



PSDiver Magazine 112

November 2015

**Public Safety Diving
and OSHA.**

Are We Exempt?

FINAL

ANSWER!

SPECIAL EDITION

Dead Man Walking!

I have received a number of inquiries about the future of the magazine. To be honest, I don't know yet. We took an unbelievably hard blow almost two years ago when Lynn died. It turns out we had not fully appreciated just how much she did that kept the magazine, and me, organized and running. Later in that same year we decided to retire complete from the retail world and closed our dive shop and sold our other business. The time involved to do that was unsettling.



PSDiver will continue from here but I am unsure of the format. At the least I suspect the magazine will become as quarterly publication with an occasional special issue. I have released all of our advertisers from their contracts and absolved all money owed to us for past advertising. When we decide what we are going to do, we will start over.

Our sponsors/advertisers have been incredible resources for our PSD community. They have helped us grow and worked to learn what we do and how they can help us. Almost all of our original advertisers are still with us and supporting our efforts. With no exception they have engaged the PSD community and worked to expand their product lines and support for us – more so than most related companies. Our archives will stay up and I recommend you download past issues and be attentive to the advertisers. They are there for you and have proven their dedication to the PSD community.

I took some time off this year to see if I could recharge. I wanted to take the time to decide just how or even if I was going to continue in the PSD and maybe even the recreational scuba world. Then I got the phone call I had

been wanting for two years. It may seem silly to you but one of my retirement plans when I retired from the fire department was to travel and teach or lecture.

Last year I was invited to speak at the SARCON 2014. My wife and I flew out and spent the weekend with them, I spoke two days and we had a blast. The people were great, the facilities were amazing and the experience for us was almost perfect. We stayed in Oregon for almost a week afterward and traveled around exploring the coast and sites all the way to Seattle.

In August I got a call asking if I would come back for SARCON 2015. For me that was a sign that my retirement plan was going to work. Of course I said yes!

But there was a problem. Earlier in the year while on vacation I had a couple of experiences where I got very short of breath and had to rest a few minutes. It was odd. I may not be in peak physical condition, but I didn't think I was in that bad of shape. Occasionally I had a nagging muscle pull between the upper ribs on my left side chest. It was more annoying than painful.

9 months later it was still nagging me so for peace of mind, I finally called my cardiologist and they scheduled my annual stress test and a couple of other tests. The test results showed my veins were normal and I was not at risk of a heart attack. However, the heart murmur I first learned about in my 30's had developed into an aortic valve problem. I was not in a hurry to get it done but when I was told I had maybe weeks, not months I agreed to have the surgery. I had open heart surgery and my aortic valve replaced on September 1. Had I not, there was a high probability that it would have just quit. There was only one symptom, sudden death. Surprise!

The symptoms I had were not readily identifiable as a cardiac issue to me until after I learned I had a two leaf valve instead of a three leaf valve. This is a birth defect that is not uncommon. It first shows up as a minor heart murmur and eventually will cause a reduction in blood flow through the heart. If you have ever been told you have a heart murmur and have had unusual periods where you became dizzy easily, out of breath or have had a pulled muscle type of pain in your upper chest, left or right side, GO SEE A CARDIOLOGIST. You may not be at risk for a heart attack but you may have a similar valve issue and without repair or replacement, **the only conclusion is sudden death**. This condition is my next research venture. Considering the minor discomfort and the fatal conclusion left unattended, I see the potential for some of our Brother PSD fatalities to be related.

So as excited as I was about attending, I missed SARCON 2015. BUT, a friend and colleague of mine from Washougal, WA, **Phil Graff of Omnidivers.com** was able to fill in for me. I am very thankful to have friends like that who are both willing and capable of helping when asked. (Thanks again Phil!)

We are currently in talks with a company to take over the magazine with me staying on as Editor. Nothing has been settled so far but it makes sense to me to find someone who is able to add value to what we created. How that will be achieved is unknown at this point but realistically we will have to merge with or bring on board people who will continue to build the magazine.

This issue of the magazine is going out as a special release. We have been working on getting the ultimate

answers for all things concerning Public Safety Diving and the OSHA [29 CFR Part 1910, Subpart T – Commercial Diving Operations](#) and the exemption. This project was started in February of 2015 and has been ongoing since.

We started with an open discussion on the Yahoo Groups [PSDiver-StandardsCommittee](#) site. When it was ready, we presented an article as well as a number of questions to OSHA for validation that what we had developed was correct. It turns out that we had some things right but still were plagued with a lot of misconceptions.

The folks at OSHA were very receptive of our project and put together their own team to help us. Eventually that led to them developing a matrix as well as some Q and A's that help explain the standards, how and when they are applied and what the exemption really means. They were extraordinary to work with and it would have been impossible to complete the project without their input, advice and assistance.

Sometime soon we will be starting a new project that concerns [29 CFR Part 1910, Subpart T – Commercial Diving Operations](#) and how to apply it to Public Safety Diving. If you would like to participate, click on the discussion group link and join the general discussion group. When we begin the project we will send out a notice for volunteers there.

I am always looking for content. If you have an interesting story to tell or dive mission to share, let me know.

If you would like to discuss this topic or any other, join our discussion group
[CLICK HERE TO JOIN](#)

Dive Safe,
Mark Phillips
Editor / Publisher



Public Safety Diving and OSHA, Are We Exempt? Final Answer.

