm worker in New York who was gored by a bull. The minor missed 45 days of work.

In its 2003 comments on the NIOSH Report, the National Farm Medicine Center recommended that the language in this Ag H.O. should be modified to be more concise and preclude hired youth from conducting work with large animals with high risk of injury. The National Farm Medicine Center made the following three recommendations (see Position Statement: Proposed Changes in the Hazardous Occupations Orders in Agriculture. National Farm Medicine Center, March 19, 2003, available at <http://www.regulations.gov>, docket number WHD-2011-0001):

1. Any activity with an intact (not castrated) male equine, porcine, or bovine older than six months should be prohibited.

2. Youth should be prohibited from engaging, or assisting, in animal husbandry practices that inflict pain upon the animal and/or are likely to

result in unpredictable animal behavior. These activities include, but would not be limited to, branding, breeding, dehorning, vaccinating, castrating, and treating sick or injured animals. Youth should also be precluded from handling animals with known dangerous behaviors.

3. Hired youth should be prohibited from herding animals on horseback.

The National Farm Medicine Center noted that past and recent data indicate a significant number of animal-related injuries occur to youth when they are involved in the activities cited in its second recommendation. It also reports that "[h]orseback herding requires a person to monitor and anticipate the behaviors of two (large) animals simultaneously. No youth development data exists to suggest youth younger than 16 years have the cognitive ability to handle this responsibility." A study of worker's compensation data concerning livestock-handling injuries in Colorado found that "[R]iding horseback, sorting/penning cattle and livestock handling equipment represented higher proportions of livestock-handling injuries among cattle/livestock raisers and cattle dealers" (see Doupbrate D, Rosecrance C, Stallones L, Reynolds S, Gilkey D [2008]. NORA Symposium 2008: Public Market for Ideas and Partnerships; The Use of Workers' Compensation Data to Investigate Livestock-Handling Injuries in Agriculture; available at <http://www.cdc.gov/niosh/nora/symp08/posters/006.html>). Concerns have also been expressed to the Department about the dangers to young workers associated with the herding of animals using power-driven machinery such as all terrain vehicles (ATVs), trucks, and similar vehicles, and the herding of animals in confined spaces, such as feed lots and corrals.

The Department agrees with the NIOSH Report that this Ag H.O. should be retained, and proposes to revise the Ag H.O. by incorporating the important and thoughtful recommendations of the National Farm Medicine Center.

In addition, although poultry catching and cooping are not normally classified as agricultural employment and therefore generally not subject to the Ag H.O.s, the Department is also concerned about those rare instances when the catching activities would be agricultural in nature, such as when poultry catchers are employed solely by a farmer on a farm to catch and/or coop poultry raised only by that farmer.

The Department is aware that workers who catch and coop poultry in lots in preparation for transportation or for market are often exposed to a high

degree of risk. Working in the dark, with only illumination provided by "red lights" which the fowl cannot see, and in poorly ventilated rooms, is not uncommon. These risks are heightened when the workers are young. The Department has long held that the child labor provisions applicable to nonagricultural employment prohibit youth under 16 years of age from performing this dangerous work. In a recently issued Final Rule, the Department incorporated its enforcement position into the Regulations at § 570.33(l) (see 75 FR 28449). In order to protect agricultural child poultry catchers to the same extent as nonagricultural poultry catchers, the Department is also proposing to include poultry catching and cooping on the list of prohibited occupations included in this Ag H.O. This prohibition would be applicable to the catching and cooping of all poultry, not just chickens.

Accordingly, the Department proposes to revise § 570.72(b)(4) entitled *Certain occupations involving working with or around animals (Ag H.O. 4)* and redesignate it as § 570.99(b)(4). This Ag H.O. would prohibit working on a farm in a yard, pen, or stall occupied by an intact (not castrated) male equine, porcine, bovine, or bison older than six months, a sow with suckling pigs, or cow with newborn calf (with umbilical cord present); engaging or assisting in animal husbandry practices that inflict pain upon the animal and/or are likely to result in unpredictable animal behavior such as, but not limited to, branding, breeding, dehorning, vaccinating, castrating, and treating sick or injured animals; handling animals with known dangerous behaviors; poultry catching or cooping in preparation for slaughter or market; and herding animals in confined spaces such as feed lots or corrals, or on horseback, or using motorized vehicles such as, but not limited to, trucks or all terrain vehicles. The use of such vehicles would also be banned by the proposed Ag H.O. 2 discussed above.

It is important to note that the Department is not proposing to prohibit hired farm workers from all horseback riding—only that horseback riding associated with the herding of animals. It is also important to note that the Department's proposals, as well as the existing child labor regulations, only apply to the employment of young hired farm workers while they are on the job. Riding horses and all-terrain vehicles are popular recreational activities and the Federal child labor laws do not apply to such activities outside of employment.

The Department does not propose that a student-learner exemption apply to this Ag H.O.

F. Felling, Bucking, Skidding, Loading, or Unloading Timber With Butt Diameter of More Than Six Inches (29 CFR 570.71(a)(5))

The NIOSH Report recommends (*see* Report, page 77) that the Department retain this hazardous occupations order relating to timber, but remove the six inch diameter threshold. NIOSH states that there is no evidence that working with timber with a butt diameter of six inches or less is any safer than working with larger timber. NIOSH also notes that timbering work on farms exposes workers to many of the same risks as in logging operations, which is one of the most hazardous industries in the U.S. Nonagricultural HO 4, (*Forest fire fighting and forest fire prevention occupations, timber tract occupations, forestry service occupations, logging occupations, and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill*) has prohibited the employment of youth under 18 years in logging operations for seventy years regardless of the butt diameter of the trees. Further, NIOSH reports the dangers associated with stump removal, citing a 1996 study of 16 rear rollovers that resulted from improper hitching to farm tractors in New York. That study found that 63% of the overturns occurred when operators were pulling logs or removing stumps (*see* NIOSH Report, page 78). The National Farm Medicine Center, in its comments on the recommendations of the NIOSH Report, concurred in this NIOSH recommendation.

The NIOSH Report states that the CFOI identified 97 fatalities from 1992–1997 associated with felling, bucking, skidding, loading, or unloading timber among workers in agricultural production in the U.S., and that almost one-third of these deaths occurred while a worker was using a tractor to push or pull trees or stumps, causing the tractor to overturn (*see* NIOSH Report, page 78).

The Department agrees with the NIOSH recommendation and proposes to modify the existing Ag H.O. to both remove the size limits and to prohibit all work involved in the removal of tree stumps. Thus, it proposes to redesignate current § 570.71(a)(5) as § 570.99(b)(5) and revise it as *Occupations involving timber operations (Ag H.O. 5)*. This Ag H.O. would prohibit the felling, bucking, skidding, loading, or unloading of timber and the removal and disposal of tree stumps by other than manual means. No student-learner exemption is

being proposed for this Ag H.O. In addition, the Department requests comment on the approach of replacing the six-inch timber threshold with a lower threshold as an alternative to eliminating it.

The term *timber* has been used in the existing Ag H.O., without a stated definition, since its adoption as part of the Interim Order in 1967. Although the term *timber* often has a commercial connotation of trees or large sticks of wood that have been squared or are capable of being squared for use in construction or building, for purposes of this Ag H.O. *timber* means trees, logs, and other similar woody plants. However, this HO would not prohibit a hired farm youth from performing such tasks as carrying firewood or clearing brush.

G. Working From a Ladder or Scaffold (Painting, Repairing, or Building Structures, Pruning Trees, Picking Fruit, etc.) at a Height of Over 20 Feet (29 CFR 570.71(a)(6))

The NIOSH Report recommends (*see* page 79) that the current Ag H.O. retain the prohibitions concerning working from a ladder or scaffold but also be expanded to cover work on: roofs; farm structures including silos, grain bins, windmills, and towers; and vehicles, machines, and implements. NIOSH also recommends that the maximum height at which youth under 16 may work in these settings be reduced from twenty feet to six feet.

NIOSH supports its recommendations by noting that fatality and injury data for the agricultural production industry show that large numbers of worker fatalities and injuries result from falls from elevation. In 1994, there were an estimated 19,008 nonfatal falls from elevation resulting in one-half day or more restricted activity among U.S. farm workers (*see* NIOSH Report, page 81), and the circumstances of these falls are much broader than those proscribed by the current Ag H.O. (*see* NIOSH Report, page 79). According to NIOSH, expanding the Ag H.O. to cover work on roofs, on farm structures, and on vehicles, machines, and implements would cover more of the work situations in which fatal falls have occurred. NIOSH also notes that data for all ages of workers suggest that permitting youth to work at heights up to 20 feet is not sufficiently protective, as the majority of fatal falls among agricultural production workers for which the height of the fall is recorded occurred from a height of 20 feet or less (*see* NIOSH Report, page 79).

NIOSH also reports that lowering the height threshold for youth in agriculture to six feet would make the Ag H.O. more

consistent with the occupational safety standards applicable to the construction industry. NIOSH notes that OSHA's occupational safety and health standards applicable to workers of all ages require the use of fall protection for construction industry employees who work six feet or more above a lower level (*see* 29 CFR part 1926, subpart M). None of these standards currently extends to workers in agricultural production, nor do agricultural health and safety standards contain fall protection requirements of any kind.

The Federal child labor provisions for nonagricultural occupations currently prohibit minors under 16 years of age from working from any ladders or scaffolds, regardless of their height (*see* § 570.33(g)). HO 16, also only applicable to nonagricultural work, generally prohibits minors under 18 years of age from working in roofing occupations and on or about a roof (*see* § 570.67). This HO was expanded to prohibit all work "on or about a roof" in 2004 because of the number of falls and/or electrocutions being experienced by young workers employed at heights (*see* 69 FR 75397).

Section 570.33(n)(4), addressing nonagricultural employment only, in recognition of the traditionally high incidences of occupational fatalities and injuries experienced by construction workers, prohibits the employment of youth under 16 in any occupation connected with construction, including demolition and repair. Such youth may not be employed in the construction industry to perform any duties at any construction site. This prohibition encompasses all types of construction, including residential, building, heavy, and highway construction. Section 570.33(n)(3) also prohibits the employment of such youth under the age of 16 in occupations in connection with communications and public utilities. In addition, nonagricultural HO 15 prohibits the employment of youth less than 18 years of age in wrecking and demolition (*see* § 570.66), while HO 17 prohibits the employment of youth less than 18 years of age in most occupations involving excavation (*see* § 570.68).

The NIOSH Report also recommends that a new nonagricultural HO be created that would prohibit youth under 18 years of age from employment in the construction industry (*see* NIOSH Report, page 101), and the Department requested comments on that recommendation in an Advance Notice of Proposed Rulemaking (ANPRM) published in the **Federal Register** on April 17, 2007 (*see* 72 FR 19328). Because very little substantive

information was received, the Department withdrew the ANPRM on February 24, 2010. No proposed rule will result directly from that information collection effort. The Department, however, has stated that the topics discussed in the ANPRM may be the subject of future rulemaking (*see* 75 FR 28406).

The Department reiterates its concern that the agricultural child labor provisions have permitted hired farm workers, as evidenced by the discussion above, to perform certain types of work on farms, often at very young ages, that are prohibited to youth under 16 years of age—and sometimes under the age of 18 years—when performed in nonagricultural industries. The Department believes that such protections should be available to all hired youth under 16, whether employed in agricultural or nonagricultural occupations.

The Department is aware that concerns were raised when the NIOSH Report was issued regarding the recommendation that the maximum working height established by this Ag H.O. be lowered from twenty feet to six feet (*see* Comments on NIOSH Recommendations for Changes to the Federal Child Labor Regulations. Dennis J. Murphy, Ph.D., CSP, March 19, 2003, available at <http://www.regulations.gov>, docket number WHD-2011-0001); *see also* Comments Concerning Current Rules and Proposed Revisions Hazardous Orders for Agriculture. Timothy G. Prather, March 19, 2003, University of Tennessee Agricultural Extension Service, available at <http://www.regulations.gov>, docket number WHD-2011-0001). A major concern of some stakeholders was that the recommendation, as proposed by NIOSH, would not allow 14- and 15-year-old farm workers, employed as student-learners under the provisions of proposed § 570.72(b)(1)(ii), to access the operating platforms of many tractors, implements, and farm equipment; nor would they be permitted to operate such equipment because some or all of their bodies would be more than six feet above the ground.

The Department finds merit in the NIOSH recommendations regarding maximum working heights and the types of structures and equipment from which hired farm workers should be permitted to work. Accordingly, the Department proposes to revise § 570.71(a)(6) by bifurcating it into two new Ag H.O.s.

The Department proposes to create a new Ag H.O. at § 570.99(b)(6) entitled *Occupations involving working in construction; in communications; in*

public utilities; in wrecking and demolition; and in excavation (Ag H.O. 6). The Department would define *wrecking and demolition* to mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, or other structure including but not limited to a barn, silo, or windmill. This definition comports with the definition of *wrecking and demolition* contained in § 570.66 (nonagricultural HO 15). The Department's proposal would prohibit work in excavation occupations in the same way such work is prohibited by § 570.68 (nonagricultural HO 17) for youth under the age of 18 years employed in nonagricultural occupations. Work in all types of construction—building, residential, heavy, and highway—would be prohibited. Occupations in the construction, communications, and public utilities industries, other than office work, would be prohibited by this proposal in the same way such occupations are prohibited in nonagricultural employment (*see* § 570.33(n)).

This proposed Ag H.O. will provide the same protections to young hired farm workers that are afforded to minors employed in nonagricultural occupations. The Department has an extensive enforcement history of injuries and fatalities suffered by young farm workers performing tasks that would be prohibited by its proposal for hired agricultural workers under age 16. For example, in 2008, the WHD investigated the death of a 12-year-old in Montana who was assisting a 15-year-old in the installation of a communications cable. The minor was killed while attempting to throw the cable over the loader the older minor was operating. In 2007, WHD investigated the death of a youth, who was eventually determined to be 17 years of age at the time of his death, who was employed to help demolish, and then reconstruct, a barn. The minor was crushed to death when a concrete and stone wall collapsed.

The Department believes this proposal will complement and reinforce its proposals dealing with the operation of power-driven equipment and fall prevention. The Department is not proposing a limited exemption to this Ag H.O. for 14- and 15-year-old student-learners.

The Department is also proposing to create a new § 570.99(b)(7) to be entitled *Occupations involving work on roofs, scaffolds, and at elevations greater than six feet (Ag H.O. 7)*. This Ag H.O. would

prohibit working on or about a roof; from a scaffold; and at elevations greater than six feet above another elevation, such as, but not limited to, working on or from a ladder, a farm structure (including, but not limited to silos, towers, grain bins, and windmills), or equipment. This proposal not only preserves the major portions of the existing Ag H.O. but prohibits all work on a scaffold in light of the Department's proposal to prohibit all work in construction. The proposal would also prohibit all work on or about a roof, much like the existing HO 16 that addresses nonagricultural employment. The proposal would define *on or about a roof* by referencing the definition in HO 16 (*see* § 570.67(b)). *On or about a roof* as defined therein would include all work performed upon or in close proximity to a roof, including carpentry and metal work, alterations, additions, maintenance and repair, including painting and coating of existing roofs; the construction of the sheathing or base of roofs (wood or metal), including roof trusses or joists; gutter and downspout work; the installation and servicing of television and communication equipment such as cable and satellite dishes; the installation and servicing of heating, ventilation and air conditioning equipment or similar appliances attached to roofs; and any similar work that is required to be performed on or about roofs.

In addition, the Department's proposal would prohibit hired farm workers under the age of 16 from performing work on or from a ladder, farm structure, or equipment at elevations greater than six feet. The Department proposes to determine when an elevation is greater than six feet by measuring the distance between the minor's feet and the lower elevation above which the minor is working.

The Department shares the previously stated concern that a height limitation of six feet would prevent bona fide student-learners from operating certain tractors and farm equipment otherwise authorized by the student-learner exemptions contained in the proposed Ag H.O. 1 (§ 570.99(b)(1)(ii)) and Ag H.O. 2 (§ 570.99(b)(2)(ii)). The Department believes that the requirements of those exemptions, which include the use of an appropriate restraining device, when coupled with the ongoing training the student-learner will receive from his or her school and employer, will provide the young hired farm worker with sufficient fall protection. Accordingly, the Department is proposing to provide an exemption to this Ag H.O. which would allow a student-learner to operate a tractor and/

or to operate or ride upon power-driven equipment at an elevation greater than six feet when such student-learner is employed in compliance with all the requirements of the applicable exemption—such as the tractor or equipment is equipped with ROPS, when appropriate; that the tractor or equipment is equipped with seatbelts or similar restraining devices; that the student-learner is instructed to use, and actually uses the seat belt or similar restraining device; and that the equipment is operated by a licensed or otherwise qualified driver(s) who is at least 16. The proposed Ag H.O. 7 also would allow legally-employed young farm workers to ride as passengers in cars, trucks, and buses, under certain conditions in accordance with the exemption in proposed § 570.99(b)(2)(ii)(C). In addition, the Department requests comment on setting a maximum height restriction of 10 feet as an alternative to the maximum height restriction of six feet proposed in Ag H.O. 6. Also, the Department requests comment on the possibility of waiving the driving restrictions in Ag H.O. 2 for 14- and 15-year-old student-learners to drive licensed vehicles in states that provide for licensing 14- and 15-year-olds, provided they have passed required tests and examinations and are in possession of a valid driver's license or permit which authorizes them to drive certain motorized vehicles.

H. Working Inside a Fruit, Forage, or Grain Storage Designed To Retain an Oxygen Deficient or Toxic Atmosphere; an Upright Silo Within Two Weeks After Silage Has Been Added or When a Top Unloading Device Is in Operating Position; a Manure Pit; or a Horizontal Silo While Operating a Tractor for Packing Purposes (29 CFR 570.71(a)(8))

The NIOSH Report recommends (*see* Report, page 86) that the Department expand this exemption to prohibit *all* (emphasis in the original) work inside a fruit, forage, or grain storage such as a silo or bin. It also recommends that the Department continue to prohibit *all* work in a manure pit.