By Mark Phillips

For years now I have made comments, written articles, argued and defended what I believed to be correct information about the OSHA 29 CFR Part 1910, Subpart T – Commercial Diving Operations exemption for public safety diving. Having had numerous questions, way back when, I finally went to the right person in OSHA and asked specifically about the exemption. The information I later shared was from that source, not a personal opinion.

Since that time, there have been a few who debated and argued against what I was sharing because it was contrary to the information they had learned and shared. It is a little embarrassing to say, but we ALL got it wrong... and we got some of it right but for the wrong reasons.

It turns out that the information and opinions we had shared was only partly correct. As a whole, we made some critical mistakes and omitted some vital information. To fully understand how the Part 1910-Subpart T exemption is applied, we first have to know whether we are covered by Federal-OSHA or State-OSHA. Without this determination, the wording used in the OSHA standards can be confusing and erroneously interpreted. It is important to note that WE have been using the wrong terminology when we say our team is exempt from the OSHA Commercial Diving Operations. Before we have to consider the exemption we must know if we are covered by the Osh Act because **to be exempt, you must be covered by** the OSH Act.

The arguments and opinions shared and held by us have really confused things. At a recent workshop, I realized just how far reaching the arguments were and the extent of disruption the conflict was causing. Even here, with leaders in the PSD field, there was no real *once and for all* statement that the group could look at and agree with without constraint. It was wrong. There should not be misconception or argument at this point in time.

So, I have revisited OSHA with the goal of satisfying the exemption question once and for all. Here is a refresher of what we are talking about:

DIRECTIVE NUMBER: CPL 02-00-151

EFFECTIVE DATE: June 13, 2011

https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-151.pdf

SUBJECT: 29 CFR Part 1910, Subpart T – Commercial Diving Operations

Search, rescue, and related public-safety diving by or under the control of a governmental agency. OSHA received a number of comments from persons engaged in diving incidental to police and public-safety functions, and the Agency concluded that an exclusion was appropriate for such applications. The purpose of the "by or under the control of a governmental agency" language is to make the exclusion applicable to all divers whose purpose is to provide search, rescue, or public-safety diving services under the direction and control of a governmental agency (such as local, State, or federal government) regardless of whether or not such divers are, strictly speaking, government employees. In excluding these search and rescue operations, OSHA determined

*that safety and health regulation of the police and related functions are best carried out by the individual States or their political subdivisions. It is pointed out that this exclusion does not apply when work other than search, rescue, and related public-safety diving is performed (such as divers repairing a pier). Diving contractors who occasionally perform emergency services, and who are not under the control of a governmental agency engaging their services, do not come under this exclusion. Such divers may, however, be covered by the provision concerning application of the standard in an emergency (see **29 CFR 1910.401(b) and section XII., paragraph A.8., in this instruction**).*

If this is ALL you ever read and use as your guide, you will get it wrong. I think this is why there have been so many varied opinions on the subject and why it has taken so long to be able to put this issue to rest.

The exemption is only a small part of the OSHA Commercial Diving Standard, and in that paragraph of information, it does NOT expand on the rest of the information that is assumed we know. It is the information that is missing and understanding the mistaken assumptions that will help you understand the exemption.

Let's get that part out of the way first. We asked for clarification of the exemption because as a general rule WE do not consider ourselves to be commercial divers. The Commercial Diving Standard was written FOR commercial divers and the exemption was written to include the ability to deviate from safe diving practices under limited conditions (search, rescue or related public

safety purposes). There are 91 pages in the OSHA diving directive that address diving standards and we concentrated on one paragraph that is in the Appendix. Is it any wonder we missed something?

Before we can progress, we have to come to some harsh realizations of our own, realizations that will bruise our egos and challenge the way we identify ourselves.

We call ourselves Public Safety Divers and identify our type of diving as Public Safety Diving. Consider this: OSHA only identifies PURPOSE of diving, not the genre or specific style. Among ourselves, we have trouble defining what a Public Safety Diver does and what Public Safety Diving is, OSHA doesn't. For their purposes, we are just divers – and **if** our diving involves search, rescue or related public safety purposes, then we **may** be exempt from the Federal-OSHA commercial diving standard.

Within the PURPOSE of the exemption we are **persons engaged in diving incidental to police and public-safety functionswhose purpose is to provide search, rescue, or public-safety diving services.**

We call ourselves Public Safety Divers and identify our type of diving as Public Safety Diving and we've read the exemption wording, **public-safety functions and public-safety diving services**, the same. *That simple interpretation starts the confusion.* WE created the confusion over the exemption, not OSHA, by creating a definition for "Public Safety Divers" that OSHA neither has nor recognizes.

We identified "public safety diving services" as the identifying action. We have placed our own definitions into the wording and made the argument and assumption

that as public safety divers we perform *related public safety diving*. But within our community, there is no definition for what public safety diving is and we continually identify ourselves as a genre of diving we term Public Safety Diving.

OSHA has a standard for Commercial Diving and a definition of Scientific Diving. The definition of Scientific Diving exempts, under certain circumstances, the scientific diving community from the OSHA commercial diving standard (See 1910.401(a)(2)(iv) and 1910-Subpart T Appendix B. OSHA does not have any standard or definition for Public Safety Diver or Public Safety Diving. If we are not commercial or scientific divers, then by default, we are recreational divers with some very specific, even unique, special skills. We worked to apply the OSHA exemption to the extent we disregarded that there was something to be exempt from. There are ways to be exempt from OSHA but NOT the way you might think. And, if you cannot qualify to be exempt from OSHA, you are NOT exempt from the Commercial Diving Standards; you will only have a temporary and limited range of exemption that **does** end.

Purpose and Intent.