NIOSH notes that work in silos and bins presents hazards in many forms, including grain engulfment, exposure to silo gas, and oxygen deficiency. “Suffocation in flowing grain is the most common cause of death associated with grain storage structures in the U.S. Hazards exist either when the grain is being unloaded or loaded, or when workers fall into an air pocket under a crust of grain. Grain that flows during loading and unloading has characteristics of quicksand and can rapidly induce immersion. A worker

can be completely submerged in flowing grain in less than 8 seconds” (*see* NIOSH Report, page 87).

NIOSH also reports that even though the current Ag H.O. provides for a two-week waiting period to protect youth from entering a storage facility soon after new silage has been added, toxic gases may be present at any time in such facilities. “Although nitrogen dioxide levels are generally within a safe range after two weeks, dangerous amounts may remain for months if the silo has not been opened” (*see* NIOSH Report, page 87).

NIOSH notes that similar problems of toxic atmospheres arise from manure pits. “Manure pits are fermentation plants in which raw animal waste undergoes anaerobic bacterial decay. Manure pits allow for easy cleaning of animal confinement buildings and the efficient underground storage of large amounts of raw manure” (*see* NIOSH Report, page 87). However, such pits produce considerable amounts of toxic gases, including hydrogen sulfide, methane, ammonia and carbon dioxide. Deaths in manure pits can result from oxygen deficiency—the oxygen being replaced by toxic gases—or from the direct toxic effects of the gases (*see* NIOSH Report, page 88). NIOSH also states that the risks are especially heightened during the summer months—when more youth may be employed in agricultural occupations—because warmer, more humid weather accelerates the production of the toxic gases (*Id.*). In 2000, the WHD investigated the death of a 15-year-old hired farm worker who was suffocated when the tractor he was driving slid into a manure pit. The pit was about 100 feet long, 30 feet wide, and 10 to 12 feet deep.

The NIOSH Report also notes that incidents in silos, bins, or manure pits often result in multiple fatalities when co-workers or others die during attempts to rescue initial victims. “Often after a worker enters an oxygen-deficient or toxic atmosphere and collapses, co-workers notice the collapsed worker and enter the same atmosphere to attempt rescue; if they do not use proper precautions they also collapse” (*see* NIOSH Report, page 88). Such a tragedy is the subject of *NIOSH Fatality Assessment and Control Evaluation (FACE) Program Report 1989–46* (available at <http://www.cdc.gov/niosh/face/In-house/full8946.html>) where five individuals, including a 15-year-old, died in a manure pit on a Michigan dairy farm. The young worker and his uncle were replacing the shear pin on the manure pit's agitator shaft when they were overcome by the oxygen

deficiency. The other three adult male relatives died while trying to rescue the pair.

NIOSH reports (*see* Report, page 88) that between 1992 and 1997, CFOI identified 91 fatalities in agricultural production associated with entering a silo, grain bin, or manure pit. Sixty-five percent of the deaths were due to grain engulfment, with the rest attributable to asphyxiation either due to oxygen deficiency or a toxic atmosphere. Four of the fatal incidents resulted in multiple deaths when a co-worker attempted a rescue. CFOI also identified eight fatalities in agricultural production to youth under 16 years of age that occurred in a silo, bin, or manure pit (*see* NIOSH Report, pages 88 and 89).

Grain entrapments, unlike many other types of farm-related injuries and fatalities, continue to rise. Representatives of the Department of Agricultural and Biological Engineering of Purdue University reported that there were no less than 51 grain entrapments in 2010, the largest number ever recorded in any year (*see* Field B, Riedel S, [2011], 2010 Summary of Grain Entrapments in the United States available at <http://www.regulations.gov>, docket number WHD–2011–0001). Of the 51 incidents, 12% involved youth under the age of 16 (*Id.*).

WHD has conducted investigations regarding youth working in violation of this Ag H.O. In 2007, WHD investigated the death of a 12-year-old in New York who suffocated after falling into a grain bin. The grain collapsed and killed her. The WHD also investigated the death of a young worker who was crushed to death by soybeans while working in a 50-foot hopper. The minor died at the site.

The Department accepts the NIOSH recommendations and proposes to revise § 570.71(a)(8) by creating two new Ag H.O.s: § 570.99(b)(8) entitled *Occupations involving working inside any fruit, forage, or grain storage silo or bin (Ag H.O. 8)*, and § 570.99(b)(9) entitled *Occupations involving working inside a manure pit (Ag H.O. 9)*. The Department is not proposing any student-learner exemptions for these Ag H.O.s.

The Department is also considering whether the prohibitions of the proposed Ag H.O. 8 should be expanded to include other confined spaces, such as livestock confinement buildings with or without ventilation systems, and whether such work could safely be performed by student learners. The Department is not proposing specific regulatory language at this time but is asking for comments on whether it

should expand the proposed Ag H.O. 8 to include other types of confined spaces, and if so, for specific data supporting such a provision.

I. Handling or Applying (Including Cleaning or Decontaminating Equipment, Disposal or Return of Empty Containers, or Serving as a Flagman for Aircraft Applying) Agricultural Chemicals Classified Under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) as Category I of Toxicity, Identified by the Word "Poison" and the "Skull and Crossbones" on the Label; or Category II of Toxicity, Identified by the Word "Warning" on the Label (29 CFR 570.71(a)(9))

The NIOSH Report recommends (*see* Report, page 90) that this Ag. H.O. be revised to be consistent with the Environmental Protection Agency (EPA) Worker Protection Standard for pesticides. NIOSH recommends that the revised Ag H.O. use the following language: "Performing any tasks that would fall under the EPA definition of 'pesticide handler,' in 40 CFR part 170—The Worker Protection Standard." NIOSH states that by using its suggested language, any future changes to the EPA standards could automatically be incorporated into the Ag H.O. without additional rulemaking.

NIOSH supports its recommendation by noting that the current Ag H.O. only addresses exposures of farm workers under the age of 16 to Toxicity Category I and II pesticides, which are a concern because of their acute toxicity. The current Ag H.O. provides no protection against other chronic hazards of pesticides "such as their potential neurotoxicity, reproductive toxicity, endocrine disruption, and carcinogenic effects" (*see* NIOSH Report, page 90). The Department notes that Child Labor Regulation No. 3 (29 CFR 570.31–.37) already prohibits the nonagricultural employment of 14- and 15-year-olds to perform most of the tasks performed by a *pesticide handler* as defined by the EPA.

NIOSH reports (*see* Report, page 92) that the most recent national estimates of unintentional deaths due to pesticides were in the 1970s, and of the 113 unintentional pesticide-related deaths in the two-year period 1973–1974, 11% were classified as occupational. Citing data from the American Association of Poison Control Centers Toxic Exposure Surveillance System (*see* Report, page 93), NIOSH notes that 86,289 human poison exposure cases due to insecticides, pesticides, or rodenticides occurred in the U.S. in 1998. NIOSH also cites data

from a study which examined pesticide poisoning among working children. A total of 531 children under the age of 18 years were identified to have acute occupational pesticide-related illness. It was estimated that 62% of the cases were children employed in agricultural production and services. Of the 81% of cases where the EPA acute Toxicity Category was available, 67% of the illnesses were associated with Toxicity Category III pesticides. Toxicity Category III pesticides are not prohibited by the current Ag H.O. (*see* NIOSH Report, page 93).

The NIOSH Report details the effects of exposure to pesticides and notes that many studies report special risks for young workers. For instance, the National Research Council concluded "that the toxicity of pesticides can potentially be influenced by the immaturity of biochemical and physiological functions and body composition of developing children and adolescents. There is age-related variation in susceptibility to pesticides, based on different metabolic rates and ability to activate, detoxify and excrete xenobiotic compounds, and both qualitative and quantitative differences in toxicity of pesticides between children and adults" (*see* NIOSH Report, page 95).

The Department agrees with the NIOSH Report and proposes to revise § 570.71(a)(10) by replacing it with a new § 570.99(b)(9) entitled *Occupations involving the handling of pesticides* (Ag H.O. 10). The Ag H.O. would prevent young hired farm workers from performing any task listed under the EPA definition of a pesticide "handler" contained in the EPA's Worker Protection Standard, codified at 40 CFR part 170. NIOSH's recommendation that the Ag H.O. prohibit any tasks that fall under the EPA Worker Protection Standard's definition of pesticide handler is designed to reduce the risks of pesticide-related illness or injury by reducing or eliminating exposure to pesticides. The proposed Ag H.O. would be considerably more protective than the current Ag H.O. The EPA Standard addresses workers' and pesticides handlers' occupational exposures to pesticides used in the production of agricultural plants on farms, or in nurseries, greenhouses, and forests.

The Department will continue to work with EPA to ensure that the safe employment of young farm workers is properly addressed.

The Department proposes to define the term *pesticide* as it is defined in the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u). That statutory definition generally defines a

pesticide as: (1) Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer. Under the current EPA Worker Protection Standard at 40 CFR 170.3, the term *pesticide handler* is defined as any person, including a self-employed person, who performs any of the following tasks:

- (1) Mixing, loading, transferring, or applying pesticides;
- (2) Disposing of pesticides or pesticide containers;
- (3) Handling opened containers of pesticides;
- (4) Acting as a flagger;
- (5) Cleaning, adjusting, handling, or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues;
- (6) Assisting with the application of pesticides;
- (7) Entering a greenhouse or other enclosed area after the application and before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by 40 CFR 170.110(c)(3) or in the labeling has been met to operate ventilation equipment, to adjust or remove coverings used in fumigation, or to monitor air levels;
- (8) Entering a treated area outdoors after application of any soil fumigant to adjust or remove soil coverings such as tarpaulins;
- (9) Performing tasks as a crop advisor during any pesticide application, before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by 40 CFR 170.110(c)(3) or in the labeling has been met, or during any restricted-entry interval.

The definition of *pesticide handler* does not include any person who is only handling pesticide containers that have been emptied or cleaned according to pesticide product labeling instructions or, in the absence of such instructions, have been subjected to triple-rinsing or its equivalent. The Department is proposing to define *pesticide handler* in proposed § 570.99(b)(9) by adopting the EPA definition in 40 CFR 170.3.

The Department does not propose any student-learner exemptions for this Ag H.O.

J. Handling or Using a Blasting Agent, Including but Not Limited to, Dynamite, Black Powder, Sensitized Ammonium Nitrate, Blasting Caps, and Primer Cord (29 CFR 570.71(a)(10))

The NIOSH Report (page 96) recommends that this Ag H.O. be retained. NIOSH notes that explosives are used in agriculture for a variety of purposes, and their use increases the possibility of catastrophic events, such as fires and explosions. These events often involve multiple victims.

The Department concurs with the NIOSH Recommendation and proposes to move the current Ag H.O. to § 570.99(b)(11) and entitle it *Occupations involving the handling of blasting agents (Ag H.O. 11)*. The Ag H.O. would prohibit young hired farm workers from handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord. The Department is not proposing to create a student-learner exemption for this Ag H.O.

K. Transporting, Transferring, or Applying Anhydrous Ammonia (29 CFR 570.71(a)(11))

NIOSH recommends (*see* Report, page 97) that this Ag H.O. be retained. NIOSH notes that anhydrous ammonia (ammonia without water) is an inexpensive chemical used commonly in agriculture as a fertilizer. It requires strict handling, operating, and maintenance procedures to prevent hazardous exposure.

Any exposure to anhydrous ammonia can cause severe burns and death due to its powerful corrosive action on tissue. "Inhalation of high concentrations causes death due to bronchoconstriction, edema, and inflammation of the airway walls (EPA 2000; Leduc *et al.* 1992; Sharp 1965). Exposure to lower concentrations for longer periods can also be fatal as the gas reaches deeper parts of the lung. Chronic fibrosis of the lung may occur if the victim survives the initial insult. Direct contact with the ammonia in liquid form causes severe burns to skin and mucous membranes. Due to its high water solubility and alkalinity, it causes necrosis of the tissue and can penetrate deeply. Severe corneal burns may result from contact with the eyes. If contact occurs as anhydrous ammonia liquid escapes from a container, vaporization can cause freezing burns of the skin and eyes due to rapid heat loss" (*see* NIOSH Report, page 97).

The CFOI identified eight fatalities between 1992 and 1997 related to work with anhydrous ammonia. The majority

of these cases were due to exposure to anhydrous ammonia gas. NIOSH also notes that, during 1997, injuries and illnesses caused by anhydrous ammonia "[r]esulted in a median of 20 days away from work" (*see* Report, page 97). This is indeed a dangerous chemical warranting national standards and procedures for its safe storage, transportation, and handling. As NIOSH notes, "[y]outh should not be given the heavy responsibility of following these complex procedures which, if not followed, could be fatal or severely debilitating to themselves and any others nearby" (*see* NIOSH Report, pages 97–98).

The Department agrees with the NIOSH recommendation and proposes to retain the Ag H.O. as written, but rename it *Occupations involving the transporting, transferring, or applying of anhydrous ammonia (Ag H.O. 12)*, and move it to a new § 570.99(b)(12). No student-learner exemption is proposed for this Ag H.O.

L. Employment in Tobacco Production and Curing

The Department is proposing to create a new Ag H.O. that would prohibit the employment of young hired farm workers in tobacco production and curing in order to prevent occupational illness due to green tobacco sickness (GTS). GTS is acute nicotine poisoning, unique to tobacco production and the handling of wet tobacco. It is caused by the absorption of nicotine through the skin and into the bloodstream. This illness, which afflicts farm workers of all ages, is characterized by weakness, headache, dizziness, nausea, vomiting, itching, and rashes. Symptoms may also include abdominal cramps, prostration, difficulty breathing, and occasionally fluctuations in blood pressure or heart rate (*see* Arcury TA, Quandt SA. 2006. Health and social impacts of tobacco production. *J Agromedicine*. 11:71–81). Because nicotine poisoning through the skin is slow acting, workers may not begin to notice symptoms for hours after the initial exposure to wet tobacco.

"GTS is normally a self-limiting condition from which workers recover in 2 or 3 days. However, symptoms are sometimes severe enough to result in dehydration and the need for emergency medical care." (*See* Arcury TA, Quandt SA, Preisser JS, Bernert JT, Norton D, Wang J. 2003. High levels of transdermal nicotine exposure produce green tobacco sickness in Latino farm workers. *Nicotine Tob Res*. 5:315–321). There is no special treatment or cure for GTS. The most important actions a sick farm worker can take to treat GTS are to stay hydrated by drinking lots of water, get

adequate rest, and take anti-nausea drugs as needed (*see* North Carolina Farmworker Health Module *Green Tobacco Sickness* available at <http://www.ncfhp.org/module/GTS.pdf>).

Although GTS is not a new problem, there are few published reports detailing the incidence of GTS in the United States. GTS has likely existed as long as workers have been harvesting wet tobacco (*see* NIOSH Update, July 8, 1993, available at <http://www.cdc.gov/niosh/updates/93-115.html>). Increased awareness of the condition, better surveillance, the development of diagnostic criteria, and recognition that the symptoms of GTS could have caused its misdiagnosis as pesticide poisoning, may all account for the rise in the number of reported cases since 1990 (*Id.*). One study of 304 North Carolina Latino tobacco farm workers conducted in 2005 disclosed that 18.4% of those farm workers met the GTS case definition (*see* Arcury TA, Vallejos QM, Schulz MR, Feldman SR, Fleischer, AB, Verma A, Quandt SA. 2008. Green tobacco sickness and skin integrity among migrant Latino farm workers. *Am J Ind Med*. 51:195–203). In another study, the Centers for Disease Control and Prevention (CDC) reported in 1992 that the estimated crude two-month incidence rate of hospital-treated GTS among tobacco workers in a five-county study area was 10 per 1,000 workers. Statewide extrapolation of this incidence rate among the approximately 60,000 persons who, at least part time, harvest tobacco annually in Kentucky, suggests as many as 600 persons in that state could have sought emergency department care for the condition in 1992. This is not an insignificant number (*see* Green Tobacco Sickness in Tobacco Harvesters—Kentucky, 1992, *MMWR Weekly*, April 9, 1993, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00020119.htm>). The CDC also notes that this figure may underestimate the true incidence of GTS because many affected persons may not seek hospital treatment (*Id.*). A review of published reports of GTS in children and adolescents identified at least six studies between 1970 and 1996 where children—some as young as seven years of age—were identified as having suffered from the sickness (*see* McKnight RH, Spiller HA. 2005. *Public Health Reports* 120:602–6).

The potential for GTS exists throughout the tobacco production process. The study of Latino farm workers in North Carolina reported that "[w]ork activities among the participating farm workers varied across the season, with planting, cultivating, and harvesting tobacco being dominant

activities in the early part of the season, topping tobacco being dominant in the middle season, and harvesting tobacco and barning and baling tobacco being dominant in the later part of the season” (see Arcury TA, Vallejos QM, Schulz MR, Feldman SR, Fleischer, AB, Verma A, Quandt SA. 2008. *Am J Ind Med* 51:195–203). Two of these tasks, topping and harvesting, particularly raise a farm worker’s risk for GTS—and in the United States, children often perform both tasks (see McKnight RH, Spiller HA. 2005. *Public Health Reports* 120:602–6). “‘Topping’ involves removing the flower from the growing plant to encourage greater root growth, leaf weight, and nicotine content at harvest. To ‘top,’ workers walk through rows of tobacco plants and snap off the flowers by hand. As one would expect, workers have nearly constant contact with tobacco leaves as they perform this task” (*Id.*). Harvesting not only requires continuous and complete contact with tobacco plants, but in the United States, generally occurs in late August or early September when the ambient temperature is high. “The combination of high ambient temperatures and hard physical labor shunts blood to the skin to help lower body temperature. The resultant increase in surface blood flow also significantly increases dermal absorption of nicotine” (*Id.*).

GTS is preventable. Strategies to help prevent GTS include not working with tobacco that is wet from dew or a recent rain; staying hydrated; wearing protective clothing, long sleeves, long pants, shoes that cover the entire foot, hats, and gloves; and wearing rain gear or waterproof clothing. It is also important that workers change out of clothes immediately upon leaving the field or barn, even if the clothes are dry, as nicotine will remain in the clothing. Work clothes must be washed after each use before being worn again. Upon completion of the work shift, tobacco workers should shower with cool, soapy water to remove residue from the skin (see North Carolina Farmworker Health Module *Green Tobacco Sickness* available at <http://www.ncfhp.org/module/GTS.pdf>).

McKnight and Spiller report that children may be especially vulnerable to being afflicted with GTS because “[t]heir body size is small relative to the dose of nicotine absorbed, they lack tolerance to the effects of nicotine, and they lack knowledge about the risks of harvesting tobacco, especially after a recent rain.” Young farm workers are often unable to recognize the importance of such strategies as hydration, wearing protective clothing, and the immediate changing of clothes

and showering; and they may not be able to identify their own GTS symptoms promptly. In addition, some of the waterproof protective clothing farm workers are encouraged to wear when working with tobacco, such as plastic aprons and rainsuits, may place such workers at increased risk of heat stress caused by wearing impermeable clothing in hot weather (see NIOSH Update, July 8, 1993 available at <http://www.cdc.gov/niosh/updates/93-115.html>). In addition, many farm workers, especially young hired farm workers, may not have immediate access to the important preventative measures discussed above. Accordingly, the Department is proposing to create a new Ag H.O. entitled *Occupations involving working in the production and curing of tobacco* (Ag H.O. 13) located at a new § 570.99(b)(13). This Ag H.O. would ban all work in the tobacco production and curing, including, but not limited to such activities as planting, cultivating, topping, harvesting, baling, barning, and curing. The Department is not proposing any student-learner exemption for this Ag H.O.

M. Employment in Agriculture Under Adverse Conditions

The Department is also considering whether to create a new Ag H.O. that would limit the exposure of young hired farm workers to extreme temperatures and/or arduous conditions and is asking for comment on this subject. Workers of all ages are susceptible to occupational illness and injury when they work for prolonged periods of time in extreme temperatures. See, e.g., Centers for Disease Control Report on *Heat-Related Deaths Among Crop Workers—United States, 1992–2006* available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm>; see also National Institute for Occupational Safety and Health Report on *Cold Stress* available at <http://www.cdc.gov/niosh/topics/coldstress>. As Human Rights Watch documented in its May 2010 Report, *Fields of Peril: Child Labor in Agriculture*, pp. 54–55, agricultural work naturally lends itself to occupational exposure to extreme heat and cold. Although the FLSA limits the hours that most youth in agriculture can work to “outside of school hours,” children whose hours would normally be restricted when school is in session can work for unlimited hours over the summer months, which in most parts of the country are the hottest of the year.

Heat stress is a recognized hazard for people of all ages, including children. Although preventative measures, such

as drinking sufficient amounts of water and alternating work and rest periods, can combat occupational heat stress, it is imperative that each worker is able to recognize the signs and symptoms of heat-related illnesses, such as heat exhaustion and heat stroke (see, e.g., OSHA Fact Sheet No. 95–16, *Protecting Workers in Hot Environments* available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FACT_SHEETS&p_id=167). Unlike their older counterparts, young workers may not have the maturity and judgment to recognize the symptoms of heat stress, which can quickly become fatal (see EPA/OSHA Publication EPA–750–b–92–001, *A Guide to Heat Stress in Agriculture*, May 1993, pages 1, 21).

Therefore, the Department is asking for comments on whether it should create a new Ag H.O. addressing youths’ exposure to extreme temperatures. Such an Ag H.O. could provide that youth under the age of 16 would not be permitted to work in agricultural occupations where the temperatures at which they are working exceed or drop below a certain temperature, factoring in such things as humidity, wind velocity, and the degree and duration of the physical exertion required by the work. It might also require that hours in direct sun be limited, if the temperature reaches certain thresholds for prolonged periods of time, and/or that workers be provided with shade, additional water supplies, more frequent breaks, the use of fans in shaded rest areas, or other options for relieving heat stress in certain circumstances. Comments are also requested about whether the payment of piece rates to young farm workers impacts their prolonged exposure to potentially harmful conditions. The Department seeks input from stakeholders on how best to protect young workers from heat-related illnesses and injury, what the triggers for such requirements should be, and what mechanisms the Department could use, such as using heat index charts or methods like the wet bulb globe temperature index to measure field temperatures, or using medical documentation of heat-related illness, to enforce such a provision.

N. Child Labor Exemptions Applicable to Agricultural Employment (29 CFR 570.123)

The Department proposes to revise this section of subpart G to reflect the statutory changes to the FLSA provisions dealing with child labor employment in agriculture that were made since the last update of the subpart. A similar revision of the subpart addressing nonagricultural

employment was made by the Final Rule published by the Department on May 20, 2010 (*see* 75 FR 28404).

The Department proposes to clarify the parental exemption involving agricultural employment by including information about the exemption discussed in the Background section of this preamble. The proposal provides guidance as to who qualifies as a parent; what determines that a farm is “operated by” a parent; and how the Department interprets the extension of this parental exemption to persons standing in the place of a parent as well as a relative who may take temporary custody of a youth and stands in the place of the parent. The revision also notes that the parental exemption—both in terms of working during school hours and performing hazardous occupations normally prohibited by the Ag H.O.s—would not apply to the employment of a child of a farmer when that child is employed on a farm not owned or operated by his or her parent. It also addresses related situations, such as where the farm or its property may be owned by a closely-held corporation or partnership consisting of family members or other close relatives.

The Department also proposes to incorporate the provisions of FLSA sections 13(c)(2) and 13(c)(1)(A) through (C) into § 570.123. These sections were enacted after the last revision to subpart G. Section 13(c)(2) establishes the Secretary’s authority to find and declare certain agricultural occupations to be particularly hazardous for the employment of children below the age of 16 and sets the minimum ages for employment in agriculture. Unlike the parental exemption contained in section 3(l) which exempts only the employment of a youth by a parent or person standing in place of a parent in a business/farm solely owned by that parent or person, sections 13(c)(1)(A) and 13(c)(2) expand the parental exemption to include youth who are employed in agriculture by a parent or person standing in place of a parent on a farm *operated* by such parent or person. The parent/operator of the farm must be the employer of the minor for this exemption to apply. Although section 13(c)(2) permits youth working for their parent(s) or person(s) standing in place thereof on a farm operated by such parent(s) or person(s) to perform hazardous work otherwise prohibited by the Ag H.O.s, section 13(c)(1) limits such employment to periods outside of school hours for the school district where the youth is living while so employed.

The Department’s proposal retains the current explanation of the term *school*

hours for the school district where such employee is living while so employed. The Department is proposing to clarify that interpretation by defining *graduating from high school* as the successful completion of the 12th grade. This would include the successful completion of a high school general equivalency diploma (GED) program. The Department also proposes to revise its guidance concerning the hiring of children who have moved from one to school district to another. The current regulation suggests that employers not hire such youth prior to May 15th, the Department’s proposal would change that to June 1st in recognition of the longer school years now in effect in most of the country. In addition, the proposal would update the acceptable evidence regarding school schedules to permit statements by a school official regarding dates for the beginning and end of the school year or school day in the particular district in question, or report cards or other documents which may be provided to the student by the school.

Finally, the Department proposes to revise § 570.123(d) to reflect that the agricultural hazardous occupations orders would now be contained in the proposed subpart F of 29 CFR part 570.

VI. Proposed Regulatory Provisions—Civil Money Penalties—29 CFR Part 579

The Department proposes to revise part 579 to provide additional transparency to its child labor civil money penalty assessment process by incorporating the primary provisions of Wage and Hour Division Field Assistance Bulletin 2010–1 (available at http://www.dol.gov/whd/FieldBulletins/fab2010_1.pdf). This proposal will increase the public’s understanding of the child labor civil money penalty assessment process while preserving national consistency in its administration.

The proposed revision does not change § 579.1, which the Department revised to incorporate the provisions of GINA in the Final Rule published on May 20, 2010 (*see* 75 FR 28460–61). The Department proposes to revise all other sections of part 579.

The Department proposes to revise and expand the definitions in § 579.2 as necessitated by GINA. Definitions of the terms *caused by a child labor violation*, *Child Labor Enhanced Penalty Program (CLEPP)*, *CLEPP serious injury*, *contributed to the death or injury of a minor*, *death*, *de minimis*, *first aid*, *nonserious injury*, *repeated violations*, *serious injury (Non-CLEPP)*, and *willful violations* have been added to this

section. The term *person* has been clarified to include a parent when he or she is the employer of his or her child and that child’s employment is not in compliance with the provisions of part 570 and not otherwise exempt, such as where a parent employs a 16- or 17-year-old child in a nonagricultural hazardous occupation. The Department believes that this proposal will bring clarity to the assessment process.

Section 579.3 addresses *Violations for which child labor civil money penalties may be assessed*. The Department is proposing to renumber the subparagraphs in § 579.3(a) to reuse the previously “reserved” subparagraphs (3) and (4) in § 579.3. The current § 579.3(a)(5) and (6) would become § 579.3(a)(3) and (4). The Department also proposes to revise the current § 579.3(a)(6) to note that employers will be subject to a civil money penalty for failing to comply with FLSA sections 12 and 13(c), in addition to a separate penalty for failing to comply with the provisions of 29 CFR part 570. This revision, which because of the “renumbering” would be located at § 579.3(a)(4), clarifies the civil money penalty assessment process in light of Congress’ amendments to the child labor provisions of the FLSA.

The Department is proposing to revise § 579.3(b)(2)(i) to note that *school hours* are now determined in the same manner for youth engaged in either agricultural or nonagricultural employment. This revision was necessitated by the Final Rule published by the Department on May 20, 2010 which revised § 570.35(b) (*see* 75 FR 28451). The Department is also proposing to switch the order of, but not change the language of, § 579.3(b)(2)(ii) and (iii). The Department believes this reordering brings greater clarity to the regulation.

Finally, the Department is proposing to reformat, but not change the language of, § 579.3(c)(1) and (3). By reformatting these subparagraphs in an outline form, the Department believes it brings both clarity and conformity to the regulation.

Section 579.4 has no content and is currently “reserved.” Section 579.5 addresses *Determining the amount of the penalty and assessing the penalty*. The Department proposes to bifurcate this section, creating a new § 579.4 that will address *Determining the initial amount of the penalty for child labor violations that caused the death or serious injury of a minor under the Child Labor Enhanced Penalty Program (CLEPP)*. This proposed section, by incorporating provisions of the WHD FAB 2010–1, details the processes the Department uses to determine the initial amounts of child labor civil money

penalties for violations that fall under the provisions of section 16(e)(1)(A)(ii) that were introduced by GINA. Section 579.5 will be revised and titled

Determining the initial amount of the penalty for child labor violations that do not fall under the Child Labor Enhanced Penalty Program (CLEPP). This proposed section details the processes the Department uses to determine the initial amounts of child labor civil money penalties that do not fall under the provisions of section 16(e)(1)(A)(ii). The proposed revision notes that the initial amount of a civil money penalty for child labor violations that do not fall under GINA is a predetermined amount that has been established for each type of violation based on the relative gravity of the violation when compared to the universe of violations; *i.e.*, the initial penalty amounts are stratified to take into consideration the gravity of each violation when compared to the array of possible violations. The more egregious violations—those that place young workers at greater risk—warrant a higher initial civil money penalty amount. The Department has published this list of predetermined amounts on the WHD Web site at <http://www.dol.gov/whd/childlabor.htm> and may periodically increase the initial penalty amounts in accordance with § 579.1(b) of this part or for other reasons, such as a strategic effort by the Department to increase compliance regarding specific types of violations or within specific types of industries. The Department is also proposing to redesignate § 579.5(e) and (f), which deal with the actual assessment and finality of child labor civil money penalties, as § 579.7(a) and (b).

The Department is proposing to create a new § 579.6 entitled *Determining the amount of the civil money penalty to assess*. The proposed §§ 579.4 and .5 demonstrate how WHD generates initial child labor civil money penalties. The revised § 579.6 discusses how WHD arrives at the actual amount that will be assessed. This section discusses how the Department will, during the child labor civil money penalty assessment process, continue to take into consideration both the statutory and regulatory requirements when arriving at the amounts of the penalties that will be assessed. This process, as noted in the proposed § 579.6(a), includes a review by the WHD assessing official to ensure that both the statutory and regulatory provisions are given due consideration. As previously noted, the Department proposes to create a new § 579.7 entitled *Assessment and finality of the penalty*. This new paragraph would be

comprised solely of those subparagraphs previously located at § 579.5(e) and (f).

VII. Paperwork Reduction Act

In accordance with requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, the Department seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, state, local and Tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the Office of Management and Budget (OMB) under the PRA at the final rule stage.

This “paperwork burden” analysis estimates the burdens for the proposed regulations as drafted.

Circumstances Necessitating Collection: The Department is proposing to revise 29 CFR 570.2(b) to clarify the Department’s regulations. Under current § 570.2(b), a minor 12 or 13 years of age may be employed in agriculture to perform nonhazardous work outside of school hours with the written consent of his or her parent or person standing in place of the parent, or may work on a farm where the parent or person standing in place of the parent is also employed. The section also allows a minor under 12 years of age to be employed with the consent of a parent or person standing in place of a parent on a farm where all employees are exempt from the minimum wage provisions by section 13(a)(6)(A) of the FLSA. The Department has always interpreted the term consent, as it applies to all hired farm workers under 14 years of age, to mean written consent. In order to provide clarification, the Department proposes to revise § 570.2(b) by changing *consent* to *written consent* for persons employed in agriculture under 12 years of age to make the language consistent with the existing language applicable to minors employed in agriculture at 12 and 13 years of age.

Purpose and Use: Section 11(c) of the FLSA requires employers to make, keep, and preserve records of employees and of their wages, hours, and other conditions and practices of employment in accordance with the regulations prescribed by the Administrator of the U.S. Department of Labor’s Wage and

Hour Division. The regulations require employees and employers to make and keep the third-party disclosure written parental consent. No particular format of the written parental consent is required.

The recordkeeping requirements are necessary in order for the Department to carry out its statutory obligation under the FLSA to investigate and ensure employer compliance. The Wage and Hour Division uses these records to determine employer compliance.

Information Technology: The proposed regulations prescribe no particular order or form of the written parental consent record. The preservation of records in such forms such as microfilm, photocopies, scans, PDF files, or automated word or data processing is acceptable, provided the employer maintains the information and provides adequate facilities to the DOL for inspection, copying, transcription, or reproduction.

Minimizing Duplication: The proposed change (to make the consent required for minor persons under 12 years of age employed in agriculture with the consent of a parent or person standing in place of a parent on a farm where all employees are exempt from the minimum wage provisions a written consent) does not duplicate other existing information collections.

Agency Need: The Department is assigned a statutory responsibility to ensure employer compliance with the FLSA. Without the third-party disclosure of written parental consent, the Department would have difficulty determining whether the employer has met the exemption from the child labor requirements.

Public Comments: The Department seeks public comments regarding the burdens imposed by information collections in this proposed rule. In particular, the Department seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency’s estimates of the burden of the proposed collection of information including the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are required to respond. Commenters may send their views about these information collections to the Department in the same way as all other comments (*e.g.*, through the regulations.gov Web site). All comments received will be made a

matter of public record, and posted without change to <http://www.regulations.gov>, including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department has submitted the identified information collections contained in the proposed rule to the OMB for review under the PRA. See 44 U.S.C. 3507(d); 5 CFR 1320.11. While much of the information provided to OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the <http://www.reginfo.gov/public/do/PRAMain> Web site.

In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed rule may be addressed to OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for Wage and Hour, Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll free numbers).

Confidentiality: The Department makes no assurances of confidentiality to respondents. As a practical matter, the Department would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Respondent Hours Burden Estimates: Lacking exact data, the Department estimates a total of 338 employers and parents of individual employees under 12 years of age will be burdened by the change in the proposed regulatory language. According to data published by the National Agricultural Workers Survey (NAWS), approximately 13,500 persons under 16 years of age worked in crop production between 2006–2009. (See NAWS Public Data available at: <http://www.doleta.gov/agworker/naws.cfm>). The Department divided the total persons under age 16 by the four years of the survey ($13,500/4 = 3,375$ persons under age 16). The Department further took ten percent of the annual number of persons under age 16 to represent the number of persons under age 12 working in agriculture in a single year ($3,375 \times 10\% = 338$ (rounded)).

The Department estimates that the individual or household burden of providing written consent to allow a minor under 12 years of age to be employed with the consent of a parent or person standing in place of a parent on a farm where all employees are exempt from the minimum wage provisions by section 13(a)(6)(A) of the FLSA is approximately one minute per individual, imposing an annual burden of 338 minutes (338 persons $\times$ 1 minute per person).

To define the universe, the Department used the NAWS public data (available at <http://www.doleta.gov/agworker/naws.cfm> and cited in the preamble of this NPRM) on minors hired in crop production during the period 2006–2009. The NIOSH Child Agriculture Injury Survey data from 2006 is also mentioned in the preamble of this NPRM. In defining the universe, the Department elected to use the NAWS data as opposed to the NIOSH data because the NAWS data covers a four year period and thereby reduces the risk of outliers. The Department invites comment on whether the use of the NIOSH Child Agriculture Injury Survey data for 2006 is more appropriate than the NAWS public data in making an estimate about the average number of farm workers hired each year under 12 years of age.

The Department further estimates respondent employer burden to file and maintain the record to be one minute per individual under 12 years of age employed. This imposes a burden of approximately 338 minutes (338 employers $\times$ 1 minute per individual employed in agriculture under 12 years of age).