Public Safety Divers, for the most part, are ALL **recreationally trained divers** who occasionally are *persons engaged in diving incidental to police and public-safety functionswhose purpose is to provide search, rescue, or public-safety diving services.*

The intent of the exemption was to provide us the ability to disregard safe diving practices in order to perform *search, rescue, and related public-safety diving*. We have no argument talking about "search, rescue" or "search

and rescue" or what those actions are. It is the other part we got wrong. We got it wrong because we didn't recognize "public safety" as the necessary PURPOSE of the exemption and we did not separate WHERE the teams were located or who they were.

EXAMPLE

1. Two recreational divers witness a car violently enter the water and begin to sink. They respond and attempt a rescue. We use incorrect terms when we say they are exempt. They simply are **not covered by Federal-OSHA** because there is no employer/employee relationship. The divers believe there is a chance that someone else may be in the car and manage to get a rope on the car and pull it out of the water. Again, since there is no employer/employee relationship, they are not covered by the OSH Act.
2. A commercial diving crew working on an erosion control project for a chemical plant discover a vehicle underwater that they determine contains a deceased victim. They should immediately call the local sheriff's office to report the find – the sheriff's office will, in turn, notify the appropriate coroner/medical-examiner. The divers **are covered** by and the subsequent diving to recover the deceased victim and the vehicle is not exempt (NOTE: Even though the diving may be under government control, it does not involve "Immediate Response").
3. A local dive shop owner is contracted by the Sheriffs' Office and asked to recover a weapon from the bottom of a shallow pond. This diving is not exempt (NOTE: Even though the diving may be

under government control, it does not involve "Immediate Response").

4. An insurance company asks the same dive shop to provide divers to find and remove a boat that was intentionally sunk in the local river. This diving is NOT exempt (NOTE: Even though the diving may be under government control, it does not involve "Immediate Response").
5. Police department divers perform a search of a cruise ship pier, specifically looking for potential explosives. They are exempt (NOTE: Diving in response to a bomb threat constitutes "Immediate Response" since the public is at risk).
6. In a State without a State Plan (i.e., Federal-OSHA coverage), a paid fire department dive team conducts a joint mission with a police department dive team. They search for and subsequently recover the bodies of two murder victim, -a murder weapon, a vehicle and other items of interest. Per the OSH Act, Federal-OSHA does not have any authority over State/Municipal employees - consequently, the fire & police department dive teams are not covered by the OSHA commercial diving standard.
7. In a State Plan State (i.e., State-OSHA coverage), a paid fire department dive team conducts a joint mission with a police department dive team. They search for and subsequently recover the bodies of two murder victims, a murder weapon, a vehicle and other items of interest. The State-OSHA has authority over State/Municipal employees, however, even though the diving is by or under

government control, it does not involve "Immediate Response". The fire and police department divers would be subject to State-OSHA coverage and the State would enforce the Federal-OSHA commercial diving standard; except in California, Oregon, Washington, Hawaii and Michigan where the respective "equivalent" State commercial diving standard would be enforced.

8. A local fire department dive team is being assisted by a couple of volunteer divers. Since there is no employer/employee relationship, volunteer divers are not covered by Federal-OSHA or State-OSHA.
9. A State Police dive team is being assisted by several military divers. Since the definition of "employee" in 29 CFR Part 1960.2 does not include members of the Armed Services (uniformed military personnel), military divers are not covered by Federal-OSHA or State-OSHA.

When we say may or may not be exempt, there are conditions. For example, in example 1, there is no employer / employee relationship. Without that relationship, OSHA has no jurisdiction. The same holds for the volunteer team and the military team in example 5 because according to the OSH Act, **OSHA does not have authority over volunteer teams (since they are not employees) and OSHA does not have authority over uniformed military personnel.** [NOTE: The OSH Act does not cover federal civilian employees, including those working for the military, however, Presidential Executive Order 12196 & 29 CFR Part 1960 extend the application of the OSH Act to all federal civilian employees.

In examples 2, 3 and 4 an employer / employee relationship exists.

Examples 5, 6 and 7 pose some concerns. In order for them to be exempt they have to be covered. So we have to involve some discussion of the *State Plan vs Federal Plan States*. For teams in a state with a State OSH Plan, the issue will be the timing of the search. If there was reason to believe there is an imminent life threat or environmental disaster, that condition activates the exemption. Otherwise the exemption will not be in play. There is NO exemption for a routine check or training exercise.

In order to grasp the difference between who is and is not covered, and State vs. Federal Plans, we have to look at where this all started: **Occupational Safety and Health Act of 1970.**

The US Department of Labor affords some understanding of the OSH Act.
(<http://www.dol.gov/elaws/elg/osha.htm>)

Who is Covered -

The Occupational Safety and Health Act of 1970 (OSH Act) is administered by the Occupational Safety and Health Administration (OSHA). In general, the OSH Act covers all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories. Coverage is provided either directly by the federal Occupational Safety and Health Administration or by an OSHA-approved state job safety and health plan. Employees of the U.S. Postal Service also are covered.

[Occupational Safety and Health Act of 1970 \(OSH Act\)](#)
[29 USC §651 et seq.; 29 CFR Parts 1900 to 2400](#)

The Act defines an employer as any "person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a State." Therefore, the Act applies to employers and employees in such varied fields as manufacturing, construction, long shoring, agriculture, law and medicine, charity and disaster relief, organized labor, and private education. The Act establishes a separate program for federal government employees and extends coverage to state and local government employees only through the states with OSHA-approved plans.