There are no Federal burdens or costs associated with this information collection.

TOTAL ANNUAL BURDEN HOURS = 11 HOURS ($338 + 338 = 676$ minutes).

There is a cost burden imposed on employers who are required to maintain records of parental consent for three years in compliance with the FLSA recordkeeping requirements. As a result, employers will require staff to receive and file the written parental consent. Without the availability of specific data on employers who maintain these parental consent records, the Department has used the January 2011 average hourly rate for production or nonsupervisory workers on nonfarm payrolls of \$22.86 to determine respondent costs. In “The Employment Situation, January 2011”, Bureau of Labor Statistics, Table B–3, <http://www.bls.gov/news.release/pdf/empst.pdf>, the Department estimates annual respondent costs to be

approximately \$126 ($\22.86×5.5 employer respondent burden hours) annually to file and maintain these written parental consent records.

TOTAL ANNUAL COST BURDEN = \$126.

VIII. Executive Orders 13563 and 12866; Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The Fair Labor Standards Act, in order to curtail oppressive child labor, charges the Secretary of Labor to find and by order declare those nonagricultural occupations that are particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being (see 29 U.S.C. 203(l)). A similar charge, regarding the employment of youth under 16 years of age in agriculture, is provided in 29 U.S.C. 213(c). Both the nonagricultural Hazardous Occupations Orders (HOs) and the Agricultural Hazardous Occupations Orders (Ag H.O.s) identify the types of occupations and tasks that young workers may not perform in order to reduce occupational injuries and deaths to young workers.

Because of changes in the workplace, improved occupational injury surveillance, Wage and Hour Division investigation findings, the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing Federal and state standards, and divergent views on how best to balance scholastic requirements and work experiences, the Department has been conducting a continuous review of the Federal child labor provisions with the purpose of refining and improving its regulations. A detailed discussion of the Department’s

review was included in the Notice of Proposed Rulemaking (NPRM) relating primarily to the nonagricultural HOs that was published in the **Federal Register** on April 17, 2007 (see 72 FR 19339). That NPRM led to a Final Rule that was published in the **Federal Register** on May 20, 2010 (see 75 FR 28404), which became effective on July 19, 2010.

An important component of the Department's continuous review includes the aforementioned NIOSH Report. The Department provided funds for NIOSH to develop the report based on a review of the data and the scientific literature. The primary data sources used by NIOSH were the Census of Fatal Occupations Injuries (CFOI), the Survey of Occupational Injuries and Illnesses (SOII), the National Electronic Injury Surveillance System (NEISS), and the Current Population Survey (CPS).

NIOSH made recommendations regarding all the existing hazardous occupations—both agricultural and nonagricultural—and suggested new orders for occupations and tasks not then regulated. The recommendations were driven by information on high-risk activities for all workers, not just patterns of fatalities and serious injuries among young workers. The general rationale for recommending an order was the number of fatalities and the number and severity of nonfatal injuries, as well as research on health effects of workplace exposures (see NIOSH Report, page xi).

As discussed earlier, the NIOSH recommendations regarding the nonagricultural HOs were addressed in previous rulemaking efforts (see 72 FR 19339, see also 72 FR 19328). All the NIOSH recommendations concerning the Ag H.O.s are addressed in this NPRM. The current Ag H.O.s, and the NIOSH Report recommendations addressing them, are as follows:

(1) *Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor* (see 29 CFR 570.71(a)(1)). NIOSH recommends that the Department “(1) Revise to remove the 20 PTO (power-take off) horsepower threshold; (2) Revise exemption for 14- and 15-year-olds with tractor certification to require tractors to be equipped with a rollover protective structure (ROPS) and mandate the use of seatbelts” (see NIOSH Report, page xv).

(2) *Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines: corn picker, cotton picker,*

grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyor, the unloading mechanism of a nongravity-type self-unloading wagon or trailer, power post-hole digger, power post driver, or nonwalking type rotary tiller (see 29 CFR 570.71(a)(2)).

(3) *Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines: trencher or earthmoving equipment; fork lift; potato combine; power-driven circular, band, or chain saw* (see 29 CFR 570.71(a)(3)).

NIOSH recommends that the Department combine Ag H.O. 2 and Ag H.O. 3 and expand the prohibitions from a list of specific machines to a list of machines organized by function; e.g., harvesting and threshing machinery; mowing machinery; plowing, planting and fertilizing machinery; excavating machinery; etc. (see NIOSH Report, page xv).

(4) *Working on a farm in a yard, pen, or stall occupied by a bull, boar, or stud horse maintained for breeding purposes; a sow with suckling pigs; or cow with newborn calf (with umbilical cord present)* (see 29 CFR 570.71(a)(4)). NIOSH recommends that the Department retain this Ag H.O. (see NIOSH Report, page xv).

(5) *Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than 6 inches* (see 29 CFR 570.71(a)(5)). NIOSH recommends that the Department remove the 6-inch diameter threshold (see NIOSH Report, page xv).

(6) *Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet* (see 29 CFR 570.71(a)(6)). NIOSH recommends that the Department (1) expand the Ag H.O. to include work on roofs, on farm structures including silos, grain bins, windmills, and towers; and, on vehicles, machines and implements; and (2) reduce the maximum height at which youth may work in these settings from 20 feet to 6 feet (see NIOSH Report, page xvi).

(7) *Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper* (see 29 CFR 570.71(a)(7)). NIOSH recommends that the Department (1) expand the Ag H.O. to prohibit driving of all motor vehicles and off-road vehicles (including all-terrain vehicles), with or without passengers, on or off the highway; (2) expand the Ag H.O. to prohibit work as an outside helper on a

motor vehicle; and (3) retain the provision prohibiting riding on a tractor as a passenger or helper, but move it under the revised Ag. H.O. 1 (see NIOSH Report, page xvi).

(8) *Working inside a fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere; an upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position; a manure pit; or a horizontal silo while operating a tractor for packing purposes* (see 29 CFR 570.71(a)(8)). NIOSH recommends that the Department expand the Ag H.O. to prohibit *all* (emphasis in the original) work inside a fruit, forage, or grain storage, such as a silo or bin; and *all* work in a manure pit (see NIOSH Report, page xvi).

(9) *Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) as Category I of toxicity, identified by the word “poison” and the “skull and crossbones” on the label; or Category II of toxicity, identified by the word “warning” on the label* (see 29 CFR 570.71(a)(9)). NIOSH recommends that the Department revise this Ag H.O. to be consistent with the Environmental Protection Agency (EPA) Worker Protection Standard for pesticides, encompassing prohibitions against pesticides with chronic health effects as well as pesticides with recognized acute toxicity (see NIOSH Report, page xvi).

(10) *Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord* (see 29 CFR 570.71(a)(10)). NIOSH recommends that the Department retain this Ag H.O. (see NIOSH Report, page xvi).

(11) *Transporting, transferring, or applying anhydrous ammonia* (see 29 CFR 570.71(a)(11)). NIOSH recommends that the Department retain this Ag H.O. (see NIOSH Report, page xvii).

As discussed in the preamble of this NPRM, the Department proposes to accept all of the NIOSH Ag H.O. recommendations and they, along with input from other stakeholders and the Department's own enforcement experiences, serve as the impetus for the revisions being proposed by this NPRM.

The Department considers the issuance of this proposed rule an important and necessary step to reduce occupational injuries and deaths of young workers. This proposal, which,

under the Secretary's FLSA charges must be restrictive in nature, still strives to balance the potential benefits of transitional, staged employment opportunities for youth with the necessary protections for their education, health and safety.

This proposed rule is necessary for many reasons. Many studies have noted that young workers are not "little adults" but human beings at their own unique stage of development. It is well established that several characteristics of youth place adolescent workers at increased risk of injury and death. Lack of experience in the workplace and in assessing risks, and developmental factors—physical, cognitive, and psychological—all contribute to the higher rates of occupational injuries and deaths experienced by young workers. Many of the physical and cognitive limitations of young workers cannot be overcome by training or supervision. *See, i.e.,* Sudhinaraset M, Blum R, [2010]. The Unique Developmental Considerations of Youth-Related Work Injuries, *International Journal of Environmental Health*; 16:216–22. *See also* NIOSH Alert *Preventing Deaths, Injuries, and Illnesses of Young Workers* available at <http://www.cdc.gov/niosh/docs/2003-128/2003128.htm>; NIOSH Report, page 6; Casey B, Getz S, Galvan A, [2007]. The Adolescent Brain, available online at <http://www.sciencedirect.com>. These injury and death risks associated with employment are heightened when the youth are working in agriculture because the work itself is more dangerous and the ages of permissible employment are lower than in nonagricultural employment (*see, i.e.,* Occupational Injuries and Deaths Among Young Workers—United States, 1998–2007, *Journal of the American Medical Association*, 304(1), 33–35 (2010); *see also*, Hard D, Myers J, [2006]. Fatal Work-Related Injuries in the Agriculture Production Sector Among Youth in the United States, 1992–2002. *Journal of Agromedicine*, Vol. 11(2), available at <http://ja.haworthpress.com>; BLS Report on the Youth Labor Force [2000], p. 60 available at <http://www.bls.gov/opub/rylf/rylfhome.htm>). The Census of Fatal Occupational Injuries, 2009, reported a fatality rate of 26 per 100,000 full time workers in agriculture, fishing, and hunting, well above the figure for other industries. The risks are heightened when considering that there is no minimum age established for employment on small farms not subject to the minimum wage requirements of the Fair Labor Standards Act (*see* 29 U.S.C. 213 (c)(1)).

Because youth often overcome the effects of those characteristics that initially place them at increased risk of injury and death in the workplace only through the maturation process, the Department has long believed that requiring older workers to perform those tasks that present greater risks to younger workers actually eliminates injuries and deaths—rather than delaying them or transferring them to the older workers. (*see* Sudhinaraset M, Blum R, [2010]. The Unique Developmental Considerations of Youth-Related Work Injuries, *International Journal of Occupational Environmental Health*; 16:216–222).

Research has shown that the prefrontal cortex is the last part of the adolescent brain to fully mature and that the process is not completed until the early twenties or beyond. With that maturation, the executive functioning of youth is fine-tuned, improving their ability to understanding future risks and impulsive actions. At maturation, "young workers are able to better assess and react to risks" (*Id.*). For example, the states' wide adoption of graduated driver licensing, which has been an important process for reducing automobile crashes among the youngest drivers, is designed to compensate for the lack of judgment of youth and the fact that judgment only comes with maturity (*see* Insurance Institute for Highway Safety *Licensing Systems for Young Drivers* available at <http://www.iihs.org/laws/graduatedlicenseIntro.aspx>. *See also* Thompson R, [2010]. What's Really Hurting Our Kids? The School Nurse Role in Preventing Teen Vehicle Fatalities, *National Association of School Nurses School Nurse*, 25; 183).

Adoption of this proposed rule is essential to reducing occupational injuries to young workers, especially those employed in agriculture. As noted earlier, the agricultural industry is broad in terms of occupational categories; the work is often seasonal, meaning that farm workers perform a wide variety of tasks depending on the production cycle. This wide diversity of tasks does not allow specialization among workers and creates special challenges when training and developing a safe agricultural workforce.

The number of farm workers affected by this proposal is quite small—there are only approximately 56,000 hired farm workers under the age of 16, as discussed earlier in this preamble. However, the fatality rate for youth aged 15 to 17 between 1992 and 2000 who performed work on farms was four times higher than the risk experienced by their peers in other industries (*see*

NIOSH Alert *Preventing Deaths, Injuries, and Illnesses of Young Workers* available at <http://www.cdc.gov/niosh/docs/2003-128/2003-128.htm>).

The Government Accountability Office noted that during the 1990s, while only about four percent of all working youth were employed in the agricultural and forestry sector, they experienced over 40 percent of all workplace youth fatalities. GAO Report 98–193, *Child Labor in Agriculture*, August 1998, pp. 22–23.

Eliminating injuries and deaths, especially those involving youth, obviously result in considerable benefits in terms of reduced human pain and suffering and increased economic cost savings. As noted earlier, approximately one-third of all deaths to young agricultural workers can be attributed to tractors, and in about one-half of the cases, the tractor overturned on the youth. Helen Murphy, writing in 2007 as the outreach and education director at the University of Washington Pacific Northwest Agricultural Health and Safety Center, noted that annually, more than 100 children—who live on, work on, and/or visit farms—are killed on U.S. farms, with tractors being responsible for 41 percent of the accidental farm deaths of children under 15 years of age (*see* Tractor Safety Advice Saves Lives available at http://depts.washington.edu/trsafety/files/P1_Tractor_Advice_Murphy.pdf). NIOSH reports that "[r]ollover protective structures have been identified as the best means of preventing deaths from overturns." NIOSH (*see* Report, page 71) also reports that "[a] study in Sweden, which has implemented regulations requiring ROPS on all tractors, has shown a 92% reduction in tractor rollover fatalities following the intervention. The United States has a tractor rollover lost-life rate 24 times higher than Sweden" (internal citations omitted).

The Department's proposal, by prohibiting most youth under 16 years of age from operating tractors, and allowing only bona fide 14- and 15-year-old student-learners to operate such equipment under conditions that include the use of ROPS and seat belts, has the potential for reducing the number of deaths and injuries experienced by young hired farm workers. Timothy W. Kelsey, PhD, surveyed surviving family members of people killed between 1985 and 1987 in New York farm tractor rollovers and found the average expected income lost by each death was \$243,615 (*see* Kelsey T, [1992]. The Cost of Farm Tractor Rollover Deaths in New York. *The Journal of Rural Health*. Volume 8, Issue

2, pages 143–146). Although the value of these lost wages pales next to the life of a young farm worker, preventing the accident preserves both the young life and the potential earnings.

Although it might appear that an employer would incur greater labor costs because of the requirement that for certain jobs it hire older workers, most youth occupy entry-level jobs and receive entry-level wages—at or close to the applicable state or Federal minimum wage. Hiring a 19-year-old rather than an 18-year-old for nonagricultural work, or a 16-year-old rather than a 15-year-old in agricultural employment, is unlikely to result in significantly increased labor costs. These labor inputs could be seen as easily substitutable, especially within the “less than 16 years of age” category. In addition, hiring a 16-year-old rather than a 15-year-old would allow an agricultural employer to comply with this proposed rule with almost no other change in behavior; such an employer would incur minimal or no additional costs, but such changes would have a potential positive impact in the reduction of occupational injuries and deaths to workers under the age of 16.

Implementing the Department’s proposal to revise subpart G of the child labor regulations, *General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended*, to incorporate all the regulatory changes relevant to agricultural employment that were made since this subpart was revised in 1971—including those contained in this proposal—provides compliance guidance on the youth employment provisions detailed in earlier subparts of 570 and reflects practices in which employers are already engaged. As discussed elsewhere in this section, this revision would not impose any additional economic costs, as subpart G does not impose any independent obligations; it simply sets forth guidance on the requirements set forth in other subparts.

The creation of two new nonagricultural HOs in subpart E dealing with employment in farm-product raw materials wholesale trade industries and the use of electronic devices, including communication devices, while operating or assisting to operate power-driven equipment, along with the revision of several of the Ag H.O.s, in subpart F would (1) implement specific recommendations made by NIOSH or by those who commented on the NIOSH recommendations; (2) bring greater parity between the agricultural child labor provisions and the nonagricultural child labor provisions;

and/or (3) implement improved protections as a result of Departmental enforcement experiences. These changes are expected to have little or no direct cost impact but produce benefits related to reduced injuries, deaths, and property damage.

For example, traffic crashes have long been the leading cause of death among youth 16 to 20 years of age, and persons in this age group have the highest fatality and injury rates due to traffic crashes of any age group (see NIOSH Report, page 23). The number of drivers aged 15–20 involved in fatal crashes in 2008, according to the Rocky Mountain Insurance Information Association, was 5,864. They accounted for 12% of all drivers involved in fatal crashes (see Teen Driving Statistics available at <http://www.rmiiia.org/index.asp>). The National Highway Traffic Safety Administration (NHTSA) in its study *The Economic Burden of Traffic Crashes on Employers* (DOT Publication HS 809 682) reports that motor vehicle crash injuries on and off the job cost U.S. employers almost \$60 billion annually in 1998–2000. The NHTSA data would include 14- and 15-year-old farm workers driving motor vehicles on farm roads and the prevention of a death of such a worker would reduce the overall costs. A white paper funded by OSHA notes that the average crash costs an employer \$16,500—and when a worker has an on-the-job crash that results in an injury, the cost to his or her employer is \$74,000. These costs, according to the white paper, can exceed \$500,000 when a fatality is involved (see Guidelines for Employers to Reduce Motor Vehicle Crashes, available at http://www.osha.gov/Publications/motor_vehicle_guide.pdf). The National Safety Council has described these increased costs as including wage and productivity losses, medical expenses, administrative expenses, motor vehicle damage, and employers’ uninsured costs (see National Safety Council, Arizona Chapter *Estimating the Costs of Unintentional Injuries* available at <http://www.acnsc.org/estimating-the-costs-of-unintentional-injuries.html>). Reductions in the number of teen driving injuries and fatalities attributable to the Department’s proposal would result in considerable monetary savings and avoid the substantial emotional pain associated with such tragedies.

These proposals also include revising the first Ag H.O. relating to the operation of agricultural tractors by removing the 20 PTO tolerance, incorporating a prohibition from another Ag H.O. concerning riding on a tractor as a passenger, requiring that the

youth hold a valid state driver’s license when operating a tractor on a public road, and requiring that all tractors operated under the student-learning exemption associated with this Ag H.O. be equipped with proper rollover protection structures and seat belts. The costs associated with rollover protection structures and seat belts are expected to be outweighed by the savings associated with fatality and injury prevention. Most tractors manufactured and sold in the U.S. in the last twenty-five years have been equipped with these essential safety devices. Manufacturer-provided retrofit kits are available for many older tractors. One study reported that the cost of retrofitting older tractors for rollover protection structures varied between \$676 and \$903 (2002 dollars),² including three hours of installation time and shipping costs (see Tevis C, Adding roll bars saves lives. *Successful Farming*. February 2002, Vol 100, No 2). Another study noted that, in 1993, the material cost of retrofitting rollover protection structures was estimated at \$937 per tractor.³ That same study reported an estimated retrofitting cost of \$825,000 per life saved⁴ (see Myers JR, Snyder KA, Roll-over Protective Structure Use and the Cost of Retrofitting Tractors in the United States, 1993.⁵ *Journal of Agricultural Safety and Health*. 1(3):185–197, 1995). It is also important to reiterate that this proposal does not require any agricultural employers to retrofit any tractors with rollover protection structures and seat belts—such equipment only becomes mandatory on a tractor if the employer wishes to employ a hired farm worker under the age of 16 to operate or assist in the operation of that tractor. In addition, little or no costs in the form of increased wages would be incurred and full compliance would be achieved if the

² The costs in 2011 dollars would be \$845 and \$1,129. See http://www.dol.gov/bls/data/inflation_calculator.htm.

³ The cost in 2011 dollars would be \$1,458. See http://www.dol.gov/bls/data/inflation_calculator.htm.

⁴ \$1,284,065 in 2011 dollars. See http://www.dol.gov/bls/data/inflation_calculator.htm.

⁵ Myers and Snyder report that the ROPS retrofitting cost per life saved for these specific tractors was estimated by: (1) Determining how many years would be required to reach the same level of ROPS protection, based on hours of use, if no retrofit program was conducted; (2) estimating the number of lives saved, assuming 100% effectiveness for the retrofit ROPS, over the number of years estimated in step 1; and (3) estimating the cost effectiveness of a ROPS-retrofit program by dividing the total cost of the retrofit program by the estimated number of lives saved by the retrofit program (Jacobs, 1991). It was assumed the cost of retrofitting would occur in a single payment and that all retrofitted tractors would remain in use for the entire time period.

employer chose to employ a 16-year-old worker to drive the tractor rather than a 14- or 15-year-old worker. The Department does not have any data on which to estimate the number of farmers who will choose to retrofit their tractors so they can continue to employ 14- and 15-year-olds as tractor operators. The NIOSH CAIS indicates that only 7,565 such youth operated a tractor in 2006 as part of their employment (this information is unpublished data from the NIOSH 2006 Childhood Agricultural Injury Survey provided by NIOSH and approved by the USDA National Agricultural Statistics Survey on February 26, 2009, available at <http://www.regulations.gov>, docket number WHD-2011-0001). The Department invites commenters to provide data regarding the number of farmers who employ such young workers; the percentage of them who own tractors that do not have ROPS and seat belts; and the percentage of such farmers who will retrofit their tractors.

The proposal would also combine the existing second and third Ag H.O.s into a single Order that prohibits operating, riding in or on, assisting to operate, repairing, or cleaning of all power-driven machinery. This new Order would also incorporate provisions of a current Ag H.O. which addresses the driving of motor vehicles when transporting passengers or working as a helper on such vehicles. The proposed new Ag H.O. would permit student-learners to operate and work with several named pieces of farm machinery, under the provisions of a written training agreement, after specified training has been successfully completed. The Department is not aware of data regarding the number of 14- and 15-year-olds hired to work on machinery that would be newly barred under this proposal. However, as noted above, the Department believes there would be little or no additional wage cost involved with instead hiring a 16-year-old to perform such work. Moreover, given that machinery is a leading cause of death among young farm workers, the Department believes that any costs would be outweighed by the savings resulting from reduced injuries and deaths.

The proposal would also strengthen the prohibitions concerning herding and working with or around certain animals, and remove the six inch butt-diameter tolerance currently associated with the felling, bucking, skidding, loading, or unloading of timber. The proposal would expand the Ag H.O. prohibiting work from scaffolds or ladders at heights in excess of twenty feet by prohibiting work on or about a roof,

from a scaffold, or from farm structures and equipment at elevations greater than six feet. As an adjunct to the recommendations concerning working at heights, the proposal would also create a new Ag H.O. prohibiting the employment of youth in construction, communications, public utilities, excavation, and demolition—prohibitions long applicable to nonagricultural employment of youth under 16 years of age. The Department is not aware of any data on the number of youths under 16 years of age performing construction, demolition, or excavation performing work on scaffolds above 6 feet but less than 20 feet or working with timber of less than a six-inch diameter on which to estimate the cost of this proposed provision. However, the Department believes that providing youth employed in agriculture the same protections as youth employed in nonagriculture, to the extent permitted by law, will reduce occupational deaths and injuries and thereby reduce the financial and emotional costs associated with such tragedies.

The proposal would continue the prohibitions regarding working inside a manure pit and expand the prohibitions concerning work in a silo and fruit, forage, or grain storage facility. The proposal also strengthens the current Ag H.O. addressing working with pesticides by prohibiting young farm workers from performing any tasks that would be performed by a pesticide handler under the Environmental Protection Agency's pesticide Worker Protection Standard. The proposal also retains the Ag H.O.s that address the handling of explosive materials and the transporting, transferring, or applying of anhydrous ammonia. The Department is not aware of any data on the number of youths under 16 years of age performing work inside a manure pit or a silo, fruit, forage, or grain storage facility; performing tasks performed by pesticide handlers; handling explosive materials; or transporting, transferring, or applying anhydrous ammonia. However, the Department believes that providing youth employed in agriculture the same protections as youth employed in nonagriculture, to the extent permitted by law, will reduce occupational deaths and injuries and thereby reduce the financial and emotional costs associated with such tragedies. Moreover, as noted above, the Department believes that because employers may achieve compliance by assigning these tasks to 16-year-olds, any increased wage costs will be minimal.

The proposal brings the agricultural youth employment standards more in

line with those applicable to nonagricultural employment by eliminating the two certification programs contained in § 570.72(b) and (c). Under the proposal, 14- and 15-year-old hired farm workers would still be able to perform work otherwise prohibited by some of the Ag H.O.s, but only when they are bona fide student-learners enrolled in a detailed and progressive course of study that provides them with important knowledge and safety information before the actual work is performed. The student-learner exemption, as retained in this proposal, continues to mimic the student-learner exemption applicable to 16- and 17-year-olds employed in nonagricultural occupations (see § 570.50(c)). The Department is not aware of any data on the number of youths under 16 years of age performing otherwise prohibited agriculture work under the auspices of the existing certification programs. However, the Department believes that providing youth employed in agriculture the same protections as youth employed in nonagriculture, to the extent permitted by law, will reduce occupational deaths and injuries and thereby reduce the financial and emotional costs associated with such tragedies. Nevertheless, the Department invites comments on the number of 14- and 15-year-old hired farm workers who qualify for exemption each year under current § 570.72(b) or (c), because they have completed the existing training programs, and on the number of such youth who are hired to perform duties that require that training.

The Department believes that implementation of the proposed rule would not reduce the overall number of safe, positive, and legal employment opportunities available to young workers. Although, as mentioned above, some employers would be required in most cases to replace younger workers with workers 16 years of age or older to perform certain tasks were the Department's proposals implemented, the impact would be minimal as relatively few minors are currently employed to perform these occupations and the wage differential between young hired farm workers and older hired farm workers is minimal. As noted in the preamble of this NPRM, the United States Department of Agriculture's (USDA) National Agricultural Statistics Service (NASS) reported that, in 2006, there were approximately 1.01 million hired farm workers, which made up a third of the three million people employed in agriculture in the United States (see USDA, *Profile of Hired Farmworkers, A 2008 Update*, Economic

Research Report Number 60). The USDA went on to report that approximately 15.1 percent of those workers, which equates to about 152,500 individuals, were between the ages of 15 and 21 years. Of this number, only a small portion—those under 16 years of age—would be subject to the Federal Ag H.O.s.

The National Agricultural Workers Survey (NAWS) has reported similar findings which apply only to crop production workers. In addition, NAWS notes that the number of young hired crop workers relative to all hired crop workers is declining. For the period of 1994 through 1997, NAWS reported that 8.62 percent of all hired crop workers were 14 to 17 years of age; that same cohort constituted 3.65 percent of all hired crop workers during the period of 2002 through 2005. Of this number, NAWS reported that only one-quarter were under the age of 16 (*see* NAWS Public Data available at <http://www.doleta.gov/agworker/naaws.cfm>). Unpublished NAWS data reflect that for the period of 2006 through 2009, the percentage for the 14 to 17 cohort had fallen to just below three percent. Using an estimated 1.8 million hired crop workers, a figure provided by the NAWS, the data suggest that there were about 54,000 young workers aged 14 to 17 working in crop production during 2006–2009 and that 13,500 were under the age of 16 and, thus, subject to the Ag H.O.s, some of whom could qualify for the limited exemptions under existing § 570.72.

The National Institute for Occupational Health and Safety (NIOSH) Childhood Agriculture Injury Survey (CAIS) estimates that, in 2006, there were 14,395 youth under the age of 14 who were directly hired by a farm operator and, of that number, less than 1,800 were reported to have operated a tractor (this information is unpublished data from the NIOSH 2006 Childhood Agriculture Injury Survey provided by NIOSH and approved by the USDA National Agricultural Statistics Survey on February 26, 2009, available at <http://www.regulations.gov>, docket number WHD–2011–0001). This number is rather high considering that none of those youth under the current Federal agricultural child labor provisions could legally be employed to operate a tractor unless a parent owned or operated the farm. CAIS also estimates that in 2006, 41,476 youth 14 or 15 years of age were directly hired by a farm operator, and of that number, 7,565 were reported to have operated a tractor as part of their employment. This latter group could legally operate certain tractors only if employed in compliance with the

provisions of existing § 570.72.

Combining the above two estimates, the data would indicate that there were fewer than 56,000 hired farm workers under the age of 16 in 2006. NIOSH notes that the above estimates do not include contracted farm workers and that they are a head count of youth who did any farm work regardless of the length of employment. The estimates were reported by the farm operator at a single point in time, which could lead to some under-reporting.

The Department believes that these proposals will enhance the safety of working youth by prohibiting occupations that are particularly hazardous or detrimental to their health or well-being. Costs that might result from using older employees to perform the previously permitted tasks are likely to be offset by reduced health and productivity costs resulting from accidents and injuries to minors on the job. Ensuring that permissible job opportunities for working youth are safe and healthy as required by the statute produces many positive benefits in addition to fewer occupational injuries and deaths. These benefits include reduced health and productivity costs that employers may otherwise incur because of higher accident and injury rates to young and inexperienced workers.

The increases in the maximum child labor civil money penalties that may be assessed for violations that cause the death or serious injury of a minor that were implemented by GINA have not had a significant impact on the total amount of child labor civil money penalties that the Department has assessed. Fortunately, investigations that involve a death or serious injury of a minor that could fall under the provisions of GINA have traditionally represented less than three percent of all child labor investigations. The amounts of child labor civil money penalties assessed by the Department have remained fairly constant for the year prior to the enactment of GINA (\$4.4 million in 2007), the year GINA was enacted (\$4.2 million in 2008), and the year after the enactment of GINA (\$4.2 million in 2009). In addition, as employers are expected to attain and maintain constant compliance with all applicable provisions of the FLSA, including its child labor provisions, the amount of civil money penalties assessed for violations of the FLSA is not considered as an incremental cost under this Order. The Department has similarly concluded that this proposed rule is not a “major rule” requiring approval by the Congress under the Small Business Regulatory Enforcement

Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). It would not likely result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act and the Department has certified to this effect to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Therefore, no Regulatory Flexibility Analysis is required. The factual basis for such a certification is that even though this rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor, as discussed below, is there a significant economic impact upon those entities that are affected.

As previously discussed, NIOSH's CAIS estimates that in 2006, 41,476 youth 14 or 15 years of age were directly hired by a farm operator, and of that number, 7,565 were reported to have operated a tractor as part of their employment. It is for these youth—and for only these youth—that this proposal would require a farmer to retrofit a tractor with ROPS and a seat belt should the farmer wish to have a 14- or 15-year-old student-learner operate the tractor. This proposal does not require tractor retrofits for a farmer to employ his or her own child on a farm owned or operated by that farmer, because of the statutory parental exemption. Nor would a tractor retrofit as proposed in this NPRM change the Department's longstanding prohibition that no hired farm worker under the age of 14 may operate a tractor under any conditions.

Of the total 2,204,792 farms in the United States,⁶ only 5 percent have sales equal to or greater than \$500,000 per year. Some of these farms will fall within SBA's definition of small entities, which is \$750,000 for the Agriculture, Fishing and Forestry industry. Even if each youth under the age of 16 were employed by a different farm meeting the SBA definition of small entities, only 7,565 small farms (less than 1/2 of 1 per cent) would be impacted by the tractor provision of this

⁶ 2007 U.S. Census of Agriculture—United States Data.

rule because, as NIOSH identified, that was the number of hired 14- and 15-year-old farm workers who drove tractors. Were the Department to assume that *all* 56,000 hired farm workers under the age of 16 were (1) employed by a different small farm entity, and (2) affected by any provision of this proposed rule, approximately only 2.5 percent of all small farm entities would be impacted. Therefore, this proposal does not affect a substantial number of small entities.

The costs associated with retrofitting all the tractors discussed above, even assuming all 7,565 young operators were to drive tractors none of which were equipped with proper ROPS and a seat belt, would not be significant. One study reported that the cost of retrofitting older tractors with ROPS varied between \$676 and \$903 (2002 dollars), including three hours of installation time and shipping costs (*see* Tevis C, Adding roll bars saves lives. *Successful Farming*. February 2002, Vol 100, No 2). Another study noted that, in 1993, the material cost of retrofitting rollover protection structures was estimated at \$937 per tractor. That same study reported an estimated retrofitting cost of \$825,000 per life saved (*see* Myers JR, Snyder KA, Roll-over Protective Structure Use and the Cost of Retrofitting Tractors in the United States, 1993. *Journal of Agricultural Safety and Health*. 1(3):185–197, 1995). If all 7,565 14- and 15-year-old hired farm workers identified by NIOSH as having driven tractors drove a different tractor, and none of those tractors already were equipped with proper ROPS and a seat belt, the cost of retrofitting all of those tractors using the maximum estimate of \$937 per tractor provided by Myers and Snyder would be less than \$7,100,000. Furthermore, for those small farms that employ workers under the age of 16, the cost of compliance with this portion of the proposal can be completely avoided by ensuring no hired farm worker under the age of 16 operates any tractor, although there may be minimal additional wages paid to the 16-year-old youths.

Finally, the proposal would prohibit young farm workers from employment in the production and curing of tobacco. NIOSH calculated the average cost to the work for treatment of GTS in Kentucky in 1993 to be \$250 for outpatient treatment, \$566 for hospital admission, and \$2,041 for intensive care treatment (*see* NIOSH Update, July 8, 1993 available at <http://www.cdc.gov/niosh/updates/93-115.html>). NIOSH notes that these costs can impose an enormous burden on farm families

because in many states agricultural workers are not covered by worker's compensation and some tobacco harvesters have no form of health insurance (*Id.*). NIOSH also emphasized that when a worker gets sick during the busy tobacco harvest season, the employer suffers losses because taking the sick worker to medical care ties up another worker and a vehicle; thus harvesting is slowed down by the loss of one or more workers (*Id.*). The Department believes that the proposal may reduce this lost work time because children may be more susceptible to green tobacco sickness in light of their small body size.

IX. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any Federal mandate that may result in excess of \$100 million in expenditures by state, local and Tribal governments in the aggregate or by the private sector.

X. Executive Order 13132 (Federalism)

The proposed rule does not have federalism implications as outlined in E.O. 13132 regarding federalism. Although states are covered employers under the FLSA, the proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of E.O. 13175 and determined not to have “Tribal implications.” The proposed rule does not have “substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes.” As a result, no Tribal summary impact statement has been prepared.

XII. Effects on Families

The undersigned hereby certify that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XIII. Executive Order 13045, Protection of Children

E.O. 13045, dated April 21, 1997 (62 FR 19885), applies to any rule that (1)

is determined to be “economically significant” as defined in E.O. 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866.

XIV. Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XV. Executive Order 13211, Energy Supply

This proposed rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

XVI. Executive Order 12630, Constitutionally Protected Property Rights

This proposal is not subject to E.O. 12630, because it does not involve implementation of a policy “that has takings implications” or that could impose limitations on private property use.

XVII. Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects

29 CFR Part 570

Child labor, Child labor occupations, Employment, Government, Incorporation by reference, Intergovernmental relations, Investigations, Labor, Law enforcement, Minimum age.

29 CFR Part 579

Child labor, Law enforcement, Penalties.

Signed at Washington, DC, this 22nd day of August, 2011.

Nancy J. Leppink,

Deputy Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the DOL proposes to amend Title 29, parts 570 and 579 of the Code of Federal Regulations as follows:

PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

1. The authority citation for part 570, subpart A, continues to read as follows:

Authority: Secs. 3, 11, 12, 52 Stat. 1060, as amended, 1066 as amended, 1067, as amended; 29 U.S.C. 203, 211, 212.

2. Amend § 570.2 by revising paragraph (b) to read as follows:

§ 570.2 Minimum age standards.

* * * * *

(b) *Occupations in agriculture.* The Act sets a 16-year minimum age for employment in agriculture during school hours for the school district in which the employed minor is living at the time, unless the parental exemption in section 3(l) of the Act applies. The Act also sets a 16-year minimum age for employment in any occupation in agriculture that the Secretary of Labor finds and declares to be particularly hazardous except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person (see Subpart F of this part). There is a minimum age requirement of 14 years generally for employment in agriculture outside school hours for the school district where such employee is living while so employed. However—

(1) A minor 12 or 13 years of age may be so employed with written consent of his parent or person standing in place of his parent, or may work on a farm where such parent or person is also employed; and

(2) A minor under 12 years of age may be employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person, or may be employed with the written consent of such parent or person on a farm where all employees are exempt from the minimum wage provisions by virtue of section 13(a)(6)(A) of the Act.