The Act does not cover:

- Self-employed persons;
- Farms which employ only immediate members of the farmer's family;
- Working conditions for which other federal agencies, operating under the authority of other federal laws, regulate worker safety. This category includes most working conditions in mining, nuclear energy and nuclear weapons manufacture, and many aspects of the transportation industries;
- Federal civilian employees, including those working for the military, however, Presidential Executive Order 12196 & 29 CFR Part 1960 extend the application of the OSH Act to all federal civilian employees; and
- **Employees of state and local governments, unless they are in one of the states operating an OSHA-approved state plan.**

It is this last sentence that we need to be attentive to. Because, depending on what State you work in, if Federal-OSHA has coverage (i.e., it is not a State Plan State) they do not have authority over State/Municipal employees. (See OSHA Commercial Diving Operations Directive, Appendix B, "Summary of OSHA Authority")

State Plan vs Federal Plan

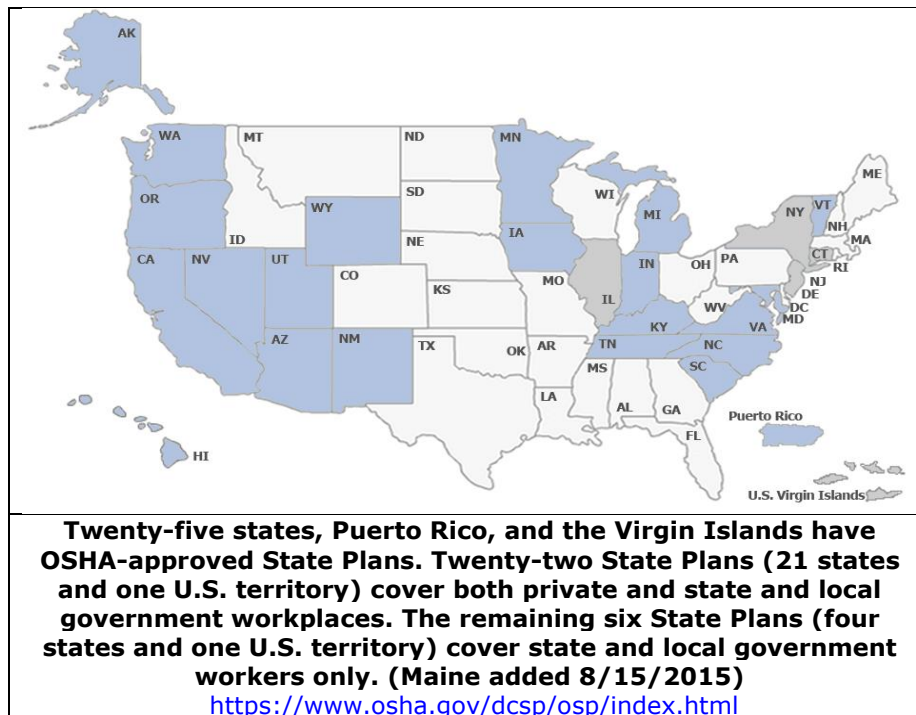
The Occupational Safety and Health (OSH)

Act covers most private sector employers and their workers, in addition to some public sector employers and their workers in the 50 states and certain territories and jurisdictions under federal authority. Those jurisdictions include the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Northern Mariana Islands, Wake Island, Johnston Island, and the Outer Continental Shelf Lands as defined in the *Outer Continental Shelf Lands Act*.

Pursuant to [Section 18 of the Occupational Safety and Health Act of 1970](#) (Federal OSHA), States may administer their own job safety and health programs,

or [State Plans](#), if they meet minimum federal requirements.

Five additional states and one U.S. territory have OSHA-approved State Plans that cover public sector workers (State and Municipal employers) only. They are Connecticut, Illinois, New Jersey, New York, Maine, and the U.S. Virgin Islands. (Maine became the fifth state August, 15,2015.)



The following 22 states or territories have OSHA-approved State Plans that cover both private and public sector workers: Alaska, Arizona, California*, Hawaii*, Indiana, Iowa, Kentucky, Maryland, Michigan*, Minnesota, Nevada, New Mexico, North Carolina, Oregon*, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington*, Wyoming and Puerto Rico. *Approved equivalent State standard for commercial diving operations.

These 28 State Plans may operate because Federal OSHA approved each respective State Plan as being "at least as effective" as the Federal OSHA program. **This means if you are a Public Safety Diver working in one of the States listed below, you fall under the jurisdiction of your state OSH which uses the**

federal OSHA for Commercial Diving standard or an equivalent State-OSHA standard (*NOTE: CA, OR, WA, HI, MI).

28 State Plans

Alaska, Arizona, California*, Connecticut, Hawaii*, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan*, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon*, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington*, Wyoming, Puerto Rico, U.S. Virgin Islands.

In these States and territories, State and local government workers are covered by the State or territory for matters related to safety and health. OSHA rules also permit states and territories to develop plans that cover only public sector (state and local government) workers. In these cases, private sector workers and employers remain under federal OSHA jurisdiction.

You could fall under a State Plan that includes a State-OSHA standard for Commercial Diving (California, Hawaii, Michigan, Oregon or Washington), or your State Plan will require Public Safety Divers to be in compliance with the federal diving standards.