3. The authority citation for part 570, subpart E, continues to read as follows:

Authority: 29 U.S.C. 203(l), 212, 213(c).

4. Add § 570.69 to subpart E to read as follows:

§ 570.69 Occupations in farm-product raw materials wholesale trade industries (Order 18).

(a) *Finding and declaration of fact.* All occupations in farm-product raw materials wholesale trade industries are particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) *Definition.* The term *all occupations in farm-product raw materials wholesale trade industries* would include all work performed in conjunction with the storing, marketing, and transporting of farm-product raw materials listed in Standard Industrial Codes 5153, 5154, and 5159. The term would include, but not be limited to, occupations performed at such establishments as country grain elevators, grain elevators, grain bins, silos, feed lots, feed yards, stockyards, livestock exchanges, and livestock auctions. The term would not include work performed in packing sheds where employees clean, sort, weigh, package and ship fruits and vegetables for farmers, sales work that does not involve handling or coming in contact with farm-product raw materials, or work performed solely within offices.

5. The authority citation for part 570, subpart E–1, is revised to read as follows:

Authority: 29 U.S.C. 212, 213, 218.

Subpart E–1—[Redesignated as Subpart F]

6. Redesignate subpart E–1, consisting of §§ 570.70 through 570.72, as subpart F.

§§ 570.70 through 570.72 [Redesignated as §§ 570.97 through 570.99]

7. Redesignate §§ 570.70 through 570.72 as §§ 570.97 through 570.99 in newly redesignated subpart F.

8. Add new § 570.70 to subpart E to read as follows:

§ 570.70 The use of electronic devices, including communication devices, while operating power-driven equipment (Order 19).

(a) *Findings and declaration of fact.* The use of electronic devices, including communication devices, while operating or assisting to operate power-driven equipment is particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) *Definitions.* *Operating power-driven equipment* includes such duties as supervising or controlling the operation of such machines; setting up, adjusting,

repairing, oiling, or cleaning the machine; starting and stopping the machine; placing materials into or removing them from the machine; or any other functions directly involved with the operation of the machine. In the case of power-driven equipment used for the moving or transporting of people, goods, or materials, it does not matter if the equipment is operated on public or private property. *Operating power-driven equipment* does not include periods of time when the machine is not being powered (is turned off), and in the case of a motor vehicle, is legally parked.

Power-driven equipment includes any equipment operated by a power source other than human power, that is designed for:

(1) The movement or transportation of people, goods, or materials;

(2) The cutting, shaping, forming, surfacing, nailing, stapling, stitching, fastening, punching, or otherwise assembling, pressing, or printing of materials; or

(3) Excavation or demolition operations.

Use of electronic devices, including communication devices, would include, but not be limited to, such things as talking, listening, or participating in a conversation electronically; using or accessing the Internet; sending or receiving messages or updates such as text messages, electronic mail messages, instant messages, “*chats*,” “*status updates*,” or “*tweets*”; playing electronic games; entering data into a navigational device or global positioning system (GPS); performing any administrative functions; or using any applications offered by the communication devices. *Use of electronic devices, including communication devices*, does not include listening to music or other recorded information on a one-way, non-interactive device such as a radio or iPod™ as long as the device is being operated “hands free” without headphones or earbuds. *Use of electronic devices, including communication devices*, does not include glancing at or listening to a navigational device or GPS that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device or GPS either before driving or when the vehicle is legally parked. In addition, the term does not prohibit the use of a cell phone or other device to call 911 in emergencies.

§§ 570.71 through 570.96 [Reserved]

9. Add reserved §§ 570.71 through 570.96 to newly redesignated subpart F.

10. Revise newly redesignated §§ 570.97 through 570.99 to read as follows:

§ 570.97 Purpose and scope.

(a) *Purpose.* Section 13(c)(2) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(c)(2)), states that the provisions of section 12 of the Act relating to child labor shall apply to an employee below the age of 16 employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of 16, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person. The purpose of this subpart is to apply this statutory provision.

(b) *Parental Exception.* This subpart shall not apply to the employment of a child below the age of 16 by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(c) *Statutory definitions.* As used in this subpart, the terms *agriculture*, *employ*, and *employer* have the same meanings as the identical terms contained in section 3 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203), which are as follows:

Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(f) of [U.S.C.] Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Employ includes to suffer or permit to work.

Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

§ 570.98 General.

(a) *Higher Standards.* Nothing in this subpart shall authorize non-compliance with any Federal or state law, regulation, or municipal ordinance establishing a higher, more protective standard. If more than one standard within this subpart applies to a single activity, the higher standard shall be applicable.

(b) *Student-learners.* Some sections in this subpart contain an exemption for the employment of 14- and 15-year-olds as vocational agricultural student-learners. Such an exemption shall apply only when each of the following requirements is met:

(1) The student-learner is enrolled in an ongoing vocational education training program in agriculture operated by a state or local educational authority, or in a substantially similar program conducted by a private school;

(2) Such student-learner has satisfactorily completed the equivalent of at least 90 hours of systematic school instruction in agricultural education at or above the eighth grade level;

(3) Such student-learner is employed under, and in accordance with, a written agreement which provides:

(i) That the work of the student-learner in the occupations declared particularly hazardous is incidental to his training;

(ii) That such work shall be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced adult who is at least 18 years of age;

(iii) That the student-learner has completed at least 90 hours of systematic school instruction in agricultural education at or above the eighth grade level;

(iv) That safety instruction shall be given by the school and correlated by the employer with on-the-job training; and

(v) That a schedule of organized and progressive work processes to be performed on the job have been prepared.

(4) Such written agreement contains the name of the student-learner, and is signed by the employer, the parent or guardian of the student-learner, and by a person authorized to represent the educational authority or school; and

(5) Copies of each such signed agreement shall be kept on file by both the educational authority or school and by the employer before the student-learner may be employed to perform work that would otherwise be prohibited under this subpart.

§ 570.99 Hazardous occupations involved in agriculture.

(a) *Findings and declarations of fact as to specific occupations in agriculture.* The occupations in agriculture listed in paragraph (b) of this section are particularly hazardous for the employment of children below the age of 16.

(b) *The agricultural hazardous occupations orders.* (1) *Occupations involving the operation of agricultural tractors (Ag H.O. 1).* Operating and assisting in the operation of an agricultural tractor.

(i) Definitions:

Agricultural tractor shall mean a wheeled or track vehicle which is designed to furnish the power to pull, carry, propel, or drive implements that are designed for agriculture. The term would include all such equipment, regardless of the date it was manufactured or the amount of engine horsepower. The term shall include low profile tractors. The term shall not include self-propelled implements, nor shall it include garden-type tractors, lawn tractors, or riding mowers designed primarily for lawn mowing and lawn maintenance—all of which are subject to the provisions of paragraph (b)(2) of this section.

Low profile tractor means

(1) A wheeled tractor that possesses the following characteristics:

(i) The front wheel spacing is equal to the rear wheel spacing, as measured from the centerline of each right wheel to the centerline of the corresponding left wheel;

(ii) The clearance from the bottom of the tractor chassis to the ground does not exceed 18 inches;

(iii) The highest point of the hood does not exceed 60 inches; and

(iv) The tractor is designed so that the operator straddles the transmission when seated.

(2) The term shall not include self-propelled implements, nor shall it include garden-type tractors, lawn tractors, or riding mowers designed primarily for lawn mowing and lawn maintenance—all of which are subject to the provisions of paragraph (b)(2) of this section.

Operating includes the tending, setting up, adjusting, moving, cleaning, oiling, or repairing of the tractor; riding on an agricultural tractor as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such a tractor. *Operating* also includes starting, stopping, or any other activity involving physical contact associated with the operation or maintenance of the tractor.

Public road or highway shall mean a road or way established and adopted (or accepted as a dedication) by the proper authorities for the use of the general public, and over which every person has a right to pass and to use for all purposes of travel or transportation to which it is adapted and devoted. It does not matter whether the road or highway has been constructed at public or private expense.

Use of electronic devices, including communication devices, would include, but not be limited to, such things as talking, listening, or participating in a conversation electronically; using or accessing the Internet; sending or receiving messages or updates such as text messages, electronic mail messages, instant messages, "chats," "status updates," or "tweets"; playing electronic games; entering data into a navigational device or global positioning system (GPS); performing any administrative functions; or using any applications offered by the communication devices. *Use of electronic devices, including communication devices*, does not include listening to music or other recorded information on a one-way, non-interactive device such as a radio or iPod™ as long as the device is being operated "hands free" without headphones or earbuds. *Use of electronic devices, including communication devices*, does not include glancing at or listening to a navigational device or GPS that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device or GPS either before driving or when the vehicle is safely at a complete stop and incapable of moving—such as when the transmission is in "park" or when the transmission is in "neutral" and the hand brake is set—so that the minor can safely direct his or her attention away from the safe operation of the tractor. The term also does not include glancing at or listening to other similar electronic devices on the tractor, such as moisture monitors or chemical applicator computers, provided that they are programmed either before driving or when the vehicle is safely at a complete stop and incapable of moving. In addition, the term *use of electronic devices, including communication devices*, does not prohibit the use of a cell phone or other device to call 911 in emergencies.

(ii) *Exemption*. A student-learner employed in accordance with the provisions of § 570.98(b) may operate and assist in the operation of an agricultural tractor, including the

connecting and disconnecting of an implement or any of its parts to or from the tractor, when all of the following conditions are met:

(A) The tractor is equipped with both a roll-over protection structure and a seat belt, and the tractor operation, the roll-over protection structure, and the seat belt meet all the requirements of the U.S. Department of Labor's Occupational Safety and Health Administration's standard at § 1928.51 of this title established for roll-over protection structures for tractors used in agricultural operations;

(B) When implements are being used, both the operation of the implements and the implements themselves must meet the requirements of the U.S. Department of Labor's Occupational Safety and Health Administration's standard at § 1928.57 of this title established to prevent hazards associated with moving machinery parts of farm field equipment, farmstead equipment, and cotton gins used in any agricultural operation;

(C) The employer must have instructed the student-learner in the use of the seat belt and the student-learner must actually use the seat belt while operating the tractor;

(D) The student-learner must have successfully completed his or her school's classroom-portion of the educational unit on the safe operation of agricultural tractors, and if he or she is connecting, operating, and/or disconnecting an implement to the tractor, the student-learner must have also successfully completed his or her school's classroom-portion of the educational unit addressing the safe operation of the particular implement being connected, operated, or disconnected by the student-learner;

(E) The employer must instruct the employee that the use of electronic devices, including communication devices, while operating the tractor or implement is prohibited and the minor in fact does not use any electronic device while operating the tractor or implement.

(F) If the student-learner operates the tractor on a public road or highway, he or she must hold a state motor vehicle license valid for the class of vehicle being operated;

(G) The student-learner must not operate a tractor upon which a passenger or helper is riding, other than a single passenger over the age of 18 years who is engaged in training the student-learner in the safe operation of the tractor. Such passenger must be seated in an approved passenger seat that is fitted with a seat belt that meets the requirements of the U.S. Department

of Labor's Occupational Safety and Health Administration's (OSHA) standard at 29 CFR 1928.51 established for roll-over protection structures for tractors used in agricultural operations, and the seat belt must be used. The student-learner may not ride on any tractor as a passenger or helper, even if the tractor is equipped with a seat for a passenger.

(2) *Occupations involving the operation of power-driven equipment, other than agricultural tractors (Ag H.O. 2)*. Operating and assisting in the operation of power-driven equipment.

(i) *Definitions*.

Farm field equipment means implements, including self-propelled implements, or any combination thereof used in agricultural operations. The term does not include agricultural tractors as defined in paragraph (b)(1)(i) of this section.

Farmstead equipment means agricultural equipment normally used in a stationary manner. This includes, but is not limited to, materials handling equipment and accessories for such equipment whether or not the equipment is an integral part of a building.

Garden and lawn tractors shall mean small, light and simple tractors designed for use in home gardens or on lawns. Such equipment is usually designed primarily for cutting grass, being fitted with horizontal rotary cutting decks.

Implements shall include, but not be limited to, power-driven equipment and tools used in agricultural occupations such as farm field equipment and farmstead equipment as defined in this section.

Operating includes the tending, setting up, adjusting, moving, cleaning, oiling, repairing, feeding or offloading (whether directly or by conveyor) of the equipment; riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such equipment. *Operating* also includes starting, stopping, or any other activity involving physical contact associated with the operation or maintenance of the equipment.

Power-driven equipment includes all machines, equipment, implements, vehicles, and/or devices operated by any power source other than human hand or foot power, except for office machines and agricultural tractors as defined in paragraph (b)(1)(i) of this section. The term includes lawn and garden type tractors, and lawn mowers that are used for yard mowing and maintenance.

Use of electronic devices, including communication devices, would include,

but not be limited to, such things as talking, listening, or participating in a conversation electronically; using or accessing the Internet; sending or receiving messages or updates such as text messages, electronic mail messages, instant messages, “chats,” “status updates,” or “tweets”; playing electronic games; entering data into a navigational device or global positioning system (GPS); performing any administrative functions; or using any applications offered by the communication devices. *Use of electronic devices, including communication devices*, does not include listening to music or other recorded information on a one-way, non-interactive device such as a radio or iPod™ as long as the device is being operated “hands free” without headphones or earbuds. *Use of electronic devices, including communication devices*, does not include glancing at or listening to a navigational device or GPS that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device or GPS either before driving or when the vehicle and/or implement is safely at a complete stop and incapable of moving—such as when the transmission is in “park” or when the transmission is in “neutral” and the hand brake is set—so that the minor can safely direct his or her attention away from the safe operation of the tractor and/or implement. The term also does not include glancing at or listening to other similar electronic devices on the implement, such as moisture monitors or chemical applicator computers, provided that they are programmed either before driving or when the vehicle is safely at a complete stop and incapable of moving. In addition, the term does not prohibit the use of a cell phone or other device to call 911 in emergencies.

(ii) *Exemption.* (A) A student-learner employed in accordance with the provisions of § 570.98(b) may operate and assist in the operation of the power-driven machinery named in paragraphs (b)(2)(ii)(A)(1) through (7) of this section if he or she has successfully completed his or her school’s classroom-portion of the educational unit on the safe operation of the specific piece of power-driven machinery he or she is operating or assisting to operate. If the minor is operating the machinery on a public road or highway as defined in paragraph (b)(1)(i) of this section, he or she must hold a state motor vehicle license valid for the type of machine being operated.

The employer must instruct the student-learner that the use of electronic devices, including communication devices, while operating or assisting in the operation of the power-driven machinery is prohibited and the student-learner in fact does not use any wireless communication device while operating or assisting in the operation of the power-driven machinery. The equipment must meet and be operated in accordance with the requirements of the U.S. Department of Labor’s Occupational Safety and Health Administration’s standard at § 1928.57 of this title if it is a type of equipment addressed by the standard. If the equipment is being powered or pulled by a tractor, the student-learner must also be employed in accordance with the provisions of paragraph (b)(1)(ii) of this section. The student-learner may ride as an extra passenger in or on the equipment named in paragraphs (b)(2)(ii)(A)(1) through (7) of this section only if the vehicle, machinery, or implement is equipped with an approved passenger seat that includes a seat belt or appropriate similar restraint that comports with the U.S. Department of Labor’s Occupational Safety and Health Administration’s standard at § 1928.51(b)(2) of this title and the minor actually uses the seat belt or similar restraint, but not when the vehicle, machinery, or implement is being operated by someone under the age of 16 years or on a public road or highway as defined in paragraph (b)(1)(i) of this section.

(1) Harvesting and threshing machinery, including balers, grain combines, and reapers, but not including potato combines;
 (2) Plowing machinery;
 (3) Planting machinery;
 (4) Spreading machinery;
 (5) Mowing and swathing machinery;
 (6) Power post-hole digger and power post driver machinery; and
 (7) Nonwalking type rotary tillers.

(B) Student-learners may not operate, as defined in paragraph (b)(2)(i) of this section, the following power-driven equipment under any circumstances:

(1) Automobiles, buses, or trucks, including serving as an outside helper on such motor vehicles;
 (2) All terrain vehicles, scooters, or motorcycles;
 (3) Trenching or earthmoving equipment, including backhoes and bulldozers;
 (4) Loaders, including skid steer loaders, front end loaders, and Bobcats;
 (5) Milking equipment;
 (6) Potato combines;
 (7) Hoisting equipment, including cranes, derricks, highlift trucks, fork

lifts, hoists, and manlifts as defined in § 570.58;

(8) Woodworking machines as defined in § 570.55;

(9) Feed grinders;

(10) Circular, reciprocating, band, or chain saws as defined in § 570.65;

(11) Wood chippers as defined in § 570.65;

(12) Abrasive cutting discs as defined in § 570.65;

(13) Metal forming, punching, or shearing machines as defined in § 570.59;

(14) Welding equipment;

(15) Augers, auger conveyors, or conveyors;

(16) Irrigation equipment;

(17) Rotary tillers, walking type;

(18) Crop dryers; and

(19) The unloading mechanism of a nongravity-type self-unloading wagon or trailer.

(C) Notwithstanding the definition of *operating* in paragraph (b)(2)(i) of this section, minors under 16 years of age may ride as passengers in automobiles, trucks, and buses, on public roads and private property, *provided* all of the following are met:

(1) Each minor riding as a passenger in a motor vehicle must have his or her own seat in the passenger compartment;

(2) Each seat must be equipped with a seat belt or similar restraining device; the employer must instruct the minors that such belts or other devices must be used while riding; and the seat belt or similar restraining device is actually used; and

(3) Each driver transporting the young workers must hold a state driver’s license valid for the type of driving involved and, if the driver is under the age of 18, his or her employment must comply with the provisions of § 570.52.