“Public Safety Exemption”

*OSHA received a number of comments from persons engaged in diving incidental to **police and public-safety functions**, and the Agency concluded that an exclusion was appropriate for such applications. The purpose of the “by or under the control of a governmental agency” language is to make the exclusion applicable to all divers whose purpose is to **provide search, rescue, or public-safety diving services** under the direction and control of a*

governmental agency (such as local, State, or federal government) regardless of whether or not such divers are, strictly speaking, government employees

“Public Safety Purposes” **does not include** body recovery, vehicle or boat recovery that does not pose an immediate threat to human life/injury or major environmental/property damage. Nor does it apply to ship or boat hull searches unless conducted in response to a bomb threat. (Imminent threat to life or environment)

The exemption allows for deviations from the requirements of OSHA’s diving standard in situations where death, serious physical harm, or major environmental damage is likely, but only to the extent that such action is immediately necessary to prevent or minimize the harm. No exemption is provided for situations where purely economic or property damage is likely.

Once it is possible to comply with established safe diving practices (i.e., complete dive team and diving equipment is onsite) then the “public safety purposes” exemption is no longer germane.

According to the Occupational Safety and Health Act of 1970, **OSHA does not have authority over state or municipal governments**. Consequently, if you are employed by a State/municipal government – Fire, Law Enforcement, EMS – in a State with Federal-OSHA coverage, then you are not covered by any OSHA standard (including OSHA’s Commercial Diving Operations standard). If you are a private sector employee (i.e., non-government) in a State with Federal-OSHA coverage, and providing support as a diver for an immediate response

operation (human life or limb, and/or major property damage) that is “by or under the control of a governmental agency” then you are covered by the 1910.401(a)(2)(ii) exemption.

The purpose of the “by or under the control of a governmental agency” language is to make the exclusion applicable to all divers whose purpose is to provide search, rescue, or public-safety diving services under the direction and control of a governmental agency (such as local, State, or federal government) regardless of whether or not such divers are, strictly speaking, government employees.

Within this realm (Federal-OSHA covered State), those Public Safety Dive Teams (State/Municipal employees)

who are in a Federal-OSHA State are left with no enforceable standards to follow. For instance, if a City Manager asked the Fire Department dive team to check the condition of a city pier and do minor repairs while on duty, the divers are not covered by OSHA standards because Federal-OSHA does not have authority over state or municipal governments. That does not mean those teams will be held harmless in a civil or even criminal law suit. It might mean they become an even greater target for those types of law suits especially if and when a fatality occurs. [NOTE: In practice, voluntary compliance with the Federal-OSHA diving standard is a sound approach to provide for employee safety & health and to guard against potential litigation].

To help make sense of all of this OSHA has provided this matrix to help.

Diver Status	By or Under the Control of a Governmental Agency	No Involvement by Governmental Agency
<p>Volunteer (Not paid or compensated for diving services)</p>	<p>Federal-OSHA <u>does not cover</u> volunteers since there is no employer/employee relationship. However, States with an approved State Plan may cover workers defined by OSHA as volunteers.</p>	<p>Federal-OSHA <u>does not cover</u> volunteers since there is no employer/employee relationship. However, States with an approved State Plan may cover workers defined by OSHA as volunteers.</p>
<p>Public-Sector (State and/or Municipal) Employees (Police, Fire, environmental, fish & wildlife, etc.)</p>	<p>Federal-OSHA <u>does not cover</u> public-sector (State and/or Municipal) employees per the OSH Act.</p> <p>However, States with an approved State Plan¹ <u>do cover</u> public-sector employees, and enforce 29 CFR Part 1910, Subpart T (Federal-OSHA Commercial Diving Operations standard), or the approved equivalent State standard (CA, WA, OR, HI and MI).</p>	<p>Not applicable.</p>

Diver Status	By or Under the Control of a Governmental Agency	No Involvement by Governmental Agency
<p align="center">Federal Civilian Employees</p>	<p>Federal-OSHA <u>covers</u> federal civilian employees per Presidential Executive Order 12196 and 29 CFR Part 1960 (29 CFR Part 1910, Subpart T).</p>	<p align="center">Not applicable.</p>
<p align="center">Uniformed Military Personnel (Navy, Army, Air Force, Coast Guard, Marine Corps)</p>	<p>Federal-OSHA <u>does not cover</u> uniformed military personnel.</p> <p>NOTE: Uniformed military personnel can include NOAA and Public Health Service if activated by DOD; and National Guard (State employees) <u>if federalized</u>.</p>	<p align="center">Not applicable.</p>
<p align="center">Private-Sector Employees (Paid or otherwise compensated)</p>	<p>Federal-OSHA <u>covers all</u> private-sector employees <u>except</u> in States with an approved State Plan (29 CFR Part 1910, Subpart T) <u>that covers</u> private-sector employees.</p> <p>States with an <u>approved State Plan that covers</u> private-sector employees, enforce 29 CFR Part 1910, Subpart T, or the approved equivalent State standard (CA, WA, OR, HI and MI).</p>	<p>The 1910.401(a)(2)(ii) exemption would not be applicable – however, 1910.401(b) <i>Application in Emergencies</i> may apply.</p> <p>In States with an approved equivalent State standard for commercial diving operations (CA, WA, OR, HI and MI), the equivalent to 1910.401(b) <i>Application in Emergencies</i> may apply.</p>

¹ Six State Plans (Connecticut, Illinois, New Jersey, New York, Maine, and the U.S. Virgin Islands) limit their occupational safety and health authority to public-sector (State and Municipal) employers only. State Plans that cover both public- and private-sector employers are: Alaska, Arizona, and California*, Hawaii*, Indiana, Iowa, Kentucky, Maryland, and Michigan*, Minnesota, Nevada, New Mexico, North Carolina, and Oregon*, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, and Washington*, and Wyoming.

*Approved equivalent State standard for commercial diving operations.

To meet the "public safety purposes" exemption under 29 CFR 1910.401(a)(2)(ii), the diving must:

- Be by or under the control of a governmental agency; and
- Involve immediate response to save human life or prevent serious injury; or to prevent/mitigate serious threats and/or major property damage to the community (such as actions to keep a dam from catastrophic failure, recovery of hazardous material that threaten a community water supply, or initial response efforts during a declared emergency by the President/Governor/City Manager/Mayor).

NOTE: "Public Safety Purposes" does not include humanitarian recovery (body recovery of known deceased – the call as to whether a person is or is not deceased is left to the discretion of the Incident Commander or other authority in charge of the recovery effort), vehicle/boat recovery that does not pose an immediate threat to human life/injury or major environmental/property damage, ship/boat hull searches (unless conducted in response to a bomb threat). Remember that the purpose of the exemption is to allow for immediate response where compliance with established safe diving practices is not possible – once it is possible to comply with established safe diving practices (i.e., complete dive team and diving equipment is onsite) then the "public safety purposes" exemption is no longer germane.

Questions Previously Answered:

1. Does OSHA recognize the term Public Safety Diver as a genre of diving?

No. In APPENDIX C: Exclusions and Exemptions from OSHA's Commercial Diving Standards, the wording does not imply any nomenclature to identify any particular genre of diving. The wording used is "public-safety diving services" and references "all divers whose purpose is to provide search, rescue, or related public-safety diving services under the direction and control of a governmental agency (such as local, State, or federal government) regardless of whether or not such divers are, strictly speaking, government employees."

2. Will a State military or auxiliary dive team be included within the exemption? Will a National Guard dive team be excluded?

"If federalized" responds to the comment and answers the question. Federal-OSHA does not cover uniformed military personnel. Uniformed military personnel can include NOAA and Public Health Service if activated by DOD; and National Guard (State employees) if federalized.

3. If a local, State, or federal government dive team receives federal funds will that change the exemptions rules of "By or Under the Control of a Governmental Agency"?

No.

4. How is "Volunteer" defined relative to this chart?

"Volunteer" for the purposes of this chart and standard means *an individual who receives no pay or any compensation* (i.e., a person who keeps a provided wetsuit or scuba gear is accepting compensation and therefore is not a volunteer).

Check with individual State Plans that may have their own definition.

5. If a volunteer is covered by a workers compensation and liability insurance, will this be considered compensation and negate their volunteer status?

No.

6. Some teams receive hazard pay or special team pay incentive to be members of a dive team. Will this incentive pay be considered compensation?

Yes. However, it is a moot point. Teams working in a State Plan State operate under 29 CFR Part 1910, Subpart T, or the approved equivalent State standard (CA, WA, OR, HI and MI). Federal-OSHA does not cover public-sector (State and/or Municipal) employees per the OSH Act so the compensation received as what could be considered a retainer has no bearing.



It is likely that there will be a tremendous outcry over the OSHA elaboration of "Public Safety Diving Services".

"Public Safety Purposes" **does not include humanitarian recovery** (body recovery of known deceased – the call as to whether a person is or is not deceased is left to the discretion of the Incident Commander or other authority in charge of the recovery effort), vehicle/boat recovery that does not pose an immediate threat to human

life/injury or major environmental/property damage, ship/boat hull searches (unless conducted in response to a bomb threat).

Body recovery, weapon recovery and vehicle recover are the primary missions of a Public Safety Dive Team. So the arguments and opinions contrary to the elaboration were and are wrong. There are five State Plans that include their own diving standards. The majority of them mimic the federal standards but Washington's State Plan includes in their commercial diving standards a reiteration of the intent of the OSHA exemption.

- A. Unless the activity falls within a specific exemption, the activity of any employee who dives is covered by the standard.
 - 1. One specific exempted activity is "search and rescue" (SAR). Employers who engage in diving activities beyond search and rescue (after there is no longer hope for rescue), are covered by the standard.
 - a. SAR does **not** include:
 - The search for or recovery of the bodies of victims
 - The search for or retrieval of evidence, **or**
 - Any other activities that are not time-sensitive in nature and not directly related to the SAR activities.

It is important to remember that those who work **without** a State OSH plan **and** are *under the direction and control of a governmental agency*, are not under the jurisdiction of the OSHA Commercial Diving Standards.

The way the exemption is written and being described potentially places a great burden on Public Safety Dive Teams within State Osh Plans. Without identifying Public Safety Diving as a type or genre of diving, and knowing we are not Scientific Divers we are left with only two choices. We are either recreational divers or we are commercial divers. But there is a problem with either of those choices because our concern is if we fall under the jurisdiction of OSHA.

The first and simplest test is easiest: If you are an employee you are under the jurisdiction of OSHA. If you are a volunteer, you are not under the jurisdiction of OSHA. The second test is: Do you work under a State Osh or Federal Osh?

While some of the recreational scuba training agencies offer Public Safety Diving programs, they are usually quick to point out that they are recreational certifications. Some of the specialized agencies separate their genres of training and identify public safety diving and recreational diving separately but all of them have a foundation in recreational diving.

We all claim we are not commercial divers and that the work we perform is specialized and unique to us. Is it? We can look at the requirements and qualifications of a commercial diver and in no way compare. But is that true? There are provisions in the standard for scuba dives, depth limitations and equipment. If you find the particular standards that apply to what you actually do, is there really a problem following the Commercial Diving Standards?