(3) *Occupations involving the operation of non-power-driven hoisting apparatus and conveyors* (Ag H.O. 3). Operating and assisting in the operation of hoisting apparatus and conveyors that are operated either by hand or by gravity.

(i) *Definitions.*

Non-power-driven hoisting apparatus and conveyors mean hoisting apparatus and conveyors that are operated by human hand, foot, or by gravity. Power-driven hoisting apparatus and conveyors are addressed in paragraph (b)(2) of this section.

Operating includes the tending, setting up, adjusting, moving, cleaning, oiling, repairing, of the equipment; riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such equipment. *Operating* would also include starting,

stopping, or any other activity involving physical contact associated with the operation or maintenance of the equipment. Minors are also prohibited from serving as "safety spotters" directing the operator of the hoisting apparatus or conveyor as to the proper operation of the equipment.

(ii) [Reserved]

(4) *Certain occupations involving working with or around animals (Ag H.O. 4).* Working on a farm in a yard, pen, or stall occupied by an intact (not castrated) male equine, porcine, bovine, or bison older than six months, a sow with suckling pigs, or cow with newborn calf (with umbilical cord present); engaging or assisting in animal husbandry practices that inflict pain upon the animal and/or are likely to result in unpredictable animal behavior such as, but not limited to, branding, breeding, dehorning, vaccinating, castrating, and treating sick or injured animals; handling animals with known dangerous behaviors; poultry catching or cooping in preparation for slaughter or market; and herding animals in confined spaces such as feed lots or corrals, or on horseback, or using motorized vehicles such as, but not limited to, trucks or all terrain vehicles.

(5) *Occupations involving timber operations (Ag H.O. 5).* Felling, bucking, skidding, loading, or unloading timber and the removal and disposal of tree stumps by other than manual means.

(6) *Occupations involving work in construction; in communications; in public utilities; in wrecking and demolition; and in excavation (Ag H.O. 6).* (i) *General.* The restrictions concerning employment in the construction, communications, and public utilities industries will be applied in the same manner as in § 570.33(n). Construction occupations include occupations in all types of construction, including building, residential, heavy, and highway construction.

(ii) *Definitions.*

Occupations involved in excavation shall have the same meaning as in § 570.68(a).

Wrecking and demolition shall mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, or other structure including but not limited to a barn, silo, or windmill.

(7) *Occupations involving work on roofs, scaffolds, and at elevations greater than six feet (Ag H.O. 7).* Working on or about a roof; from a scaffold; and at elevations greater than six feet above another elevation, such

as, but not limited to, working on or from a ladder, a farm structure (including, but not limited to silos, towers, grain bins, and windmills), or equipment.

(i) *Definitions.*

Elevations greater than six feet will be determined by measuring the distance between the minor's feet and the lower elevation above which the minor is working.

On or about a roof shall have the same meaning as in § 570.67(b).

(ii) *Exemption.* The prohibition against working on or from equipment at elevations greater than six feet above another elevation shall not apply to a bona fide student-learner as described in § 570.98(b) employed in compliance with the provisions of § 570.98(b) and paragraphs (b)(1)(ii) and/or (ii) of this section.

(8) *Occupations involving working inside any fruit, forage, or grain storage silo or bin (Ag H.O. 8).*

(9) *Occupations involving working inside a manure pit (Ag H.O. 9).*

(10) *Occupations involving the handling of pesticides (Ag H.O. 10).* Performing any task that may be performed by a pesticide handler.

(i) *Definitions.*

Pesticide shall mean any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; and any nitrogen stabilizer, except that the term *pesticide* shall not include any article that is a new animal drug within the meaning of section 201(w) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(w)), that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or that is an animal feed within the meaning of section 201(x) of such Act (21 U.S.C. 321(x)) bearing or containing a new animal drug. The term *pesticide* does not include liquid chemical sterilant products (including any sterilant or subordinate disinfectant claims on such products) for use on a critical or semi-critical device, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321). For purposes of the preceding sentence, the term *critical device* includes any device which is introduced directly into the human body, either into or in contact with the bloodstream or normally sterile areas of the body and the term *semi-critical device* includes any device which contacts intact mucous membranes but which does not ordinarily penetrate the

blood barrier or otherwise enter normally sterile areas of the body.

Pesticide handler shall mean any person, including a self-employed person, who performs any of the following tasks:

(1) Mixing, loading, transferring, or applying pesticides;

(2) Disposing of pesticides or pesticide containers;

(3) Handling opened containers of pesticides;

(4) Acting as a flagger;

(5) Cleaning, adjusting, handling, or repairing the parts of mixing, loading, or application equipment that may contain pesticide residues;

(6) Assisting with the application of pesticides;

(7) Entering a greenhouse or other enclosed area after the application and before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by 40 CFR 170.110(c)(3) or in the labeling has been met to operate ventilation equipment, to adjust or remove coverings used in fumigation, or to monitor air levels;

(8) Entering a treated area outdoors after application of any soil fumigant to adjust or remove soil coverings such as tarpaulins;

(9) Performing tasks as a crop advisor during any pesticide application, before the inhalation exposure level listed in the labeling has been reached or one of the ventilation criteria established by 40 CFR 170.110(c)(3) or in the labeling has been met, or during any restricted-entry interval.

(10) The term *pesticide handler* does not include any person who is only handling pesticide containers that have been emptied or cleaned according to pesticide product labeling instructions or, in the absence of such instructions, have been subjected to triple-rinsing or its equivalent.

(ii) [Reserved]

(11) *Occupations involving the handling of blasting agents (Ag H.O. 11).* Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord.

(12) *Occupations involving the transporting, transferring, or applying of anhydrous ammonia (Ag H.O. 12).*

(13) *Occupations involving the production and curing of tobacco (Ag H.O. 13).* All work in the production and curing of tobacco, including, but not limited to, planting, cultivating, topping, harvesting, baling, barning, and curing.

11. Revise § 570.123 to read as follows:

§ 570.123 Agriculture

(a) Section 13(c)(1) and (c)(2) of the Act, when read together with section 3(l), provide an almost complete exemption from the child labor provisions for any youth who is employed in agriculture by his or her parent (or by a person standing in the place of his or her parent) on a farm owned by such parent or person. By virtue of the parental exemption provided in sections 3 and 13 of the Act, children under 16 years of age are permitted to work, for their parent (or person standing in place thereof) on a farm owned by such parent or person at any time to perform any tasks, provided they are not employed in a manufacturing or mining occupation. Sections 13(c)(1) and (c)(2) also provide a limited exemption from certain of the agricultural child labor provisions for any youth who is employed in agriculture by his or her parent (or by a person standing in the place of that parent) on a farm operated by such parent or person. When employed by a parent or person standing in place of a parent on a farm operated by that parent or person, the minor may perform hazardous work as described in § 570.99(b) of this part, but the minor must be employed outside of school hours for the school district where he or she is living while so employed.

(1) Application of the parental exemption in agriculture is limited to the employment of children exclusively by their parents or person(s) standing in place thereof on a farm owned or operated by the parent(s). Only the sole owner or operator of a farm is in a position to regulate the duties of his or her child and provide guidance. Where the ownership or operation of the farm is vested in persons other than, or in addition to, the parent or person standing in place of the parent, such as a business entity, corporation, or partnership (unless wholly owned by the parent(s)), the child worker is responsible to persons other than his or her parent, and his or her duties would be regulated by the corporation or partnership.

(2) A relative, such as a grandparent or aunt or uncle, who assumes the duties and responsibilities of the parent to a child regarding all matters relating to the child's safety, rearing, support, health and well-being is a "person standing in the place of" the child's parent. It does not matter if the assumption of the parental duties is permanent or temporary, such as a period of three months during the summer school vacation during which the youth resides with the relative.

Generally, a period of less than one month would not be sufficient for the parental exemption to apply in such situations.

(3) The "parent or person standing in the place of the parent" shall be a human being and not an institution or facility, such as a corporation, business, partnership, orphanage, school, church, or a farm dedicated to the rehabilitation of delinquent children.

(4) "Operated by" the parent or person standing in the place of the parent means that he or she exerts active and direct control over the operation of the farm or ranch by making day to day decisions affecting basic income, work assignments, hiring and firing of employees, and exercising direct supervision of the farm or ranch work. A ranch manager who meets these criteria could employ his or her own children under 16 years of age on the ranch he or she operates to perform any tasks, but only outside of school hours for the school district where the youth is living while so employed.

(5) A child who is exempt from the agricultural child labor provisions of the FLSA when employed on his or her parent's farm would lose that exempt status (not be exempt) when employed on a farm owned or operated by a neighbor or non-parental relative. Such youth could not be employed during school hours, nor could he or she perform any tasks prohibited by an Ag. H.O unless exempt as a student-learner in accordance with § 570.98(b) of this part. This is true even if the youth is operating equipment owned by his or her parent.

(b) Section 13(c)(1) provides additional exemptions from the Act's child labor provisions for the following employees employed in agriculture outside of school hours for the school district where such employees are living while so employed if not employed in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of 16:

(1) An employee less than twelve years of age who is employed with the written consent of his or her parent or person standing in the place of his or her parent on a small farm where none of the employees are required to be paid the Federal minimum wage prescribed by FLSA section 6(a)(5) because the criteria of FLSA section 13(a)(6)(A) have been met;

(2) An employee who is 12 or 13 years of age and such employment is either with the written consent of his or her parent or person standing in place of his or her parent or his or her parent is

employed on the same farm as the youth; and

(3) An employee who is 14 years of age or older.

(c)(1) The exemptions discussed in paragraph (b) of this section apply only when the employment is limited to periods outside of school hours for the school district where the minor resides while so employed.

(2) The applicability of the exemptions to employment in agriculture discussed in paragraph (b) of this section depends in general upon whether such employment conflicts with the school hours for the locality where the child lives. Since the phrase "school hours" is not defined in the Act, it must be given the meaning that it has in ordinary speech. Moreover, the statute speaks of school hours "for the school district" rather than for the individual child. Thus, the provision does not depend for its application upon the individual student's requirements for attendance at school. For example, if an individual student is excused from his studies for a day or a part of a day by the superintendent or the school board, the exemption would not apply if school was in session then. "Outside of school hours" generally may be said to refer to such periods as before or after school hours, holidays, summer vacation, Sundays, or any other days on which the school for the district in which the minor lives does not assemble. Since "school hours for the school district" do not apply to minors who have graduated from high school (successfully completed the 12th grade or a high school general equivalency diploma (GED) program), the entire year would be considered "outside of school hours" and, therefore, their employment in agriculture would be permitted at any time. While it is the position of the Department that a minor who leaves one district where schools are closed for the summer and moves into and lives in another district where schools are still in session is subject to the hours that schools are in session in the new district, the Department generally will not assert a violation for the agricultural employment of that minor during those few weeks that the schools in the new district are still in session. As a reasonable precaution against employing children during school hours, however, no employer should employ a child under such circumstances before June 1, and after that date it should do so only if shown by the minor satisfactory evidence in the form of a written statement signed by a school official stating that the school with which he is connected is the one last attended by the minor and

that the school is closed for summer vacation. Such statement should contain the minor's name, the name and address of the school, the date the school closed for the current year, the date the statement was signed, and the title of the school official signing the statement. In addition, the minor could allow the employer to examine or even photocopy his or her report card to document that the minor has completed the school year prior to seeking agricultural employment.

(d) The hazardous occupations orders contained in subpart E of this part declaring certain occupations to be particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being shall not apply to employment in agriculture. Agricultural employment is subject to the agricultural hazardous occupations orders contained in subpart F of this part.

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

12. The authority citation for part 579 continues to read as follows:

Authority: 29 U.S.C. 203(l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 09–2009 (Nov. 16, 2009): Delegation of Authorities and Assignment of Responsibilities to the Administrator, Wage and Hour Division, 74 FR 58836; 104 Stat. 890 (28 U.S.C. 2461 note), as amended by 110 Stat. 1321–373 and 112 Stat. 3293.

13. Revise § 579.2 to read as follows:

§ 579.2 Definitions.

As used in this part and part 580 of this chapter:

Act means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*);

Administrative law judge means a person appointed as provided in 5 U.S.C. 3105 and qualified to preside at hearings under 5 U.S.C. 554–557.

Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes an authorized representative designated by the Administrator to perform any of the functions of the Administrator under this part and part 580 of this chapter.

Agency has the meaning given it by 5 U.S.C. 551.

Caused by a child labor violation means that there is a relationship between the violation that occurred and the serious injury or death of a minor employee. Causation shall be found when the injury or death can be directly

attributed to the performance of a violative act listed in § 579.3. Causation may also be found if the death or serious injury occurs while the youth is employed in an occupation, workplace, or industry that the Secretary has found and declared in subpart E of part 570 of this chapter to be particularly hazardous for the employment of workers 16 and 17 years of age, such as in a saw mill, in a meat processing plant, as a roofer, or in a mine. Causation may also be found when a minor under 16 years of age was killed or seriously injured while employed in an agricultural occupation or workplace that the Secretary has found and declared in subpart F of part 570 of this chapter (previously subpart E–1) to be particularly hazardous for the employment of children below the age of 16, such as handling or using a blasting agent or working inside a manure pit. Causation may also be found when a minor under 16 years of age was killed or seriously injured while employed in an occupation, workplace, or industry that the Secretary has found and declared, in accordance with § 570.33 of this chapter, to not be a permitted occupation, workplace, or industry for the employment of 14- and 15-year-olds, such as work in a warehouse, in construction, in transportation, or in a room where manufacturing or processing takes place. Finally, causation may be found when a minor was seriously injured or killed as a result of a violation of the hours and times of day standards established by § 570.35 of this chapter when it can be demonstrated that the time of day or the number of hours worked by the minor employed in violation jeopardized his or her health, safety, alertness, or mental acumen.

Chief Administrative Law Judge means the Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., Suite 400, Washington, DC 20001–8002.

Child Labor Enhanced Penalty Program (CLEPP) refers to the process the Department has developed to assess a civil money penalty of up to \$50,000 for each violation that caused the serious injury or death of any employee under the age of 18 as authorized by section 16(e) of the FLSA, as amended by the Genetic Information Nondiscrimination Act of 2008. Such penalties may be doubled, up to \$100,000, when the violation is determined to be repeated or willful. An employer may be assessed CLEPP and Non-CLEPP penalties for violations documented during the same investigation.

CLEPP serious injury means an injury to a minor employee that: occurred after May 20, 2008; was *caused by a child labor violation* as defined in this section; and involves the permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation); the permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part. The Department's assessment whether the injury resulted in substantial impairment will take into account the nature and degree of the impairment and its expected duration. A cut or abrasion that impairs a youth's ability to bend his or her knee for one week, for example, will not rise to the level of a substantial impairment because the injury is neither significant nor long-lasting, while a puncture or laceration that results in permanent numbness or scarring to a youth's finger will be deemed to have substantially impaired the youth's sense of touch. Even if an injury is expected to eventually heal with no lasting effects, it may qualify as a substantial impairment under CLEPP if the initial injury, such as a fall that shatters a youth's leg, impairs a body part, sense, or mobility for a significant period of time. While injuries resulting in substantial impairment will generally take longer than six weeks to heal, an impairment may be substantial for purposes of CLEPP even if it lasts, or is expected to last, for fewer than six weeks, particularly if the youth is unable to attend school or work for that period of time.

Contributed to the death or injury of a minor means that although there may not be a direct causal relationship between the child labor violation and the death or injury, the death or injury would not have occurred if a minor were not employed in violation of a child labor provision at the time of the death or injury. For example, if a 14-year-old was employed in a retail store at 9:30 p.m. in violation of the hours standards established by Child Labor Regulation No. 3 (CL Reg. 3) (subpart C of part 570 of this chapter) and was crushed to death because a large box that was improperly stowed fell from a high shelf, the hours standards violation would not have caused the death. But the hours standards violation would have contributed to the minor's death because had he or she not been

employed at that time, the death would not have occurred.

Death means the cessation of life, even if the death does not occur immediately but eventually results from an injury. A child labor civil money penalty may be assessed under CLEPP if the death of an employee under the age of 18 years occurred after May 20, 2008 and the death was caused by a child labor violation listed in § 579.3 of this chapter. A child labor civil money penalty of up to \$11,000 may be assessed for each violation that caused or contributed to the death of a minor when the violations do not fall under CLEPP.

De minimis means something of such minimal importance or trifling nature that the law does not refer to it and will not consider it. A *de minimis* child labor violation, for the purpose of determining the amount of child labor civil money penalties that will be assessed an employer, includes only those CL Reg. 3 hours standards violations that involve the employment of no more than one minor and recordkeeping violations that involve the employment of no more than one minor. Violations of the CL Reg. 3 hours standards (beginning and ending of work day, total number of hours worked in a day, and total number of hours worked in a week) could be *de minimis* only if the individual violations: are the only child labor violations documented by the investigation of the employer; do not violate the standard by more than 15 minutes—i.e., the minor worked no later than 7:15 p.m. on a winter evening, did not work before 6:45 a.m., or worked no more than 3¼ hours on a school day; such violations involve the employment of a only a single minor; and there are no more than three such violations involving exceeding the CL Reg. 3 hours standards during that minor's employment with the employer. A recordkeeping violation may be considered a *de minimis* child labor violation only when the employer fails to maintain a record of the date of birth of no more than one minor employee and no other child labor violations are documented by the investigation of the employer. The following types of child labor violations cannot be considered *de minimis* for the purpose of determining the amount of child labor civil money penalties that will be assessed:

(1) Violations involving hazardous occupations orders detailed in subparts E and F of part 570 of this chapter;

(2) Violations which caused or contributed to the death, CLEPP serious injury, serious injury (Non-CLEPP), or nonserious injury of a minor;

(3) Violations involving CL Reg. 3 occupation standards detailed in subpart C of part 570 of this chapter;

(4) Violations involving minors under the age of 14 in nonagricultural employment and under the age of 12 in agricultural employment;

(5) Violations involving minors under 16 years of age working during school hours; and

(6) Repeated or willful violations as defined in this section.

Department means the U.S. Department of Labor.

First aid shall mean any one-time treatment of a nonserious injury. Such one-time treatment is considered *first aid* even though provided by a physician or registered medical professional personnel.

Nonserious injury means any injury that requires treatment no more extensive than first aid and results in the youth missing school or work, or having their normal activities curtailed, for less than five days. A *nonserious injury* may be caused by a child labor violation or the violation may have only contributed to the injury. A child labor civil money penalty may only be assessed for a *nonserious injury* when the minor whose employment is in violation of a child labor provision is also the minor who suffered the *nonserious injury*. A *nonserious injury* will never fall under the provisions of CLEPP.

Person includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons. For purposes of the assessment of child labor civil money penalties, the term person shall also include a parent when he or she is the employer of his or her child and that child's employment is not in compliance with the provisions of part 570 of this chapter and not otherwise exempt.

Repeated violations have two components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections shall be deemed to be *repeated*:

(1) Where the employer has previously violated section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or,

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 12 or section

13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

Secretary means the Secretary of Labor, U.S. Department of Labor, or an authorized representative of the Secretary.

Serious injury (Non-CLEPP) means an injury that, while significantly impacting the life of the minor, fails to meet any or all of the criteria listed in the definition of *CLEPP serious injury*. A *serious injury (Non-CLEPP)* is one that did not: Occur after May 20, 2008; fall within one of the three categories of CLEPP serious injury; and/or meet the level of causation required by CLEPP, but which either requires treatment more extensive than *first aid* or which curtails the minor's normal activities (school, work, sports) for at least five days. A *serious injury (Non-CLEPP)* includes situations where a minor is required to return to a medical practitioner after an accident to have stitches removed or for an evaluation of the healing process. A child labor civil money penalty may only be assessed for a *serious injury (Non-CLEPP)* when the minor whose employment is in violation of a child labor provision is also the minor who suffered the *serious injury (Non-CLEPP)*.

Solicitor of Labor means the Solicitor, U.S. Department of Labor, and includes attorneys designated by the Solicitor to perform functions of the Solicitor under this part and part 580 of this chapter.

Willful violations have several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections shall be deemed to be *willful* where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful. An employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act, among other situations, if the employer should have inquired further into whether its conduct was in compliance

with the Act, and failed to make adequate further inquiry.

14. Amend § 579.3 by:

a. Redesignating paragraphs (a)(5) and (6) as paragraphs (a)(3) and (4), respectively;

b. Revising newly redesignated paragraph (a)(4); and

c. Revising paragraphs (b)(2)(i) through (iii), (b)(4)(ii), and (c)(1) and (3) to read as follows:

§ 579.3 Violations for which child labor civil money penalties may be assessed.

(a) * * *

(4) The failure by an employer employing any minor subject to any provision of FLSA sections 12 and 13 and/or any provision of part 570 of this chapter to take or cause to be taken such action as is necessary to assure compliance with all requirements of such provisions which, by the Act and the regulations in such part, are conditions for lawful employment of such minor.

(b) * * *

(2) * * *

(i) During school hours for the school district where such minor is living while so employed; or

(ii) In any manufacturing or mining occupation; or

(iii) In agriculture in any occupation found and declared by the Secretary, as set forth in subpart F of part 570 of this chapter, to be particularly hazardous for the employment of minors below such age; or

* * * * *

(4) * * *

(ii) Is employed with the written consent of a parent or person standing in place of a parent of such minor, on a farm where, because of the provisions of section 13(a)(6)(A) of the Act, none of the employees are required to be paid at the wage rate prescribed by section 6(a)(5) of the Act.

(c) * * *

(1) That none of the child labor provisions of section 12 shall apply to:

(i) Any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions;

(ii) Any employee engaged in the delivery of newspapers to the consumer;

(iii) Any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths); or

(iv) Any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of

the United States other than the States, territories, and possessions listed in section 13(f) of the Act (*see* Act, sections 13(c)(3), 13(d), 13(f));

* * * * *

(3) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors as described in paragraph (b)(2)(iv) of this section, a parent or person standing in place of a parent may lawfully employ his or her own child or a child in his or her custody under the age of 16 years in an occupation other than:

(i) Manufacturing;

(ii) Mining; or

(iii) An occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being, and an employer may lawfully employ a young worker between 14 and 16 years of age in an occupation permitted and under conditions prescribed by part 570 of this chapter, subpart C;

* * * * *

15. Add § 579.4 to read as follows:

§ 579.4 Determining the initial amount of the penalty for child labor violations that caused the death or serious injury of a minor under the Child Labor Enhanced Penalty Program (CLEPP).

(a) *General.* This section addresses the administrative determination of the initial amount of the civil money penalty that may be assessed for each violation that occurred after May 20, 2008 and caused the death or CLEPP serious injury of an employee under 18 years of age.

(b) *CLEPP assessment for minor's death.* The Department will generally determine an initial child labor civil money penalty amount of \$50,000 for each violation that occurred after May 20, 2008 that caused the death of any employee under 18 years of age. In accordance with FLSA section 16(e), the minor who was killed need not be the minor whose employment is the subject of such violation. For example, if a 17-year-old minor, while operating a forklift in violation of Hazardous Occupations Order No. 7, ran over and killed another 15-year-old employee, the Department could determine an initial civil money penalty amount under CLEPP of \$50,000 because the 17-year-old was employed in violation of the child labor provisions and the violation caused the death of any employee under the age of 18 years.

(c) *Assessment for CLEPP serious injuries.* (1) The Department will conduct a general review of each CLEPP

serious injury and determine where, on the continuum of serious injuries, the permanent loss, permanent paralysis, or substantial impairment falls. When evaluating the seriousness of the injury, WHD will consider the totality of the injury, including such things as the nature and degree of the permanent loss, permanent paralysis, or substantial impairment, potential for recovery, recovery time, impact of the injury on the minor's daily life, the prognosis by medical practitioners and therapists, and evaluations of the degree of loss or impairment pursuant to sources such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* or a determination by a state or Federal worker's compensation authority.

(i) With respect to the evaluation of a substantial impairment, as the degree of impairment increases, the duration that is necessary for the impairment to qualify as substantial decreases. Even if an injury is expected eventually to heal with no lasting effects, it may qualify as a substantial impairment under CLEPP if the impairment lasts for a significant period of time, or it has a significant, albeit temporary, impact.

(ii) Generally, a total body impairment rating of 35 percent or more will merit placement at the higher (more serious) end of the continuum. Those injuries that merit an impairment rating of between 20 percent and 35 percent will generally merit placement in the middle of the continuum. Finally, those injuries that are the least severe but still fall within the definition of a CLEPP serious injury—that merit an impairment rating of less than 20 percent—will generally merit placement at the lower end of the continuum.

(2) In accordance with FLSA section 16(e)(1)(A)(ii), which addresses the death or serious injury of any employee under the age of 18 years, the minor who suffered the CLEPP serious injury need not be the minor whose employment is the subject of such violation. For example, if a 16-year-old minor employee, while operating a motor vehicle in the course of his or her employment on a public road in violation of Hazardous Occupations Order No. 2 (*see* § 570.52 of this chapter), caused an accident that resulted in the CLEPP serious injury of a 17-year-old co-worker who was riding in the vehicle as a passenger, the Department would determine an initial civil money penalty under CLEPP because the 16-year-old was employed in violation of the child labor provisions and the violation caused the CLEPP serious injury of any employee under the age of 18 years. The amount of the

initial penalty determination would be based on the severity of the minor's injury.

(3) The amount of the initial civil money penalty determination will be \$40,000 for each violation that causes a CLEPP serious injury to any employee under the age of 18 years that the Department determines belongs on the higher (more serious) end of the serious injury continuum.

(4) The amount of the initial civil money penalty determination will be \$25,000 for each violation that causes a CLEPP serious injury to any employee under the age of 18 years that the Department determines belongs in the middle of the serious injury continuum.

(5) The amount of the initial civil money penalty determination will be \$15,000 for each violation that causes a CLEPP serious injury to any employee under the age of 18 years that the Department determines belongs at the lower (least serious) end of the serious injury continuum.

(6) The initial civil money penalty amount may be reduced in consideration of the small size of the employer's business in accordance with § 579.6(b)(3). The initial civil money penalty amount may also be increased, up to a maximum of \$50,000 or \$100,000 if the violation is repeated or willful, in accordance with the provisions of § 579.6(b)(2).

16. Revise § 579.5 to read as follows:

§ 579.5 Determining the initial amount of the penalty for child labor violations that do not fall under the Child Labor Enhanced Penalty Program (CLEPP).

(a) This section addresses the administrative determination of the initial amount of the civil money penalty that may be assessed for each violation that does not fall under CLEPP, *i.e.*, those violations that occurred before May 21, 2008 and/or did not cause the death or serious injury of an employee under 18 years of age. Paragraph (b) of this section addresses the determination of initial penalty amounts for Non-CLEPP violations that do not involve the death or injury (serious or nonserious) of a minor. Paragraph (c) of this section addresses the determination of penalty amounts for violations of child labor provisions that caused or contributed to the death, serious injury (Non-CLEPP) and/or nonserious injury of an employee under 18 years of age.

(b) For Non-CLEPP violations that involve the employment of a minor who was the subject of a violation of section 12 or section 13(c)(5) of the Act relating to child labor or of any regulation issued under those sections but that did not

result in a youth's injury, the Department may assess a civil money penalty not to exceed \$11,000 for all child labor violations impacting his or her employment. The assessment of the penalty will be based on the available evidence. The Department will use, as an initial starting point for determining the amount of the penalty, a predetermined amount established for each type of violation based on the relative gravity of the violation when compared to the universe of violations. The initial penalty amounts are stratified to take into consideration the gravity of each violation, when compared to the array of possible violations. The more egregious violations—those that place young workers at greater risk—warrant a higher initial civil money penalty amount. The Department has published this list on the WHD Web site and may periodically increase the initial penalty amounts listed in accordance with § 579.1(b) of this part or for other reasons, such as a strategic effort by the Department to increase compliance regarding specific types of violations or within specific types of industries.

(c) When determining the initial penalty amounts for those child labor violations that do not qualify under CLEPP but caused or contributed to the death, serious injury (Non-CLEPP), or nonserious injury of a minor employee, the Department will consider the following:

(1) The Department will conduct a general review of each serious injury (Non-CLEPP) and determine where, on the continuum of injuries, the injury falls, depending on the severity and permanency of the injury. When evaluating the seriousness of the injury, WHD will consider the totality of the injury, including such things as the nature and degree of impairment, potential for recovery, recovery time, impact of the injury on the minor's daily life, the prognosis by medical practitioners and therapists, and evaluations of the degree of loss or impairment pursuant to sources such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* or a determination by a state or Federal worker's compensation authority. Generally, a total body impairment rating of 35 percent or more or a recovery period of three months or more will merit placement at the higher (more serious) end of the continuum. Those injuries that merit an impairment rating of between 20 percent and 35 percent or a recovery period between one and two months will generally merit placement in the middle of the continuum. Finally, those injuries that

are the least severe but still fall within the definition of a CLEPP serious injury—that merit an impairment rating of less than 20 percent or a recovery period of less than one month—will generally merit placement at the lower end of the continuum. In accordance with FLSA section 16(e)(1)(A)(i), the minor who suffered the serious injury (Non-CLEPP) must also be the minor whose employment is the subject of such violation.

(i) The amount of the initial civil money penalty determination will be \$10,000 for each child labor violation that causes or contributes to a serious injury (Non-CLEPP) to the employee employed in violation when the Department determines the serious injury belongs on the higher (most serious) end of the injury continuum.

(ii) The amount of the initial civil money penalty determination will be \$8,000 for each child labor violation that causes or contributes to a serious injury (Non-CLEPP) to the employee employed in violation when the Department determines the injury belongs in the middle of the injury continuum.

(iii) The amount of the initial civil money penalty determination will be \$6,000 for each child labor violation that causes or contributes to a serious injury (Non-CLEPP) to the employee employed in violation when the Department determines the injury belongs at the lower (least serious) end of the injury continuum.

(iv) The initial civil money penalty for violations causing or contributing to these serious injuries (Non-CLEPP) may be reduced in consideration of the small size of the employer's business in accordance with § 579.6(b)(3). Such initial civil money penalty may also be increased, up to a maximum of \$11,000 for each violation, in accordance with the provisions of § 579.6(b)(1) and (c) when appropriate.

(2) For each violation (Non-CLEPP) that contributed to the death of an employee under 18 years of age, WHD will generally assess an initial penalty of \$11,000.

(3) For each violation that caused or contributed to the nonserious injury of a minor under 18 years of age, the initial penalty amount will be three times the predetermined amount that is listed for the violation on the List of Initial Child Labor Civil Money Penalty Amounts posted on the Wage and Hour Division's Web site (www.dol.gov). The initial civil money penalty for violations causing or contributing to a nonserious injury may be reduced in consideration of the small size of the employer's business in accordance with § 579.6(b)(3). Such

initial civil money penalty may also be increased, up to a maximum of \$11,000 per child in accordance with the provisions of § 579.6(b)(1) and (c).

17. Add new §§ 579.6 and 579.7 to read as follows:

§ 579.6 Determining the amount of the civil money penalty to assess.

(a) All initial child labor civil money penalty amounts will be reviewed by the WHD assessing official for conformance with the provisions of the FLSA and this part. The Department will adjust the initial civil money penalty amounts to arrive at the amount to be assessed as discussed in paragraphs (b) through (e) of this section, as appropriate.

(b) When determining the amount of the penalty, the Department may reduce certain initial civil money penalty assessments in consideration of the size of the business of the person(s) charged with the violation(s) and the gravity of the violation(s). The Department will typically not find reductions to be appropriate in those cases where a violation (or violations) causes or contributes to a youth's death; causes the most serious type of CLEPP serious injury; or causes or contributes to the most serious type of serious injury (Non-CLEPP), but will consider the facts of each individual case before making such a determination.

(1) Adjustments to the Non-CLEPP initial penalty amounts may be made in the following manner. The initial penalty amounts may be doubled, not to exceed \$11,000 per violation, when any of the following aggravating factors are present:

(i) It is determined that any of the employer's child labor violations were repeated or willful;

(ii) The employer falsified records to conceal child labor violations;

(iii) The employer concealed child labor violations during the investigation that led to the assessment of civil money penalties; or

(iv) The employer did not agree to future compliance with the child labor provisions, did not achieve such compliance when advised of the violations, or gave promises of future compliance which, in WHD's sole estimation, cannot be relied upon.

(2) The initial civil money penalty amounts computed pursuant to § 579.4(b) and (c) for CLEPP assessments

may be doubled, not to exceed \$100,000, for each violation that is determined to be repeated or willful.

(3) Certain CLEPP and Non-CLEPP initial penalty amounts may be reduced as provided in paragraph (b)(3)(i) or (ii) of this section. WHD will generally find such reduction to be appropriate only when: none of the violations caused or contributed to the death of an employee under the age of 18 or a serious injury that the Department has determined is among the most serious type of CLEPP serious injury or serious injury (Non-CLEPP); none of the aggravating factors listed in paragraph (b)(1) of this section were present; and the employer's gross annual dollar volume of sales made or business done, exclusive of excise taxes, did not exceed \$1,000,000 at any time during the period of the investigation that documented the child labor violations. However, WHD will consider the appropriateness of a civil money penalty reduction based on the facts of each case.

(i) The initial child labor civil money penalty amounts may be reduced by 50 percent if the employer never employed more than 20 employees during any workweek during the period of investigation; or

(ii) The initial child labor civil money penalty amounts may be reduced by 30 percent if the employer employed at least 21 employees, but never more than 99 employees, during any workweek during the period of investigation.

(c) When a violation of a child labor provision listed in § 579.3 causes or contributes to the death, CLEPP serious injury, or serious injury (Non-CLEPP) of an employee under 18 years of age, the Department will generate the initial penalty amounts regarding the employment of the youth employed in violation using the formulae detailed in § 579.4 or § 579.5 as appropriate. The Department will also increase the initial penalty amounts for any minor employees also employed by the employer who—although themselves not killed or seriously injured—performed the same violative act(s) as those that caused or contributed to the death or serious injury of the minor. The initial penalty for such minors will be five times the predetermined amount listed for each violation on the List of Initial Child Labor Civil Money Penalty Amounts posted on the Wage and Hour

Division's Web site (<http://www.dol.gov>). The total child labor civil money penalty addressing the employment of any such minor employee who was not himself or herself killed or injured may not exceed \$11,000.

(d) In determining the amount of the child labor civil money penalty, the Department will also consider, when appropriate, whether the evidence shows that the child labor violation is *de minimis*, whether the violation involved any intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being or was inadvertent, whether the person so charged has given credible assurance of future compliance, and whether a civil money penalty in the circumstances is necessary to achieve the objectives of the Act.

(e) Factors that the Department will not consider when determining the amount of the child labor civil money penalty include whether the minor or his or her parent or guardian provided an incorrect birth date, whether the minor's actions contributed to the violation and/or his or her injury or death, and whether the parent or guardian attempted to or agreed to waive the child labor provisions on behalf of the minor.

§ 579.7 Assessment and finality of the penalty.

(a) An administrative determination of the amount of the civil money penalty for a particular violation or particular violations of FLSA sections 12 and 13(c) relating to child labor or any regulation issued under those sections shall become final 15 days after receipt of the notice of penalty by certified mail by the person so charged unless such person has, pursuant to § 580.6 of this chapter, filed with the Secretary an exception to the determination that the violation or violations for which the penalty is imposed occurred.

(b) A determination of the penalty made in an administrative proceeding after opportunity for hearing as provided in section 16(e) of the Act and pursuant to part 580 of this chapter shall be final.

[FR Doc. 2011-21924 Filed 8-31-11; 8:45 am]

BILLING CODE 4510-27-P