Office of Maritime Enforcement, Stephen Butler, Director U.S. Dept. of Labor, OSHA: *If a Public Safety Diver is documented as having met the ANSI-ACDE standard for SCUBA and/or Surface-Supplied diving, what issues are there regarding compliance with OSHA standards for commercial diving?*

*Recreational diver training **can** be applied towards meeting the ANSI-ACDE Minimal Standard for Commercial Diving, as applicable.*

Does that mean that we somehow are now commercial divers? No, what it means is if you do not dive with a helmet, or within no decompression limits the standards that apply to them do not apply to you. If you are not live boat diving or diving in a hazardous environment then the standards that apply to them do not apply to you.

OSHA considers PSDivers to be commercial divers ... Part 1910-T applies to every place of employment within the waters of the United States, or within a State, et.al. (Territories)[1910.401(a) *Scope*] ... the definition of diver [1910.402] is "Diver. An employee working in water using underwater apparatus which supplies compressed breathing gas at the ambient pressure." ... When diving is performed solely for search, rescue, or related public safety purposes by or under the control of a governmental agency, then OSHA's commercial diving operations standard does not apply [See 1910.401(a)(2)(ii)].

Here is a real challenge for you: Click here to find the most recent release of the [29 CFR Part 1910, Subpart T – Commercial Diving Operations](#) and locate **APPENDIX I:**

Checklist for Commercial Diving Operations. In this appendix you will find a number of checklists:

- 1910.410 QUALIFICATIONS OF DIVE TEAM.**
- 1910.420 SAFE PRACTICES MANUAL.**
- 1910.421 PRE-DIVE PROCEDURES.**
- 1910.422 PROCEDURES DURING DIVE.**
- 1910.423 POST-DIVE PROCEDURES.**
- 1910.424 SCUBA DIVING**
- 1910.425 SURFACE-SUPPLIED AIR DIVING.**
- 1910.426 MIXED-GAS DIVING.**
- 1910.427 LIVEBOATING.**
- 1910.430 EQUIPMENT.**
- 1910.440 RECORDKEEPING REQUIREMENTS**

If there are checklists that do not apply to you or your team, then that part of the standards will not apply to you. The rest may have sections that will not apply to you like exceeding the no decompression limits or even surface supplied diving.

Consider what will happen if a lawsuit is filed against you or your team. If you have to defend your actions it will not matter if you are a Commercial Diver, a Public Safety Diver a Volunteer or Employee; you will be required to defend your actions. What if it you who is hurt or killed? If you can prove that you are in compliance with just the parts of the Commercial Diving Standard that apply to you, your position will be strong.

It is unlikely that OSHA intended to force this but without defining what Public Safety Diving is, there is no recognition that what Public Safety Divers do is unique. Without any industry standard for Public Safety Diving, there is confusion and argument over what is or is not

Public Safety Diving, Safe Practices or even requirements for an entry level position. But that does not mean the Public Safety Diving community is without recognition.

Within the U.S. Department of Homeland Security / Federal Emergency Management Agency's NIMS Resource Typing they identify Public Safety Dive Teams. The category is Law Enforcement / Security and includes four types with Type I and IV being the most extensive. (Type IV is equal to Type I but includes explosives training).

Type III is the entry level typing and requires: **Scuba Certification; Public Safety Certification** – 60 hours minimum, including the use of full face masks and lift bags; Certification of 6 training dives per year.**

Types II and III share the SAME training level requirements but to qualify as a Type II Public Safety Dive Team they are required to be able to lift a minimum of 4,000 pounds. A Type I team is required to be able to lift a minimum of 6,000 pounds.

Here is an example of how scattered standards can be for Public Safety Divers: EACH NIMS Resource Typing description, from the most basic to the most advanced, requires the training and use of lift bags. But, there is no qualification offered FOR that training. That brings us back full circle to the commercial diving standards. It should be obvious that lifting 4,000 – 6,000 pounds requires a great amount of training and equipment; the kinds of things that would be used for salvage recovery. We are still are not commercial divers. It is hoped that common sense prevails and those who perform heavy lifting have received proper training in the use of lift bags.

But the simple tests of jurisdiction still remains: employee or volunteer; State OSH or No State Osh.

If you want to find this section you look under Police Divers. Even though they perform these same functions Fire Department dive teams are not included here. Fire Department dive teams are listed as a subcategory under Swift Water Rescue.

The Bottom Line:

If you are in a state with a State Plan, a State OSH, you are not exempt from the OSHA commercial diving standards. You only have a temporary exemption that allows you to deviate from safe diving practices. This deviation is allowed only under limited conditions and only for as long as it takes to reestablish safe diving practices.

If you are in a Federal OSHA state and work for a state or municipal government, Federal-OSHA does not cover public-sector (State and/or Municipal) employees per the OSH Act.

After 9/11 and the inflow of Homeland Security Grants and increased awareness, Pubic Safety Dive teams went through a growth spurt. Where they were a small squeaky wheel that was finally noticed, now there is an international body of divers who claim the title of Public Safety Diver and work to recover the very things that are excluded in the exemption: bodies, evidence, weapons and vehicles. They do not claim to be recreational divers, commercial divers or even technical divers. They identify themselves as Public Safety Divers.

The final standard for commercial diving became effected on October 20, 1977. At the time, Scientific Diving was

not exempted. It was only after the American Academy of Underwater Sciences (AAUS) was formed that a unified body was able to petition OSHA for an exemption. Once started, it only took 4 years for them to receive the exemption.

It is unlikely that the intent of the OSHA exemption was ever to do anything more than provide standards affording protection for those who are Public Safety Divers. Divers have been performing body recoveries on scuba since the 1950's. We can easily agree that diving and the related technology has changed over the years. We have developed processes and techniques that help keep us safe. We have dedicated training agencies who work to improve awareness and training relative to public safety diving. We have created and developed our own identity and carved out a very specific niche of specialized diving.

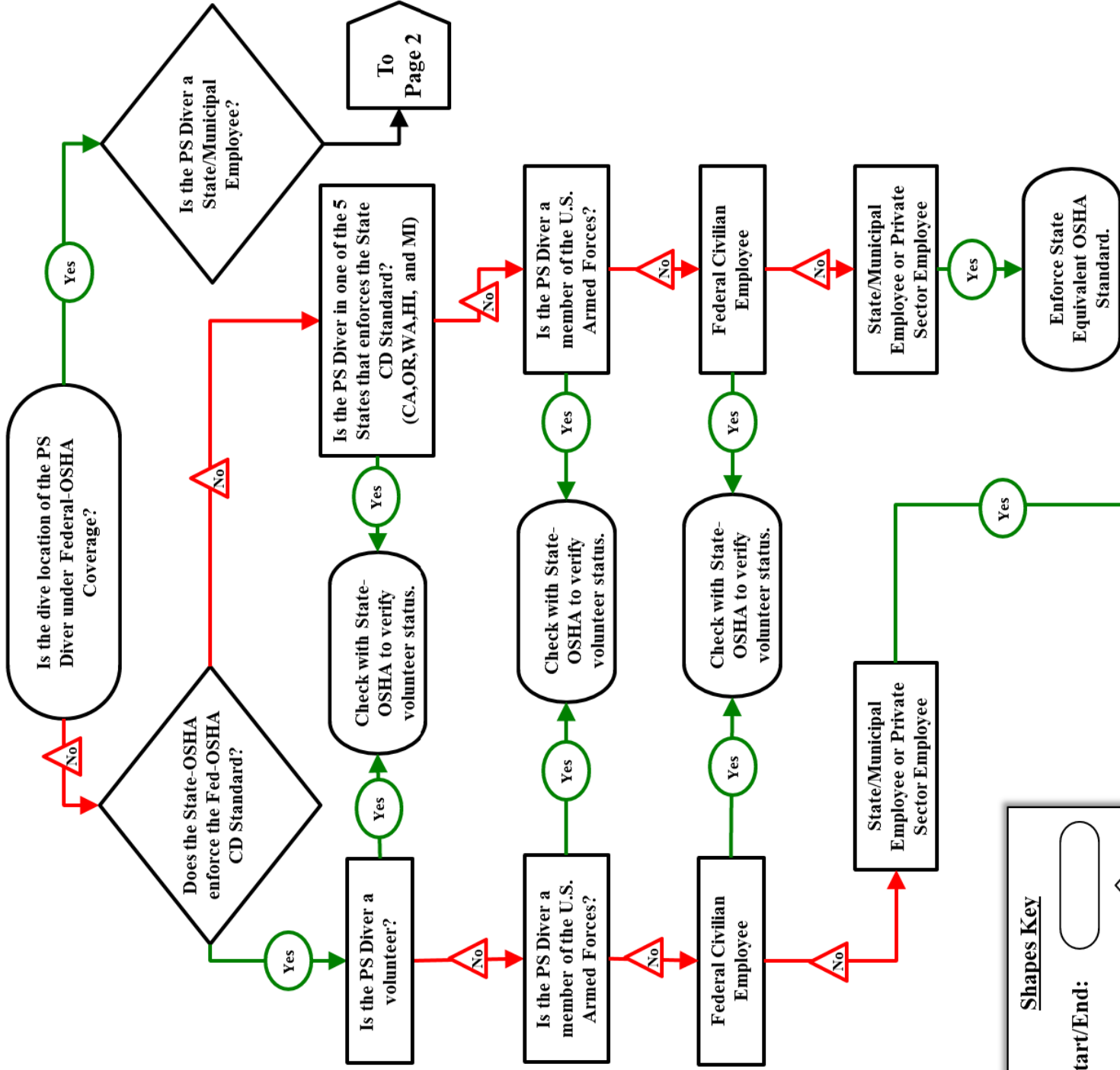
Isn't it time we had our own standards?

If you would like to discuss this topic or any other join our discussion group

[CLICK HERE TO JOIN](#)

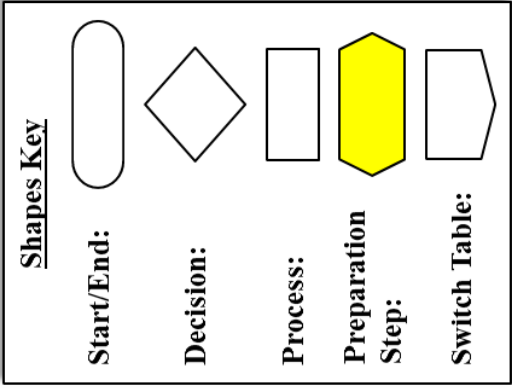
On the following pages, OSHA has developed and provided us a flow chart of their matrix.

OSHA – Are we Exempt?



The PS Diver may be exempt from 1910.401(a)(2) if diving is:

- Under the Control of a government agency (Federal/State/Municipal).
- Involves immediate response to save human life or prevent serious injury; or to prevent serious threats and/or major property/environmental damage to the community.



OSHA – Are we Exempt?

